

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**



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WRITTEN STATEMENTS

EXPOSÉS ÉCRITS

**1. LETTER OF 30 NOVEMBER 1981 FROM THE
SECRETARY-GENERAL OF THE UNITED NATIONS
TO THE ACTING PRESIDENT OF THE
INTERNATIONAL COURT OF JUSTICE**

I have the honour to refer to the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an Advisory Opinion on the Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal.

In connection with that request and as required by paragraph 2 of Article 11 of the Tribunal's Statute and pursuant to paragraph 2 of Article 66 of the Statute of the Court, I have instructed Mr. Suy to transmit to you, under separate cover, 30 copies of a statement setting forth the views of Mr. Ivor P. Mortished, the Applicant to whom the above-mentioned Judgement of the Administrative Tribunal relates.

(Signed) Kurt WALDHEIM.

STATEMENT OF MR. IVOR PETER MORTISHED

Part I

A. SUMMARY OF PLEADINGS

We respectfully request the Court to *adjudge and declare*:

- A. That inasmuch as the procedure by which the advisory opinion was requested allows a member State which was not a party to the original proceedings before the Administrative Tribunal to request a review of the Judgement of the Tribunal, it is legally defective because:
 1. It impinges upon the authority of the Secretary-General under Article 97 of the United Nations Charter as Chief Administrative Officer of the Organization, and conflicts with Article 100 of the Charter regarding the "exclusively international character" of the secretariat.
 2. It violates the general principles governing judicial review.
 3. It imposes in a bilateral dispute a condition of legal and practical inequality upon one of the parties.
- B. That apart from the legal defects of the Article 11 procedure, the Committee's decision to request the Court's advisory opinion is legally defective, for the following reasons:
 1. The Committee received an application which in substance did not fall within the terms of Article 11 of the Statute of the Tribunal and in form violated Article II of the Committee's Provisional Rules of Procedure, and acted favourably on the legally defective application.
 2. The Committee in its proceedings violated the following fundamental principles of natural justice: *audi alteram partem*, and *nemo iudex in causa sua*.
 3. The Committee failed to adopt a uniform interpretation of Article 11 in the present case in which the Applicant is a member State.
 4. The Members of the Committee at its Twentieth Session lacked the competence for, or else failed to perform the functions required of the Committee.
 5. There is nothing exceptional about Judgement No. 273, other than that a member State does not like it, to warrant recourse to the Court for an Advisory Opinion.
- C. That in relation to the question submitted to the Court by the Committee:
 1. The Court's function is confined to determining whether the Tribunal exceeded its jurisdiction in Judgement No. 273, and whether the Tribunal committed an error of law relating to the provisions of the Charter.
 2. Concerning the contention that the Tribunal committed an error of law relating to the provisions of the Charter, to *adjudge and declare*:
 - (a) that the Committee had no legal basis for determining that the Tribunal committed an error of law relating to the provisions of the Charter;
 - (b) that the Tribunal did not commit an error of law relating to the provisions of the Charter, for the following reasons:
 - (i) Judgement No. 273 performed a judicial function, namely, the settlement of a specific dispute between the Secretary-General

- and Mr. Mortished—a function which is not conferred upon the General Assembly by the Charter;
- (ii) the Tribunal was bound to and did rightly take into account the whole legal régime established by the General Assembly as embodied in the Staff Regulations, the Staff Rules, and the Statute of the Tribunal itself;
 - (iii) nothing in the United Nations Charter prohibits the Tribunal from denying retroactive effect to a particular decision of the General Assembly in relation to the Staff;
 - (iv) the Tribunal was correct in holding that the application of General Assembly resolution 34/165 should not prejudice the acquired right of Mr. Mortished to the payment of a repatriation grant without evidence of relocation.

Concerning the contention that the Tribunal exceeded its jurisdiction or competence, to *adjudge and declare*:

- (a) that the Committee had no basis, none whatsoever, for impugning the jurisdiction or competence of the Tribunal with respect to Judgement No. 273;
 - (b) that the Tribunal did not exceed its jurisdiction or competence in Judgement No. 273.
- D. Further, on the question submitted by the Committee, to *adjudge and declare*:
- 1. That the question submitted to the Court contains the following misconception of the Judgement, namely that it had determined that General Assembly resolution 34/165 “could not be given immediate effect”; in fact, the Judgement only held that the resolution should not prejudice the acquired rights of staff members and was on that account absolutely “warranted”.
 - 2. Even if the Court agrees that Judgement No. 273 determined that General Assembly resolution 34/165 could not be given immediate effect, the judgement would still be “warranted”.

B. EXPLANATORY NOTE

1. This statement is submitted to the International Court of Justice (hereafter referred to as the “Court”) pursuant to Article 66(2) of the Statute of the Court, in respect of the application for an advisory opinion on Judgement No. 273 of the Administrative Tribunal, submitted to the Court by the Committee on Review of Administrative Tribunal Judgements on 13 July 1981.

2. The Statement is submitted on behalf of Mr. Mortished, who was the Applicant in the proceedings before the Administrative Tribunal leading to Judgement No. 273.

3. The Statement is in three parts, including this part containing the Summary of Pleadings and this Explanatory Note.

4. Part II contains background information on the developments leading to the present Application before the Court, and consists of five Sections.

5. Section A gives an account of the nature and origin of the repatriation grant and the evolution of the Staff Rules on the repatriation grant. This account, in the view of Mr. Mortished, will show the legal basis of his entitlement to the repatriation grant without the need for evidence of relocation, which the Administrative Tribunal properly took into account in Judgement No. 273.

6. Section B examines the proceedings before the Administrative Tribunal, and sets out the grounds for the Tribunal's decision. In the view of Mr. Mortished, such an examination of the proceedings before the Tribunal and the

Tribunal's decision, will show not only that the Tribunal neither committed an error of law relating to the provisions of the United Nations Charter nor exceeded its jurisdiction or competence, but also that Judgement No. 273 was "warranted". This is elaborated upon in the subsequent argument, in Part III.

7. Section C contains information on the action taken by the Secretary-General pursuant to Judgement No. 273. This information indicates that the two parties to Judgement No. 273, namely Mr. Mortished and the Secretary-General of the United Nations, do not challenge the judgement of the Tribunal but on the contrary would have complied with it but for the intervention of a member State.

8. Section D reviews the actions taken by the Committee on Applications for Review of Administrative Tribunal Judgements. The review reveals the legal deficiencies in the proceedings of the Committee as well as in the decisions taken by it; these deficiencies are further elaborated upon in the argument (Part III).

9. Section E, finally, provides information on the position of Mr. Mortished in relation to the proceedings before the Court. This information reinforces the contentions of Mr. Mortished regarding the defects of the various aspects of the procedure contained in Article 11 of the Statute of the Administrative Tribunal.

10. Part III of the Statement contains an elaboration on the pleadings of Mr. Mortished as set forth in Part I A.

11. In Section A of Part III we respectfully request the Court to address itself to the legal merits of the procedure by which a member State is allowed to apply for a review of an Administrative Tribunal judgement—to which the member State was not a party and upon which the two parties have expressed no desire to obtain an advisory opinion. Our request to the Court in this Section is for the Court merely to adjudge and declare that the procedure, to the extent that it allows such an intervention, is legally defective. Such an adjudication and declaration by the Court would itself constitute sufficient satisfaction. We do *not* therefore specifically request the Court to decline to render the advisory opinion requested from it on this ground. But the Court may, *suo motu*, decide to decline from rendering an advisory opinion.

12. In Section B of Part III we further request the Court to adjudge and declare that the Committee's decision itself was legally defective. The Court's *affirmative declaration on this contention would similarly constitute sufficient satisfaction*. This is similarly without prejudice to the Court's right to decline from rendering an advisory opinion.

13. Our requests under Parts III A and B, for the Court only to give an affirmative declaration on the legal defects of the Article 11 procedure and the Committee's decision rather than to decline to render an advisory opinion on the ground of those legal defects, are guided by the following considerations. The Court did consider the Article 11 procedure acceptable in its 1973 Advisory Opinion, albeit with some reservations. This procedure, as noted by Judge Aréchaga in the 1973 Opinion (p. 243), had been instituted by the General Assembly in 1955 in response to the Court's own "thinly veiled suggestions" in its 1954 Advisory Opinion. But while accepting the Article 11 procedure in 1973, the Court did not consider all aspects of the procedure as satisfactory. In particular, President Lachs had stated in his declaration appended to the *Advisory Opinion of 1973*:

"the choice ought surely to lie between the existing machinery of control and one which would be free from difficulty and more effective. I see no compelling reason, either in fact or in law, why an improved procedure could not be envisaged." (P. 214.)

The controversy surrounding the adoption of the Article 11 procedure by the General Assembly (which is recounted in the argument), as well as the reservations expressed by the Court in 1973, were part of the general back-

ground to the Committee's decision to request this advisory opinion. These reservations provided the inspiration for, *inter alia*, the request of Mr. Mortished for an official verbatim transcript of the Committee's proceedings—which was acceded to and constitutes an improvement in the machinery for judicial review. Our requests in Parts III A and B are thus for action by the Court, which would in itself respond to the apprehensions of the staff regarding the Article 11 procedure by pointing the way to further improvements.

14. Our submissions in Section C of Part III deal with the specific objections raised against Judgement No. 273, on the basis of which the Committee requested the Court's advisory opinion. We respectfully request the Court, in rendering its advisory opinion, to restrict its function to a determination on the validity of those two specific objections—that is, whether the Tribunal had committed an error of law relating to the provisions of the Charter, and whether it had exceeded its jurisdiction or competence, in Judgement No. 273. We then request the Court to adjudge and declare that the Tribunal had *neither* committed an error of law relating to the provisions of the charter, *nor* exceeded its jurisdiction or competence, in Judgement No. 273.

15. Our final submission, in Section D of Part III, addresses the question as submitted to the Court by the Committee, namely whether Judgement No. 273 was "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?" As we contended in Section C, this was not the question that should have been submitted to the Court. The questions submitted to the Court should instead have been those dealt with in Section C. To the extent that the Court considers it necessary to deal with the question as submitted, we respectfully request the Court to find that this question contains and betrays a misconception of Judgement No. 273. We request the Court to rule that Judgement No. 273 *did not* determine that General Assembly resolution 34/165 could not be given immediate effect, but only determined that the resolution should not prejudice the acquired rights of staff members. Furthermore, even if the Court agrees that Judgement No. 273 had denied "immediate effect" to resolution 34/165, we respectfully request the Court to adjudge and declare that the Judgement would still be "warranted", that is to say, correct, inasmuch as the Tribunal had correctly interpreted and applied the rules and regulations pertinent to the claims of Mr. Mortished.

Part II. Background

A. The Repatriation Grant

1. Nature and origin

16. The legal régime governing the repatriation grant scheme is contained in Staff Regulation 9.4, Annex IV to the Staff Regulations, and Staff Rule 109.5.

17. Staff Regulation 9.4, adopted by the General Assembly in circumstances reviewed in paragraphs 21-31 below, provides:

"The Secretary-General shall establish a scheme for the payment of repatriation grants within the maximum rates and under the conditions specified in Annex IV to the present Regulations."

18. Annex IV, to which Staff Regulation 9.4 refers, stipulates:

"In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate. The repatriation grant shall not, however, be paid to a staff member who is summarily dismissed.

Detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General. The amount of the grant shall be proportional to the length of service with the United Nations, as follows:

Years of continuous service away from home country	Staff member with a spouse or dependent child at time of separation	Staff member with neither a spouse nor a dependent child at time of separation	
		Professional and higher categories	General Service category
(Weeks of Pensionable Remuneration less staff assessment, where applicable)			
1	4	3	2
2	8	5	4
3	10	6	5
4	12	7	6
5	14	8	7
6	16	9	8
7	18	10	9
8	20	11	10
9	22	13	11
10	24	14	12
11	26	15	13
12 or more	28	16	14"

(Annex IV to the Staff Regulations, ST/SGB/Staff Regulations/Rev.13, 23 February 1981.)

19. Staff Rule 109.5, which the Secretary-General adopted pursuant to Staff Regulation 9.4 and Annex IV, provides:

"Rule 109.5

REPATRIATION GRANT

Payment of repatriation grants under regulation 9.4 and Annex IV to the Staff Regulations shall be subject to the following conditions and definitions:

(a) 'Obligation to repatriate', as used in Annex IV to the Staff Regulations, shall mean the obligation to return a staff member and his or her spouse and dependent children, upon separation, at the expense of the United Nations, to a place outside the country of his or her duty station.

(b) 'Home country', as used in Annex IV to the Staff Regulations, shall mean the country of home-leave entitlement under Rule 105.3 or such other country as the Secretary-General may determine.

(c) Continuous service away from the staff member's home country shall, for the purposes of this rule, exclude service before 1 January 1951. If at any time the staff member was considered to have acquired permanent residence in the country of his or her duty station and subsequently changed from such status, the staff member's continuous service will be deemed to have commenced at the time the change was made. Continuity of such service shall not be considered as broken by periods of special leave without pay or in partial pay, but full months of any such periods shall not be

credited as service for the purpose of calculating the amount of the grant payable; periods of less than one calendar month shall not affect the ordinary rates of accrual.

(d) Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station. 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.

(e) Entitlement to repatriation grant shall cease if no claim for payment of the grant has been submitted two years after the effective date of separation.

(f) (Cancelled).

(g) Payment of the repatriation grant shall be calculated on the basis of the staff member's pensionable remuneration, the amount of which, exclusive of non-resident's allowance or language allowance, if any, shall be subject to staff assessment according to the applicable schedule of rates set forth in staff regulation 3.3 (b).

(h) Payment shall be at the rates specified in Annex IV to the Staff Regulations.

(i) No payments shall be made to local recruits under Rule 104.6, to a staff member who abandons his or her post or to any staff member who is residing at the time of separation in his or her home country while performing official duties, provided that a staff member who, after service at a duty station outside his or her home country, is transferred to a duty station within that country may be paid on separation a full or partial repatriation grant at the discretion of the Secretary-General.

(j) A dependent child, for the purpose of repatriation grant, shall mean a child recognized as dependent under Rule 103.24 (b) at the time of the staff member's separation from service. The repatriation grant shall be paid at the rate for a staff member with a spouse or dependent child to eligible staff members regardless of the place of residence of the spouse or dependent child.

(k) Where both husband and wife are staff members and each is entitled, on separation, to payment of a repatriation grant, payment shall be made to each, at single rates, according to their respective entitlements, provided that, where dependent children are recognized, the first parent to be separated may claim payment at the rate applicable to a staff member with a spouse or dependent child. In this event, the second parent, on separation, may claim payment at the single rate for the period of qualifying service subsequent thereto, or, if eligible, at the rate applicable to a staff member with a spouse or dependent child for the whole period of his or her qualifying service, from which shall normally be deducted the amount of the repatriation grant paid to the first parent.

(l) Loss of entitlement to payment of return travel expenses under Rule 107.4 shall not affect a staff member's eligibility for payment of the repatriation grant.

(m) In the event of the death of an eligible staff member, no payment shall be made unless there is a surviving spouse or one or more dependent children whom the United Nations is obligated to return to their home country. If there is one such survivor, payment shall be made at the single rate; if there are two or more such survivors, payment shall be made at the rate applicable to a staff member with a spouse or dependent child."

20. Paragraph (f), which is indicated above as cancelled and on which the claim of Mr. Mortished before the Administrative Tribunal partly relied had provided as follows:

"(f) Notwithstanding paragraph (d) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service."

* * *

21. The repatriation grant is closely linked with the "salaries and related allowances" of staff members, in the context of which it originated. From the history of its establishment, as indicated in paragraphs 22-31 below, it emerges that the grant itself, its size and time of payment are part and parcel of the financial emoluments that accrue to service in the Organization by staff members whom the Organization is obligated to repatriate.

22. Prior to the establishment of the repatriation grant scheme, an expatriation allowance had been in place by the United Nations beginning 16 June 1947, payable annually to staff members serving outside their home countries. Authority for the payment of the expatriation allowance had been derived from General Assembly resolution 13 (I), part IV, paragraph 20, which stated:

"In determining salaries . . . account should be taken of the special factors affecting service in the secretariat . . . and the additional expenses which a large proportion of the staff will incur by living away from their own country . . ."

23. In 1949 the Secretary-General established a Committee of Experts on Salary, Allowance and Leave Systems to undertake a comprehensive review of the structure of salaries and allowances system. That Committee recommended the replacement of the expatriation allowance with a single lump-sum payment at the termination of a staff member's period of service. It did so on the ground "that upon leaving the Organization and being repatriated to his home country, a staff member is faced with certain extraordinary expenses, and that such expenses would fully justify payment of a special lump-sum grant". These extraordinary expenses, the Committee of Experts considered, would arise for the following reasons:

"(a) the loss, during United Nations service, of professional and business contacts with the home country referred to in subparagraph (c) of paragraph 106 above¹; (b) the necessity of giving up residence and liquidating obligations in a foreign country; and (c) the expenses which a staff member will normally have to meet in re-establishing himself and his home on return to his own country." (See *Official Records of the General Assembly, Fourth Session, Fifth Committee, Annex, Volume II, Report of the Committee of Experts on Salary, Allowance and Leave Systems (A/C.5/331 and Corr.1, para. 108).*)

24. The Committee of Experts recognized the combination of all of the above factors as the basis for the repatriation grant. Thus, it conceived the rationale for the repatriation grant scheme as being to ease the financial difficulties following the termination of service with the United Nations, of which only one element was relocation to one's home country.

¹ Subparagraph c of paragraph 106 had mentioned:

"(c) The progressive and serious loss of professional or business contacts with the home country and the resulting increasing difficulty in finding suitable employment in the home country if work with the United Nations should be terminated."

25. The Committee also recommended a scale for the determination of the amount of the repatriation grant. The scale was to be dependent upon the marital status of the staff member and upon the number of years of continuous service away from the home country.

26. The idea of the Committee of Experts to replace the expatriation allowance with the repatriation grant was accepted by the Advisory Committee on Administrative and Budgetary Questions (hereafter referred to as "ACABQ"). In its report to the General Assembly in 1950, the ACABQ accepted the view of the Committee of Experts that the purpose of the repatriation grant should be to ease the position of staff members leaving the Organization.

27. The ACABQ, however, recommended a cut in the amounts proposed by the Committee of Experts by reducing to half the number of weeks of pensionable remuneration. Its revised recommendation was to determine the amount of the repatriation grant as follows:

Years of continuous service away from home country	Staff member with neither a wife, dependent husband or dependent child at time of termination (weeks of salary)	Staff member with a wife, dependent husband or dependent child at time of termination (weeks of salary)
After 2 years	4	8
3 years	5	10
4 years	6	12
5 years	7	14
6 years	8	16
7 years	9	18
8 years	10	20
9 years	11	22
10 years	12	24
11 years	13	26
12 years	14	28

See General Assembly, *Official Records, Fifth Session, Supplement No. 7a* (A/1313), para. 70.

28. The recommendations of the ACABQ were first considered by a Sub-Committee which the Fifth Committee of the General Assembly established for that purpose. The Sub-Committee agreed on the replacement of the expatriation allowance system with the system of repatriation grants. In addition, the Sub-Committee agreed that a two-year transition period should be provided for during which staff members would have the option of continuing to receive the expatriation allowance or accruing service credit toward the repatriation grant¹. The Sub-Committee's report was supported by the Fifth Committee. During the discussions in the Fifth Committee, a number of delegations raised the issue of assuring justice by providing for the transitional arrangements recommended by the Sub-Committee; the protection of acquired rights of staff was also mentioned. Other delegations pointed out that whilst the General Assembly had a legal right to change the staff regulations, it also had a moral obligation to treat the staff in a just and equitable manner.

29. Following the discussion, the Fifth Committee recommended to the

¹ The transition period was to run until 1 January 1952.

General Assembly the adoption of a draft resolution on the salary, allowances and leave system of the United Nations—including repatriation grants.

30. The General Assembly adopted the recommendation in resolution 470 (V) of 15 December 1950, which provided in relevant part:

“The Secretary-General shall establish a scheme for the payment of repatriation grants in accordance with the maximum rates and conditions specified in Annex II to the present regulations.”

31. In resolution 590 (VI) of 2 February 1952, the General Assembly adopted revised staff regulations incorporating the new Staff Regulation 9.4 and Annex IV, respectively.

2. *Evolution of the Staff Rules on the Repatriation Grant*

32. In accordance with General Assembly resolution 470 (V), as incorporated into the Staff Regulations, the Secretary-General established Staff Rules determining the detailed conditions of eligibility to the repatriation grant. Additional rules and conditions were also established as necessary by the Secretary-General: see Staff Rule 114, ST/AFS/SGB/81/Rev.2, effective 1 January 1951; Staff Rule 114, ST/AFS/SGB/81/Rev.3, effective 1 July 1951, Staff Rule 109.5, ST/AFS/SGB/94, effective 1 January 1953; Staff Rule 109.5 (f), ST/AFS/SGB/94/Rev.2, effective 1 February 1954; Staff Rule 109.5, ST/SGB/94/Rev.4, effective 1 September 1955; Staff Rule 109.5, ST/SGB/Staff Rules/1/Amend.18, effective 1 January 1962; Staff Rule 109.5, ST/SGB/Staff Rules/1/Rev.3, effective 1 June 1976; Staff Rule 109.5, ST/SGB/Staff Rules/1/Rev.4, effective 1 January 1977; Staff Rule 109.5, ST/SGB/Staff Rules/1/Rev.5, effective 1 July 1979; Staff Rule 109.5, ST/SGB/Staff Rules/1/Rev.5/Amend.1, effective 1 January 1980.

33. Following the promulgation by the Secretary-General of Staff Rule 114, various minor revisions of the repatriation grant scheme were introduced by the Secretary-General in amendments to the Staff Rules. These are noted in document No. 93 in the *Dossier*.

34. Over the years, the Secretary-General, within the framework of the Consultative Committee on Administrative Questions (hereafter referred to as “CCAQ”)¹, kept the repatriation grant system under continuous survey.

35. In May 1952, the CCAQ considered the repatriation grant system. It proposed a number of principles on which payment of the repatriation grant should be based. The purpose behind these principles was “to provide a basis for uniformity in administration [within the common system]”. In reference to the requirement of relocation, the CCAQ stated that the repatriation grant “should be paid . . . regardless of whether the staff member is actually repatriated. However, the organization is not considered obligated where the staff member voluntarily assumes the nationality of the country of duty station” (CORD/R.124, pp. 6-7). The CCAQ principles were incorporated by all the organizations into their Staff Rules and Regulations, and consistently followed.

36. These principles and the practice of paying the repatriation grant were communicated to the General Assembly, which raised no objection. Subsequent to the introduction of the principle and practice of paying the repatriation grant without the requirement of evidence of relocation, the General Assembly on several occasions considered the regulations on the repatriation grant. In 1974, for example, with a view to eliminating discrimination between staff members on grounds of sex, the General Assembly in resolution 3353 (XXIX) amended

¹ The CCAQ is a subsidiary body of the Administrative Committee on Coordination.

Annex IV to the Staff Regulations by substituting the word "spouse" for the words "wife", "dependent husband" throughout the Regulations.

37. Again in 1976, after a review of the United Nations salary system by the *International Civil Service Commission*, the General Assembly decided (resolution 31/141 of 17 December 1976) that terminal payments, including the repatriation grant, which had been calculated in terms of "base salary or wage" should be determined instead in terms of "pensionable remuneration less staff assessment". Further, the General Assembly, in the same resolution, amended Annex IV of the Staff Regulations to create a separate scale of entitlement for staff members with neither a spouse nor a dependent child at time of separation.

38. At its thirty-ninth session, the CCAQ required its secretariat to review the repatriation grant system and the conditions of entitlement to the grant. The CCAQ secretariat discharged this mandate in its report CCAQ/SEC/325/PER, of 6 May 1974. The report examined the question whether the grant should be paid to a staff member who did not repatriate to his/her home country. The CCAQ secretariat was of the view that since the purpose of the grant was to assist the staff member and his family to re-establish themselves in their home country, it should ordinarily not be paid to a staff member who remained in the country of his last duty station after termination of service. The view was also expressed that the United Nations would not be in a position to know where a staff member actually resided after retirement, nor would it have an accurate procedure for verification of such residence. The report pointed out instances of the difficulties that would attend the relocation requirement. For example, the staff member may have two or more residences after separation from service; the address to which pensions were paid may not necessarily be the address of the residence of the staff member; and if payment of the grant was dependent upon actual repatriation it could lead to possible deception by the staff member. Finally, it was noted that a staff member may be indecisive as to his place of residence especially after retirement—which would put an indefinite delay on payment pending the personal decision of residence by the staff member. The CCAQ secretariat concluded for these reasons that the enforcement of a relocation requirement would cost unnecessary time and expenditure to the United Nations, and that it would therefore not be feasible to make payment of the grant dependent on evidence of repatriation.

39. In its report to the *International Civil Service Commission* in 1978, the CCAQ examined possible changes in the conditions of entitlement to the separation payments including the repatriation grant (CO-ORD/R.1263/Add.3). The CCAQ observed that an obligation to repatriate the staff member at the end of service was assumed by the organization on recruiting a staff member who was a national of a country other than that of the duty station. Referring to the position which the 1949 Committee of Experts had taken on this matter, the CCAQ stated the purpose of the grant as being to assist the staff member in meeting the extraordinary expenses on leaving the organization and returning to his/her home country. The CCAQ also noted the belief of the various organizations that the concept of the grant, as evolved over the years, and as applied in the varying circumstances under which the grant was paid, adequately responded to employment policies laid down by their respective governing organs.

40. Thus, until 1978, the scale and conditions of entitlement remained essentially the same from the original provisions governing the grant: staff members who were eligible for the repatriation grant included those whom the Organization was "obliged to repatriate" and the amount payable was dependent upon the number of years of continuous service away from the staff member's home country; the grant was payable whether or not repatriation or relocation to a place outside the country of the last duty station took place; it was not part of the conditions of eligibility that the staff member should produce evidence of repatriation or relocation.

41. In resolution 31/141 of 17 December 1976 (referred to in para. 37 above) the General Assembly had also mandated the ICSC:

“to examine, in the light of the views expressed in the Fifth Committee

(a) The conditions for the provision of terminal payments (for example, repatriation grant, termination indemnities), in particular on retirement, and the possibility of establishing a ceiling for the maximum aggregate of entitlements to these payments.”

42. In line with this mandate the ICSC undertook a review of the repatriation grant, among other topics, in its 1978 report to the General Assembly (A/33/30). This review focused on the following two issues: (a) the justification for the progressive scale of amounts of the grant and (b) the appropriateness of paying the grant to a staff member who, upon separation, did not return to his/her home country (see para. 181, *ibid.*). The ICSC noted the purpose of the grant as being a replacement of the previously existing expatriation allowance. It took the position that the progressive scale of the grant gave it the characteristics of “an earned service benefit as well as an *ad hoc* subsidy” (para. 182, *ibid.*).

43. Concerning the element of repatriation as a condition for obtaining payment, the ICSC considered that a strict interpretation of the term “repatriation” meant that the grant should not be paid to a staff member who remained in the country of the last duty station or to a staff member who relocated to a country other than his home country, since the objective of the grant was to assist in the repatriation of the staff member. But, like the CCAQ, the ICSC recognized that there would be practical difficulties in monitoring the movements and the residences of former staff members after separation from service. These difficulties were pointed out by the representatives of the various organizations:

“The representatives of the organizations . . . pointed out to the Commission the practical difficulties they would have in keeping track of the movements of a former staff member after he had left the service. The fact that he had used his entitlement to repatriation travel would not be conclusive, since he might travel to his home country but return immediately afterwards to settle in his last duty-station country or go to some third country.” (Para. 184, *ibid.*)

44. The ICSC, however, decided that the grant should not be paid to a staff member who, on separation, remained permanently in the country of his last duty station. But it also concluded that an international administrative network for monitoring the movements of former staff members, for the purpose of verifying relocation, would be neither feasible nor desirable. The ICSC thus recommended that payment of the grant should be made conditional upon a declaration of intent from the staff member:

“That requirement should come into effect from 1 January 1979 for new staff members. If the organizations consider that some period of grace should be allowed to serving staff members who may already have planned the place where they will reside after their separation on the assumption that they will receive the grant, CCAQ should agree on a common transitional measure.” (Para. 186, *ibid.*)

45. In resolution 33/119 of 19 December 1978, the General Assembly agreed with the ICSC recommendation. The repatriation grant would not be paid to a staff member who remained at the last duty station after separation from service. The General Assembly further decided that evidence of actual relocation must be produced by the staff member, subject to terms to be established by the ICSC:

“(The General Assembly) *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."

46. In accordance with the decision of the General Assembly, the ICSC considered the terms for the implementation of resolution 33/119, in its report submitted to the thirty-fourth session of the General Assembly, in 1979 (A/34/30). The ICSC decided that the former staff member must provide documentary evidence of his/her residence in another country, and that the official request for the repatriation grant by the staff member must be made within two years after separation from service. In regard to staff members who retired after the new provision came into effect but who had an expectation of receiving the grant under the existing rules, the ICSC relied on advice from the legal advisors of various organizations, including the Legal Counsel to the Secretary-General. Supported by the jurisprudence of the United Nations Administrative Tribunal, and by the opinions of the Legal Counsels that an acquired right to the grant existed, the ICSC concluded that entitlements to the repatriation grant already earned by staff members could not be affected retroactively by the new Staff Rule. However, entitlements accruing after the date of the change were to be subject to compliance with the new condition (paras. 23 and 24, *ibid.*).

47. The Commission promulgated these terms in the document CIRC/GEN/39:

"The following modifications to the terms of entitlement to the repatriation grant are established by the International Civil Service Commission in pursuance of paragraph 4 of section IV of General Assembly resolution 33/119:

- (a) with effect from 1 July 1979 payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station;
- (b) 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;
- (c) payment of the grant may be claimed by the former staff member within two years of the effective date of separation;
- (d) notwithstanding paragraph (a) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had 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 set out in paragraphs (a) to (c) above."

48. It should be noted, in passing, that the position taken by the ICSC with regard to the effective date of its terms (para. (d) of CIRC/GEN/39), was in accordance with its own obligation to respect acquired rights—as contained in Article 26 of its Statute. That Article reads:

"The Commission, in making its decisions and recommendations, and the executive heads, in applying them, shall do so without prejudice to the acquired rights of the staff under the staff regulations of the organizations concerned."

49. The Secretary-General adopted the terms prescribed by the ICSC and promulgated the decision in an Administrative Instruction (ST/AI/262) of 23

April 1979. Amendments to the Staff Rules were to be promulgated in accordance with the Administrative Instruction. The Secretary-General in circular ST/SGB/Staff Rules/1/Rev.5 announced the amendment of Rule 109.5 to make payment of the grant conditional upon presentation of actual evidence of relocation with respect to periods of eligibility arising after 1 July 1979. Under the authority vested by Staff Regulation 9.4 and Annex IV, the Secretary-General incorporated as amendments to the repatriation grant Staff Rule 109.5 (d) and 109.5 (f). These new provisions were adopted by the Secretariat of the United Nations and other specialized agencies within the common system.

50. Thus, the detailed conditions and definitions relating to eligibility to the repatriation grant, after the date of this amendment, were as quoted in paragraphs 19 and 20 above.

51. The General Assembly again considered the issue of the repatriation grant at its thirty-fourth session. At the 38th meeting of the Fifth Committee on 6 November 1979 the delegate from Australia questioned the ICSC position regarding retroactive application of the new Staff Rule on the repatriation grant, and doubted whether prior entitlement to the repatriation grant had become an "acquired right". During the 46th meeting of the Fifth Committee on 13 November 1979, the United States also objected to the conditions for entitlement to the repatriation grant established by the ICSC in accordance with General Assembly resolution 33/119, on the grounds that the General Assembly did not intend the repatriation grant to be paid to a staff member who did not repatriate to his/her home country, regardless of the years of service prior to the institution of the new Staff Rule. The United States therefore proposed a draft resolution stating that the repatriation grant should be paid only to staff members who relocated to a place outside the country of their duty station upon separation from service.

52. In the ensuing debate the attention of the Fifth Committee was drawn to the legal opinion rendered by the Office of Legal Affairs to the ICSC on the issue. Some delegations however stated that they considered that opinion to be erroneous.

53. At the 55th meeting of the Fifth Committee on 21 November 1979, the Acting Chairman of the ICSC explained the decision to allow staff members to retain an entitlement to the repatriation grant prior to 1 July 1979 without evidence of relocation. He stated that the previous practice of paying the grant to separated staff members who did not relocate was based on the provision in the Staff Regulations referring explicitly to "staff members whom the Organization is obligated to repatriate". Since the ICSC had proceeded upon the premise that the practice of paying the grant to staff members who did not repatriate, was in conformity with the Staff Regulations, it had therefore determined "that the staff members concerned had in fact earned an entitlement, since the repatriation grant was calculated on a progressive scale" (A/C.5/34/SR.55, para. 40).

54. The Acting Chairman of the ICSC also pointed out that the action was based not only on the advice by the Legal Counsel of the United Nations, but also the jurisprudence of the Administrative Tribunals of the ILO and the United Nations; this jurisprudence seemed to the ICSC to have established the principle that "benefits and advantages accruing to staff members for services rendered before the entry into force of an amendment cannot be prejudiced". Furthermore, the ICSC expressed the view that a measure strictly in compliance with resolution 33/119, without provision for a transitional scheme in consideration of rights acquired prior to the resolution, would certainly be challenged by staff members and that it would most likely be rejected by the administrative tribunals "as contrary to the fundamental principles of labour law" (A/C.5/34/SR.55, para. 41). Lastly, the Acting Chairman informed the Fifth Committee that the majority of other organizations had incorporated the ICSC recommendation since July 1979, into their Staff Regulations.

55. At the 60th meeting of the Fifth Committee held on 27 November 1979 the Under-Secretary-General for Administration, Finance and Management, in an attempt to dissuade the Fifth Committee from pressing forward with the draft resolution proposed by the United States, pointed out that the ICSC decision had been based upon the mandate given to it in General Assembly resolution 33/119. He further pointed out that:

"... in a number of agencies, the ICSC decision had been considered and accepted by the respective legislative organs when they had adopted the revisions to their respective staff rules and regulations. In the United Nations, the ICSC decision had already been incorporated into the Staff Rules. The provisions contained in part II of draft resolution A/C.5/34/L.23 would have the effect of revoking a decision which was in process of implementation by the agencies of the common system." (A/C.5/34/SR.60, para. 59.)

In his view, the adoption of the draft resolution would hinder the ability of the ICSC to discharge authoritatively its task of regulating and coordinating the conditions of service applied by the United Nations and the specialized agencies. He adverted to the disparity which the resolution would introduce into the common system, as follows:

"... if the General Assembly, whose competence did not extend beyond the United Nations proper, were to rescind the ICSC decision in respect of staff members of the Organization, the resulting disparity in the practices of the common system would be contrary to the objectives underlying the mandate of ICSC. Such a decision would also inevitably be viewed by the United Nations staff as discriminatory treatment and would lead to appeals to the Administrative Tribunal with all the potential consequences that such action might entail." (A/C.5/34/60, para. 60.)

56. Finally, the Under-Secretary-General pointed out the practice of the United Nations to implement policy changes in the least disruptive manner "either in order to respect acquired rights or simply to ensure a smooth transition from one set of arrangements to another" (para. 61, *ibid.*). The draft resolution, by its drastic and categorical nature, ran afoul of this practice.

57. The Fifth Committee at the 62nd meeting held on 28 November 1979, adopted the draft text as proposed. The draft resolution stated the following:

"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 last duty station is provided."

58. On the recommendation of the Fifth Committee, the General Assembly on 17 December 1979 adopted the draft text as resolution 34/165.

59. In the Administrative Instruction, ST/AI/269 of 21 December 1979, resolution 34/165 was promulgated by the Secretary-General with effect from 1 January 1980. The Secretary-General amended Rule 109.5 by deleting subparagraph (f) thereof, to implement the decision adopted by the General Assembly.

B. The Proceedings Before the United Nations Administrative Tribunal

60. The circumstances which led Mr. Mortished to file an application before the United Nations Administrative Tribunal are not in dispute. They are as set forth on pages 2 to 5 of Judgement No. 273 of the Tribunal.

61. The contentions of Mr. Mortished as well as those of the Respondent are also set forth on pages 5 to 7 of that Judgement.

62. Based upon these contentions the Tribunal ruled for Mr. Mortished on two separate grounds. First, it took judicial notice of the personnel action form issued by the Office of Personnel Services to Mr. Mortished at the time of his transfer from ICAO to the United Nations, which had stated: "service recognized as continuous from 14 February 1949" and "Credit towards repatriation grant commences on 14 February 1949"; and consequently held (p. 9) that:

"Although these statements do not appear in the letter of appointment itself, they nevertheless unquestionably constitute the explicit recognition by the United Nations of entitlement to the repatriation grant, and validation for that purpose of more than nine years' service already completed with ICAO.

In the Applicant's case, a formal reference was thus made at the time of appointment to the repatriation grant and to the principle of the relationship between the amount of that grant and length of service. As a result, the Applicant is in the position noted by the Tribunal in Judgement Nos. 95 and 142 cited above, namely, that special obligations towards him were assumed by the United Nations."

63. Secondly, after reviewing the history and developments in relation to the repatriation grant up to and including the adoption of General Assembly resolution 34/165, the Tribunal observed that whatever link there might have been between actual repatriation and the payment of the grant was broken in Staff Rule 109.5 (a). The Tribunal then went on to state as follows (p. 18):

"at no time did the General Assembly contemplate supplementing or amending the provisions relating to the repatriation grant contained in the Staff Regulations. Nor did the Assembly examine the text of the Staff Rules in force since 1 July 1979, and it never claimed that there was any defect in the provisions introduced on that date which diminished their validity. The Assembly simply stated a principle of action which the Secretary-General acted upon in establishing a new version of Staff Rule 109.5 which, from 1 January 1980, replaced the version previously in force on the basis of which the applicant could have obtained the repatriation grant."

64. The Tribunal then posed the question before it in the following terms (p. 18):

"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."

In answer to this question the Tribunal stated (pp. 18-19):

"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. As in the case of Judgement No. 266 (*Capio*), it is incumbent upon the Tribunal to assess the consequences of any failure to recognize an acquired right.

XVI. By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's acquired right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 (*f*)."

65. The Tribunal then ruled, on the basis of the foregoing, that an injury had been perpetrated on Mr. Mortished as a result of a disregard of his acquired rights—this disregard being manifested in the deletion of subparagraph (*f*) of Staff Rule 109.5. Thus, having recognized that General Assembly resolution 34/165 had been given immediate effect by the Secretary-General to delete the transitional system which had accorded respect to Mr. Mortished's acquired rights, thereby causing him injury, the Tribunal went on to rule that Mr. Mortished was "entitled to compensation for that injury", the compensation to be assessed "at the amount of the repatriation grant of which payment was refused".

C. Action Taken by the Secretary-General Pursuant to Judgement No. 273

66. Judgement No. 273 was rendered by the Tribunal on 15 May 1981. According to Article 11 of the Statute of the Tribunal:

"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 30 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 . . ." (Emphasis added.)

The Secretary-General did not avail himself of this provision to initiate a request for the advisory opinion of the Court.

Furthermore, according to Article 12 of the same Statute:

"The Secretary-General or the applicant may apply to the Tribunal for a revision of a judgement on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence. The application must be made within 30 days of the discovery of the fact and

within one year of the date of the judgement. Clerical or arithmetical mistakes in judgments, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Tribunal either of its own motion or on the application of any of the parties."

The Secretary-General has not availed himself of this provision to apply to the Tribunal for a revision of Judgement No. 273.

68. Lastly, under Article IV of the provisional rules of procedure of the Committee:

"Article IV

1. The other party to the proceedings before the Administrative Tribunal or the parties in those cases where the application is made by a member State 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 its comments with respect to the application.

2. Comments of a party, or parties, shall be submitted in six copies in any one of the five official languages of the United Nations."

69. Following the application of the United States Government for a review of Judgement No. 273, however, the Secretary-General advised the Committee that he was not availing himself of his right to submit comments on the application (*Dossier*, doc. No. 4).

70. Apart from the Secretary-General not having in any way questioned or impugned the Judgement, the Office of Personnel Services sought from the Office of Legal Affairs the latter's advice as to the scope of the Judgement. The Secretary-General subsequently took the position that the Judgement applies only to Mr. Mortished because of the statement in the Judgement to the effect that "special obligations towards him were assumed by the United Nations". Accordingly, the rights of three other staff members, from whom payment of the repatriation grant was withheld, to file appeals before the Administrative Tribunal were preserved for the period of 90 days as of the time the Judgement would have become final (Annex I).

D. Action before the Committee on Applications for Review of Administrative Tribunal Judgements

71. On 15 June 1981 the United States in a communication addressed to the Acting Legal Counsel, applied to the Committee on Applications for Review of Administrative Tribunal Judgements to request an advisory opinion from the International Court of Justice on Judgement No. 273.

72. A copy of the United States communication 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.

73. The Committee met on 9 and 13 July 1981. According to the Report of the Committee (A/AC.86/25) as well as the transcript of its proceedings, the Committee was composed of 29 member States. However, no official record was taken or kept of the members of the Committee present at the Committee's meetings. To elicit this information, a request dated 22 October 1981, was made by counsel for Mr. Mortished addressed to the Secretary to the Committee, in response to which the latter supplied the following "unofficial" list of the member States which were present (see Annex II). They were represented as follows:

Canada	— Mr. Philippe Kirsch
France	— Mr. Michel Lennuyeux-Comnène
Germany, Fed. Rep. of	— Dr. Karl Borchard

Greece	— Mr. Dimitri G. Rallis
Honduras	— Dr. Mario Carias
Malaysia	— Mr. A. W. O'mardin
Morocco	— Mr. Rachid Lahlou
Niger	— Mr. Adamou Seydou
Pakistan	— Mr. Kemal
Portugal	— Mr. Fernando Andresen
Romania	— Mr. Ion Diaconu
Senegal	— Mr. Balla Mandau Dia
Tunisia	— Mr. Hamda Kbaier
USSR	— Mr. Yury Gregoryevich Petrov
United Kingdom	— Mr. Michael F. H. Stuart
United States	— Mr. Robert B. Rosenstock
Zimbabwe	— Mr. Eubert Paul Mashaire

74. As noted in paragraph 69 above, the Secretary-General, by a memorandum dated 23 June 1981, 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).

75. 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). In the same letter, the Committee was requested to allow counsel for Mr. Mortished to be present during its proceedings, and, if necessary, to make statements in explanation of or in addition to his written comments in defence of Mr. Mortished's entitlements, as recognized in the Judgement in question. The Committee was further requested by counsel for Mr. Mortished that its sessions be open, that its proceedings be recorded, and that an official transcript be produced and made available within a reasonable time after the conclusion of the proceedings.

76. The Committee was also informed that the President of the Staff Committee of the Staff Union at the United Nations Headquarters had sent a letter dated 29 June 1981 requesting that a representative of the Union be admitted as an observer to the deliberations of the Committee.

77. The Committee agreed to only one of these requests—that of producing an official transcript (docs. A/AC.86(XX)/PV.1; A/AC.86(XX)/PV.2; and A/AC.86(XX)/PV.2/Add.1)—although it maintained its practice of holding closed meetings.

78. On the issue of the participation of counsel for Mr. Mortished and of a Staff Union representative, the Committee at its first meeting deferred a decision but proceeded with its consideration of the United States application—without the participation of counsel for Mr. Mortished, or the Staff Union representative. At its second meeting, the Committee reverted to the question of counsel's participation and decided ultimately to exclude counsel for Mr. Mortished from its deliberations. During the discussions on the issue, some members of the Committee supported the participation of counsel for Mr. Mortished and his right to make statements. For example, Mr. Stuart of the United Kingdom stated:

"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."

Statements in support of the admission of Mr. Mortished's counsel were also made by Mr. Rallis of Greece (A/AC.86(XX)/PV.2, pp. 4-5), Mr. Seydou of Niger (A/AC.86(XX)/PV.1, p. 18), Mr. Kbaier of Tunisia (*ibid.*), and Mr. Andersen of Portugal (A/AC.86(XX)/PV.2, pp. 18-20).

79. In opposition to the request of Mr. Mortished, Mr. Rosenstock of the United States had stated:

"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." (A/AC.86(XX)/PV.1, p. 16.)

80. The Committee decided, by 5 votes to 2 with 9 abstentions, against the participation of counsel for Mr. Mortished (see A/AC.86(XX)/PV.2, p. 16).

81. In the course of the debate on the participation of counsel for Mr. Mortished, a number of delegates made statements—such as that just quoted above—on the scope of the Committee's functions. The United States delegate, for instance, again stated:

"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 the Charter . . ." (p. 29, A/AC.86(XX)/PV.1).

Subsequently he reverted to this issue in the following terms:

"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 . . . 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 delegate has presented and that they are sufficiently serious to merit the advice of the International Court of Justice." (*Ibid.*, p. 32.)

And again:

"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" (at p. 33 of A/AC.86(XX)/PV.2).

82. Mr. Diaconu of Romania also stated, on this same issue:

"We need pronounce only on the question 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 Court [*sic*] has, for example, exceeded its competence, we would be saying what the Court is supposed to say." (At p. 37, *ibid.*)

83. On the other hand, some of the representatives on the Committee, like counsel for Mr. Mortished in his written comments (doc. A/AC.86/R.100, p. 9), maintained that the questions of error of law relating to the provisions of the United Nations Charter and of excess of jurisdiction or competence were not before the Committee. Mr. Lennuyeu-Connène of France, for example, pointed out that those two grounds had not been invoked by the United States in its application:

"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 . . ." (see pp. 38-40 of A/AC.86(XX)/PV.1).

84. Although the representative of France agreed with other representatives that

"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" (*ibid.*, pp. 38-40)

he proceeded to argue that the application was *not* well founded (pp. 38-42, *ibid.*).

85. The Committee returned to the issue of the participation of Mr. Mortished's counsel at its second meeting. After further discussion on the issue as well as on some of the other issues raised in the application, the Committee decided by 5 votes to 2 in favour with 9 abstentions to exclude Mr. Mortished's counsel.

86. It appears from the *transcript* that the Committee's decision to exclude counsel for Mr. Mortished was taken on the basis of the argument that the Committee would not itself decide the merits of the application, with regard to the grounds of error of law and excess of jurisdiction. Thus, in explaining his vote against the participation of counsel for Mr. Mortished, Mr. Lahlou of Morocco stated:

"My delegation voted against the proposal for the following reasons: 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." (P. 21 of A/AC.86(XX)/PV.2.)

87. Other statements in explanation of vote were made as follows:

Mr. Seydou of Niger:

"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." (A/AC.86(XX)/PV.2, p. 17.)

Mr. Andresen of 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." (*Ibid.*, pp. 18-20.)

88. On the issue of the attendance of a representative of the Staff Union raised by the request of the President of the Staff Committee, no decision was taken by the Committee. The Committee ignored the issue and thus implicitly excluded such an attendance.

89. On the merits of the United States application, the Committee considered these indirectly, as shown in paragraphs 81-84 above, in the context of the issue of the participation of Mr. Mortished's counsel; but it also considered the merits of the application on their own. The United States had invited the Committee to find the application meritorious on the grounds that the Tribunal had not given due weight to the actions of the General Assembly and that, by failing to give such "due weight" to the actions of the General Assembly the Tribunal had *ipso facto* violated Article 101 of the Charter.

90. In their statements various representatives similarly based their view of the merits of the application on the notion that the Tribunal had set aside a General Assembly resolution. Thus the following statements were made:

Mr. Stuart of the United Kingdom:

"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." (P. 3, A/AC.86(XX)/PV.2.)

Mr. Rallis of 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." (*Ibid.*, pp. 4-5.)

Mr. Dia of Senegal:

"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 its 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." (*Ibid.*, pp. 21-22.)

Mr. Diaconu of Romania:

"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 of 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." (*Ibid.*, p. 22.)

Mr. Seydou of Niger:

"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." (*Ibid.*, pp. 26-27.)

Mr. Rosenstock of the United States:

"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 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." (*Ibid.*, p. 30.)

91. Following the discussions, the Chairman posed the following question to the Committee:

"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." (P. 43, A/AC.86(XX)/PV.2.)

92. By 14 votes in favour to 2 against, with 1 abstention the Committee then proceeded to answer the question in the affirmative (*ibid.*, p. 45).

93. After the vote Mr. Rosenstock of the United States for the first time raised the issue of excess of jurisdiction or competence on the part of the Tribunal. He stated that the Committee's finding that the Tribunal had erred on a question of

law relating to the provisions of the Charter necessarily meant that the Committee also felt that the Tribunal had exceeded its jurisdiction or competence. In his own words:

"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." (*Ibid.*, p. 46; see also, *ibid.*, p. 48.)

94. The Chairman disputed the interpretation of the vote of the Committee which the United States representative advanced. The Chairman stated:

"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 II." (*Ibid.*, pp. 49-50.)

95. Following this statement, the United States delegate requested that the additional ground of excess of jurisdiction be put before the Committee (p. 51, *ibid.*). At his repeated requests the Chairman put the following additional question before the Committee:

"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?" (*Ibid.*, p. 54.)

96. By 10 votes in favour to 2 against, with 6 abstentions, the Committee immediately answered that question in the affirmative, without any discussion of what the Tribunal's jurisdiction or competence covered or did not cover (*ibid.*, pp. 55-59).

97. On the issue of the formulation of the question to be submitted to the Court for an advisory opinion, the representative of France had proposed that the Committee amend the formulation of the question to be submitted to the Court, as contained in the United States application, by substituting the words "could not be given immediate effect" with the words "could not take effect retroactively" (*ibid.*, pp. 52-53). After the decision, he withdrew his proposal and disassociated himself from the decisions taken by the Committee (*ibid.*, p. 60).

98. The Committee went on to agree that the request for an advisory opinion should be on the question as submitted by the United States, 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 34/165 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?" (*Ibid.*, p. 63.)

E. Concerning the Proceedings before the International Court of Justice

99. On 20 July 1981 the Secretary of the Committee informed Mr. Mortished and his counsel by cable that the Committee had decided on 13 July 1981 to grant the application of the United States for a request of the Court's advisory opinion.

100. By a letter dated 29 July 1981 the Secretary of the Committee transmitted to Mr. Mortished and his counsel copies of the transcript of the Committee's proceedings at its twentieth session.

101. By a letter dated 17 September 1981 the Legal Counsel to the Secretary-General communicated to Mr. Mortished's counsel a copy of a letter dated 10

August 1981 from Mr. A. Pillepich, Deputy-Registrar of the Court. The letter of the Deputy-Registrar of the Court contained information on the Order of the Court fixing 30 October 1981 as the time-limit within which written statements were to be submitted to the Court.

102. By a letter dated 23 September 1981 addressed to the Legal Counsel to the Secretary-General, counsel for Mr. Mortished referred to the failure until 17 September 1981 to communicate to either Mr. Mortished or himself the information on the time-limit for filing a statement. He requested an additional one month, namely until 30 November 1981, to compensate for part of the time lost as a result of the failure of communication. The time factor, the letter stated, was important in view of the time constraints under which internal volunteer counsel work.

103. By a letter dated 24 September 1981 addressed to the Registrar, the Legal Counsel to the Secretary-General informed the Court of the request for an extension of the time-limit for filing a written statement and expressed the support of the Secretary-General for the extension.

104. By a cable dated 6 October 1981, the Registrar of the Court informed the Legal Counsel to the Secretary-General of the Court's decision to extend to 30 November 1981 the time-limit for the filing of a written statement.

Part III. Elaboration of Pleadings

A. Inasmuch as the Procedure by which the Advisory Opinion Was Requested Allows a Member State Which Was not a Party to the Original Proceedings before the Administrative Tribunal to Request a Review of the Judgement of the Tribunal, it Is Legally Defective Because:

1. It impinges upon the authority of the Secretary-General under Article 97 of the United Nations Charter as Chief Administrative Officer of the Organization, and conflicts with Article 100 of the Charter regarding the "exclusively international character" of the Secretariat.

105. According to Article 97 of the United Nations Charter:

"The Secretariat shall comprise a Secretary-General and such staff as the Organization may require. The Secretary-General shall be appointed by the General Assembly upon the recommendation of the Security Council. *He shall be the chief administrative officer of the Organization.*" (Emphasis added.)

106. As Chief Administrative Officer of the Organization the Secretary-General appoints staff to the secretariat and promulgates staff rules and administrative instructions for the running of the secretariat, subject only to "regulations" established by the General Assembly (Article 101 of the Charter). The appointment of staff is effected by a contract between the Secretary-General as chief administrative officer and the person concerned. Although this contract incorporates statutory elements by reference to the Staff Regulations and Staff Rules, its contractual and personal characteristics remain: detailed conditions of service are negotiated and concluded on a case by case basis; each contract stipulates its own duration and so on. The settlement of disputes arising out of a staff member's contract is therefore a primary responsibility of the Secretary-General in his capacity as the chief administrative officer of the Organization. Towards the discharge of this function the Secretary-General has established internal machinery to consider staff appeals—namely the Joint Appeals Board—to make recommendations to him which he may accept or reject. But further recourse may be had to the Administrative Tribunal of the United

Nations, if the internal machinery fails to achieve a satisfactory settlement of the dispute. In that event, the Secretary-General appears as respondent before the Administrative Tribunal in the same capacity as Chief Administrative Officer of the Organization. When the Administrative Tribunal has rendered its judgement, the Secretary-General may, if he does not wish to accept and implement the judgement, apply for its review. (See Article 11 of the Statute of the Tribunal.)

107. The procedure contained in Article 11 of the Statute of the Tribunal allows a member State to inject itself into a dispute between the Secretary-General and his staff. It allows any member State to force the Secretary-General to refrain from accepting and implementing an otherwise final and binding judgement. We submit that such an intervention by a member State impinges upon the position of the Secretary-General as Chief Administrative Officer of the Organization, contrary to Article 100 of the Charter.

108. In fact, in the debates leading to the adoption of Article 11, a number of delegates had raised this same objection (among others) to the procedure exemplified in the instant case. Thus, Mr. Menon of India had stated:

"I suggest that this is not only against the principles of jurisprudence and the ordinary requirements of law, legal proceedings and equity, but also contrary to the Charter itself. It is contrary to Article 100, paragraph 2, of the Charter, which says:

'Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not seek to influence them in the discharge of their responsibilities'." (*General Assembly, Official Records, Tenth Session, 8 November 1955, p. 280.*)

Mr. Nincic of Yugoslavia had also stated:

"We could not—nor can we even now—see how the right of States to initiate the review procedure can be brought into conformity with either the spirit or the letter of Article 100 of the Charter, and in particular with the obligations of member States to 'respect the exclusively international character of the responsibilities of the Secretary-General and the staff'." (*Ibid.*, p. 286.)

Another reference to this had also been made by Mr. Holmback of Sweden:

"there is a danger that the proposal for granting a member State which was not a party to a case judged by the Tribunal the right to make an application against the Tribunal's decision in that case may lead to a situation in which members of the secretariat will be influenced in the discharge of their responsibilities—and that is contrary to the spirit of Article 100 of the Charter" (*ibid.*, p. 287).

109. Judgement No. 273 resolved a dispute between Mr. Mortished and the Secretary-General of the United Nations in his capacity as the Chief Administrative Officer of the Organization and employer of Mr. Mortished. As the information contained in paragraphs 60 and 61 above shows, this dispute spanned over a two-year period during which Mr. Mortished and similarly situated staff expressed concern on the subject of repatriation grant payments.

110. The intervention by a member State in disputes between the Secretary-General of the United Nations and his staff—as in the instant case—has the automatic effect of preventing the Secretary-General, contrary to his wishes, from accepting and honouring a particular judgement of the Tribunal. We submit that such intervention by a member State has the effect of influencing the Secretary-General in the discharge of his responsibilities, contrary to the above-cited provisions of the United Nations Charter.

111. Furthermore, paragraph 1 of Article 100 states that:

“In the performance of their duties the Secretary-General and the Staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall refrain from any action which might reflect on their position as international officials responsible only to the Organization.”

112. The procedure which the intervention of a member State brings into action entails that the staff member submit written observations on the application of that State to the Committee on Applications for Review of Administrative Tribunal Judgements. (See Article IV of the Committee's Provisional Rules of Procedure.) In stating his observations, a staff member in whose favour a judgement has been rendered will necessarily challenge the views of the member State concerned regarding the judgement; he might for instance request the Committee to dismiss the application as lacking a substantial basis. He might furthermore be tempted to lobby members of the Committee towards accepting his point of view. And even if such a staff member were to desist from any lobbying of the members of the Committee toward his viewpoint, we submit that the mere fact of having to challenge the applicant government, and the process of pursuing this challenge through the necessarily adversary character of judicial and quasi-judicial proceedings, jeopardizes the staff member in the performance of his duties as an international official, contrary to paragraph 1 of Article 100.

2. It violates the general principles governing judicial review.

113. We contend that this procedure allowing a third party to raise objections to a judgement in which it has no legal right or interest and to seek a review of that judgement is contrary to fundamental principles of the judicial process.

114. Judgement No. 273 settled a contractual dispute between Mr. Mortished and the Secretary-General in his capacity as Chief Administrative Officer of the United Nations Organization. The United States, though a member State of the United Nations, was not the employer of Mr. Mortished and therefore not privy to the contract which was the subject-matter of the proceedings before the Tribunal. Nor was the United States party to those proceedings.

115. Thus, the United States had no legal right or standing in respect of the contractual dispute between Mr. Mortished and the Secretary-General of the United Nations. The judgement rendered in that dispute is *res judicata* as between Mr. Mortished and the Secretary-General. The United States does not derive any legal rights nor incur any legal obligations in consequence of that judgement.

116. Not only did the United States have no legal interest in the proceedings: its intervention gratuitously infringed on the rights of the parties to the original proceedings—particularly on the rights of Mr. Mortished, in whose favour a judgement has been rendered by a *bona fide* judicial body and accepted without question by the Respondent, the Secretary-General. The vindication of Mr. Mortished's legal rights has thus been compromised, undermined, and delayed by this gratuitous intervention. As argued in paragraph 110 above, this gratuitous intervention also prevents the Secretary-General from honouring a judgement of the Administrative Tribunal which the Secretary-General himself is not questioning.

117. In its Advisory Opinion of 1973, the Court adverted to the propriety of the initiation of proceedings for the review of Administrative Tribunal judgements by a member State not party to the original proceedings before the Tribunal. The Court left that question open at the time, stating that

“these arguments introduce additional considerations which would call for

close examination by the Court if it should receive a request for an opinion resulting from an application to the Committee by a member State" (p. 178).

118. As noted in paragraph 108 above, the propriety of proceedings being initiated by a member State had also been questioned by several delegations in the debates leading to the adoption of Article 11 of the Tribunal's Statute. In fact, Mr. Bihin of Belgium had submitted a draft resolution proposing that the legality of that procedure be referred to the International Court of Justice for an advisory opinion:

"The Belgian delegation has submitted to the General Assembly a draft resolution (A/L.199) under which the International Court of Justice would be requested to give an advisory opinion on the draft resolution recommended by the Fifth Committee. . . .

The draft now proposed to the General Assembly reserves to member States of the United Nations the right to initiate the review of Administrative Tribunal judgements. It may be asked whether the recognition of this right would be in keeping with the Charter. In any case, it is inconceivable that a State not a party to a dispute before the Administrative Tribunal should be able to challenge a decision which is satisfactory to both parties.

In addition to these considerations, the actual legal basis of the draft resolution must be examined. The Assembly cannot adopt it unless it is certain that it complies with law. Nearly half the countries that took part in the discussions asserted the contrary, and the most serious doubts were expressed, especially with regard to the conformity of the draft with the letter and the spirit of the Charter, with the Statute of the International Court of Justice and with the statute of the Administrative Tribunal, and with regard to its consistency with the contractual obligations of the United Nations towards its staff members . . .

Neither the Secretary-General nor the qualified representatives of United Nations staff members consider it necessary to organize a review procedure for Administrative Tribunal judgements. In any case, the question involves the very interests of the international organization and of its staff, and is sufficiently important for all the time and all the care it deserves to be devoted to it." (*General Assembly, Official Records, Tenth Session*, 8 November 1955, p. 277.)

119. These arguments were supported by a number of delegates. For instance, Mr. Menon of India:

"Last year, the General Assembly decided to accept the principle of judicial review. My delegation voted for the acceptance of that principle—as a matter of compromise, in order to obtain agreement on the resolution at that time. We stand by our acceptance of the principle of judicial review, but to accept that principle is different from saying that the procedures now proposed are in consonance with that principle.

My delegation questions that and does not agree that the procedures proposed by the Fifth Committee are consistent with the principle of judicial review. We say further that they are not consistent with the Statute of the International Court of Justice or with the Charter of the United Nations. . . .

Now the dispute in these matters—the cause of action, in legal terms—is between the Secretary-General, as the employer in this case, and the staff member. The member State does not enter into this at all, and I think that it is an elementary principle of jurisprudence that you cannot at the stage of an appeal bring into court a party that is not a party to the proceedings. A

judicial proceeding is a continuous matter, and if you want to introduce another party you must do it through judicial proceedings.

Here a member State is given the initiative to intervene, and the dispute is not between the member State and the staff member. The dispute, as it is referred to the Tribunal, is between the Secretary-General, on the one hand, and the staff member on the other, and the introduction of a third party in a dispute is possible in civil disputes only by a process known as *amicus curiae* (friend of the court). That is not the position that is claimed by the member State. The member State becomes a litigant and—at this stage, not the original stage—the member State is introduced as a party and has rights which are not only full rights but even more than full rights in this case. . . .

Therefore, whether one looks at it from the point of view of the Charter, the Statute of the International Court of Justice, or the elementary principles of civilized jurisprudence, or of the equities in the case, the procedure recommended, namely, the setting up of a political committee to decide whether there should be a review or not, is a violation of the decisions taken last year (resolution 888 (IX) and of the principles of judicial review).

Therefore we cannot support the draft resolution recommended by the Fifth Committee. While the proper attitude would be one of total opposition, we are, however, prepared at this stage to support the Belgian draft resolution (A/L.199). It is a very much more moderate draft resolution." (*Ibid.*, pp. 279-281.)

Mr. Tarazi of Syria in support of the Belgian proposal:

"It will be remembered that, after the discussion in the Fifth Committee, we were faced with a situation in which the attitude finally adopted by the Committee did not meet with the approval of all the delegations. Those who disapproved were prompted by legal scruples, as the United States representative has just said. Despite the doubts voiced by delegations which did not believe in the possibility of having recourse to the International Court of Justice and did not recognize the Court's right to pronounce on Administrative Tribunal judgements, either by way of hearing appeals, or by way of rendering advisory opinions, the Fifth Committee adopted the draft resolution now before the General Assembly.

The Belgian representative, in submitting his delegation's draft, has attempted to carry the study of this question further. I consider the draft resolution reasonable, wise and moderate. It is designed to dispel all the misgivings which might arise subsequently, if the General Assembly were to adopt the draft resolution proposed by the Fifth Committee." (*Ibid.*, p. 285.)

Further, Mr. Nincic of Yugoslavia had argued:

"My delegation has never, for its part, been convinced of the necessity or the desirability of instituting a review procedure on the judgements of the Administrative Tribunal. Indeed, we fail to discern anything in our experience with the working of the Tribunal that would point to the usefulness of such a change in the Tribunal's Statute. On the other hand, there is little doubt in our minds as to the disadvantages and even the potential dangers of the proposed change.

However, even if we had been prepared to accept the principle of judicial review, as a majority of the members of this Assembly have been prepared to do, we could not but have been disturbed by the form the proposal has taken—the form in which it emerged from the Special Committee, and in which it has since been endorsed by the Fifth Committee . . .

Moreover, the very fact that a State, that is to say, a party which had not

taken part in the previous stages of the proceedings, should appear in the review stage, can hardly be viewed as being in keeping with the generally accepted principles of judicial procedure . . .

Whatever our views on the actual merits of the case, we cannot but admit that there have been few instances in the history of the United Nations where a proposal has given rise to such serious doubts concerning its legal aspects. Nor do I think that any of us, however we may feel as to the substance of the matter, would wish to embark upon a course with such clearly far-reaching implications for the secretariat of the United Nations and, indeed, for the United Nations as a whole, a course whose legal soundness so many of us doubt so strongly.

The least we can do, therefore, before we go any further in this matter, is to try to make sure of the legal ground upon which we stand. That, as we see it, is the purpose of the Belgian draft resolution in seeking the advisory opinion of the International Court of Justice." (*Ibid.*, p. 286.)

And, Mr. Holmback of Sweden had also argued:

"None of the parties that can appear before the Administrative Tribunal—that is, the Secretary-General and the members of the Secretariat—has expressed the view that a review procedure is called for, and the Staff Council has furthermore stated that it has not been convinced that a review procedure must be established. The Administrative Tribunal is not in a position to retain a member of the Secretariat whom the Secretary-General wants to dismiss. The Secretary-General can dismiss him notwithstanding the opinion of the Tribunal. What the Tribunal can do is to give him compensation, if it considers his dismissal unfounded. Such compensation, however, can influence the budget of the United Nations to a very small degree. Finally, the right of the General Assembly to replace a member of the Tribunal upon the expiration of his three-year term is, according to our view, a sufficient means of control in regard to the Administrative Tribunal." (*Ibid.*, p. 287.)

120. These arguments had been swept aside by a majority of the General Assembly at the time. But the dangers pointed out so persuasively are now fully manifested in the instant case. These dangers lie in the fact that the intervention of a member State not party to the original case clearly undermines the judicial process.

121. Although the Court has jurisdiction under Article 65 of its Statute to render an advisory opinion, Article 65 of the Statute is permissive rather than mandatory in character, and the Court may decline where compelling reasons oppose the exercise of this jurisdiction.

122. In its 1973 Advisory Opinion the Court expressly stated that: "in exercising this discretion, the Court has always been guided by the principle that, as a judicial body, it is bound to remain faithful to the requirements of its judicial character even in giving advisory opinions" (p. 175). Thus it considered the threshold question whether "these features of the procedure established by Article 11 are of such a character as should lead it to decline to answer the request" (*ibid.*). Only after it satisfied itself that the procedure prescribed in Article 11 did not run counter to the requirements of the Court's judicial character did it consent to render the advisory opinion.

123. Judge Dillard stated further in the 1973 Advisory Opinion that compelling reasons against rendering an advisory opinion would exist if doing so would weaken the integrity of the judicial process (p. 230). In his declaration appended to the Court's opinion, President Lachs also stated:

"I would go further than the Court's observation that it does not consider the procedure instituted by Article 11 of the Tribunal's Statute as

'free from difficulty' (para. 40), for neither the procedure considered as a whole nor certain of its separate stages can in my view be accepted without reserve. Not surprisingly, the legislative history of the provision in question reveals that they were adopted against a background of divided views and legal controversy.

There would, perhaps, be little point in adverting to this problem if the sole choice for the future appeared to lie between judicial control of the kind exemplified by the present proceedings and no judicial control at all. That, however, does not, in my view, have to be the case, for the choice ought surely to lie between the existing machinery of control and one which would be free from difficulty and more effective. I see no compelling reason, either in fact or in law, why an improved procedure could not be envisaged." (P. 214.)

124. The Court's qualified acceptance of the Article 11 procedure in its 1973 Advisory Opinion was based on the fact that the procedure gave the same rights to staff members as it gave to the Secretary-General, *these being the parties to judgements of the Administrative Tribunal*. It stated that:

"The mere fact that Article 11 provides for the possibility of a member State applying for the review of a judgement *does not alter the position in regard to the initiation of review proceedings as between a staff member and the Secretary-General*. Article 11, the Court emphasizes, gives the same rights to staff members as it does to the Secretary-General to apply to the Committee for the initiation of review proceedings." (P. 178, emphasis added.)

125. We contend that the Court found the procedure acceptable *as between a staff member and the Secretary-General* precisely because the staff member and the Secretary-General would in every case be the parties to the judgement in question. But the Court did not thereby accept the notion that an application from a member State not party to the original case could also be acceptable. In fact, the premise on which it accepted the 1973 application—that the procedure gave the same rights in that regard to the parties to the case—indicates that it would consider an application from a member State not party to the case as presenting an unsatisfactory situation. Thus, it is our contention that the present request for an advisory opinion falls short of the conditions under which the Court accepted the Article 11 procedure in the 1973 Opinion, and further, that unlike the 1973 application, this request does not conform with fundamental principles of the judicial process.

126. We thus pray the Court to rule that the application of the United States, leading to the request for the Court's advisory opinion, violates fundamental principles of the judicial process in so far as it overrides the wishes, and prejudices the legal rights of the parties to the dispute—a dispute which has been settled in a judgement that is binding on the parties and that has furthermore been accepted by them.

127. Furthermore, we contend that an intervention in judicial proceedings can only be based on the existence of a legal right or interest in those proceedings. In the *South West Africa* cases (*Ethiopia v. South Africa; Liberia v. South Africa*), *I.C.J. Reports 1966*, page 6, this Court addressed the question of the Applicants' "legal right or interest in the subject-matter of their claim", and stated as follows:

"It is a universal and necessary, but yet almost elementary principle of procedural law that a distinction has to be made between, on the one hand, the right to activate a court and the right of the court to examine the merits of the claim,—and, on the other, the plaintiff party's legal right in respect of the subject-matter of that which it claims, which would have to be established to the satisfaction of the Court.

... in a dispute causing the activation of a jurisdictional clause, the substantive rights themselves which the dispute is about, must be sought for elsewhere than in this clause, or in some element apart from it,—and must therefore be established aliunde vel aliter. Jurisdictional clauses do not determine whether parties have substantive rights, but only whether, if they have them, they can vindicate them by recourse to a tribunal." (P. 39, emphasis added.)

128. The Court then went on to rule, after an examination of provisions of the mandate granted by the League of Nations to South Africa over the territory of South West Africa, and of the individual rights of the former member States of the League in so far as an "invigilatory function" over the mandate was concerned—that

"the Applicants (the Governments of Ethiopia and Liberia) cannot be considered to have established any legal right or interest appertaining to them in the subject-matter of the present claims, and that, accordingly, the Court must decline to give effect to them" (p. 51).

129. In the present case, we contend that the Article 11 procedure only confers on member States a jurisdictional right to activate this Court for the purpose of rendering an advisory opinion; but it does *not* confer any legal rights in the subject-matter of the original dispute. We contend, further, that no such legal rights exist on the part of the Applicant in the subject-matter of the dispute between Mr. Mortished and the Secretary-General of the United Nations Organization. No such legal rights, appertaining to the United States were established at any point during the proceedings before the Committee, and no such legal rights can be established by the United States before this Court. We therefore pray the Court to apply the principles established in the *South West Africa* cases to this case as well.

3. It imposes in a bilateral dispute a condition of legal and practical inequality upon one of the parties.

130. The procedure established by the General Assembly in Article 11 of the Tribunal's Statute contained an inherent legal inequality and resulted, in the present case, in a prejudice to Mr. Mortished. Although a party to the proceedings before the Tribunal, Mr. Mortished nonetheless had no legal right to appear or to be represented before the Committee on Applications for Review of Administrative Tribunal Judgements. Much as he indicated a clear interest to be represented by his counsel, any appearance or representation that he might have obtained would only have been at the discretion of the Committee.

131. The manner in which the Committee treated the specific request for his counsel to be allowed to follow the proceedings of the Committee introduced a further inequality into the nature of the procedure. First, the Committee after taking up the issue of the attendance of Mr. Mortished's counsel decided to postpone a decision on it but proceeded throughout its entire first meeting to a consideration of the United States application; when the Committee returned to the issue at its second meeting, it decided to deny Mr. Mortished's counsel the right to be present at the Committee's proceedings or to make any statement to the Committee, on the legally irrelevant argument that he had nothing to say which would be uniquely relevant to the proceedings of the Committee. In contrast, the applicant for review was not only allowed to be present before the Committee; the verbatim transcript of the Committee's proceedings shows that it exercised the weight of its presence to propel the Committee into decisions concerning Judgement No. 273 prejudicial to the interests of Mr. Mortished.

132. Second, even though Mr. Mortished was entitled under Article IV of the

Committee's provisional rules of procedure to submit written comments on the application within seven days, he had subsequently no opportunity to elaborate upon these. Moreover, such comments as he submitted related only to the ground implicitly contained in the application, namely that the Tribunal erred on a question of law relating to the provisions of the Charter. Mr. Mortished had no opportunity to comment upon the second basis for impeaching the validity of Judgement No. 273 which was surreptitiously introduced during the proceedings of the Committee and voted upon.

133. Third, the procedure prescribed in Article 11 of the Statute produces before the International Court of Justice a situation in which Mr. Mortished, unlike the applicant for review and unlike the Respondent in Judgement No. 273, has no direct access to the Court: he must approach the Court through the Secretary-General who was the Respondent in the proceedings before the Tribunal. Even if it were possible to separate the position of the Secretary-General *qua* litigant from the position in which the Secretary-General stands in relation to the Court—a separation that we contend is fictional—the procedure nonetheless imposes upon Mr. Mortished an inequality in relation to the Applicant for review. This inequality, namely the lack of direct access to the Court, is not a nominal inequality. In the present instance, the reality and injurious effect of this inequality was manifested: (i) in that the Order of the Court dated 10 August 1981 which fixed the time-limit for filing statements was not communicated to Mr. Mortished and to his counsel until 17 September 1981—some six weeks later; and (ii) the request of Mr. Mortished's counsel for compensatory time was communicated to the Court as a request by counsel for an extension of the time-limit.

134. Fourth, the applicant for review is legally entitled to request that the Court conduct oral hearings and, if the Court decides to do so, to appear before the Court. Although it is the Court which decides whether or not to hold oral hearings, it remains the case that the applicant for a review as well as the Respondent are legally entitled to request oral argument, whereas Mr. Mortished is not. Further, in the event that the Court decides to hold oral argument, Mr. Mortished is, unlike the applicant for review and the Respondent, incapable, by virtue of Article 34 of the Statute of the Court, of appearing before the Court.

135. The procedure established by the General Assembly in Article 11 also places Mr. Mortished in a position of practical inequality. The time-limit allowed Mr. Mortished by the Committee's rules of procedure for filing observations on the application is insufficient for the purpose. According to Article IV of the Committee's provisional rules of procedure:

"1. The other party to the proceedings before the Administrative Tribunal, or the parties in those cases where the application is made by a member State 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 its comments with respect to the application.

2. Comments of a party, or parties, shall be submitted in six copies in any one of the five official languages of the United Nations." (Emphasis added.)

As Mr. Mortished has pointed out (A/AC.86/R.100, p. 16):

"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 does 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."

The prejudice to Mr. Mortished would have been even more pronounced were he based in some other part of the world where communications are less rapid than from New York to Geneva.

136. Furthermore, even if Mr. Mortished and/or his counsel were admitted to the proceedings of the Committee, the practical inequality would remain with respect to the extent to which they could realistically affect the proceedings or decisions of the Committee.

137. Finally, Mr. Mortished, having been dragged into these proceedings by a member State which was not a party to Judgement No. 273, has to expend considerable effort to protect his rights—without the benefit of resources anywhere near those at the disposal of the applicant.

138. The Court has stated that it will participate in the procedure established for a review of Administrative Tribunal Judgements by rendering an advisory opinion if the requirement of *equality of the parties* is satisfied (see, e.g., *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, p. 84; *Constitution of the Maritime Safety Committee of the Inter-Governmental Maritime Consultative Organization, Advisory Opinion, I.C.J. Reports 1960*, p. 153; *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973*, p. 178).

139. In the Advisory Opinion of 1956, the Court thus considered at the outset the question of whether the fact that, (i) only one party to the Administrative Tribunal Judgement could institute the review proceedings, and (ii) the officials in whose favour the Judgement in question had been given could not appear before the Court, imposed a condition of inequality upon the parties. It agreed to give an advisory opinion only after it was satisfied that the answer to the two questions was in the negative. Similarly in its Advisory Opinion of 1973 (*Fasla*), even though the issue of inequality did not arise because the Applicant for review was the staff member, the Court however dealt with the inequality that would be presented where the Applicant for review was a member State. It observed in this connection (p. 178):

"The Court does not overlook that Article 11 provides for the right on individual member States to object to a judgement of the Administrative Tribunal and to apply to the Committee to initiate advisory proceedings on the matter; and that during the debates in 1955 the propriety of this provision was questioned by a number of delegations. The member State, it was said, would not have been a party to the proceedings before the Administrative Tribunal, and to allow it to initiate proceedings for the review of the judgement would, therefore, be contrary to the general principles governing judicial review. To confer such a right on a member State, it was further said, would impinge upon the rights of the Secretary-General as chief administrative officer and conflict with Article 100 of the Charter. It was also suggested that, in the case of an application by a member State, the staff member would be in a position of inequality before the Committee. These arguments introduce additional considerations which would call for close examination by the Court if it should receive a request for an opinion resulting from an application to the Committee by a member State. The Court is not therefore to be understood as here expressing any opinion in regard to any future proceedings instituted under Article 11 by a member State."

140. In the present case, the inequality imposed upon Mr. Mortished has continued to run from the origination of the United States application. This inequality stands in sharp contrast with the legal rights and political weight enjoyed by the applicant in this whole process of review.

141. To sum up the instances of this inequality, on the one hand: Mr. Mortished was excluded from the proceedings of the Committee and his request to participate denied; he had no opportunity to comment upon one of the grounds on which the Committee held that there was a substantial basis for the Application notwithstanding the opportunity under Article IV of the Committee's Provisional Rules of Procedure to submit written comments; the verbatim records of the Committee's proceedings show that the Committee hardly gave any weight, let alone equal weight, to the written comments submitted by him and on his behalf. That the written comments of Mr. Mortished were not given any weight at all appears not only from the Committee's failure to consider them but also from the attitude taken in the Committee that Mr. Mortished's counsel had nothing to say that would be uniquely relevant to the work of the Committee. Furthermore, although he submitted written observations through the Secretary-General, he could not as he had requested elaborate upon these orally, or indeed initiate a request to the Court for oral hearings to be held.

142. On the other hand: the Applicant for review who was not a party to the proceedings before the Administrative Tribunal was not only a member of the Committee; it exercised voting power on the question whether its own application had a substantial basis. Beyond the Committee, the United States which was the applicant for review does not depend upon the goodwill of the Secretary-General to transmit its observations to the Court; it is also entitled to request and to participate in oral hearings before the Court. The fact that it may or may not voluntarily waive this legal right in no way diminishes Mr. Mortished's position of inequality.

B. Apart from the Legal Defects of the Article 11 Procedure, the Committee's Decision to Request the Court's Advisory Opinion Is Legally Defective, for the Following Reasons:

1. The Committee received an application which in substance did not fall within the terms of Article 11 of the Statute of the Tribunal and in form violated Article II of the Committee's Provisional Rules of Procedure, and acted favourably on the legally defective application.

143. According to Article II, paragraph 3, of the Committee's Provisional Rules of Procedure:

"3. The application shall contain the following information in the order specified:

- (a) The number and date of the judgement concerning which a review is desired, and the names of the parties with respect to which the judgement was rendered.
- (b) The full name of the applicant for review, and his address for the purpose of the proceedings. If the applicant for review is one who has succeeded to the rights of the person in respect of whom the judgement was rendered on the latter's death, this fact together with supporting evidence including relevant data pertaining to the succession shall be set forth.
- (c) A statement setting forth *in detail* the grounds of the application under Article 11, paragraph 1, of the Statute of the Administrative Tribunal and the supporting argument.

- (d) A text of the legal question or questions on which it is desired that an advisory opinion should be requested from the International Court of Justice.
- (e) A list of any documents which are submitted in support of the application.

144. Article II, paragraph 3 (c), of the Committee's Rules of Procedure stipulates that the application should set forth in detail the grounds under Article 11 of the Statute of the Tribunal on which the judgement is being questioned. The grounds set out in Article 11 are in very clear and specific terms. They are:

"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".

145. Contrary to the clear requirements of this provision, the United States application did not set forth in any detail the relevant grounds under Article 11 of the Statute of the Tribunal on which the judgement was being challenged. In the second paragraph of its application, it appears that the application was instead based upon the following ground:

"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."

146. The fact that the 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: see, for example, Judgement Nos. 57, 66, 67, and 70, among others. To fall within the ambit of Article 11 of the Statute, the application must be specifically based on the ground that the Tribunal has erred on a question of law relating to the provisions of the Charter. As the United States application failed to meet this requirement, we submit that it should have been rejected by the Committee.

147. Furthermore, Article II, paragraph 3 (c), of the Committee's Rules of Procedure requires that the application set forth in detail the supporting argument. No attempt at doing so was made in the United States application. Instead the application repeatedly raised the question 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.

148. Far from founding its request on one or more of the four grounds specified in Article 11, the United States application only referred generally to "constitutional dimensions", "the relevance of Article 101 of the Charter", and "the authority of the General Assembly". Important as these issues are in themselves, they cannot be substituted for the specific grounds required by Article 11 of the Tribunal's Statute.

2. The Committee in its proceedings violated the following fundamental principles of natural justice: *audi alteram partem*, and *nemo iudex in causa sua*.

149. In line with the settled jurisprudence of the Court (see paras. 122 and 123 above) that the requirements of its judicial character must be met in every

request for its advisory opinion, we submit that the threshold question which the Court should consider is whether or not the requirements of its judicial character are met in the present instance. We respectfully request the Court to conclude that the requirements of its judicial character were not met, on the ground that the Committee, which is a quasi-judicial body and performs quasi-judicial functions, nonetheless violated the following principles of natural justice:

150. *Audi alteram partem*: This universally accepted principle of justice applies to all judicial and/or quasi-judicial proceedings. It is also established in the jurisprudence of the United Nations Administrative Tribunal as well as other international tribunals. For example, in *Keeney v. the Secretary-General of the United Nations* (Judgement No. 6), the United Nations Administrative Tribunal struck down a decision of the Secretary-General which it otherwise considered justiciable, because of a violation of this principle:

“while the statements of cause assigned by the Secretary-General for the termination of [the Applicant’s] temporary-indefinite contract are in style of conclusions rather than causes and lack the specificity which the Tribunal regards as desirable, they undoubtedly constitute adequate reasons for termination.

However, *inasmuch as Mrs. Keeney was at no time in a position to plead directly to the statements of cause for termination assigned by the Secretary-General, an essential element of procedural due process is lacking.*” (Emphasis added.)

The Tribunal finds that the application of Mrs. Keeney is well founded and orders that the decision contested by the Applicant be rescinded in accordance with Article 9 of the Statute of the Tribunal.” (P. 25.)

151. The principle is also reflected in Article IV (cited in para. 68 above) of the Committee’s Provisional Rules of Procedure.

Furthermore, Article VII of the Rules specifies that:

“The Committee may at any time invite additional information or views on any point with respect to which it considers such information or views necessary provided that in such cases the same opportunity to present additional information or views is afforded to all parties to the proceedings.”

152. In the present case, Mr. Mortished had expressly requested that the Committee grant him the opportunity to participate in the proceedings of the Committee and to make such statements as might be necessitated in the course of the proceedings. The Committee initially failed to take a decision on the request and yet proceeded to consider the merits of the application; later it denied the request. By so doing, the Committee violated the principle of *audi alteram partem*.

153. While the applicant for review was a member of the Committee and had ample opportunity to elaborate upon and to introduce an additional ground not contained in the application, Mr. Mortished was denied the same opportunity in contravention of Article VII of the Committee’s Rules of Procedure.

154. Furthermore, the attitude in the Committee that Mr. Mortished’s counsel had nothing to say which would be relevant to the work of the Committee casts serious doubts on the question of the extent to which his written comments were examined by the Committee. As the Court may note, the transcript of the Committee’s proceedings does not reveal any examination of those written comments. We submit that the Committee treated the right of Mr. Mortished under Articles IV and VII of its Rules of Procedure as a purely formalistic matter and failed to make any actual evaluation of the comments made by him and on his behalf.

155. We submit further that the decisions and approach taken by the Committee violated the premise on which the Court has found certain features of the Article 11 procedure acceptable, when it noted in its 1973 Opinion that "the decisions of the Committee are reached after an examination of the opposing views of the interested parties" (p. 176). As shown above, the Committee did not so examine the opposing views of the interested parties before adopting its decisions.

156. *Nemo iudex in causa sua*: It is a universally accepted principle of law that a party to a dispute should not at the same time be judge in that dispute. Thus, in *re Mauch* (Judgment No. 27), in which the Medical Adviser of the ILO had participated in a decision of the Medical Committee to confirm certain reservations made by himself regarding the applicant's state of health—on which the Organisation's decision not to re-engage the applicant was partly based—the ILO Administrative Tribunal stated:

"while no statutory provision was violated, it is nonetheless regrettable that the Medical Adviser should have participated as a full member of the Medical Committee to which his own decision was appealed, and it appears highly undesirable that the Medical Adviser should thus have become a judge in his own cause" (p. 5).

The Tribunal went on to award compensation to the applicant "for the moral prejudice resulting from the equivocal explanation given of the failure to re-engage her" (p. 6).

157. In the present case the Committee is a "subsidiary organ" (p. 174, 1973 Advisory Opinion) of the General Assembly which had adopted resolution 34/165. The proceedings of the Committee show that its members considered themselves *a priori* obligated to support the actions of the General Assembly. For example:

Mr. Dia (Senegal):

"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 its 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 Judgment, if only to ensure that the Secretary-General does not find himself in a similar situation again in the future." (A/AC.86(XX)/PV.2, p. 22.)

Mr. Stuart (United Kingdom):

"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, 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." (A/AC.86(XX)/PV.1, pp. 21-22.)

Mr. Lahlou (Morocco):

"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." (A/AC.86(XX)/PV.1, p. 26.)

158. Whilst it is true that the Committee is not required to take a final judicial decision as to whether or not Mr. Mortished had any acquired rights, the Committee was supposed to decide on the merits of the United States application impartially. As evidenced by the statements in the Committee, the members of the Committee were not in a position to act impartially. On the contrary, they considered the decision of the General Assembly that the Tribunal had allegedly failed to give due weight to as their own and considered themselves duty bound *a priori* "never to agree" with the Tribunal. In doing so, the Committee violated the principle of *nemo iudex in causa sua*.

159. Apart from the Committee's own violation of *nemo iudex in causa sua* the United States itself, as the applicant before the Committee, should not have been permitted by the Committee to participate in the decision on its own application. The active role of the United States in the Committee's decision in itself violated the principle of *nemo iudex in causa sua*.

3. The Committee failed to adopt a uniform interpretation of Article 11 in the present case in which the applicant is a member State.

160. In its Advisory Opinion of 1973, the Court stated with respect to the uniform interpretation of Article 11:

"Other than what may be derived from the present proceedings, there is no information before the Court regarding the criteria followed by the Committee in appreciating whether there is 'a substantial basis' for an application. The statistics of the Committee's decisions may appear to suggest the conclusion that, in applications made by staff members, it has adopted a strict interpretation of that requirement." (P. 177.)

Although it did not consider that this fact in itself rendered the procedure incompatible with the requirements of the judicial process, it also stated (p. 177) that:

"It would, on the other hand, be incompatible with these principles if the Committee were not to adopt a uniform interpretation of Article 11 also in cases in which the applicant was not a staff member."

161. Admittedly, it is difficult to establish that the Committee has not adopted a uniform interpretation of Article 11 of the Tribunal for two reasons: first, this was the first time that the Committee dealt with an application from a member State, and second, except in the present case, the Committee had never produced transcripts of its proceedings, which could be used for comparative purposes. However, we contend that in order to establish that the Committee did not adopt a "uniform interpretation" in the present case, it is sufficient to show that it did not adopt a strict interpretation of Article 11, such as it has done with respect to other applications.

162. In the present case, the Committee received an application which was not in strict compliance with Article II of the Committee's provisional rules of procedure (see paras. 143-148 above).

163. As regards its decisions on the merits of the application, the Committee held that there was an error of law relating to the provisions of the Charter without identifying these errors and with only casual references to this or that article of the United Nations Charter which "we should also bear in mind" (see, for example, A/AC.86(XX)/PV.2, pp. 4-5). Furthermore, the Committee, having allowed a surreptitious introduction of a second ground of challenge to Judgement No. 273, decided that the Tribunal had exceeded its jurisdiction without any examination whatsoever of, on the one hand, the scope of the Tribunal's jurisdiction and, on the other, the actual tenor of Judgement No. 273. This manner of proceeding as well as the decisions taken by the Committee reveal that it adopted in this case where a member State was involved anything other than a strict interpretation of Article 11.

4. The Members of the Committee at its twentieth session lacked the competence for, or else failed to perform the functions required of the Committee.

164. From the legislative history behind the establishment of the Committee on Applications for Review of Administrative Tribunal Judgements it is clear that the function of examining applications and deciding whether they have a substantial basis was intended to be performed by a body composed of persons with the highest legal and administrative experience.

165. This necessarily arises from the nature of the decisions that the Committee is required to make. For instance, as it has to decide whether there is "a substantial basis" to the contention that the Tribunal has exceeded its jurisdiction, the members of the Committee should have at least some familiarity with the content and limits of the Tribunal's jurisdiction as spelt out in the Tribunal's Statute. Or, where called upon to decide the merits of an application on the ground that a fundamental error in procedure has been committed which has occasioned a failure of justice, substantial expertise on the part of members of the Committee on legal procedures is clearly required. Again, where called upon to decide whether there has been an error of law relating to the provisions of the Charter, members of the Committee must know or be able to ascertain the content of the applicable law and the relationship of that law to the provisions of the United Nations Charter. As the Court itself has pointed out "These are functions which, in the Court's view, are normally discharged by a legal body" (Advisory Opinion, 1973, p. 176).

166. It may well be, as one of the members of the Committee contended, that:

"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 . . ." (A/AC.86(XX)/PV.1, p. 32.)

Nevertheless, the Committee must decide that there is "a substantial basis" to the application on the grounds raised. In order to come to that conclusion, we submit that there must be a *prima facie* showing that there has been an error of law relating to the provisions of the Charter or that the Tribunal has exceeded its jurisdiction or competence. The determination that such a *prima facie* case exists is one that can only be made by a legal body, which the Committee is not.

167. It is clear that the Committee as composed at its twentieth session did not have the requisite expertise to perform the above functions which, as the Court itself has stated, are "quasi-judicial" (see Advisory Opinion of 1973, p. 176). Even if the Committee could be said to have been competent, an examination of the transcript of the Committee's proceedings shows that no attempt whatsoever was made to establish such a *prima facie* showing on the grounds alleged. Instead, general statements were made by this and that representative as to the supposed undesirability of the Tribunal's ruling. It was repeatedly alleged that the Tribunal had exceeded its jurisdiction without an iota of discussion of the content of the judgement or the scope of the Tribunal's jurisdiction. Similarly, it was repeatedly alleged that the Tribunal had committed an error of law without any examination of the pertinent Staff Regulations and Rules which the Tribunal had applied. Moreover, whilst the United States application was based on the crucial premise that the Tribunal had ruled "that General Assembly resolution 34/165 of 17 December 1979 could not be given immediate effect", there was no discussion of the question of whether this was in fact the tenor of the judgement. Neither was there any discussion, beyond the invocation of this or that provision of the Charter, of the specific respects in which those provisions may have been violated. Indeed, the proceedings in the Committee raise serious doubts as to the familiarity of the majority of representatives with the Tribunal's Judgement.

168. In view of the foregoing, we request the Court to declare that the Committee failed to perform its function of examining the merits of the United States application. The Court may also on its own decide that the proper course of action for it is to decline from rendering the advisory opinion requested.

5. There is nothing exceptional about Judgement No. 273, other than that a member State does not like it, to warrant recourse to the Court for an advisory opinion.

169. As the Court itself recognized in its Advisory Opinion of 1973 "the legislative history of Article 11 shows that recourse to the International Court of Justice was to be had only in exceptional cases" (*I.C.J. Reports 1973*, p. 177). The fact that the Committee has hitherto adopted a strict interpretation of the terms of Article 11 of the Tribunal's Statute affirms this proposition.

170. Whilst the Committee itself decides whether an application submitted to it has the requisite exceptional character, in doing so it is not left unhampered to rely on purely subjective criteria. Its determination that the case on which an application is made of an exceptional character can be open to objective evaluation in reference to the judgement proposed to be reviewed.

171. In the present case, the issue before the Tribunal was whether Mr. Mortished had an acquired right to the repatriation grant, and if so whether in applying General Assembly resolution 34/165 the Secretary-General was or was not bound by Staff Regulation 12.1 to ensure that this acquired right was not prejudiced. The Tribunal held that given the nature of the repatriation grant as set out in the Staff Rules promulgated in pursuance of Staff Regulation 9.4 and Annex IV, Mr. Mortished had an acquired right to the grant without the need for evidence of relocation. We submit that there is nothing exceptional about this finding. The Tribunal has in several other instances found that an acquired right existed in the face of a General Assembly resolution: see, e.g., *Capio v.*

Secretary-General of the United Nations, Administrative Tribunal Judgement No. 266, 1980.

172. Having found that an acquired right existed in the present instance, the Tribunal proceeded to apply Staff Regulation 12.1 to the effect that the Secretary-General's implementation of the Regulation should not prejudice that right. There is nothing exceptional about the application of Staff Regulation 12.1 so as to preclude the application of new General Assembly resolutions to staff members who had acquired a right before the adoption of the resolution.

173. Far from being an exceptional ruling, the likelihood that the Tribunal would decide in this manner was quite predictable in the light of the established jurisprudence of the Tribunal and of other international tribunals. As the ICSC had noted, the Legal Counsels of the various agencies had expressed the view that a measure along the lines of General Assembly resolution 34/165, without provision for a transitional arrangement, would not be consistent with Staff Regulation 12.1 and with the jurisprudence of the various tribunals on acquired rights. The ICSC was itself persuaded of the force of this view. The same view was reiterated by the Under-Secretary-General for Administration, Finance and Management before the Fifth Committee. Thus, far from being an exceptional case, Judgement No. 273 dealt with a straightforward legal question—in a manner predicted by the Legal Counsels of the organizations concerned.

174. Furthermore, as stated in paragraph 70 above, the Secretary-General has so far taken the position that Judgement No. 273 obliges him to pay the repatriation grant only to Mr. Mortished by virtue of the fact that section VI of the judgement referred specifically to the "special obligations" assumed by the Organization towards Mr. Mortished when he transferred from the ICAO to the United Nations. It is not in dispute that if the Organization has assumed "special obligations" towards Mr. Mortished, these obligations should, as the Judgement declared, be respected. We respectfully submit that such a situation falls outside that class of extraordinary cases for which Article 11 of the Statute was intended.

175. Only the following can be said to be exceptional about the Judgement: the fact that a member State objects to the Judgement or, more precisely, to a mistaken conception of the Judgement, namely, that the Tribunal decided that General Assembly resolution 34/165 should not be given immediate effect. We submit that this is insufficient to bring the case within the class of exceptional cases for which Article 11 of the Tribunal's Statute was intended.

C. In Relation to the Question Submitted to the Court by the Committee:

1. To take the position that the Court's function is confined to determining whether the Tribunal exceeded its jurisdiction in Judgement No. 273 and whether the Tribunal committed an error of law relating to the provisions of the Charter.

176. The Committee's finding that there was a "substantial basis" to the application of the United States was based specifically on the following two grounds: (i) that the Administrative Tribunal committed an error of law relating to the provisions of the Charter of the United Nations, and (ii) that the Administrative Tribunal exceeded its jurisdiction or competence.

177. We submit that in rendering its advisory opinion the Court's function is limited to answering the specific objections raised against Judgement No. 273, on the basis of which the Committee requested the advisory opinion. Thus, the Court is only required to determine whether or not the Administrative Tribunal exceeded its jurisdiction or competence, and whether or not it committed an error of law relating to the provisions of the Charter, in Judgement No. 273. It

need not follow the path of distraction by enquiring into what is "warranted" or not warranted, into what is "immediate" or not immediate, etc.

178. The Court has always held that its function in cases of this nature is limited to answering the questions placed before it, and the specific objections raised in relation to the judgement in question. Thus, in the Advisory Opinion of 1973—which was also based on two of the four grounds laid down in Article 11 of the Statute of the Tribunal—the Court stated, in reference to Article 11 (at p. 184):

"Consequently, the Committee is authorized to request, and the Court to give, an advisory opinion only on legal questions which may properly be considered as falling within the terms of one or more of those four 'grounds'. Again, under Article 65 of the Court's Statute, its competence to give advisory opinions extends only to legal questions on which its opinion has been requested. The Court may interpret the terms of the request and determine the scope of the questions set out in it. The Court may also take into account any matters germane to the questions submitted to it which may be necessary to enable it to form its opinion. But in giving its opinion the Court is, in principle, bound by the terms of the questions formulated in the request (*Voting Procedure on Questions relating to Reports and Petitions concerning the Territory of South West Africa, Advisory Opinion, I.C.J. Reports 1955*, pp. 71-72; *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956*, pp. 98-99). In the present instance, the questions formulated in the request refer to only two of the four 'grounds' of challenge specified in Article 11 of the Administrative Tribunal's Statute, namely, failure to exercise jurisdiction and fundamental error in procedure. Consequently, it is only objections to Judgement No. 158 based on one or other of those two grounds which are within the terms of the questions put to the Court."

179. This same ruling had been made by the Court in its two earlier Advisory Opinions (1955 and 1956) cited in its 1973 Advisory Opinion. It is thus a well-established principle, as the Court reiterated in 1973 (at pp. 207-208), that it is the duty of an international tribunal "not only to reply to the questions as stated in the final submissions of the parties, but also to abstain from deciding points not indicated in those submissions".

180. The Court has been asked to determine whether Judgement No. 273 was warranted—this question being based on the contentions that the Tribunal in giving that Judgement committed an error of law relating to the provisions of the Charter, and exceeded its jurisdiction or competence. But this Court has not been asked to review every aspect and every holding of that case; for example, the Court has *not* been asked to determine whether or not Mr. Mortished had an acquired right to the payment of a repatriation grant without the need to produce evidence of relocation. Indeed, as stated by the Court in the 1973 Advisory Opinion:

"the proceedings before the Court are still advisory proceedings, in which *the task of the Court is not to retry the case but to reply to the questions put to it regarding the objections which have been raised to the Judgement of the Administrative Tribunal*" (p. 182, emphasis added).

181. Consequently, we submit that the Court's function is limited to replying to the questions whether the Administrative Tribunal exceeded its jurisdiction in Judgement No. 273, and whether it committed an error of law relating to the provisions of the Charter. In order to discharge this function, it is sufficient to consider the contentions set out in subsections 2 and 3 below.

2. Concerning the contention that the Tribunal committed an error of law relating to the provisions of the Charter, to adjudge and declare:

(a) *That the Committee had no legal basis for determining that the Tribunal committed an error of law relating to the provisions of the Charter.*

182. In order to make such a determination, it would have been necessary for the Committee to make a prior determination on what the correct law was. But the Committee was—in view of its composition—hardly competent to make such a legal determination. In any case the Committee did not make the slightest effort to ascertain the correct law, having failed to examine the pertinent rules and regulations necessary for this purpose, and having also failed to admit all interested parties to its proceedings and to hear submissions from them. The Committee could therefore not have had any legal basis, and did not establish any such legal basis, for concluding as it did, that the Tribunal had committed an error of law relating to the provisions of the Charter.

183. Instead of basing its finding on an analysis of the legal issues raised by the application as well as on the pertinent rules and regulations, the Committee proceeded on the basis of a patent misconception or lack of conception about Judgement No. 273: namely that the Tribunal had “set aside” a resolution of the General Assembly (see p. 21, A/AC.86(XX)/PV.1); that it had invalidated a decision of the General Assembly (*ibid.*, p. 32); that it had “limited the authority” of the General Assembly (*ibid.*, p. 46); that it had “shown lofty disregard” for the General Assembly and failed to apply an “absolutely crystal clear” resolution of the General Assembly (p. 30, A/AC.86(XX)/PV.2). These charges were levelled at the Tribunal merely because it had not decided the case according to the “absolutely crystal clear” notion of the resolution that some representatives had.

184. Far from examining the pertinent regulations and rules in force before coming to conclusions, members of the Committee considered the basic issue involved in Judgement No. 273—that of respect for acquired rights—to be irrelevant to their deliberations. For instance, various delegates stated that: “we are not obliged to decide whether or not Mr. Mortished has or does not have entitlements” (the United States, p. 16 of A/AC.86(XX)/PV.1); “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 . . .” (Morocco, *ibid.*, p. 26); “I 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 had a right and what the content of that right was” (the United States, *ibid.*, p. 29); “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” (Niger, p. 26 of A/AC.86(XX)/PV.2). The Committee thus failed to address the fundamental question of whether there was a *prima facie* case for the view that the Tribunal’s ruling requiring respect for acquired rights could conceivably be regarded as an error of law. We submit therefore that the Committee’s finding on error of law relating to the provisions of the Charter was totally without foundation.

(b) *The Tribunal did not commit an error of law relating to the provisions of the Charter.*

185. Although the Court indicated in its 1973 Advisory Opinion that where a judgement has been challenged on the ground of error of law relating to the provisions of the Charter, it may be called upon to review the actual substance of

the decision (see p. 188), we submit that the scope of this review is a limited one: it is limited to determining whether there is substance to the view that Charter provisions had been violated. As the Court also noted in that same Opinion, "the task of the Court is not to retry the case but to reply to the questions put to it regarding the objections which have been raised to the Judgement of the Administrative Tribunal" (p. 182). We contend that the Tribunal did not commit an error of law relating to the provisions of the Charter, for the following reasons:

- (i) Judgement No. 273 performed a judicial function, namely the settlement of a specific dispute between the Secretary-General and Mr. Mor-tished,—a function which is not conferred upon the General Assembly by the Charter.

186. The function of adjudicating upon disputes between the Secretary-General and the staff is a function which is within the competence of the Tribunal, as laid down by the General Assembly itself in the Statute of the Tribunal. It is distinct from the regulatory power of the General Assembly with regard to conditions for the appointment of staff.

187. As this Court held in its Advisory Opinions of 1954 (p. 61) and 1973 (p. 173), the Charter of the United Nations "does not confer judicial functions on the General Assembly". Under the Charter the Secretary-General of the United Nations, as the Chief Administrative Officer of the Organization, applies the regulations laid down by the General Assembly and to that end promulgates Staff Rules. Disputes arising out of the application of such regulations and staff rules, and involving non-observance of contracts of employment or terms of appointment of staff members, are to be submitted to the Administrative Tribunal, not to the General Assembly. In resolving such disputes, the Tribunal cannot be said to be violating the powers of the General Assembly under Article 101 of the Charter. This function of the Tribunal, being judicial in nature, is quite distinct from the legislative function performed by the General Assembly under Article 101.

188. In the application of the United States it is charged that the Tribunal had denied "immediate effect" or had invalidated a resolution of the General Assembly. This carried the implication that if the Tribunal had indeed denied immediate effect to a particular General Assembly resolution, it would have been in violation of Article 101 of the Charter. Contrary to this position we contend, as elaborated below, that the Tribunal is not only competent but bound to read the resolutions in conjunction with all other pertinent rules and regulations, and that this may mean, in appropriate instances, withholding immediate effect from the one or other resolution.

- (ii) The Tribunal was bound to and did rightly take into account the whole legal régime established by the General Assembly as embodied in the Staff Regulations, the Staff Rules, and the Statute of the Tribunal itself.

189. As a judicial body, the Tribunal is bound to comply with its own Statute. The Statute of the Tribunal enjoins it, in hearing and deciding upon cases, to apply "all pertinent regulations and rules in force". Thus, every rule or regulation in force, in so far as such rule or regulation was pertinent to the case before the Tribunal, had to be taken into account and applied by the Tribunal. This means that the Tribunal was *not entitled* to look at any single regulation in isolation, unless the whole body of rules and regulations required it to do so: that is to say, unless a particular question was not addressed in any way by any other rule or regulation in force.

190. The Tribunal, in Judgement No. 273, did not impute to the General Assembly any regulation not passed by the General Assembly; nor did it ignore

any pertinent regulation passed by the General Assembly, or any rule passed by the Secretary-General under authority delegated by the General Assembly. On the contrary, it examined at great length the range of Staff Regulations and Staff Rules pertinent to the case. One of these rules and regulations was Staff Regulation 12.1, which required that amendments to the Staff Regulations shall be "without prejudice to the acquired rights of staff members". This Staff Regulation, which assumes the character of a *grundnorm* in relation to all subsequent staff regulations and staff rules, is well established in the administrative and judicial practice of the United Nations system. The Tribunal thus rightly took Regulation 12.1 into account in considering the implementation of General Assembly resolution 34/165—on the basis of which the Secretary-General had promulgated an amendment of the Staff Rules affecting the rights of Mr. Mortished. The judgement of the Tribunal was thus "warranted" in construing resolution 34/165, or the amendment to the Staff Rules caused by that resolution, as being subject to the respect for acquired rights required of *all amendments* to the Staff Regulations and Staff Rules.

191. Thus, in taking the whole legal régime into account, and in considering General Assembly resolution 34/165 as being subject to the acquired rights of Mr. Mortished, the Tribunal acted in full compliance with the powers and directives of the General Assembly.

- (iii) Nothing in the United Nations Charter prohibits the Tribunal from denying retroactive effect to a particular decision of the General Assembly in relation to the Staff.

192. Another way of looking at Judgement No. 273 is that it determined that General Assembly resolution 34/165 should not be given retroactive effect. We submit that the United Nations Charter—above all legal instruments—does not prohibit the Tribunal from making such a determination.

193. The principle against retroactive legislation is an established part of the administrative law of international organizations, as developed by the various international tribunals on the basis of specific legislative provisions and of general principles of law. Thus, Wilfred Jenks stated in his book *The Prospects of International Adjudication* (Stevens & Sons, 1964):

"The League of Nations, International Labour Organisation, and United Nations Administrative Tribunals have frequently had recourse to general principles of law in the process of developing the international administrative law applicable to the legal relations between international organizations and persons in their service. The general principles derived from municipal law analogies which they have invoked include the prohibition of *non liquet*, *nemo judex in re sua*, *audi alteram partem*, *res judicata*, the prohibition of retroactivity", etc. . . . (pp. 310-311, see also Jenks, *The Proper Law of International Organizations* (Stevens & Sons, 1962), pp. 51-62).

194. Dr. M. B. Akehurst also noted, in an article entitled "Unilateral Amendment of Conditions of Employment in International Organizations", 40 *British Year Book of International Law* 286 (1964), at 329-330:

"The principle of non-retroactivity . . . seems fairly well established. In many cases it is provided for in amendment clauses inserted in Staff Regulations; and an amendment clause safeguarding acquired rights, whatever other effects it may or may not have, *will always be interpreted so as to prevent retroactive amendments*. (Emphasis added.)

However, international administrative tribunals have often applied the principle of non-retroactivity despite the absence of any clause limiting the organization's power of amendment."

195. A statutory or legislative expression of that principle, such as in Staff Regulation 12.1 of the United Nations—which has equivalents in Article XV of the ICAO Staff Regulations; Article 14.5 of the ILO Regulations; Regulation 301.121 of the FAO; Regulation 13.01 of the IAEA; Regulation 12.1 of IMCO; Regulation 12.1 of UNESCO; Regulation 12.1 of UNRWA; Regulation 12.1 of WHO; Regulation 12.1 of ITU; Regulation 12.3 of WMO; Article 114.2 of the ECSC Règlement général (1956); and Regulation 24 (b) and Annex II of the OECD—certainly precludes retroactive application to the staff of decisions adopted by, in this case, the General Assembly.

196. Even in the absence of a statutory basis, the principle of non-retroactivity has a legal anchor in the “general principles of law” referred to in Article 38 (1) (c) of the Court’s own Statute, and applied by international administrative tribunals.

197. Thus, in *Khamis v. the United Nations Joint Staff Pension Board* (Judgment No. 108, October 1967)—which involved an application to restore a prior period of service to the applicant’s pension scheme on the basis of a subsequent amendment to the staff rules—the United Nations Administrative Tribunal explored the possible application of the principle of non-retroactivity independently of the statutory provisions relating to the case. The Tribunal had examined the principle and its possible application quoting *Maxwell on the Interpretation of Statutes*—although it later decided that the facts of the case did not call it into play:

“the principle of law against retroactive construction relates mainly to cases when certain acquired rights are disturbed or denied.

XI. The result of the amendment before the Tribunal is that a period of service which could not be restored for pension benefit becomes eligible for restoration. The amendment does not affect or take away any vested or accrued right but on the other hand recognizes as eligible for restoration a prior period of service not hitherto taken into account for such benefit.

XII. The Tribunal finds that neither the text of Article XXXVII nor the principles governing non-retroactivity contradict the application of the amended Article XII to the Applicant.” (P. 231.)

Thus, if the amendment had affected or taken away any vested or accrued rights, its application would have been refused as being in violation of the principle of non-retroactivity.

198. In an earlier case, *Puvrez v. the Secretary-General of the International Civil Aviation Organization* (Judgment No. 82)—involving the applicant’s loss of entitlement to a dependency allowance in the light of a new definition of dependency introduced by an amendment to the ICAO Service Code—the United Nations Administrative Tribunal considered the principle of non-retroactivity embodied in Article XV of the Service code. It stated:

“Article XV means simply that no amendment of the regulations may affect the benefits and advantages accruing to the staff member for services rendered before the entry into force of the amendment. Hence, no amendment may have an adverse retroactive effect in relation to a staff member, but nothing prohibits an amendment of the regulations where the effects of such amendment apply only to benefits and advantages accruing through service after the adoption of such amendment.” (P. 86.)

Here again, it is quite clear that if the amendment had violated the principle of non-retroactivity, the Tribunal would have refused to grant it such effect.

199. Similarly, in *Manckiewicz v. the Secretary-General of the ICAO* (Judgment No. 110), which involved the same issue as in the *Puvrez* case, the Administrative Tribunal considered the amendment in question as being only

prospective in operation and therefore valid—with the clear implication that it would have been invalid if it had retroactive effect.

200. Lastly, in *Quéguiner v. the Secretary-General of the Inter-Governmental Maritime Consultative Organization* (Judgment No. 202)—which involved the applicant's loss of an education grant for his son as a result of an amendment to the education grant system—the United Nations Administrative Tribunal referred to the *Puvrez* case and re-asserted the principles of non-retroactivity:

"An amendment cannot have an adverse retroactive effect in relation to a staff member, but nothing prevents an amendment to the Staff Rules where the effects of such amendment apply to benefits and advantages accruing through service after the adoption of such amendment." (Pp. 322-323; emphasis added.)

201. The ILO Administrative Tribunal has also applied the principle of non-retroactivity in a number of cases. Thus, in *re Sherif* (Judgment No. 29), the Tribunal ruled that the requirement in the ILO Staff Regulations that amendments must be subject to acquired rights, meant that

"up to the date of amending the Regulations in force, there shall be no interference with the application of the said Regulations to an official and that the amended Regulations shall have no retrospective effect" (p. 6, emphasis added).

Again, in *re Poulain d'Andecy* (Judgment No. 51), the ILO Tribunal stated:

"the entitlement to the [non-resident's] allowance actually paid to the complainant at the former rate constituted an acquired right within the meaning of Staff Regulation 301.121 [of the FAO], which, under the most restrictive interpretation, has the same scope as the principle of the prohibition of retroactivity . . .

. . . the decision impugned is illegal in so far as it retroactively cancels the entitlement to the non-resident's allowance at the level at which it was fixed before 26 June 1959 and the complaint is well-founded on this point." (P. 5, emphasis added.)

And in *re Lindsey* (Judgment No. 61), the ILO Tribunal, while noting that statutory provisions "may be modified at any time in the interest of the service", went on to rule that such modifications are

"subject, nevertheless, to the principle of non-retroactivity and to such limitations as the competent authority itself may place upon its powers to modify them" (p. 7, emphasis added).

202. Thus, if General Assembly resolution 34/165 is shown to have been given retroactive effect in the manner in which it was applied by the Secretary-General to Mr. Mortished, it follows that the application would be legally improper.

203. Before the Administrative Tribunal, it had been argued on behalf of the Respondent that the Secretary-General had applied the resolution prospectively because the resolution itself had prescribed a future date, namely, 1 January 1980, for entering into force, and because the Secretary-General had applied it only to staff members who separated from service after that date.

204. However, Mr. Mortished had accrued the maximum allowable credit towards a repatriation grant during his first 12 years of service. Under the law as it existed before 1 January 1980, he could have separated from service at any time between 1969 and 1980 and been entitled to the grant without the encumbrance of having to produce evidence of relocation. This fact has never been disputed by the Secretary-General. In paragraph 24 of his *Answer* before the Tribunal he took the following position:

"24. The Respondent does *not* dispute the Applicant's plea (paragraph 10A) or statement (paragraph 23) that the repatriation scheme (regulations, rules and administrative practice) in effect prior to General Assembly resolution 34/165 allowed repatriation grant payments without actual relocation and agrees that this was consistent with (albeit not required by) the Staff Regulations promulgated by the Assembly. The Respondent also agrees that the Applicant would have been entitled to receive the grant without evidence of relocation if there had been no change in the Staff Regulations or Rules . . ."

205. As the Tribunal thus noted in paragraph 1 (pp. 6-7) of Judgement No. 273, the Secretary-General conceded that Mr. Mortished had an entitlement to the repatriation grant prior to 1 January 1980. The "taking away" of that "right acquired under existing law", as was done with effect from 1 January 1980, was thus retroactive in nature. In statutory law, a rule is regarded as having retroactive effects, or the application of a rule is retroactive, if it "takes away or impairs any vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect to transactions or considerations already past" (*Craies on Statute Law*, 6th ed., p. 386).

206. In the present case, Mr. Mortished's full entitlement had already been accrued during his first 12 years of service, under a law which entitled him to payment without the obligation to produce evidence of relocation. These first 12 years of service for which credit was accrued were "transactions or considerations already past". The fact that Mr. Mortished had to await the day of separation from service in order to claim payment was legally immaterial, once the entitlement had accrued under the law.

- (iv) The Tribunal was "warranted" in holding that the application of General Assembly resolution 34/165 should not prejudice the acquired right of Mr. Mortished to the payment of a repatriation grant without evidence of relocation.

207. In posing the question whether Judgement No. 273 was warranted "in determining that General Assembly resolution 34/165 could not be given immediate effect", the Committee did not directly impugn the finding of the Tribunal that Mr. Mortished had an acquired right to the payment of a repatriation grant. In fact, the Committee did not purport to question that specific finding, since it was solely preoccupied with the question of "immediate effect". In any case, that ruling is not one of the issues on which the Committee requested the Court's advisory opinion.

208. Furthermore, this Court has maintained that its function in rendering advisory opinions should not be equated with the ordinary appellate function; nor is it part of the Court's function to retry the case, or to re-open factual findings (Advisory Opinion of 1973, p. 182). The advisory opinion is thus to be seen as serving a higher function than the usual appellate function of ordinary courts—the latter being also above the re-opening of factual findings. Therefore, the International Court of Justice in rendering an advisory opinion is twice removed from the factual disputations of the parties.

209. We contend that the Tribunal's finding that Mr. Mortished had an acquired right is, in relation to the Court, a finding of fact; and that it is therefore not the function of the Court to re-open the question whether or not Mr. Mortished had an acquired right. The Tribunal has found, and the Court need only take cognizance of that fact, that such a right existed. The function of the Court is thus to determine whether or not Judgement No. 273 was warranted in holding that General Assembly resolution 34/165 should be applied without prejudice to the acquired right of Mr. Mortished.

210. Although the Tribunal's determination of the existence of an acquired right may be regarded as a legal exercise, inasmuch as that determination was anterior to the determination of the ultimate issue before the Tribunal, the existence of an acquired right stood in relation to that ultimate issue as a factual situation stands in relation to its legal consequence.

211. A finding of fact may be defined as "a determination of a fact by the court, averred by one party and denied by the other, and founded on evidence in case. A conclusion by way of reasonable inference from the evidence" (*Black's Law Dictionary*, Revised 4th ed., 1968, p. 758); and again, "A fact, as distinguished from the law, may be taken as that out of which the point of law arises, that which is asserted to be or not to be, and is to be presumed or proved to be or not to be for the purpose of applying or refusing to apply a rule of law" (*ibid.*, p. 706).

212. The assertion by Mr. Mortished that he had an acquired right to payment of the repatriation grant without evidence of relocation, was denied by the respondent, and proved before the Tribunal as a *fact*; out of that fact arose the point of law regarding respect for that acquired right. The Tribunal's finding that an acquired right existed was thus a finding of fact not subject to review in an advisory opinion. In any case, as argued above, that finding has not been placed before the Court in the question submitted by the Committee.

213. Thus, the question whether Judgement No. 273 was "warranted" falls to be determined, *not* by reference to the question whether Mr. Mortished did have an acquired right, but, rather, by reference to the question whether the Tribunal was justified or correct in its ruling that this acquired right must be respected in spite of resolution 34/165.

214. If, contrary to the contentions in paragraphs 207-212 above, the Court considers that the Committee in questioning whether Judgement No. 273 was warranted also thereby questioned the Tribunal's finding that an acquired right existed, and if the Court also considers itself called upon to examine the validity of that finding, we contend that the Judgement was warranted on that ground.

215. The Tribunal in Judgement No. 273 thoroughly examined, first, the contractual relationship between Mr. Mortished and the United Nations; second, the history behind the repatriation grant, and finally, the rules and regulations established to regulate payment of the grant. This examination led it to conclude that Mr. Mortished was entitled to the grant. The Tribunal noted that at the time of Mr. Mortished's appointment to the United Nations on 30 July 1958, the United Nations explicitly recognized his entitlement to the repatriation grant—which had been instituted under General Assembly resolution 470 (V) of 15 December 1950 and in fact validated for that purpose his nine years' service already completed with ICAO. Thus the Tribunal ruled, on that basis, that a special obligation towards Mr. Mortished had been assumed by the United Nations in respect of the repatriation grant (p. 9 of Judgement No. 273). Although the importance of that ruling cannot be denied or overlooked, the finding on the existence of an acquired right was not based on that ruling alone, but also on the specific Staff Rules governing the repatriation grant during the period in respect of which Mr. Mortished claimed his entitlement.

216. The Tribunal established that any link between the repatriation grant and return "to the home country" was broken in the Staff Rules as early as 1953, through Staff Rule 109.5 (a)—which had defined "obligation to repatriate" as meaning "the obligation to return a staff member and his or her spouse and dependent children, upon separation, at the expense of the United Nations to a place outside the country of his or her duty station". It found that the literal meaning of the term "repatriation" was thus abandoned in the rules in force as of 1953, and noted that the General Assembly had raised no objection to that legal fact (see p. 10 of Judgement No. 273). Thus, the Staff Rules established to

regulate the scheme of repatriation grants were not based on a literal interpretation of the term "repatriation".

217. The Tribunal went on to note that the rules of certain specialized agencies in fact did not require evidence of relocation. In the case of the United Nations, the Legal Counsel had stated that the practice of not requiring evidence of relocation was consistent with the Staff Regulations. While the Staff Rules of the United Nations were themselves silent on the issue, the practice of not requiring such evidence was consistently followed for nearly 30 years. Although the Tribunal did not consider it necessary to rule *in abstracto* on the question whether such a practice could generate a legal entitlement, we submit that the practice of the Organization was sufficient in itself to establish such an entitlement. As this Court indicated in its Advisory Opinion of 1956 (p. 92), the practice of an Organization "should serve as a warning" against an exclusively literal interpretation of its rules, and may in fact be considered to have modified relevant rules.

218. Even more significantly, the Tribunal based the existence of an entitlement to the repatriation grant, "and the respective roles of the General Assembly and the Secretary-General in defining its juridical rules of application", on the Regulations and Rules actually promulgated for that purpose (p. 11 of the Judgement). Thus, under Staff Regulation 9.4, enacted by the General Assembly itself through resolution 590 (VI) of 2 February 1952: "the Secretary-General shall establish a scheme for the payment of repatriation grants within the maximum rates and under the conditions specified in Annex IV to the present Regulations." Annex IV then stated that "*detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General*" (emphasis added).

219. The Tribunal went on to note that Annex IV stipulated certain elements to be taken into account by the Secretary-General in his determination of the "detailed conditions and definitions relating to eligibility", including the following: that the amount of the grant should be proportional to the length of service with the United Nations; that it should be calculated on the basis of a scale given in the annex, taking account, *inter alia*, of the number of years of continuous service away from the home country up to an upper limit of 12 years, and excluding from eligibility a staff member who is summarily dismissed from his post. In addition, in determining the detailed conditions relating to eligibility, the Secretary-General was to be guided by the following stipulation contained in Annex IV:

"In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate."

The Tribunal took account of this stipulation, noting that it left the Secretary-General with a margin of discretion by the use of the term "in principle", and further that eligibility was to arise on the basis of the Organization's obligation to repatriate the staff member, rather than on the basis of actual repatriation.

220. Furthermore, the Tribunal went on to observe that Staff Regulation 9.4 and Annex IV to the Staff Regulations "which expressly acknowledge that the repatriation grant scheme falls within the scope of the rule-making authority of the Secretary-General" were still in force, since no new provisions on that system had been added to the Staff Regulations by the General Assembly at either its thirty-third or thirty-fourth sessions; and further, that "*the question whether the Applicant is entitled to rely on acquired rights does not arise in respect of the Staff Regulations which fall within the competence of the General Assembly*, even though the subject of the application is closely related to the decisions on the repatriation grant taken by the General Assembly" (p. 12 of the Judgement, emphasis added).

221. As appears from the events up to the promulgation of the document CIRC/GEN/39, the Secretary-General had full authority to determine the "detailed conditions and definitions relating to eligibility" of staff members to the payment of a repatriation grant. *First*, the Secretary-General's authority in this respect was established or conferred by the General Assembly under Staff Regulation 9.4 and Annex IV. *Second*, the General Assembly had in Annex IV to the Staff Regulations stipulated certain elements to be considered by the Secretary-General in the discharge of that function. *Third*, the General Assembly had caused new elements to be added by the ICSC, through another grant of authority to that body under resolution 33/119. As appears from section A of Part II, all these new elements were embodied in the document CIRC/GEN/39. General Assembly resolution 33/119 did not take away or diminish the authority previously granted to the Secretary-General under Staff Regulation 9.4 and Annex IV—which had themselves not been amended—but had only added new parameters within which that authority was to be exercised.

222. Thus, the Secretary-General, on the strength of, and in compliance with, Staff Regulation 9.4 and Annex IV of the Staff Regulations, General Assembly resolution 33/119 and CIRC/GEN/39, and after due notice to the staff through Administrative Instruction ST/AI/262 of 23 April 1979, announced the amendment of Staff Rule 109.5 in circular ST/SGB/Staff Rules/1/Rev.5 of 22 August 1979, in order "to make the payment of the grant conditional upon presentation of actual evidence of relocation *with respect to periods of eligibility arising after 1 July 1979*" (emphasis added). The restriction of this new condition to periods of eligibility arising after the enactment of the amendment, was no doubt in consideration of the standard mandating respect for acquired rights, contained in Staff Regulation 12.1 and Staff Rule 112.2 (a) as well as in Article 26 of the ICSC's Statute.

223. The Tribunal noted that in making the amendment to the Staff Rules in 1979 in line with the ICSC recommendation, the Secretary-General adopted the same position as that of the Executive Heads of the specialized agencies (p. 16 of the Judgement), and further, that this was the first time that a provision of the Staff Rules acknowledged that entitlement to the repatriation grant might exist without evidence of relocation being provided.

224. It followed on this examination of the background to the rules governing the repatriation grant, and particularly of the specific terms of the new rules promulgated by the Secretary-General in compliance with the guidelines established by the General Assembly and the International Civil Service Commission, that Mr. Mortished,

"having entered on duty before 1 July 1979, falls into the category defined in subparagraph (f) quoted above. [The Tribunal] notes that the period of service completed by the Applicant before that date, in ICAO and in the United Nations, far exceeds the upper limit, 12 years, of the scale of years of service rendering a staff member eligible for the grant contained in Annex IV to the Staff Regulations. Consequently, under the terms of Staff Rule 109.5 (f) quoted above, the Applicant retains his entitlement to the amount of the grant without the need, as regards that period of service, to produce evidence of relocation." (P. 16 of the Judgement.)

225. The Tribunal's finding that Mr. Mortished had an acquired right was thus correct in terms of the applicable law. The applicable rules governing the repatriation grant had never made payment of the grant conditional on actual repatriation. Furthermore, the transitional system established under Staff Rule 109.5 (f), when the condition requiring evidence of relocation for future periods of entitlement was introduced, preserved previous periods of entitlement already accrued under the old rules—such as the entitlement of Mr. Mortished.

3. Concerning the contention that the Administrative Tribunal exceeded its jurisdiction or competence, to adjudge and declare:

- (a) *That the Committee had no basis, none whatsoever, for impugning the jurisdiction or competence of the Tribunal with respect to Judgement No. 273.*

226. In order for the Committee to have come to the conclusion that the Tribunal exceeded its jurisdiction or competence, it was necessary to examine the Statute of the Tribunal and the specific provisions which define the Tribunal's jurisdiction or competence. However, the Committee did not engage in any discussion of the source and extent of the Tribunal's jurisdiction. Nowhere in the *Transcript of Proceedings* is there any reference to, or analysis of, the substance of the Tribunal's jurisdiction or competence. Not having examined the content and outer limits of the Tribunal's jurisdiction, the Committee was not in a position to rule on the question whether the Tribunal exceeded its jurisdiction or competence. The only references to the question of jurisdiction or competence were those made by the United States delegate, as an inference or deduction from the contention that the Tribunal had committed an error of law. They were the following:

"It is our conclusion that in its conclusion 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 of competence;" (p. 32, A/AC.86(XX)/PV.1)

and again:

"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" (*ibid.*, p. 46).

227. We submit that an inference of excess of jurisdiction cannot be made from an error of law, even if such error of law existed. As the Court itself stated in its 1956 Advisory Opinion (p. 87):

"The circumstance that the Tribunal may have rightly or wrongly adjudicated on the merits or that it may have rightly or wrongly interpreted and applied the law for the purposes of determining the merits, in no way affects its jurisdiction. The latter is to be judged in the light of the answer to the question whether the complaint was one the merits of which fell to be determined by the Administrative Tribunal in accordance with the provisions governing its jurisdiction. That distinction between jurisdiction and merits is of great importance in the legal régime of the Administrative Tribunal."

228. In his separate opinion in the 1973 Advisory Opinion, Judge Dillard (whilst in agreement with the decision of the Court but seeking to deal with "matters of emphasis": see p. 230), dealt with the question of inferring excess of jurisdiction from an error of law, as follows (p. 237):

"Although the meaning and scope of the third ground must await possible future interpretation, it yet seems clear, on the face of it, that the contention that the Tribunal has 'erred on a question of law relating to the provision of the Charter of the United Nations' would not call directly into play the issue of whether the Tribunal has exceeded its jurisdiction or has failed to exercise it, but rather that of *whether it has correctly applied the law it is competent to administer.*" (Emphasis in text.)

229. Since the Committee's finding of excess of jurisdiction depended solely upon such an inference, we submit that a *prima facie* case that the Tribunal had

exceeded its jurisdiction or competence in Judgement No. 273 was not established.

230. It has already been argued in Section B (1) above that the question of excess of jurisdiction had not been properly placed before the Committee; it should therefore not have been entertained. Apart from that, when that question was added to the ground on which the Committee had made its finding of "substantial basis"—this being the finding that there has been an error of law, which was itself erroneous—there was absolutely no discussion of what that additional question entailed, before the Committee proceeded, precipitously, to vote on it. Instead, the discussion focused on matters not relevant to the issue of jurisdiction. (See Section D of Part II.) The Committee could only conclude that there was a substantial basis to the view that the Tribunal had exceeded its jurisdiction or competence only after ascertaining the content and full extent of such jurisdiction or competence. Since it did not ascertain the limits of the Tribunal's jurisdiction or competence we submit that it had no basis for its conclusion.

(b) The Tribunal did not exceed its jurisdiction or competence in Judgement No. 273.

231. In order to determine whether or not the Tribunal exceeded its jurisdiction or competence, it is necessary, as already noted in paragraph 226 above, to examine the relevant provisions in the Statute of the Tribunal concerning the Tribunal's jurisdiction or competence.

232. According to Article 2 of the Statute of the United Nations Administrative Tribunal:

"Article 2

1. The Tribunal shall be competent to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules in force at the time of alleged non-observance, including the staff pension regulations.

2. The Tribunal shall be open:

- (a) to any staff member of the secretariat of the United Nations even after his employment has ceased, and to any person who has succeeded to the staff member's rights on his death;
- (b) to any other person who can show that he is entitled to rights under any contract or terms of appointment, including the provisions of staff regulations and rules upon which the staff member could have relied.

3. In the event of a dispute as to whether the Tribunal has competence, the matter shall be settled by the decision of the Tribunal.

4. The Tribunal shall not be competent, however, to deal with any applications where the cause of complaint arose prior to 1 January 1950."

233. Of the 13 other Articles of the Statute of the Tribunal, none of them—except Article 14 which has no bearing to Judgement No. 273—adds to or subtracts from the subject-matter of the Tribunal's jurisdiction or competence as defined in Article 2.

234. Thus, as indicated in Article 2 above, the Tribunal's jurisdiction or competence consists of hearing and passing judgement on "applications alleging non-observance of contracts of employment of staff members of the secretariat of the United Nations or of the terms of appointment of such staff members". The words "contracts" and "terms of appointment" are then defined to include

all pertinent regulations and rules in force at the time of the alleged non-observance, including the staff pension regulations" (emphasis added).

235. It is not in dispute that Mr. Mortished fell within the category of persons to whom the Tribunal "shall be open", as laid down in paragraph 2 of Article 2. It is also not disputed that Mr. Mortished's application was an application alleging non-observance of a contract of employment and therefore an application over which the Tribunal was invested with subject-matter jurisdiction or competence. It cannot also be questioned that in hearing and passing judgement on such an application, the Tribunal is entitled, indeed, *required*, to take into account "all pertinent regulations and rules in force at the time of the alleged non-observance".

236. Staff Regulation 12.1, which the General Assembly itself had promulgated, was one such pertinent regulation in force at the time of the Mortished case. This regulation provides that any amendment to the Staff Regulations should be "without prejudice to the acquired rights of staff members". It cannot be disputed that in hearing and passing judgement on the Mortished case the Tribunal was entitled to take this particular regulation into account as well. Similarly, the Tribunal was entitled to take into account Staff Rule 112.2 (a), which provides that amendments to the Staff Rules must be in accordance with the Staff Regulations, and hence with acquired rights.

237. These are matters indisputably within the jurisdiction and competence of the Administrative Tribunal of the United Nations. Thus, in hearing and passing judgement on the Mortished case—a case properly brought before the Tribunal, and clearly within its jurisdiction or competence—the Tribunal did exactly what it was competent to do: no more and no less. We submit therefore that it is entirely erroneous, to allege that the Tribunal exceeded its jurisdiction or competence in Judgement No. 273.

D. Further, on the Question Submitted by the Committee, to Adjudge and Declare:

1. That the question submitted to the Court contains the following misconception of the Judgement, namely, that it had determined that General Assembly resolution 34/165 "could not be given immediate effect"; in fact, the Judgement only held that the resolution should not prejudice the acquired rights of staff members and was on that account absolutely "warranted".

238. The question submitted to the Court by the Committee states that Judgement No. 273 "determined that General Assembly resolution 34/165 could not be given immediate effect". This characterization of Judgement No. 273 is another expression of the misconception that had polluted the Committee's decision on the issue of "error of law relating to the provisions of the Charter"—namely, that the Tribunal had "set aside" a resolution of the General Assembly, or invalidated that resolution, or limited the authority of the General Assembly, etc.

239. However, a dispassionate analysis would show that the Tribunal did none of these things alleged by the Committee. Resolution 34/165 of the General Assembly was neither set aside nor invalidated by the Tribunal, in Judgement No. 273. Nor did that Judgement determine that the resolution could not be given immediate effect. On the contrary, the Tribunal did recognize that there had in fact been an amendment to the Staff Rules, on the basis of resolution 34/165, and that the new rule came into force on 1 January 1980. Thus, the legal force of resolution 34/165 was not in dispute; what was at issue, rather, was the violation of the acquired rights of Mr. Mortished, as a result of the manner in which the Secretary-General applied resolution 34/165.

240. The real question before the Tribunal, therefore, was whether or not General Assembly resolution 34/165 should be applied so as not to prejudice the

acquired right of Mr. Mortished to the payment of a repatriation grant without evidence of relocation. The Tribunal had rightly held, at pages 8-9 of the Judgement, that both the Secretary-General and the General Assembly were bound to respect the acquired rights of staff members in the same way, in making any amendments to the Staff Regulations or Staff Rules.

241. If the question before the Tribunal were to be looked at in terms of the point in time at which resolution 34/165 was to be given effect (as the Committee chose to do), we could do so to the extent that this provided us with the time-frame for determining when respect for acquired rights begins and when it ends. But it would be legally impermissible to ignore the acquired rights of staff members in determining the point in time for the application of the resolution. In other words, the time-frame for the coming into force of amendments to the staff rules or regulations may be an aid for determining the question of respect for acquired rights, but not a substitute for the legal standard mandating respect for acquired rights.

242. Thus, if the question before the Tribunal were to be reformulated in terms of the time-frame for the application of General Assembly resolution 34/165, that question could be reformulated in several ways, as follows: "whether resolution 34/165 should be given *retroactive* effect so as to efface Mr. Mortished's acquired right to the payment of repatriation grant . . ."; or, "whether resolution 34/165 should be given *immediate* effect so as to violate Mr. Mortished's acquired right to the payment of a repatriation grant . . ."; or "whether resolution 34/165 should be given *prospective* effect as to accord respect to Mr. Mortished's acquired right to the payment of a repatriation grant . . .". But each of these formulations would only be an aid to the solution of the basic question of respect for acquired rights, rather than a formulation necessitated by any mandatory requirement as to the point in time for enforcing new staff rules.

243. The Tribunal quite correctly chose not to regard the self-imposed time-frame of application in the resolution as dispositive in itself. The Tribunal considered the time-frame for the application of resolution 34/165 when it posed the question whether Mr. Mortished's entitlement to the payment of a repatriation grant "can have been effaced retroactively by the Secretary-General's deletion of subparagraph (f) [of Staff Rule 109.5] in pursuance of resolution 34/165" (p. 17 of the Judgement). By posing the question in this way, the Tribunal implicitly recognized the fact that resolution 34/165 was already in force; in other words, it recognized and accepted the fact that resolution 34/165 had already been given "immediate effect" by the Secretary-General. What was at issue, then, was the legal consequence of this fact, in so far as the rights of Mr. Mortished were concerned. The time-frame for the application of resolution 34/165, that is, the question of whether that resolution was to be given retroactive, immediate, or prospective effect, was not the basis for the Tribunal's decision in Judgement No. 273.

244. Rather, the basis for that Judgement was the violation of the acquired rights of Mr. Mortished as a result of the application of resolution 34/165 to refuse payment of his repatriation grant already accrued over more than 12 years of service. Thus, proceeding on the basis of the legislative criteria for deciding the case, the Tribunal only held that the application of General Assembly resolution 34/165 should not prejudice the acquired right of Mr. Mortished to the payment of a repatriation grant. The dispositive part of Judgement No. 273 states, at page 19 of the Judgement:

"By making payment of the Applicant's repatriation grant conditional on the production of evidence of relocation, the Respondent failed to recognize the Applicant's right, which he held by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 (f).

The stand taken by the Respondent has had the effect of depriving the Applicant of payment of the repatriation grant. *Recognizing that the Applicant was entitled to receive that grant on the terms defined in Staff Rule 109.5 (f) despite the fact that the rule was no longer in force on the date of the Applicant's separation from the United Nations, the Tribunal finds that the Applicant sustained injury as the result of a disregard of Staff Regulation 12.1 and Staff Rule 112.2 (a). The Applicant is thus entitled to compensation for that injury.* (Emphasis added.) The injury should be assessed at the amount of the repatriation grant of which payment was refused. Accordingly, the Tribunal rules that the Respondent shall pay to the Applicant, as compensation, a sum equal to the amount of the repatriation grant calculated in accordance with Annex IV to the Staff Regulations."

245. It is quite clear that this ruling was not concerned with depriving resolution 34/165 of its immediate effect. The fact that resolution 34/165 had been given immediate effect by the Secretary-General was already a matter of record. Far from denying or repudiating this *fait accompli*, the Tribunal recognized it and proceeded to declare the legal consequence of the actions of the Secretary-General in giving immediate effect to resolution 34/165 (as required by the General Assembly), namely, the violation of the acquired rights of Mr. Mortished.

246. Further support for the foregoing argument can also be derived from the "Statement of Policy" issued by the Administrative Tribunal at its second plenary meeting, held on 14 December 1950 (A/CN.5/R.2, 18 December 1950). This statement of policy also conformed with Article 9 of the Tribunal's Statute. The Tribunal in that statement spelt out the powers necessary for the exercise of its judicial functions as follows:

"3. The powers necessary to the attainment of these objectives include:

- (a) the ordering of the rescission of administrative decisions on cases within the competence of the Tribunal;
- (b) the awarding of compensation in cases in which the rescission of such decisions is impossible;
- (c) the preservation of the equitable rights of interested parties arising out of the proceedings of the Tribunal.

Among these latter equitable rights may be compensation for necessary, reasonable and unavoidable costs of litigation."

247. If the Tribunal had sought to deny immediate effect to resolution 34/165 it would have proceeded, as provided under paragraph 3 (a) of its Statement of Policy, by ordering the rescission of the Secretary-General's decision implementing that resolution, and the reinstatement of Staff Rule 109.5 (f). But the Tribunal did not proceed in that manner. Instead, it proceeded as provided under paragraph 3 (b); that is to say, it refrained from ordering the rescission of the Secretary-General's decision, which was based on resolution 34/165, and awarded compensation in respect of the resulting injury to Mr. Mortished—this injury being the legal consequence of the "immediate effect" of resolution 34/165. In any case, we submit that the Tribunal's judgement cannot rightly be considered to have determined that General Assembly resolution 34/165 could not be given immediate effect.

2. Even if the Court agrees that Judgement No. 273 had determined that General Assembly resolution 34/165 could not be given "immediate effect", the Judgement would still be warranted.

248. In requiring respect for acquired rights the import of Staff Regulation 12.1 and Staff Rule 112.2 (a) is that subsequent amendments to the rules and regulations *shall not* be made retroactive or operate with retroactive effect.

249. Legally, a requirement that a new Staff Rule or Regulation be applied with immediate effect does not automatically render inapplicable Staff Regulation 12.1. "Immediate effect" can, in law, only mean "as soon as all relevant legal provisions permit". In the case of Mr. Mortished, the relevant legal provisions did not permit the application to him of General Assembly resolution 34/165, since he had already accrued his entire entitlement before the adoption of this measure. On the other hand, the resolution could be given immediate effect by prohibiting credit towards the grant in respect of periods of service after 1 January 1980, for staff members who would have failed to produce evidence of relocation.

250. Even in the absence of an express regulation such as Staff Regulation 12.1, the general principle against retroactive legislation would still operate to preclude the violation or impairment of any rights acquired under pre-existing law. Thus, if by "immediate effect" the Committee meant that the acquired rights of Mr. Mortished should have been ignored, we submit that the Tribunal would have been justified in refusing to adopt such interpretation.

251. Alternatively, the Tribunal could have interpreted resolution 34/165 as not being intended to commit an illegality. This is the only interpretation that could be adopted in order to rescue the resolution from outright illegality. In line with the principle of interpretation that *ut res magis valeat quam pereat*, it is the interpretation that the Tribunal should have adopted and did adopt. Such an interpretation would entail that resolution 34/165 be deprived of or denied "immediate effect" in so far as such effect would have constituted an illegality, that is to say, a violation of the acquired rights of staff members.

252. Thus, we submit that even if the Tribunal had decided that resolution 34/165 should not be given "immediate effect", that decision would still have been warranted.

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

25 November 1981.

Annex I

THE ASSISTANT SECRETARY-GENERAL FOR PERSONNEL SERVICES TO MR.
SYLVANUS A. TIEWUL, COUNSEL FOR MR. MORTISHED

9 November 1981.

I refer to your letter of 19 October 1981 requesting information on action taken by the Administration in respect of Judgement No. 273 of the United Nations Administrative Tribunal (Mortished against the Secretary-General) and requesting a copy of any opinion written by the United Nations Office of Legal Affairs concerning this Judgement.

In relation to your request for information on action taken in respect of the Judgement, no action is being taken by the Administration in respect of the Tribunal's Judgement until the Judgement becomes final (see Article 11 of the Statute of the United Nations Administrative Tribunal). All rights of staff are, however, being preserved since it has been decided not to invoke time-limits for making requests or appeals concerning payment of repatriation grants without production of evidence of relocation from the country of last duty station if such requests or appeals are made no later than three months from the date when the Tribunal's Judgement becomes final.

You have also asked for a copy of any opinion that the Office of Legal Affairs may have prepared concerning the Judgement. I cannot accede to this request. Legal Office opinions providing advice to the Administration are, as a matter of policy, considered to be privileged and not to be released to staff or their legal advisers.

(Signed) James O. C. JONAH,
Assistant Secretary-General
for Personnel Services.

Annex II

THE SECRETARY, COMMITTEE ON APPLICATIONS FOR REVIEW OF ADMINISTRATIVE TRIBUNAL JUDGEMENTS, TO COUNSEL FOR MR. MORTISHED

23 October 1981.

This is in reply to your letter of 22 October 1981 requesting information concerning participation in the twentieth session of the Committee on Applications for Review of Administrative Tribunal Judgements.

The transcripts of the proceedings at the first and second meetings of the twentieth session of the Committee on Applications for Review (A/AC.86(XX)/PV.1-2 and PV.2/Add.1) contain the names of the representatives of members of the Committee that made interventions during the meetings of the Committee. The transcripts are the only official record available of participation in each of the two meetings held during the session. For easy reference I am listing hereunder in alphabetical order the members of the Committee and the names of their representatives as contained in the transcripts:

Canada	— Mr. Philippe Kirsch
France	— Mr. Michel Lennuyeux-Comnène
Germany, Fed. Rep. of	— Dr. Karl Borchard
Greece	— Mr. Dimitri G. Rallis
Honduras	— Dr. Mario Carias
Malaysia	— Mr. A. W. Omardin
Morocco	— Mr. Rachid Lahlou
Niger	— Mr. Adamou Seydou
Pakistan	— Mr. Kemal
Portugal	— Mr. Fernando Andresen
Romania	— Mr. Ion Diaconu
Senegal	— Mr. Balla Mandau Dia
Tunisia	— Mr. Handa Kbaier
USSR	— Mr. Yury Gregoryevich Petrov
United Kingdom	— Mr. Michael F. H. Stuart
United States	— Mr. Robert B. Rosenstock
Zimbabwe	— Mr. Eubert Paul Mashaire

The unofficial, and not necessarily complete, attendance sheets indicate that the following members also participated in the meetings of the Committee without making any intervention:

Thailand	— Mr. Vichien Chensavasdijai
Oman	— Mr. Seifeddin Ahmed Sulaiman

(Signed) Alexander BORG OLIVIER,
Secretary,
Committee on Applications for Review of
Administrative Tribunal Judgements.

2. WRITTEN STATEMENT OF THE GOVERNMENT OF THE UNITED STATES OF AMERICA

I. INTRODUCTION

A. Question Presented

The Committee on Applications for Review of Administrative Tribunal Judgements (Committee on Applications) has requested an advisory opinion of the International Court of Justice (Court), on 28 July 1981, with respect to 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?"

B. The Court's Jurisdiction

The authority for invoking the jurisdiction of the Court to render an advisory opinion is found in the Statute of the Court, which provides in Article 65 (1):

"The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

The General Assembly, pursuant to Article 96, paragraph 2, of the Charter of the United Nations, so authorized the Committee on Applications in Article 11 of the Statute of the Administrative Tribunal (resolution 957 (X) (1955)).

The Committee on Applications considered an application submitted by the United States on 15 June 1981 (UN doc. A/AC.86/R97). The United States objected to Judgement No. 273 on two of the grounds listed in Article 11, paragraph 1, of the Statute of the Administrative Tribunal: that the Administrative Tribunal had erred on a question of law relating to the provisions of the Charter of the United Nations and that the Tribunal had exceeded its jurisdiction or competence.

The Committee, composed of those member States the representatives of which served on the General Committee of the most recent regular session of the General Assembly, found, at its twentieth session, that a substantial basis for the legal objections raised by the application existed and requested the Court's advisory opinion on the above-stated question (UN doc. A/AC.86(XX)/PV.2/Add.1).

C. The Court's Discretion

The Court has repeatedly stated that, although its power to give advisory opinions is discretionary under Article 65 of its Statute, only compelling reasons would justify refusal of such a request. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwith-*

standing Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 27; Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion, I.C.J. Reports 1962, p. 151, at p. 155; Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 77, at pp. 85-86.

The Court has decided that there was no compelling reason for refusing a previous request from the Committee on Applications for Review of Administrative Tribunal Judgements made pursuant to Article 11 of the Statute of the Tribunal, made on the application of a staff member. *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, p. 166, at p. 178.* The Court has also previously granted a request for an advisory opinion on an administrative tribunal judgement made by the Executive Board of the United Nations Educational, Scientific and Cultural Organization, acting upon a resolution proposed by a member State. *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, I.C.J. Reports 1956, p. 77; I.C.J. Pleadings, Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, pp. 58-67.* The United States submits that there are no compelling reasons for refusing this present request.

The Committee's present request for an advisory opinion does mark the first time such review has been initiated by formal application from a member State. In its 1973 Advisory Opinion proceedings, the Court recalled certain arguments against initiation of review by a member State. These, in brief, are that for review to be initiated by a member State application to the Committee (1) would be contrary to the general principles of judicial review extending the right of appeal only to those who were parties below, (2) might impinge upon the rights of the Secretary-General as Chief Administrative Officer and conflict with Article 100 of the Charter and (3) would place the staff member in a position of inequality before the Committee on Applications¹. In rendering its opinions in 1973, the Court stated that "[t]hese arguments would call for close examination by the Court if it should receive a request for an opinion resulting from an application to the Committee by a member State". (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, at p. 178*). A close examination shows that none of these concerns provides a basis for declining to exercise jurisdiction in this case.

I. THE PARTIES TO THE DISPUTE ARE UNCHANGED

The first argument appears based on the assumption that the parties to the review are different when the process is initiated within the Committee on Applications by a member State than when it is initiated by the Secretary-General. However, the controlling legal principle on this question has been stated by the Court:

"the parties to [a] dispute before the Tribunal are the staff member concerned and the United Nations Organization, represented by the Secretary-General, and these parties will become bound by the judgment of the Tribunal . . . As this final judgment has binding force on the United Nations Organization as the juridical person responsible for the proper

¹ Some of these concerns were also raised in a letter from counsel for Mr. Mortished, addressed to the Secretary of the Committee on Applications (UN doc. A/AC.86/R.100) and were discussed at the Committee's meetings of 9 and 13 July 1981 (UN doc. A/AC.86(XX)/PV.1 and UN doc. A/AC.86(XX)/PV.2).

observance of the contract of service, that Organization becomes legally bound to carry out the judgment and to pay the compensation awarded to the staff member. It follows that the General Assembly, as an organ of the United Nations, must likewise be bound by the judgment." (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954, p. 47, at p. 53.*)

It also follows that the party is not the Secretary-General, but the United Nations, and that a Committee of the Assembly, as an organ of the United Nations, may act for the Organization without that juridically changing the parties. When the Assembly's Committee acts at the initiative of a member State or at the initiative of the Secretary-General to seek review of a judgement affecting the United Nations and potentially binding upon it, the request for the advisory opinion is made by the Committee of the United Nations. At the advisory opinion stage, the Secretary-General may submit views on behalf of the Organization and member States may submit views in their own behalf, pursuant to Article 66 of the Court's Statute, without that changing the parties from a juridical point of view. See, e.g., *Judgments of the Administrative Tribunal of the ILO upon Complaints Made against Unesco, Advisory Opinion, I.C.J. Reports 1956, p. 73, at p. 80.*

Even if the parties were technically changed, the issues in cases falling within Article 11 of the Tribunal's Statute can, as in the present case, be such that the Assembly and the member States are entitled to review, by the United Nations principal judicial organ, of their substantial legal objections to a judgement of an Administrative Tribunal created by the Assembly before agreeing to be bound by it. This form of "judicial review", while different from general practices, would violate no fundamental principle of judicial process and was considered by the Assembly to be a necessary form of review in the special circumstances of an international organization comprised of sovereign States such as the United Nations. As the Court has stated:

"the compatibility or otherwise of any given system of review with the requirements of the judicial process depends on the circumstances and conditions of each particular system" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, at p. 176*).

2. THE SECRETARIAT'S RIGHTS AND STATUS ARE UNDIMINISHED

The second concern is not a compelling objection as a matter of fact in this case or as a matter of law generally. The Secretary-General has raised no objection that these procedures violate his prerogatives or independence as Chief Administrative Officer of the United Nations. In fact, the United States had consulted with the secretariat to ensure that there was no concern that the United States application to the Committee on Applications interfered with or in any way diminished the authority of the Secretary-General (UN doc. A/AC.86(XX)/PV.1, pp. 31-35). Nor should such application conflict with Article 100. The member State action in such a case is to bring before the authorized committee of the General Assembly a question of serious error of law in a matter of concern to the Assembly; if the Committee agrees, it requests the United Nations principal judicial organ to provide an advisory opinion on the legal question. The independence of the Secretary-General and the international character of the staff do not require that questions of errors of law in judgements which would bind the General Assembly and its members be reviewed only at the initiative of a staff member or the Secretary-General.

3. STAFF MEMBER'S RIGHTS ARE NOT PREJUDICED BY HIS POSITION BEFORE THE COMMITTEE

The third concern is similarly not compelling. The Committee on Applications is not a judicial body taking action on the merits of the staff member's case. Rather, the function of the Committee is

"merely to make a summary examination of any objections to judgments of the Tribunal and to decide whether there is a substantial basis for the application to have the matter reviewed by the Court in an advisory opinion" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, at p. 176*).

Whether the application is that of a member State or of the Secretary-General, the Committee is essentially determining whether the Organization, itself, has serious enough doubts to warrant staying the final effect of the judgement pending an advisory opinion from the Court. The procedures followed by an authorized committee of the General Assembly in reaching such a decision concerning its own interests and prerogatives need not be judicial¹. There should be no requirement that the staff member and the member State be in a position of equality in such a process.

The staff member's interest in an equal hearing is more compelling when it is his own application which may be denied, which is not the present case. It is significantly more compelling when the second judicial procedure is reached, the procedure before the Court itself². As the Court has stated:

"there is no necessary incompatibility between the exercise of these [screening] functions by a political body and the requirements of the judicial

¹ The procedures of this committee of the General Assembly, including the manner in which the deliberations of the Committee were initiated and conducted, should not be germane in considering a request for an advisory opinion. *The Committee is authorized to request an advisory opinion. Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion*. The Committee has done so, by way of a resolution passed in accordance with its rules of procedure. The resolution must be presumed to have been validly adopted. *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, p. 16, at p. 22*.

² The United States is confident that the Court will be able to assure that its own proceedings provide the interested parties with the essential equality of opportunity to submit "all the elements relevant to the questions which have been referred" for review. *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, at p. 181*.

In this connection, the United States recalls the recommendation of the General Assembly in resolution 957 (X), after adopting the review procedure, that member States and the Secretary-General should not make oral statements before the International Court of Justice in any proceedings under Article 11. However, should the Court deem it desirable to have the benefit of the oral expression of views of the staff member, the Secretary-General, and interested member States on any or all aspects of the questions referred for an advisory opinion, neither that recommendation nor the Statute and Rules of the Court should be a bar. The Secretary-General could include counsel for the applicant as a member of a counsel team sent by the Secretary-General and could allow applicant's counsel to speak without control being exercised by the Secretary-General. This could be as viable for oral argument as for written views. Alternatively, the Court might avail itself of the possibility opened by Articles 50 and 68 of its Statute to receive the staff member's views on any issues on which the Court wishes to invite oral comments by the Secretary-General, the interested member States, and the staff member concerned.

process, inasmuch as these functions merely furnish a potential link between the two procedures which are clearly judicial in nature" (*ibid.*).

The Committee's affirmative decision is

"merely a necessary condition for the opening of the Court's advisory jurisdiction. It is then for the Court itself to reach its own, unhampered, opinion as to whether the objections which have been raised against a judgement are well founded or not and to state the reasons for its opinion." (*Ibid.*, at p. 177.)

Nevertheless, Mr. Mortished's written comments on the application of the United States were received by the Committee in a letter from his counsel (UN doc. A/AC.86/R.100¹).

4. THERE ARE IMPORTANT REASONS WHY THE COURT SHOULD EXERCISE JURISDICTION

Where, as in the present case, the issues go to such matters as the intent and effect of General Assembly decisions taken under Article 101 of the Charter, and the extent of the jurisdiction with regard to those decisions granted the Administrative Tribunal by the General Assembly, the Secretary-General and the staff members are not exclusively concerned. The member States and the General Assembly have important and distinct interests. It was such interests and concerns with decisions of the League of Nations Administrative Tribunal in 1946, and similar concerns with decisions of the United Nations Administrative Tribunal in 1953 which were before the Court in 1954, when it advised the General Assembly that the proper redress for such concerns of member States and the Assembly was to provide in the Statute for judicial review. The Court stated:

"There can be no doubt that the General Assembly in the exercise of its power could have set up a tribunal without giving finality to its judgements." (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, at p. 58.)

It further stated:

"There can be no doubt that the Administrative Tribunal is subordinate in the sense that the General Assembly can abolish the Tribunal by repealing the Statute, that it can amend the Statute and provide for review of future decisions of the Tribunal and that it can amend the Staff Regulations and make new ones. There is no lack of power to deal effectively with any problem that may arise." (*Ibid.*, at p. 61.)

¹ The Committee on Applications itself considered the question of Mr. Mortished being placed in a position of inequality or being otherwise prejudiced by its proceedings. Only after discussing the competing considerations thoroughly, did the Committee decide to deny the application to appear before it submitted by Mr. Mortished's counsel. It noted that such an appearance would not assist in its task, which was only to decide whether there was a substantial basis for the objections raised by the United States application. The issues raised by the application were not considered to be "uniquely within the competence of Mr. Mortished's counsel on which he must be heard in order for justice in fact to be done" (UN doc. A/AC.86(XX)/PV.1, p. 16). Further, the view was expressed that such an appearance might be prejudicial by giving the impression that, in hearing counsel, the Committee had disregarded its status and attempted inappropriately to deal with the substance of the matter (UN doc. A/AC.86/PV.2, p. 7).

The review procedure which the General Assembly did establish through Article 11 of the Statute of the Administrative Tribunal was the culmination of a long history with the vexing problem of objections to Administrative Tribunal judgements by the member States and representative bodies of international organizations. In adopting the procedure, the United Nations had the benefit of the precedent established by the International Labour Organisation for review of its Administrative Tribunal judgments, the benefit of the Court's advice, and the benefit of further extensive study within the United Nations during which the precise issue of applications by member States was considered at length. *Agenda Item 49, Official Records, Tenth Session, Annexes*. It would be a severe setback were the procedure now deemed improper in the precise circumstance for which it was designed. Such a decision would also put in question the status of Judgement No. 273 of the Administrative Tribunal¹.

The statement made by the Court in 1973 is equally sound in the circumstances of the present case:

"A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1973, at p. 177.*)

The United States submits that the objections which might be raised against initiation of the review procedure by formal member State application are not persuasive and are heavily outweighed by the difficulties that would be caused if review by the Court were unavailable. Therefore, the United States urges that the Court agree to provide the advisory opinion requested by the United Nations Committee on Applications for review of Administrative Tribunal Judgements.

II. SUMMARY OF THE CASE

A. History of Applicant's Claim to the United Nations Repatriation Grant

Applicant, Mr. Mortished, a former staff member of the United Nations Organization, is of Irish nationality. He was first employed by the International Civil Aviation Organization on 14 February 1949 as a translator/interpreter. On 5 August 1958, he transferred to the United Nations as a translator/precis writer and was given a permanent appointment. The Letter of Appointment provides:

"You are hereby offered a permanent appointment in the Secretariat of the United Nations in accordance with the terms and conditions specified

¹ By resolution 957 (X) of 8 November 1955, the General Assembly amended the Statute of the Administrative Tribunal, introducing the review procedure. Article 10, as amended, now makes the finality of Administrative Tribunal judgements expressly subject to Article 11. In cases in which the Committee on Applications has determined that there is a substantial basis for objecting to a judgement on the specified grounds, and has decided to request an advisory opinion, the Statute only provides for the Tribunal's judgement to be confirmed "in conformity with the opinion of the Court". The Assembly appears to have decided that the United Nations and the General Assembly will not be bound by an adverse Administrative Tribunal judgement with respect to which substantial legal doubt exists unless the Court sustains the Administrative Tribunal on the law of the matter.

below and subject to the provisions of the Staff Regulations and Staff Rules, together with such amendments as may from time to time be made to such Staff Regulations and such Staff Rules ... A copy of the Staff Regulations and Staff Rules is transmitted herewith." (Emphasis supplied.)

Prior to Mr. Mortished's transfer, the United Nations Office of Personnel sent him a letter stating that his employment with the United Nations would be considered a transfer, providing a salary figure and noting that an attached Annex would provide particulars concerning a "post adjustment" allowance payable under the Staff Rules. The Annex, in which the office had crossed out inapplicable provisions, described various allowances relevant to the commencement of employment, including the installation grant, dependency allowance, education grant, pension fund participation, travel and moving allowances. It did not mention the repatriation grant.

Just prior to Mr. Mortished's entry on duty, on 4 August 1958, the United Nations Office of Personnel executed a personnel action form. Various remarks by the Office were made in a footnote to the designation of Mr. Mortished as a "Permanent Appointment", among which were the following:

"Service recognized as continuous from 14 February 1949.
Entitled to Installation Grant and Dependency rate.
Credit toward repatriation grant commences on 14 February 1949.
Entitled to transportation of household effects.
 Next home leave *entitlement* in 1960." (Emphasis supplied.)

As respondent's brief recounts (paras. 4 and 5), on 21 December 1979, in response to his previous inquiry, the applicant was advised of the substance of the proposed General Assembly action to require all claimants to provide evidence of relocation as a condition for payment of the grant, as of 1 January 1980. Applicant did not take advantage of an offer made at that time by the Administration to waive the three-month notice period for resignation or termination of service, which would have permitted applicant to resign effective 31 December 1979 and thereby derive the benefit of the conditions for payment of the repatriation grant under the transitional Staff Rule in effect until that date.

At the time of applicant's separation from service, the Staff rules in effect pursuant to the directive of the General Assembly in resolution 34/165 required the submission of evidence of relocation in order to establish eligibility for the repatriation grant. Applicant refused to submit evidence of relocation and sought payment of the repatriation grant upon his resignation in April 1980. Respondent refused to pay and consented to direct submission of applicant's appeal to the Administrative Tribunal. Under the Staff Rules, applicant has up to two years from the date of separation (i.e., until April 1982) to relocate, submit evidence, and claim the benefit. There is no indication in the record that he plans to do so.

The Administrative Tribunal, in Judgement No. 273, of 17 December 1979, found that applicant, who had completed 12 years of expatriate service with the United Nations well before resolution 34/165 was adopted by the General Assembly, had acquired the right to receive the grant without complying with the Staff Rule requiring the submission of evidence of actual relocation.

B. Principal Legal Objections to the Judgement of the Administrative Tribunal

United Nations staff members cannot properly be deemed to have acquired a right to all or part of the United Nations repatriation grant without submitting evidence of actual relocation when required by the Staff Rules in force at the time of their separation from United Nations service. The grant was adopted by

the United Nations General Assembly in 1950 to help defray the expenses of those expatriate United Nations staff members who relocated from the country of their last duty station upon termination of lengthy service out of their home country. That original purpose was acknowledged by the Administrative Tribunal in its own judgement. That purpose was never modified by the General Assembly. The record contains repeated confirmation that the grant was not a delayed expatriation grant and that payment of the grant to staff not relocating upon separation would be inconsistent with the purpose of the grant, illogical, and possibly even discriminatory against non-expatriate staff.

Over the years, the Secretariat engaged in the administrative practice of paying the grant to expatriate former staff members claiming the benefit without requiring them to submit evidence that they had actually relocated. This was justified by the alleged practical difficulty of establishing a system of tight control. This practice was not reflected in the Staff Rules or otherwise formally brought to the attention of the General Assembly for many years. The Assembly challenged the practice and adopted resolutions in 1978 and 1979 to bring it to an end. By requiring evidence of relocation, the General Assembly exercised its right and responsibility under Article 101 of the United Nations Charter to require the implementation of the Assembly's earlier decisions establishing the grant in a fashion which assured that it would be paid only to those intended to be eligible. There are no special aspects to the applicant's contract or employment circumstances that would compel carving out for him an acquired right to be excepted from this requirement.

The Administrative Tribunal, in barring the Secretary-General from carrying out this directive of the General Assembly in applicant's case, failed to give due weight to the most reasonable interpretation of the basic criterion for eligibility, that, "*in principle, the grant shall be payable to staff members whom the Organization was obligated to repatriate*". In resolving any ambiguity the Tribunal might have perceived in this standard, it failed to give the weight required by the Charter to the readily ascertainable intent of the General Assembly. Instead, it gave undue weight to a number of doubtful factors which do not legally sustain the extraordinary conclusion that the applicant had acquired the right to receive a benefit without providing the documentation required by prudent administration and General Assembly decision. In doing so, the Administrative Tribunal erred on a question of law relating to Article 101 of the Charter and it extended the concept of "acquired rights" beyond the bounds of prior jurisprudence and the requirements of sound international organization public policy.

Whatever room for argument might have existed had the Secretary-General imposed the evidentiary requirement on his own authority was legally foreclosed when the General Assembly adopted resolutions 33/119 and 34/165. The Assembly's decisions were valid and, particularly in the latter case, unambiguous exercises of its authority under Article 101 of the Charter. By resolution 33/119, the Assembly bound the Secretary-General to make a change in the prior administrative practice and, by resolution 34/165, compelled him to delete from the books, a *transitional Staff Rule*, adopted only six months earlier, which had made an exception to the evidentiary requirement for staff members like applicant who had been in service prior to the effective date of the Assembly's decision to require evidence. These resolutions bound not only the Secretary-General, but also the applicant, whose *original Letter of Appointment* had expressly incorporated the Staff Regulations, Staff Rules and any amendments thereof into his contract. It also bound the Administrative Tribunal which is required to apply General Assembly decisions under Article 101 and the Staff Regulations and Staff Rules as they existed at the time of applicant's separation from service.

To the extent that the Administrative Tribunal construed resolution 34/165 as

somehow not dealing with applicant's situation, it erred on a question of law relating to the Charter. To the extent that the Administrative Tribunal refused to honour resolution 34/165 because to do so would allegedly violate applicant's acquired rights, it committed additional errors of law relating to Article 101 of the Charter and exceeded its jurisdiction by engaging in unauthorized judicial review of the decisions of the General Assembly taken pursuant to that same article.

III. HISTORY OF REPATRIATION GRANT

A. The Origin and Adoption of the Staff Regulation concerning the Repatriation Grant: Conception to 1950

In 1949, a Committee of Experts on Salary, Allowance and Leave Systems, after having comprehensively reviewed the salary and allowances system of the United Nations, recommended that the temporary system of yearly expatriation allowance then in effect be replaced with the payment of a terminal or end of service lump-sum repatriation grant to defray the expenses incurred by a staff member who, upon termination of service with the Organization, actually relocates to his home country.

The purpose of the expatriation allowance had been to mitigate certain disadvantages associated with expatriated employment, e.g., increased expenses associated with living for the first time in a foreign country; the insecurity of tenure which was thought to be much greater in international civil service than in the case of most national services; and the progressive loss of business contacts in the home country, which increases the difficulties of finding suitable employment there upon termination of United Nations employment (*Official Records*, Fourth Session, Annex to *Summary Records* of Fifth Committee, Vol. II, UN doc. A/C.5/331 and Corr.1). The Experts Committee felt, however, that base salaries (plus allowances such as education grants) should be established at a level sufficient to allow expatriated staff members to meet their usual expenses after the initial installation period (*ibid.*, at para. 107, p. 2).

The Experts Committee recognized that a terminal grant was warranted since:

"upon leaving the Organization and *being repatriated to his home country* a staff member is faced with certain extraordinary expenses, and . . . such expenses would fully justify payment of a special lump-sum grant at that time" (emphasis supplied) (*ibid.*, at para. 108, p. 2).

The Committee cited the following examples of such extraordinary expenses and their causes: (a) the loss, during United Nations service, of professional and business contacts with the home country and the resulting increasing difficulty in finding suitable employment in the home country if work with the United Nations should be terminated; (b) the necessity of giving up residence and liquidating obligations in a foreign country; and (c) the expenses which a staff member will normally have to meet in re-establishing himself and his home on return to his own country (*ibid.*). The Experts Committee felt the substitution of the repatriation grant for the expatriation allowance was in the interest of both economy and administrative simplicity as well as in the interest of the staff member who would receive it at the time when it was really needed. The Committee proposed:

"that the grant should be payable to all staff members with respect to whom the Organization is obligated to undertake repatriation to the home country. Staff members who are terminated by summary dismissal should not be

eligible. *The amount of the grant should vary with the length of service with the United Nations . . .*" (Emphasis supplied.) (*Ibid.*, para. 109, p. 2.)

Thus, as originally conceived, the grant was intended only to meet expenses associated with actual repatriation, and eligibility was related to that purpose. The purpose, as conceived by the Experts Committee, has been cited frequently and continues to be the rationale for the grant¹ (except that "repatriation" was subsequently defined as "relocation").

The Secretary-General's report to the General Assembly in 1949 on the work of the Committee of Experts stated that the Secretary-General was dropping his recommendation that the temporary system of expatriation grants be made permanent and that he "accept[ed]" the recommendation that the expatriation grant system be replaced by a system of repatriation grants (*Official Records*, Fourth Session, Annex to *Summary Records of Fifth Committee*, Vol. II, UN doc. A/C.5/331/Add.1 and Corr.2, para. 17). However, the Secretary-General recommended the following wording for the new Staff Regulation:

"Subject to such conditions and rates as may be prescribed by the Secretary-General, the United Nations shall pay a repatriation grant to a staff member who is separated from the Secretariat following a period of service at an official duty station outside his own country." (*Ibid.*, at para. 31.)

This wording would clearly have transformed the new repatriation grant into a delayed expatriation grant by removing the linkage to repatriation. Significantly, this recommendation was not adopted. Instead, the General Assembly ultimately adopted the wording originally used by the Committee of Experts, which contained that linkage.

During the Fifth Committee's consideration of the Committee of Experts recommendation, at the Fourth Session of the General Assembly, the Chairman of the Committee of Experts stated that he wished to speak about certain characteristics of the Committee of Experts report which were not reflected in the draft resolution submitted by the Secretary-General. After some remarks on classification of posts, children's allowances, and education grants, he turned to the question of the expatriation allowance and emphasized, *inter alia*:

"that the Committee had proposed the establishment of a repatriation grant which would enable those officials returning home to meet the often

¹ See *Report of the Secretary-General*, *Official Records*, Eighteenth Session, Annexes, Agenda item 66, UN doc. A/C.5/979, para. 13, p. 18, where, in a discussion of the grant and the service benefit, the history and purpose of the grant are restated as follows:

"[u]nlike the earlier expatriation allowance, which it replaced, the repatriation grant was established as a terminal payment designed to provide compensation for the extraordinary expenditures incurred by staff members at the time of their separation from the service and re-establishment in their home country after a prolonged absence" (emphasis supplied).

See also the following documents that have referred expressly to the grant's purpose being to defray the extraordinary expenses incurred in the course of actual repatriation and/or to the 1949 Experts Committee's statement of the purpose: UN doc. A/C.5/SR.1043 (18 November 1963), para. 36, p. 202; *Report of the International Civil Service Commission*, *Official Records*, Thirty-first Session, Supp. No. 30, UN doc. A/31/30 (1976), para. 266; *Report of the Forty-eighth Session of the CCAQ* (1978), UN doc. CO-ORDINATION/R.1263/Add.3, para. 14, p. 5; *Report of the International Civil Service Commission* (1978), *Official Records*, Thirty-third Session, Supp. No. 30, UN doc. A/33/30, para. 178, at pp. 59-60.

considerable expenses arising at that time" (UN doc. A/C.5/SR.227 (1949), para. 16, p. 230).

In 1950, the Advisory Committee on Administrative and Budgetary Questions reviewed the Experts Committee's recommendation. It accepted the principle of the grant as "a lump-sum to be paid to staff members on being repatriated to their home countries to cover costs of re-establishing themselves"; accepted the purpose of the proposed grant, "to ease the position of staff members leaving the Organization" and to "supplement the termination indemnities to staff members returning to their home countries"; and recommended the adoption of a less generous scale of payments than that proposed by the Experts Committee (emphasis supplied), *First Report of 1950 to the General Assembly of the Advisory Committee on Administrative and Budgetary Questions (Official Records, Fifth Session, Supp. No. 7A, UN doc. A/1313, paras. 68, 69 and 70)*. The Secretary-General's 1950 report to the General Assembly on the question, in arguing for the higher scale of payment recommended by the Experts Committee, now appeared to accept the nature of the grant as limited to repatriation:

"the Secretary-General desires to emphasize the view that monies repaid by the Pension Fund when a staff member leaves the secretariat, and any termination indemnity to which he may be entitled, are completely irrelevant to the repatriation grant. In his opinion, staff members should not be obliged to dissipate Pension Fund payments in the expense incurred in settling down anew in their own countries; neither should these payments be used as an argument for reducing the amount of the repatriation grant to staff members whose circumstances warrant such a payment. In short, the Secretary-General takes the view that if the permanent expatriation allowance which he has supported before the General Assembly on previous occasions and which the staff overwhelmingly favour, is to be replaced by a repatriation grant, the rates for the latter must be adequate to avoid an inequity to staff uprooted from their home countries. He consequently favours the scale of rates recommended by the Committee of Experts." (*Official Records, Fifth Session, Annexes, Agenda item 39, UN doc. A/1378, para. 12, pp. 82-83.*)

When the Fifth Committee considered this latter recommendation, the view was expressed that it would be inappropriate in principle to adopt the higher payment scale in order to mitigate the impact of the salary reduction caused by the discontinuation of the expatriation allowance since the repatriation grant was in no way intended to be part of a staff member's salary¹. Furthermore, even though a salary reduction was being effected by the elimination of the

¹ The representative from the United Kingdom elaborated on the grant's purpose by stating that

"[t]he elimination of the expatriation allowance would of course mean that the take-home pay of staff members would be decreased in various cases from \$250 to \$500. But the purpose of [the repatriation] allowance was to facilitate the return of staff members to their country of origin after termination of service. It was therefore an error to consider that allowance as an integral part of their take-home pay . . ." (UN doc. A/C.5/SR.265, para. 50, p. 179).

Similarly, the Canadian delegate noted that

"[t]he scale of the repatriation grant proposed by the Sub-Committee might be inadequate but the Committee should certainly not on that account support an incorrect principle [i.e., that the grant was intended to be a part of the staff member's salary]" (*ibid.*, at para. 76, p. 81).

expatriation allowance, it is worth noting that it was the considered view of the Committee of Experts and the Secretary-General (after discussion with the Legal Department) that "the adoption of the Committee's recommendations would not violate any acquired rights" (UN doc. A/C.5/SR.228, para. 46, p. 239). The Fifth Committee fully accepted the Experts Committee rationale for the repatriation grant but recommended the reduced payment scale (*Report of the Fifth Committee, Official Records, Fifth Session, Annexes, Agenda item 39, UN doc. A/1732, para. 16, p. 115*). The General Assembly adopted the Fifth Committee's recommendation in resolution 470 (V) of 15 December 1950, which amended the Provisional Staff Regulations to provide:

"The Secretary-General shall establish a scheme for the payment of repatriation grants in accordance with the maximum rates and conditions specified in Annex II to the present specified regulations.

ANNEX II

Repatriation grant

In principle, the repatriation grant shall be payable to staff members whom the Organization is obligated to repatriate, except those terminated by summary dismissal. Detailed conditions and definitions relating to eligibility shall be determined by the Secretary-General. The amount of the grant shall vary with the length of service with the United Nations (exclusive of periods when an expatriation allowance was received). The maximum rates payable shall be as follows: . . ."

B. Development relating to the Repatriation Grant: 1950 to 1976

The Secretary-General took immediate action to implement resolution 470 (V) by informing the staff of the same in Information Circular ST/AFS/SEP-A/72 (20 December 1950), which provided that

"[t]he principle of a repatriation grant has been established, the grant to be payable to staff members returned at United Nations expense to their home countries" (emphasis supplied) (*ibid.*, para. 11, at p. 7).

Shortly thereafter, with effect from 1 January 1951, the Secretary-General promulgated rules providing detailed conditions and definitions relating to eligibility for the grant. This first set of staff rules provided no repatriation grant would be paid to a staff member whose duty station at the time of separation was his home country; the rules, as amended in 1952 and in force to date, have preserved that general rule, but provided the Secretary-General with *discretion* to make exceptions under certain circumstances¹.

In 1952 the Consultative Committee on Administrative Questions (CCAQ), a subsidiary committee of the Administrative Committee on Coordination² (ACC), considered questions of uniform administration of the repatriation grant

¹ Contained originally in Rule 114 (e) (1 January 1951); effective 1 March 1952 through 1 July 1979, in Rule 109.5 (f) (1 December 1952); from 1 July 1979 to present, in Rule 109.5 (i) (22 August 1979).

² The ACC is the body where inter-organization consultations are held among the various specialized agencies brought into relationship with the United Nations by agreement pursuant to Articles 57 and 63 of the Charter. The CCAQ deals with, *inter alia*, personnel arrangements and administrative relationships.

accorded in a number of agencies in the United Nations family. The United Nations Secretariat prepared a working paper for this purpose, subject to further review within the United Nations Secretariat, proposing, *inter alia*, that the United Nations take the view that the grant should be paid to a staff member

“not actually repatriated, i.e., (a) he remains in the country of the official duty station; (b) he travels to a country other than his home country” (*Conditions of Eligibility for Repatriation Grant* (1952), CCAQ, Twelfth Session, UN doc. CO-ORD/CC/A.12/13).

This secretariat paper asserted that actual repatriation should not be an eligibility requirement, mainly for reasons of administrative convenience, i.e., “particularly since it would be impossible to control the final place of residence” (*ibid.*). However, when the CCAQ reported on its Twelfth Session to the ACC, it did not address explicitly the question of paying the grant to those *remaining* at their last duty station, but only proposed and requested that the ACC concur in principles which, *inter alia*, provided that:

“(a) The United Nations regulation provides that the grant is payable where the organization is ‘obligated to repatriate’. This language has been followed by FAO and UNESCO. The ILO and WHO have adopted the criterion, ‘serving at a duty station outside of the home country’. It is felt that the ILO-WHO formulation is more descriptive of the intent. Without proposing changes in regulations, it is proposed that other organizations undertake to reflect this concept in their rules.

(b) In the light of (a), it is believed that the grant should be paid after two years’ service abroad, regardless of the conditions of separation (including resignation but excluding summary dismissal) and regardless also of whether the staff member is actually repatriated.” (*Report of the Twelfth Session of CCAQ* (1952), UN doc. CO-ORDINATION/R.124.)

While the CCAQ’s preference for the ILO-WHO formula was understandable, its assertion that it was “more descriptive of the intent” than the FAO-Unesco-United Nations formula is remarkable in light of the United Nations General Assembly’s rejection of the ILO-WHO formula which had been recommended by the secretariat in 1949 (*supra*, p. 169).

Although respondent’s brief for the Administrative Tribunal indicated that the CCAQ had “adopted” these principles (Respondent’s brief, para. 11), in fact, it had only *proposed* them and *requested the concurrence of the ACC*. The documents made available in this case contain no indication that such concurrence was ever given. Furthermore, the principle that actual relocation is not required was never incorporated into either the Staff Regulations or Staff Rules. Apparently, however, the General Assembly accepted *part* of the CCAQ’s suggestions when, in the permanent Staff Regulations adopted in 1952, it indicated that repatriation referred to the relocation of staff to any place outside the country of the last duty station:

“(a) ‘Obligation to repatriate’ as used in paragraph 4 of Annex IV to the Staff Regulations shall mean obligation to return of a staff member and his dependents, upon separation, at the expense of the United Nations, to a place outside the country of his duty station.” (Staff Regulation 109.5 (a) (adopted 1 December 1952 and effective 1 March 1952), UN doc. ST/AFS/SGB/94.)

This early change in the regulations modified the meaning of “repatriation” in the sense of providing that relocation away from the last duty station to any third country, as opposed to one’s home country, was sufficient to satisfy the eligibility conditions of the grant. However, the recommendation to define the grant as payable without reference to relocation was not adopted by the General

Assembly or incorporated into the staff rules despite the CCAQ's proposal that, "[w]ithout proposing changes in the regulations, [the United Nations and] other organizations undertake to reflect this concept in their rules".

In 1964 the CCAQ, considering it inequitable that an expatriate staff member should lose what it called "his entire accrued repatriation grant entitlement" when posted in his own country, agreed that "accrued entitlement" in years (up to a maximum of 12) should be reduced by one year for each completed six months of service in the home country upon reporting there; but in the event of subsequent reposting abroad, credit should be restored at the rate of one year for each completed six months service abroad (*Report of the Twenty-Fifth Session of the CCAQ* (1964), UN doc. CO-ORDINATION/R.451, paras. 32 and 33). Although it was not incorporated into the Staff Rules, the Secretary-General has implemented the CCAQ suggestion as an exercise of his own discretion.

In 1974, the CCAQ, with a view to studying eligibility requirements of certain allowances (including the repatriation grants) that differentiated on the basis of sex, reviewed the history of the repatriation grant, noted the continuing relevance of the grant's original purpose and acknowledged that the grant should only be paid in the case of actual repatriation. It explained, in fact, that only the practical difficulties of administering this logical requirement prevented it from recommending that evidence of actual repatriation be required to establish eligibility¹.

C. General Assembly Action from 1976 to Date concerning the Repatriation Grant Eligibility Requirement of Actual Relocation

At its thirty-first session (1976), the General Assembly adopted resolution 31/141 which changed the basis for calculating certain terminal payments, including the repatriation grant, and further requested the International Civil Service Commission (ICSC)² to re-examine in the light of the views expressed in

¹ In paragraph 14 of the document requesting comments from organizations, the CCAQ stated:

"The same reasoning would seem to apply to the question of whether the grant should be paid only if repatriation actually occurs. *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.* Applying the logic is, however, fraught with practical difficulties. The organizations have no way of knowing where a staff member actually resides after he leaves service and in fact there are a number of cases in which staff have two or more residences. The secretariat of the Pension Fund has records of the addresses to which pensions are paid but these are not necessarily the *residences* of the pensioners. One could make payment of the grant dependent upon actual repatriation travel but this would only ensure that the organization incurred the cost of such travel—the value of the grant is sufficient to induce staff to accept repatriation and pay their own fares back to the duty station or to any other place in which they intend to reside. In many cases staff at the time of leaving service do not really know where they will reside and to tie the grant to actual repatriation would lead to requests for keeping the entitlement on the books pending personal decisions of the staff member. For all these reasons, CCAQ Secretariat doubts the feasibility of attempting to make payment of the grant dependent on evidence of repatriation." (*CCAQ Secretariat, Repatriation Grant* (1974), UN doc. CCAQ/SEC/325 (PER).) (Emphasis supplied.)

² The General Assembly established the ICSC by resolutions 3042 (XXVII) (19 December 1972) and 3357 (XXIX) (18 December 1974) to regulate and coordinate the conditions of service of the UN common system. The ICSC is primarily a recommendatory body.

the Fifth Committee at the current session, the "conditions for the provision of terminal payments (for example, repatriation grant, termination indemnities)". This request was prompted by the concerns expressed by numerous delegations in the Fifth Committee as to the propriety of paying the grant to those who, upon separation, remained in the country of their last duty station¹.

In 1978, the ICSC concluded that paying the grant to those who remained in the country of their last duty station was inappropriate and expressed the firm belief that the grant should be paid only to those who actually left the country of their last duty station to resettle, including those who went to places other than their home countries². The ICSC expressed its objections to paying the grant to a non-repatriating staff member in the following terms:

"Strictly speaking, it was clear that to do so would be inconsistent with the stated purpose of the grant. The staff member who remained in the country of the last duty station incurred none of the expenses of dislocation and reinstallation which the grant was intended to meet (or none more than would be incurred by a non-expatriate staff member, who would not be entitled to the grant in any case). The staff member who moved to a country other than the home country, either to work there or to retire there, did incur expenses of relocation and installation, but the strict purpose of the grant was not complied with. *To say that the staff member had earned the entitlement to the grant through having been expatriate during his service and should receive it upon separation wherever he went, then, would be to change the nature of the entitlement and to make it a kind of deferred expatriation*

¹ The Austrian delegate noted the desirability of

"a review of the conditions under which entitlements to that grant arose ... including whether it was appropriate to pay the grant to a staff member who ... remained in the country of the duty station after retirement" (UN doc. A/C.5/31/SR.32, para. 46, p. 9).

The Canadian delegation

"shared the concerns expressed by the representative of Austria with regard to the payment of repatriation benefits to employees who did not in fact return to their home countries" (UN doc. A/C.5/31/SR.34, para. 14, p. 4).

The Belgian representative, implicitly presuming that actual relocation at very least was required, requested the Commission to "decide whether the entire indemnity should be paid to a staff member retiring to a country other than his country of origin" (*ibid.*, at para. 14, p. 9).

² The Commission also examined the justification for increasing the amount of grant with the number of years of service if the grant was in fact intended to cover specific exceptional resettlement expenses. It noted that the grant had the inconsistent characteristics of both an earned service benefit and an *ad hoc* subsidy. It considered that its progressive nature was due to the grant's introduction as a substitute for the expatriation allowance and also to the influence of the progressive pattern of many other such indemnities (e.g., severance pay of United States civil service). The Commission, convinced that the grant's original purpose was still valid,

"believed there would be logic in standardizing the repatriation grant as a flat amount or as the equivalent of a number of days' daily subsistence allowance *at the rate applicable to the place to which the former staff member moved* ...; at the same time, it doubted the wisdom of eliminating entirely from the salary system all trace of a separation benefit reflecting length of service. The *institution* of such an entitlement ... would constitute a major reform of the salary system, which would need to be considered in the light, for example, of the degree of importance to be given to length of service in the context of the policy to be adopted regarding career or short-term employment." (Emphasis supplied.) (*Report of the ICSC* (1978), *Official Records*, Thirty-third Session, Supp. 30, UN doc. A/33/30, para. 182, p. 61.)

allowance, so raising the question of possible duplication with that part of the margin included in base salary which is defined as compensation for expatriation.

The Commission ... did believe, however, that *to pay repatriation grant to a person who remained permanently in the country of his last duty station was incompatible with the purpose of the grant and could also be seen as discriminatory by non-expatriate staff members.*" (Emphasis supplied.) (Report of the ICSC (1978), *Official Records*, Thirty-third Session, Supp. No. 30, UN doc. A/33/30, paras. 183-185, pp. 61-62.)

Notwithstanding this, the ICSC considered it impracticable to require evidence of relocation due to the significant difficulties of administratively monitoring staff members' movements after separation. It also considered that

"the proportion of staff members who did not return to their home country on separation was in any case very small; the ICSC was of the opinion that the setting up of cumbersome water-tight controls would not be warranted" (*ibid.*, at para. 186, p. 62).

Therefore, the ICSC thought that grants should not be paid only to those who supplied evidence of actual relocation to prove their eligibility. Instead, it recommended relying on the staff member's good faith guarantee of his intentions by conditioning the grant upon the staff member's signature of a declaration providing that he or she intended not to remain permanently in the country of the last duty station.

At its thirty-third session, in 1978, the General Assembly agreed that the grant should not be paid to staff remaining at their last duty station, but rejected the recommended declaration of intent as an insufficient guarantee against abuse of the grant¹. Instead, it decided that payment of the grant should be conditioned upon the presentation by staff of evidence of actual relocation, and in resolution 33/119 (19 December 1978) accordingly provided in operative paragraph 4 of section IV

"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 [ICSC]".

When this proposal was introduced, the representatives from Barbados and Belgium, expressly questioned whether the phrase providing for the ICSC's establishment of certain terms could be interpreted in derogation of the evidence requirement (UN doc. A/C.5/33/SR.56, para. 37, p. 11 (Barbados) and para. 50, p. 14 (Belgium)). The Japanese delegation, which co-sponsored and presented this draft resolution on behalf of all the sponsors, reassured the Fifth Committee that the language did not permit any such dilution of the thrust of the requirement, and in any event, the ICSC was accountable to the Fifth Committee. In this regard, the Japanese delegate

"explained that the final phrase of paragraph 4 was considered necessary because certain ambiguous circumstances could arise in which more specific guidelines would prove necessary. For example, would a staff member who presented evidence of relocation years after his repatriation still be entitled

¹ See statements made by the following delegations in the meetings of the Fifth Committee in 1978 reflecting this view: Japan (UN doc. A/C.5/33/SR.37, para. 76, p. 22), Austria (UN doc. A/C.5/33/SR.38, para. 22, p. 6) and Canada (UN doc. A/C.5/33/SR.41, para. 62, p. 13).

to a grant? Or, should a staff member who needed the grant to pay for tickets to return to his country be required to submit evidence of relocation? Many such situations could arise, but he trusted that the Commission would be able to draw up appropriate conditions and terms. However, he assured the representative of Belgium that the phrase in question in no way diluted the thrust of the decision in paragraph 4 but merely provided for its administrative implementation. Moreover, the Commission would inform the Fifth Committee of the terms and procedures it established." (*Ibid.*, at para. 51, p. 1.)

However, in drafting the terms, the ICSC exceeded the scope of this mandate as clarified by the Japanese delegate, by providing that staff already in service before 1 July 1979 (the effective date of the conditions specified in resolution 33/119) would remain "entitled" (*sic*), without the production of evidence, to that portion of the grant attributable to the period of their service before 1 July 1979. The Secretary-General adopted these terms to govern the United Nations staff in an Administrative Instruction of 23 April 1979 (UN doc. ST/AI/262) and eventually incorporated them into the Staff Rules as rules 109.5 (d) to 109.5 (f), which provided as follows:

"(d) Payment of the repatriation grant shall be subject to the provision by the former staff member of evidence of relocation away from the country of the last duty station. 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.

(e) Entitlement to repatriation grant shall cease if no claim for payment of the grant has been submitted within two years after the effective date of separation.

(f) Notwithstanding paragraph (d) above, staff members already in service before 1 July 1979 shall retain the entitlement to repatriation grant proportionate to the years and months of service qualifying for the grant which they already had accrued at that date without the necessity of production of evidence of relocation with respect to such qualifying service." (UN doc. ST/SGB/Staff Rules/1/Rev.5 (22 August 1979).)

The ICSC appears to have been prompted to disregard its limited discretion under the mandate given by the General Assembly by the view expressed by the legal advisers of several organizations that there was an acquired right to the portion of the grant "already earned" which "could not be affected retroactively by the changing of the rule". The ICSC apparently thought this view was further supported by the opinion it requested from the Office of the Legal Affairs of the United Nations secretariat, which found that the Staff Rules and payment practices (e.g., the practice of not requiring evidence) gave rise to valid and enforceable entitlements and obligations (*Report of the ICSC (1979), Official Records, Thirty-fourth Session, Supp. No. 30, UN doc. A/34/30, paras. 23 and 24, p. 7*). That opinion, in relevant part, provided

"The history of the repatriation grant as well as the wording and [payment] schedule ... suggest that the number of years of expatriate service was considered by the General Assembly to be the most significant element of the entitlements. Although the General Assembly defined the recipients of the grant by reference to the definition of those entitled to repatriation travel, there is no express or implied provision to the effect that only those who actually made use of the travel entitlement should receive the grant.

In Annex IV of the Regulations, the General Assembly specifically left it to the Secretary-General to establish the conditions for payment of the repatriation grant, and the Secretary-General did this by promulgating staff rule 109.5 and also by establishing a practice in an agreement within the

Consultative Committee on Administrative Questions. Staff rule 109.5 (*f*), which even provides for discretion to pay the grant to persons whose final service is within their home country and who could not therefore be entitled to repatriation travel, was—like all Staff Rules—reported to and noted by the General Assembly, which must accordingly have deemed that rule to be consistent with the intent and purpose of the Regulation.” (*Opinion of the Office of Legal Affairs, appearing in Report of the ICSC, Note by the secretariat* (1979), UN doc. A/C.5/34/CRP.8.)

In 1979, at the thirty-fourth session of the General Assembly, the Fifth Committee conducted extensive debate concerning the terms recommended by the ICSC and incorporated into the Staff Rules. The Fifth Committee rejected as inappropriate, for reasons stated below, the terms providing for entitlement without evidence to a proportionate part of the grant. Certain delegations expressed the view that the terms were a distortion of the General Assembly's original intent in establishing the grant, as well as its reasons for adopting resolution 33/119. (Statements of United States and Spanish delegations, UN doc. A/C.5/34/SR.46, para. 65, pp. 13-14, and SR.47, para. 38, p. 9 (1979), respectively.) The ICSC was considered, by certain representatives, to have exceeded that resolution's mandate regarding the establishment of terms by which it was intended that the ICSC would not derogate from the requirement of evidence and tight linkage to actual relocation (*ibid.*). Certain delegations expressed the unequivocal belief that the legal opinion on which the Commission relied was completely wrong. (Statements of Australian and United Kingdom representatives, UN doc. A/C.5/34/SR.47, paras. 5-7, p. 3 and para. 34, p. 8, respectively.) The Australian delegate, in a particularly strong criticism of that legal opinion, stated that:

“As indicated in the [legal opinion], staff rule 109.5 had been reported to and noted by the General Assembly, which must accordingly have deemed the rule to be consistent with the intent and purpose of the staff regulation. His delegation noted, however, that nowhere in the document was it stated that the repatriation grant was payable whether or not the staff member was repatriated. Staff rule 109.5 (*f*) [relettered 109.5 (*i*)] when the transitional rule was adopted as 109.5 (*f*)] indeed gave the opposite impression, in that it gave the Secretary-General discretion to pay a grant to a staff member who at the time of separation resided in his home country ... That in no way implied endorsement of the idea of paying a repatriation grant to a person who was not repatriated.

The legal opinion, in fact, appeared to assume that 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.”

Several representatives expressed the doubt that the repatriation grant involved any acquired rights (e.g., statements of Japanese, US, Spanish and USSR delegates, UN doc. A/C.5/34/SR.46, para. 87, p. 19 (Japan), para. 66, p. 14 (US), and SR.47, para. 38, p. 9 (Spain) and SR.62, para. 11, p. 3 (USSR)), with the Australian delegation stating unequivocally in this respect that

“[t]he fact that in the past [the repatriation grant] had been incorrectly applied did not confer an unchangeable entitlement” (UN doc. A/C.5/34/SR.47, para. 6, p. 3).

Many members of the Fifth Committee were of the opinion that the grant was never intended to be paid to staff who after separation did not relocate away from the country of their last duty station and were unwilling to support the controversial ICSC provision. This view was variously stated by representatives from the United States (UN doc. A/C.5/34/SR.46, paras. 65 and 66, pp. 13-14), Italy (UN doc. A/C.5/34/SR.46, para. 69, p. 15), Australia (UN doc. A/C.5/34/SR.47, paras. 3-6, pp. 2-3), Syrian Arab Republic (UN doc. A/C.5/34/SR.47, para. 15, p. 5), United Kingdom (UN doc. A/C.5/34/SR.47, para. 34, p. 8), Spain (UN doc. A/C.5/34/SR.47, para. 38, p. 9) and the USSR (UN doc. A/C.5/34/SR.55, para. 9, p. 3). Only the Japanese delegation expressed willingness to support the ICSC decision, and then with regret, because of doubts that acquired rights to the grant existed in the case of present staff members and because it was felt that the grant should be paid in accordance with rules in force at the time of actual repatriation (UN doc. A/C.5/34/SR.46, para. 87, p. 19). The Committee adopted the view that the grant was never intended to be paid without relocation in recommending to the General Assembly a resolution correcting the ICSC's interpretation and implementation of resolution 33/119. On 17 December 1979, the General Assembly accordingly adopted resolution 34/165 which, in operative paragraph 3 of section II, provides

"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".

This resolution was implemented, with effect from 1 January 1980, by Administrative Instruction ST/AI/269 (21 December 1979). The Staff Rules were subsequently amended with effect from 1 January 1980, to reflect this action by deleting Staff Rule 109.5 (*f*), the transitional staff rule which had provided the exception from the evidence-of-relocation requirement for the portion of the grant allocable to periods of service before 1 July 1979.

IV. LEGAL OBJECTIONS TO THE TRIBUNAL'S JUDGEMENT

A. United Nations Staff Members Cannot Have an Acquired Right to Payment of the Repatriation Grant without Evidence of Relocation Required by Staff Rules in Force at the Time of Their Separation

For reasons of language, common sense and law, United Nations staff members cannot be properly deemed to have acquired a right to all or part of the United Nations repatriation grant without submitting evidence of actual relocation. There are no special elements in the relationship of the United Nations Organization with the applicant, Mr. Mortished, which would justify finding that he had acquired such a right where other staff members generally, who also had extensive service prior to 1 July 1979, had not. In ruling that applicant had acquired such a right, the Administrative Tribunal frustrated the intent of the General Assembly as to the nature of the grant being provided pursuant to the Staff Regulations. Instead, it relied improperly on comparatively insignificant factors, primarily: an inconclusive notation on an early personnel action; the linkage made in the Staff Regulations and Rules between length of service and the amount of the grant; administrative practice of uncertain origin and extent; a short-lived transitional Staff Rule repudiated and reversed by the General Assembly on the first opportunity it had to do so; and alleged

ambiguities in the General Assembly's previous decisions. In so doing, the Administrative Tribunal erred on questions of law relating to Article 101 of the United Nations Charter.

1. THE REPATRIATION GRANT HAS ALWAYS BEEN INTENDED ONLY FOR EXPATRIATE STAFF WHO RELOCATE FROM THE COUNTRY OF LAST DUTY STATION UPON SEPARATION FROM UNITED NATIONS SERVICE; THE EVIDENTIARY REQUIREMENT WAS CONSISTENT WITH THE BASIC CRITERION OF ELIGIBILITY FOR THE GRANT

There should be no doubt that the repatriation grant adopted by the General Assembly was not intended as a delayed expatriation grant, payable to employees retiring after years of expatriate service, as deferred additional compensation for such service, but as a grant intended to help defray the expenses which retiring expatriate employees would be expected to encounter upon actual relocation from their foreign duty posts. There is little genuine ambiguity in the terms of the Staff Regulation originally adopted by the United Nations General Assembly, which stated that the grant would be payable to staff members "whom the Organization is obligated to repatriate". It would be difficult to understand the sense in which the United Nations would have any obligation to repatriate a retiring employee who did not relocate within two years from the date of his retirement.

To the extent that any ambiguity might be deemed to exist, it must be resolved in a manner that reflects the intent of the repatriation grant which is evident from the history set out at length in the preceding section of these comments and summarized here. The General Assembly, from the initial decision of 15 December 1950, through every action it subsequently took with respect to the repatriation grant, including adoption of resolution 34/165 on 17 December 1979, clearly intended the repatriation grant to be paid only to those who relocated upon termination of their employment. The Assembly acted to replace the earlier temporary expatriation grant, earned and paid for each year of expatriate service, with a repatriation grant of a different nature, not merely a deferred expatriation grant. The Secretary-General had recommended a draft Staff Regulation to the Assembly which would have made the grant payable upon retirement to all expatriate employees, without reference to relocation, but that formula was not accepted. In the course of the debates on the initial levels of the grant, those delegations commenting made it clear that the new grant, unlike the grant it was replacing, was not intended to form part of a staff member's compensation, but, instead, was intended to facilitate relocation.

The original purpose was accurately reflected in the concise and unambiguous statement of eligibility reported to the staff, without any misinterpretation, by the Secretary-General in the first information circular on the grant, which specified that the grant was to be "payable to staff members returned home at United Nations expense". The Administrative Tribunal expressly acknowledges this original purpose, in paragraph VII of its Judgement.

Over the succeeding years, no changes occurred in the Staff Regulations or Staff Rules to indicate that the General Assembly had decided to modify or acquiesce in modification of the nature of the grant. To the contrary, the fundamental nature of the grant was reiterated on almost every occasion that a discussion of the grant appears in the record submitted with this case, from 1950 until 1979, with the exception of the discussion held among representatives of the various secretariats in 1952, in the CCAQ. This CCAQ record is more an indication of the strength of the staff's attachment to the earlier expatriation grant than evidence of the repatriation grant's meaning. The 1952 recommendations of the CCAQ were neither taken up in the Staff Rules nor, as far as the

record indicates, brought at the time to the attention of the Assembly as official United Nations secretariat policy and practice. This omission is the more significant in view of the fact that the *Staff Regulations* were amended at that time to pick up a part of the CCAQ recommendation, i.e., defining "repatriation" more broadly to include relocation to any place outside the country of last duty station.

Other features of the Staff Rules adopted and modified from time to time indicate that the grant continued to be defined in principle by reference to relocation of the expatriate employee from the country of his last duty station. For example, there was the general rule that the grant would not be payable to an employee whose duty station at the time of separation was his home country; together with the provision allowing the Secretary-General discretion to make *exceptions* from that general rule. It is significant that the Staff Rules have always allowed a staff member two years from date of separation to claim this benefit, while allowing shorter periods for other termination benefits, such as the travel grant, and vesting some benefits in the staff member automatically upon separation, e.g., pension and disability. This confirms that the staff member was to do something to qualify other than separate from service as an expatriate.

The Secretary-General's report on the repatriation grant in 1963 indicated no backsliding from the clear understanding that the grant, "unlike the earlier expatriation allowance, which it had replaced", was established as a terminal payment to compensate staff for expenditures incurred "at the time of their separation from the service and re-establishment in their home country". Eventually, the documents of the CCAQ itself came to reflect an acceptance of the nature and purpose of the grant which clearly linked it to repatriation. The 1974 CCAQ document admitted that "there was no logical justification for paying the grant to a staff member who remains in the country of his last duty station". The ICSC, charged by the Assembly in 1976 with examining the grant after several delegations had expressed concern with its being paid to staff members who did not relocate from the country of last duty station, reached conclusions in 1978 which confirmed the continuing validity of the original purpose of the grant, expressed the belief that the payment of the grant to a person who did not relocate was "incompatible" with that purpose and could be seen as discriminatory by non-expatriate staff members. The ICSC could not have been clearer as to the nature of the grant when it stated:

"To say that the staff member had earned the entitlement to the grant through having been expatriate during his service and should receive it upon separation wherever he went . . . would be to change the nature of the entitlement."

The remaining history confirms what preceded. The ICSC recommended that some statement of intent to relocate be required, but the General Assembly decided that more was needed, that evidence of actual relocation should be provided by the staff member claiming the grant to assure that it was implemented in a manner which respected the basic and constant intent of the Assembly that only relocating employees were eligible. The ICSC, influenced by a legal opinion provided by the United Nations Secretariat which used language of "entitlement" not justified by the prior record, suggested the transitional rule, which was quickly implemented by the secretariat, allowing staff to receive repatriation grants proportionate to the years of service prior to the General Assembly decision without the necessity of producing evidence of relocation. The General Assembly's swift rejection of this is eloquent evidence of its unwillingness to abide even a transitional system for paying the grant without actual relocation.

2. THE CONSIDERATIONS ADVANCED BY THE ADMINISTRATIVE TRIBUNAL DO NOT OVERCOME THE GRANT'S LINKAGE TO ACTUAL RELOCATION OR SUSTAIN THE FINDING OF AN ACQUIRED RIGHT TO THE GRANT WITHOUT EVIDENCE OF
RELOCATION

Despite the unusually detailed, lengthy, and explicit record concerning the meaning and intent of the repatriation grant, the Administrative Tribunal reached the conclusion that the applicant had acquired the right to receive the grant without complying with the Staff Rule, adopted by the Secretary-General in response to the Assembly's mandate in resolution 34/165, requiring submission of evidence of actual relocation. In effect, the Tribunal held that staff in applicant's situation had acquired a right to payment of the grant in the very circumstances in which the CCAQ had said (in 1974) that there would be "no logical justification in paying the grant"—the very same circumstances which the ICSC described (in 1978) as "incompatible" with the grant's purpose. This is an extraordinary result which would require extraordinary strong justification. The United States submits that applicant and the Administrative Tribunal have not sustained the burden and that the Tribunal's unwarranted finding has created a conflict with decisions of the General Assembly under Article 101 where none should reasonably exist.

The elements adduced in the critical paragraphs of its judgement in which the Administrative Tribunal explains its conclusion, paragraphs XV and XVI, are: (1) entitlement to a repatriation grant had been explicitly recognized at the time of applicant's appointment; (2) there was also a recognized relationship between the amount of the grant and the length of service; (3) payment of the grant "did not require evidence of relocation" at the time of applicant's entry on duty; and (4) the link between the amount of grant and the length of service culminated in applicant holding an acquired right to the grant without production of evidence of relocation "by virtue of the transitional system in force from 1 July to 31 December 1979 and set forth in Staff Rule 109.5 (f)". These elements form the stated basis for the Tribunal's finding that applicant was "entitled to receive that grant on the terms defined in Staff Rule 109.5 (f) despite the fact that rule was no longer in force on the date of applicant's separation from the United Nations". Individually and cumulatively, however, they do not sustain the Tribunal's conclusion.

The first of the elements, the notation on his personnel action form relating to the repatriation grant¹, which was cited by the Administrative Tribunal in an apparent attempt to treat applicant as a special case, is most reasonably interpreted as a mere recognition of a credit of his prior years service with ICAO in the calculation of the repatriation grant for which applicant might or might not be eligible upon termination of his United Nations service. The notation is absolutely silent on the terms and conditions of eligibility for the grant. It appears on a secondary document, a document on which other benefits are marked with the word "entitled", while the repatriation grant reference is only to a "credit" toward the grant including his years with ICAO. It is the type of notation which routinely would appear in the personnel file of an employee transferring from one international organization to another. There is no evidence that the terms and conditions to be met in order to acquire an entitlement to the repatriation grant were the subject of any special discussions with applicant at the time. Applicant's contract itself stipulated that his appointment was subject to the Staff Rules and Regulations and such amendments as may from time to time be made to them. Thus, there are no special features to applicant's employment record which would create a contractual entitlement for him to specific terms and conditions of eligibility for the

¹ *Supra*, p. 166: "Credit toward repatriation grant commences on 14 February 1949."

repatriation grant despite specific Staff Rules and controlling interpretations of the long-standing Staff Regulations to the contrary¹. Nor are there surrounding facts and circumstances in applicant's case which, under previous Administrative Tribunal judgements, would support a finding of specialized obligations of the organization to applicant notwithstanding the failure of the Rules in force to so provide².

The second element, the linkage made in the regulations between length of service and amount of grant, is susceptible of at least two interpretations: either that length of service was an element to be taken into account in figuring the amount of grant a staff member would receive were he otherwise eligible upon retirement, or that the progressive increments in the repatriation grant were deferred compensation which applicant and similarly situated staff members earned through each creditable year of expatriate service. It is submitted that the former is a more natural interpretation and the history of the grant makes it clear, as it was to the ICSC in 1978, that the former was in fact the intended meaning of the Staff Regulation and pre-1979 Staff Rules. The concept of an expatriation grant, albeit deferred, was explicitly rejected. Further, other features of the grant render the "earned annual increment" theory untenable. Many of these were cited in respondent's brief, but ignored by the Tribunal. For example, other termination benefits may be progressive, without an entitlement arising merely by virtue of length of service. If the entitlement accrued to the staff member as something earned for each of the creditable years of expatriate service, summary dismissal should not cancel it; loss of deferred but already earned benefits would be a rather extraordinary punitive element in a summary personnel action. Nor would it seem reasonable for the Secretary-General to enjoy the discretion, upon posting an expatriate employee to his home country, to deprive him of one year of an earned entitlement for every six months service in the home country, or, as appears to have been the pre-1964 practice, to deprive him of all prior years' entitlements at the outset of such a posting.

The most reasonable interpretation of the linkage between amount of grant and length of service is that it is just a formula for calculating the amount, and no more. One can reasonably infer that the General Assembly recognized that

¹ The Administrative Tribunal's remark "that respect for acquired rights carries with it the obligation to respect the rights of the staff members expressly stipulated in the contract", suggests that it may consider applicant to have a contractual "acquired right" through the personnel form notations to receive a repatriation grant regardless of the Rules and Regulations in effect from time to time relating to criteria for eligibility and requirements of proof. Normal rules of contract formation and interpretation would not sustain such a conclusion; nor would the well-developed jurisprudence of the administrative tribunals. Under that jurisprudence, contractual provisions have been found to create acquired rights only where the rights are expressly stipulated in the contract of employment itself, i.e., the letter of appointment, and "affect the personal status of each member—e.g., nature of his contract, salary, grade" (United Nations Administrative Tribunal (UNAT) Judgement No. 19, *Kaplan*, para. 3); where they are a determining consideration in acceptance of the contract (UNAT Judgement No. 202, *Queguiner*, para. VIII); where both parties intend them to be inviolate (*In re de Los Cobos and Wenger*, Administrative Tribunal of the ILO (ILOAT) Judgment No. 391, p. 7); and which cannot therefore be changed unilaterally (*Kaplan*, *supra*, para. 3). Under this jurisprudence, the notations on applicant's personnel form regarding the repatriation grant would not be sufficient.

² UNAT Judgement No. 95, *Sikand*; UNAT Judgement No. 142, *Bhattacharyya*. These cases involved very explicit discussions or correspondence with the staff member. Additionally, the standards established by the *Sikand* and *Bhattacharyya* cases for finding a special obligation from highly personalized dealings and mutual understandings would not be satisfied by any generalizable practice such as the administrative practice adopted for documenting repatriation grant eligibility.

difficulties of repatriation and the related expenses could be greater the longer the expatriate service and that the Assembly was willing for the Organization to pay a progressively larger share of those relocation expenses for longer-term employees. No implications as to entitlement to receive the grant itself are logically drawn from this method of calculating the amount.

The third element, that payment of the grant did not require evidence of relocation at the time of applicant's entry into United Nations service, is not persuasive evidence of the nature of the grant or the requirements for legal entitlement generally or for applicant in particular either at that time or upon applicant's separation from United Nations service. First it is not at all clear that, at the time applicant entered into service or even by the time his United Nations service terminated, any significant numbers of staff members had laid claim to the grant who did not actually relocate¹. Second, applicant finished his first 12 years of creditable employment in 1961; yet the Secretary-General's report in 1963² would not have encouraged applicant to assume that he had been progressively earning annual deferred compensation for expatriation which would be his property to collect upon separation from United Nations service should he decide to remain in the country of his final posting. Nor is it clear in what year of applicant's employment an administration practice not reflected in the Rules would have become such a decisive term of applicant's appointment as to overcome the contrary indications about the repatriation grant detailed above.

Admittedly, the administrative practice over the years had been very lax about documentation required to establish that a person was someone whom the Organization was "obligated to repatriate"; but that did not change the definition of eligibility for the benefit or preclude future improvements in verifying eligibility for that benefit. The failure to require actual evidence of relocation was generally defended over the years for practical reasons relating to the difficulty of establishing a tight system of control. The issue raised by the administrators was not "who was entitled" but, rather, what documentation or evidence should the claimants have to submit to establish that they met the criteria of eligibility. The Administrative Tribunal's finding would grant staff "acquired rights" to lax administration of a termination benefit by the secretariat itself: it would elevate such practice over a specific decision of the General Assembly adopted prior to the staff member's retirement. To transform lax enforcement practice by the secretariat into a source of rights superior to the decisions of the General Assembly under Article 101 would be a serious error of law relating to the Charter.

The Tribunal's reasoning regarding the fourth element, the effect of the transitional rule itself, is unsound. The transitional Staff Rule 109.5 (*f*) of 1 July 1979 is understood by the Administrative Tribunal to be the Rule *by virtue of which* applicant held an acquired right to the repatriation grant regardless of the contrary Rule in force, pursuant to General Assembly decision, upon his separation from service. That transitional rule, as has been noted above, was adopted by the Secretary-General upon the basis of an ICSC recommendation which the General Assembly did not accept as within the ICSC's mandate. The

¹ *Report of the ICSC (1978), Official Records, Thirty-third Session, UN doc. A/33/30, para. 186, p. 62; see, supra, pp. 174-175.*

² *Supra*, footnote, p. 169:

"Unlike the earlier expatriation allowance, which it replaced, the repatriation grant was established as a terminal payment designed to provide compensation for the extraordinary expenditures incurred by staff members at the time of their separation from service and re-establishment in their home country after a prolonged absence."

Assembly specifically examined the transitional rule, found it wanting, and repudiated it through resolution 34/165, swiftly and categorically. The transitional rule was not on the books at the time applicant was hired; it was not on the books during any portion of applicant's original 12 years of employment creditable toward the repatriation grant, and it was not the rule on the books at the time he left the Organization. Further, had it been the rule at any of those times prior to his retirement, it would, by the express terms of applicant's Letter of Appointment, have been subject to such amendments as might from time to time be made. Even under the prior jurisprudence of the international organization administrative tribunals, an acquired right to the continued enjoyment of a staff rule would not be deemed to arise in the circumstances of this case. That jurisprudence applies only to rules in force at the time service commences, which were of such personal and decisive importance in accepting employment that the employee's reliance will be protected¹. The Rules relating to eligibility for the repatriation grant on the books at the time of applicant's transfer to the United Nations did not provide for establishing entitlement to the grant without relocating. It was never contended that applicant was aware of the administrative practice relating to documenting eligibility, understood it to provide entitlement merely upon retirement after expatriate service without reference to actual relocation or considered that it was of decisive importance to him in accepting employment. Had he so understood and relied upon it, he would not have been justified.

A number of other elements recited by the Tribunal appear to be questionable, although it is not clear from the Judgement to what extent the Tribunal relied on them. For example, the Tribunal cites the early breaking of the link between eligibility for the grant and actual *repatriation*. However, the link to actual *relocation* is the issue, and that was not broken at any time in the Staff Regulations. The Tribunal also refers to the alleged margin of discretion in defining eligibility left to the Secretary-General by the Regulation's use of the term "obligated to repatriate" rather than such a term as "relocated". However, as the above history and analysis have demonstrated, the wording of the Staff Regulation contains no ambiguity sufficient to convert the grant into one to which entitlement accrues simply by years of expatriate service, without relocation. Finally, the Administrative Tribunal cites the fact that no new element was expressly added to the Staff Regulations by the General Assembly in 1978 or 1979 and asserts that the Assembly did not examine the transitional Staff Rule or find it deficient. However, the former is utterly unremarkable in light of the fact that the Assembly understood the administrative practice to require correction, not the Staff Regulation establishing the repatriation grant. The assertion that the Assembly did not examine or find the transitional rule deficient is plainly incorrect and inexplicable.

3. IN FINDING THAT APPLICANT HAD AN ACQUIRED RIGHT, THE TRIBUNAL FAILED TO GIVE THE WEIGHT REQUIRED BY ARTICLE 101 OF THE UNITED NATIONS CHARTER TO THE INTENT OF THE GENERAL ASSEMBLY IN ITS ACTIONS REGARDING THE GRANT

Pursuant to the Charter of the United Nations, it is the General Assembly which establishes and can amend the fundamental terms and conditions of staff employment which the Secretary-General is required to implement. The terms of

¹ Such a rule has been held to be unalterable with respect to those staff members to whom it applies and who were reasonably entitled to expect that the condition of service contained therein would continue (*In re de Los Cobos and Wenger* (ILOAT Judgment No. 391); *in re Gubin and Nemo* (ILOAT Judgment No. 429)).

employment of the Staff, including applicant, acknowledge this by expressly making all appointments subject to the Regulations and Rules and *amendments* which may be made in them from time to time. The Statute of the Tribunal also reflects this by granting to the Administrative Tribunal jurisdiction over disputes "alleging non-observance . . . of contracts of employment . . . or terms of appointment which include pertinent regulations and rules *in force at the time of alleged non-observance*" (emphasis supplied). A primary task of the Administrative Tribunal in approaching a question of the alleged non-observance of the regulations and rules must be to understand what they mean in light of the intent of the General Assembly's decisions.

Even in cases where there are alternative constructions which might, with equal reason, be placed on the words of the relevant Regulations, Rules, authorized standard terms of appointment, and routine personnel documentation, the Tribunal is obliged to give great weight to the intent of the Assembly. This is particularly so where the Assembly has spoken directly to the question at issue and its intent is readily ascertainable from the official records as well as from the context of its actions.

The Judgement rendered by the Administrative Tribunal in this case does not fulfil this requirement. It does not respect the Assembly's intent and understanding of the repatriation grant which is so evident from the record of the grant's history.

B. Resolution 34/165 Legally Barred Repatriation Grant Payment Without Evidence of Relocation and the Administrative Tribunal Was not Authorized to Refuse to Give It Effect

The United Nations Committee on Applications for Review of Administrative Tribunal Judgements, in requesting an advisory opinion, found that there was a substantial basis for objection to the judgement not only on the ground that the Administrative Tribunal erred on a question of law relating to the Charter of the United Nations, but also on the ground that the Administrative Tribunal exceeded its jurisdiction. The United States believes that the Administrative Tribunal's decision was not warranted on both grounds, but is convinced that, to so find, the Court need not reach the question of the ultimate limits of the Administrative Tribunal's jurisdiction with regard to General Assembly decisions. The United States comments on the jurisdictional issue are offered with this qualification in mind.

1. RESOLUTION 34/165 WAS A DECISION OF THE GENERAL ASSEMBLY UNDER ARTICLE 101 OF THE CHARTER WHICH REQUIRED TERMINATION OF THE PRACTICE OF PAYING REPATRIATION GRANTS WITHOUT EVIDENCE OF RELOCATION AND CANCELLED TRANSITIONAL STAFF RULE 109.5 (f)

Although the Administrative Tribunal's reasoning is not clear, it appears to entail the notion that the Secretary-General was neither bound nor permitted to carry out the repatriation grant resolutions of the General Assembly, particularly resolution 34/165, since to do so would violate the alleged acquired rights of a staff member. The Tribunal's treatment of "the fundamental principle of respect for acquired rights", cites Staff Regulation 12.1 and Staff Rule 112.2 (a) for the proposition that "the Secretary-General is bound to respect the acquired rights of staff members *in the same way as the General Assembly*" (emphasis supplied) (Judgement No. 273, para. IV). This assertion, which overlooks the fundamental differences in the situation of the General Assembly and the Secretary-General with regard to the Staff Regulations and Staff Rules, appears to be at the heart of the Administrative Tribunal's treatment of the

General Assembly's decisions on the repatriation grant, particularly the Tribunal's failure to give effect to resolution 34/165.

The General Assembly and the Secretary-General are not in identical situations regarding the interpretation and modification of the Staff Regulations and Staff Rules, whether they be the Regulations and Rules relating to acquired rights or those relating to the terms and conditions of entitlement to a repatriation grant. It is the Assembly which sets the fundamental conditions of service and the basic rights, duties and obligations of the United Nations secretariat. Though resolution 34/165 is best understood as a decision to require the correct implementation of earlier Assembly actions in the exercise of such powers, it would, nevertheless, be controlling were it a change in the meaning of prior decisions. The authority of the General Assembly under Article 101 to bind the Secretary-General and to effect changes in the conditions of employment of the staff is well settled. As the Court previously stated: "The General Assembly could at all times limit or control the powers of the Secretary-General in staff matters, by virtue of the provisions of Article 101." (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, at p. 60.)

The Administrative Tribunal seeks to avoid direct challenge to the General Assembly's decision by (1) citing the fact that resolution 34/165 was not framed as a formal amendment or supplement to the Staff Regulations, (2) asserting that the Assembly did not examine the transitional Staff Rule 109.5 (*f*) of 1 July 1979 or claim that it was "defective", and (3) referring to the resolution of the Assembly as "simply stat[ing] a principle of action". The Tribunal appears to imply by this that the Assembly decision did not represent an action in exercise of its power under Article 101 with respect to the transitional staff rule (Judgement No. 273, para. XIV).

The Administrative Tribunal's effort to deal with resolution 34/165 in this fashion is probably best understood in light of its own jurisprudence in the "proofreaders case" (UNAT Judgement No. 76, *Champoury*). In that case, the Tribunal held that the decision of the General Assembly disapproving a proposed budget item intended to pay for upgrading the positions of the proofreaders in Geneva did not constitute an action by the General Assembly under its authority to lay down a principle to which the Secretary-General must conform in exercising his authority to classify posts and staff, or which would take away the Secretary-General's right to resubmit the budget request in the future. The Administrative Tribunal stated, however, that

"the situation would be otherwise . . . where the request conflicted with a 'principle' laid down by the Assembly in the matter of posts and staff, but in that case Staff Regulation 2.1 would be involved¹ and not the budgetary procedure alone" (*ibid.*, at para. XIV).

The Administrative Tribunal also stated that a

"principle . . . is something that is explicit and general. Before it can be said that a principle has been laid down, the General Assembly must have adopted a definite expression of opinion on the matter of classification;

¹ Staff Regulation 2.1 contained an introductory phrase, added expressly to show that authority in respect of the classification of posts and the salary scheme rests with the General Assembly:

"In conformity with principles laid down by the General Assembly, appropriate provision shall be made by the Secretary-General for the classification of posts and staff according to the nature of the duties and responsibilities required."

there must have been agreement on a concept in that respect" (*ibid.*, at para. XII).

While the Administrative Tribunal does not make mention of this case in Judgement No. 273, its effort to characterize the Assembly action in resolution 34/165 would appear to be aimed at the proposition that, while setting out a "principle of action", resolution 34/165 was not explicit or definite enough to constitute a controlling decision or "principle" regarding the transitional staff rule.

In seeking to avoid dealing with resolution 34/165 as a decision affecting the short-lived transitional staff rule, the Tribunal went well beyond its decision in *Champoury*, which dealt with an Assembly decision taken under Article 17. In Judgement No. 273, the Tribunal attempts to avoid the clear intent of a decision taken by the Assembly under Article 101. In this, it has erred.

Neither the Charter of the United Nations, the practice of the Assembly, nor the prior jurisprudence of the administrative tribunals imposes a requirement that Assembly action under Article 101 be taken in any specific form, such as a resolution expressly supplementing or amending the Staff Regulations or expressly finding that a rule or practice of the Secretary-General was defective¹. The fact that resolution 34/165 was not worded as a change in the Staff Regulations and did not contain an express reference to the transitional staff rule is neither a legal defect preventing the resolution from constituting a decision regarding that rule under Article 101 nor evidence that the Assembly intended to stop short of such a decision. The wording of resolution 34/165 is itself unambiguous and categorical:

"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." (Emphasis supplied.)

Rules of construction leave no room for legitimate doubt that this decision was aimed at overruling the transitional rule. If resolution 34/165 did not have that meaning, it would have had no meaning: only the rule in 109.5 (f) of 1 July 1979 would have allowed *some* staff to receive *some part* of the grant without evidence of relocation notwithstanding the new general rule in 109.5 (d) requiring evidence of relocation. Were there some textual ambiguity, the legislative history and context of resolution 34/165 would make it crystal clear that the General Assembly was taking a decision to terminate the administrative practice of paying all or any part of the repatriation grant without evidence of actual relocation by the staff member separating from United Nations service. It was doing so, furthermore, in full awareness that the claim of acquired rights might be advanced. There is no reasonable basis for concluding that, in adopting resolution 34/165, the General Assembly intended to do anything other than exercise its authority under Article 101 to reject specifically and unequivocally the applicability of the transitional system set out in Staff Rule 109.5 (f) of 1 July 1979². In so doing, the Assembly took an action which was in fact intended

¹ The United Nations Administrative Tribunal itself has heretofore consistently held that the resolutions of the General Assembly constitute part of the conditions of employment of the staff members to whom they apply even before being formally incorporated into the Staff Regulations. (UNAT Judgements No. 249, *Smith*, para. VI; No. 67, *Harris, et al.*, para. 5; No. 236, *Belchamber*, para. XVI; No. 237, *Powell*, para. XI.)

² The Administrative Tribunal's statement in paragraph XIV that the Assembly did not "examine the text of the Staff Rules in force since 1 July 1979, and it never claimed that there was any defect" in them is, as noted at page 184 above, simply inexplicable. See UN doc. A/C.5/34/SR.46, para. 65, and SR.47, para. 38.

to be and, as a matter of United Nations Charter law, is controlling as to the interpretation and application of the Staff Regulations and Staff Rules relating to the repatriation grant. This is the case whether the decision of the Assembly is characterized as confirming the intent of earlier Assembly decisions on the repatriation grant; removing any ambiguity and, with it, prior discretion which the Secretary-General may have thought he had; ending an administrative practice which constituted an unauthorized abuse with respect to which the patience of the Assembly had finally run out; or, as is least likely, changing the meaning of the Staff Regulation on the repatriation grant.

2. THE ADMINISTRATIVE TRIBUNAL ERRED AND EXCEEDED ITS JURISDICTION IN FAILING TO GIVE EFFECT TO RESOLUTION 34/165

To the extent that the Administrative Tribunal's judgement depends on the attempt to characterize resolution 34/165 as something other than an Assembly decision on the transitional rule under Article 101 of the Charter, the Tribunal has erred on a question of law relating to provisions of the Charter. To the extent that the Administrative Tribunal has refused to honour the General Assembly resolution despite its decisional nature because to do so allegedly would violate a staff member's acquired rights, the Tribunal's action constitutes an exercise of judicial review of the decisions of the Assembly. Thus, the issue arises as to the authority of the Administrative Tribunal to exercise such jurisdiction.

The Statute of the Administrative Tribunal does not vest in that body any power of judicial review of decisions of the General Assembly. As noted earlier, Article 2, paragraph 1, of the Statute allows the Tribunal only:

"to hear and pass judgement upon applications alleging non-observance of contracts of employment of staff members of the secretariat of the United Nations or of the terms of appointment of such staff members. The words 'contracts' and 'terms of appointment' include all pertinent regulations and rules *in force at the time of alleged non-observance*, including the staff pension regulations." (Emphasis supplied.)

Not only is the Statute silent as to any grant of authority of judicial review of General Assembly decisions, but the legislative history of Article 2, paragraph 1, which grants the Administrative Tribunal its jurisdiction, precludes any attempt to derive such authority by implication. During the consideration of Article 2, paragraph 1, of the draft Statute by the Fifth Committee of the General Assembly, on 2 November 1949, the United States representative was explicit:

"The United States delegation wished to emphasize the importance of clearly understanding the relationship between the authority of the Tribunal and that of the Assembly itself. It wanted to be sure that the Tribunal would not be in a position to challenge the authority of the General Assembly in making such alterations and adjustments in the staff regulations as circumstances might require . . .

The United States delegation interpreted the second sentence of paragraph 1, Article 2, of the draft statute as giving full assurances on that point. The Tribunal would naturally bear in mind the General Assembly's intent and not allow the creation of any such acquired rights as would frustrate the measures which the Assembly considered necessary. On that assumption, the United States delegation was prepared to withdraw its

proposed amendment to Article 2 of the draft statute¹." (UN doc. A/C.5/SR.214, paras. 25 and 26, pp. 180-181 (2 November 1949).)

The United States view was supported by other delegations, contradicted by none, and incorporated in the Fifth Committee's report to the General Assembly in the following terms:

"In connection with Article 2, as amended, two points were made in the course of the discussion regarding the Tribunal's competence:

.....
 (b) That the Tribunal would have to respect the authority of the General Assembly to make such alterations and adjustments in the staff regulations as circumstances might require. It was understood that the Tribunal would bear in mind the General Assembly's intent not to allow the creation of any such acquired rights as would frustrate measures which the Assembly considered necessary ..." (*Official Records*, Fourth Session, Annexes, Agenda item 44, UN doc. A/1127 and Corr.1, para. 9, p. 168.)

Even without such a clear legislative history, there would be strong reason for caution in imputing to the Administrative Tribunal authority of judicial review over explicit decisions of the General Assembly taken under Article 101. The crisis attending the 13 judgements of the Administrative Tribunal of the League of Nations in 1946 remains an instructive episode as to the sensitivity surrounding the relationship of an administrative tribunal with the decisions of the international organization's legislative body. The League Assembly decided not to give effect to those awards, because of the conviction that the Tribunal had disregarded the clear intent of a prior Assembly decision². This history was fairly fresh in the minds of the international community at the time the General Assembly adopted the Statute of the Administrative Tribunal of the United Nations, as the above-cited excerpts from the legislative history of that Statute make clear.

¹ The United States had proposed the following new paragraph:

"Nothing in this Statute shall be construed in any way as a limitation on the authority of the General Assembly or of the Secretary-General acting on instructions of the General Assembly to alter at any time the rules and regulations of the Organization including, but not limited to, the authority to reduce salaries, allowances and other benefits to which staff members may have been entitled." (UN doc. A/C.5/L.4/Rev.1 and Corr.1 (4 October 1949).)

² In that incident, the League's Supervisory Commission found that:

"it was the undoubted intention of the Assembly that the decisions . . . should apply to all officials of the League and not only to those whose contracts expressly reserved the possibility of their modification by the Assembly. The Secretary-General and the Director of the International Labour Office, in applying the decisions to the complainants, have therefore correctly interpreted the Assembly resolution . . . acceptance of the findings of the Administrative Tribunal would put its decision above the authority of the Assembly . . ." (*I.C.J. Pleadings, Effect of Awards of Compensation Made by the United Nations Administrative Tribunal*, pp. 222-223.)

The report of a subcommittee of the League Assembly set up to consider the issue also rejected the Tribunal's interpretation of the prior Assembly resolution and asserted that:

"we think it is within the power of the Assembly, which can best interpret its own decisions, by a legislative resolution, to declare that the awards made by the Tribunal are invalid and are of no effect both because they sought to set aside the Assembly's legislative act and because of their mistaken conclusion as to the intention of that act" (*ibid.*).

The League action was criticized and the United Nations Administrative Tribunal was found to be an independent judicial organ, the judgements of which may be binding upon the General Assembly unless overturned through review provided for in the Statute of the Tribunal (*Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, Advisory Opinion, I.C.J. Reports 1954*, at p. 47). However, the Tribunal has not been and should not be found independent in the sense of being authorized either to substitute its interpretations of Staff Regulations for those made by the General Assembly or to refuse to give effect to other explicit Assembly decisions made under Article 101 prior to its judgement. Such authority would flow neither from a reasonable understanding of the intent of the Assembly in establishing the Administrative Tribunal's jurisdiction, nor from the judicial nature of the Tribunal. Judicial review of the acts of the legislature is not within the jurisdiction of every judicial body. The correct rule in this regard has been expressed by the Administrative Tribunal of the International Labour Organisation which has held that it was not competent to rule on the legality of a resolution of an international organization's Plenipotentiary Conference which changed the position of a staff member under the rules and regulations. It further held that decisions taken by the executive authorities of the organization in pursuance of that resolution, expressly approved by the Plenipotentiary Conference, were not open in contentious proceedings before the Tribunal (ILOAT Judgment No. 209 (1973), *Lindsey v. International Telecommunications Union*).

The United Nations Administrative Tribunal was required by Article 2, paragraph 1, of its Statute, to base its judgements on "all pertinent regulations and rules in force at the time of alleged non-observance". At the time of the alleged non-observance, the staff rule in force, pursuant to an explicit decision of the General Assembly under Article 101 of the Charter, was the rule requiring that, as of 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". During the period (ending in February 1961) in which the complaining staff member, Mr. Mortished, had established the maximum 12 years of credit for the calculation of a repatriation grant (should he be eligible for one on retirement), there was no staff regulation or rule which stated that a staff member would be entitled to any portion of a repatriation grant without reference to actual relocation. During only a brief period, from 1 July 1979 through 31 December 1979, would the Staff Rule on the books have expressly purported to entitle a retiring staff member to a repatriation grant without reference to actual relocation. Mr. Mortished was given the opportunity to retire during the period of applicability of that transitional rule, but chose to delay until the transitional rule was terminated. The Administrative Tribunal, however, failed to apply the rule in effect at the time of alleged non-observance, that is at the time of actual retirement, the time when an "obligation to repatriate" (relocate) can finally be judged, and eligibility established¹. In so

¹ It is interesting to note that, in a case relating to calculation of pension rights, the United Nations Administrative Tribunal had earlier held that retirement benefits accrue on the first day of retirement:

"The last day of the Applicant's service was 31 December 1969; it cannot be the date on which retirement benefits accrue, since one and the same official in one and the same organization cannot be both in service and in retirement. Consequently, no retirement benefit accrued to the Applicant before 1 January 1970."

This decision resulted in the Applicant's pension being calculated at a more favourable rate which took effect 1 January 1970 (UNAT Judgement No. 141, *Majid*, para. I).

doing, the Administrative Tribunal exceeded its jurisdiction. It did so not only in basing its Judgement on considerations other than those specified in the second sentence of Article 2, paragraph 1, of its Statute, but also in failing either to respect the General Assembly's decisions as authoritative interpretations of the nature of the repatriation grant or to give effect to resolution 34/165 as an explicit Assembly decision compelling termination of the 1 July 1979 transitional rule. These actions also constituted errors on questions of law relating to the Charter of the United Nations.

V. CONCLUSION

The Assembly decisions which are controlling in this case were explicit and contradicted no express provision of the Staff Regulation on the repatriation grant in force at any time during the grant's history. To the contrary, the decisions were consistent with the undisputed intent of the repatriation grant, an intent originally expressed with the adoption of the grant in 1950 and reaffirmed in a number of ways during the years prior to the 1 July 1979 transitional rule. The decisions of the Assembly were neither arbitrary nor capricious. They do not shock the juridical conscience or cause injustice. Thus, the Administrative Tribunal exceeded its jurisdiction and otherwise erred on a question of law relating to the Charter, and was not warranted in its Judgement. In these circumstances, the Court need not reach the question of whether there are ever circumstances in which the Administrative Tribunal would be lawfully entitled to refuse to give effect to a decision of the General Assembly on a staff matter. Such circumstances clearly do not exist in this case.

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

3. EXPOSÉ ÉCRIT DU GOUVERNEMENT DE LA RÉPUBLIQUE FRANÇAISE

30 novembre 1981.

Se prévalant de la faculté qui lui est ouverte par l'article 66, paragraphe 2, du Statut de la Cour et conformément à l'invitation qui lui a été adressée par lettre en date du 10 août 1981 du Greffe de la Cour internationale de Justice, le Gouvernement de la République entend d'une part présenter un certain nombre de remarques concernant les modalités de saisine de la Cour dans la présente affaire, d'autre part démontrer que les griefs articulés à l'encontre du jugement n° 273 du Tribunal administratif des Nations Unies ne sont pas établis.

I. LA SAISINE DE LA COUR

1. Aux termes de l'article 65 de son Statut :

« 1. La Cour peut donner un avis consultatif sur toute question juridique, à la demande de tout organe ou institution qui aura été autorisé par la Charte des Nations Unies ou conformément à ses dispositions à demander cet avis. »

Conformément à la jurisprudence constante de la Cour, comme d'ailleurs à celle de la Cour permanente de Justice internationale, cette disposition est purement permissive et,

« en vertu de ce texte, le pouvoir que la Cour possède de donner un avis consultatif a un caractère discrétionnaire. Dans l'exercice de ce pouvoir discrétionnaire, la Cour a toujours suivi le principe selon lequel, en tant qu'organe judiciaire, elle doit rester fidèle aux exigences de son caractère judiciaire, même lorsqu'elle donne des avis consultatifs (voir par exemple *Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco, avis consultatif*, C.I.J. Recueil 1956, p. 84; *Composition du Comité de la sécurité maritime de l'Organisation intergouvernementale consultative de la navigation maritime, avis consultatif*, C.I.J. Recueil 1960, p. 153) » (C.I.J., *avis consultatif, Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, 12 juillet 1973, Recueil 1973, p. 175).

En particulier, le caractère permissif de l'article 65 de son Statut « donne à la Cour le pouvoir d'apprécier si les circonstances de l'espèce sont telles qu'elles doivent la déterminer à ne pas répondre à une demande d'avis » (C.I.J., *avis consultatif, Interprétation des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie (première phase)*, 30 mars 1950, Recueil 1950, p. 72; *avis consultatif, Certaines dépenses des Nations Unies*, 20 juillet 1962, Recueil 1962, p. 155).

Toutefois, selon une jurisprudence non moins constante, « il faudrait des raisons décisives pour déterminer la Cour à opposer un refus » à une demande d'avis consultatif (C.I.J., *avis consultatif, Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco*, 23 octobre 1956, Recueil 1956, p. 86; voir également, C.I.J., *avis consultatif, Interprétations des traités de paix conclus avec la Bulgarie, la Hongrie et la Roumanie (première phase)*, Recueil 1950, p. 71, ou *Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud*

en Namibie, nonobstant la résolution 276 (1970) du Conseil de sécurité, 21 juin 1971, *Recueil 1971*, p. 27, etc.).

Il reste cependant que :

« la Cour, étant une Cour de justice, ne peut se départir des règles essentielles qui régissent son activité de tribunal, même lorsqu'elle donne des avis consultatifs » (*C.P.J.I., avis consultatif, Statut de la Carélie orientale*, 23 juillet 1923, *série B* n° 5, p. 29).

Or dans la présente espèce on peut se demander si les modalités retenues pour saisir la Cour répondent aux « exigences de son caractère judiciaire » et si la rédaction de la question posée est conforme aux règles établies par les textes qui régissent sa compétence. D'une part, en effet, la demande originaire de réformation émane d'un Etat membre et non d'une partie au jugement devant le Tribunal ; d'autre part, la question posée peut, du fait de sa formulation, susciter certaines difficultés.

2. Ce sont les Etats-Unis d'Amérique qui ont saisi le Comité des demandes de réformation des jugements du Tribunal administratif (ci-après le « Comité des demandes de réformation ») par une demande datée du 15 juin 1981. Il s'agit là du premier cas où un Etat membre se prévaut de la faculté qui lui est ouverte par l'article 11, paragraphe 1, du statut du Tribunal administratif, de saisir le Comité.

Or, la conformité de cette disposition à la Charte des Nations Unies et au Statut de la Cour internationale de Justice a été dans le passé contestée. La Cour a elle-même résumé l'ensemble des difficultés que soulève cette procédure dans les termes suivants :

« La Cour n'oublie pas que l'article 11 donne aux Etats Membres le droit de contester un jugement du Tribunal administratif et de demander au Comité d'entamer une procédure consultative en la matière et elle relève qu'au cours des débats de 1955 un certain nombre de délégations ont mis en cause l'opportunité de cette disposition. On a dit que, l'Etat Membre n'ayant pas été partie à l'instance devant le Tribunal administratif, l'autoriser à engager une procédure en vue de la réformation du jugement serait contraire aux principes généraux régissant les recours judiciaires. On a dit en outre que le fait de conférer un tel droit à un Etat membre constituerait un empiètement sur les droits du Secrétaire général, qui est le plus haut fonctionnaire de l'Organisation, et contreviendrait à l'article 100 de la Charte. On a également émis l'opinion qu'en cas de demande présentée par un Etat membre le fonctionnaire serait dans une position d'infériorité devant le Comité. Ces arguments font intervenir des considérations additionnelles que la Cour devrait soigneusement examiner si elle était un jour saisie d'une requête pour avis consultatif sur demande adressée au Comité par un Etat Membre. » (*C.I.J., avis consultatif, Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, 12 juillet 1973, *Recueil 1973*, p. 178.)

De l'avis du Gouvernement français, la présente affaire fournit l'occasion d'un tel examen, notamment en ce qui concerne la compatibilité de la procédure suivie avec le principe de l'indépendance des fonctionnaires internationaux ainsi qu'avec le caractère exclusivement judiciaire de la procédure de réformation des jugements du Tribunal administratif.

3. De même, la formulation même de l'unique question posée à la Cour ne va pas sans entraîner certaines difficultés.

En effet, les motifs de contestation des jugements du Tribunal administratif des Nations Unies sont limitativement énumérés par l'article 11 du statut de cette juridiction. Ils sont au nombre de quatre :

(i) le Tribunal « a outrepassé sa juridiction ou sa compétence » ;

- ii) il « n'a pas exercé sa juridiction »;
- iii) il « a commis une erreur de droit concernant les dispositions de la Charte des Nations Unies »; ou
- iv) il « a commis, dans la procédure, une erreur essentielle qui a provoqué un mal-jugé. » (*C.I.J. Recueil 1973*, p. 183-184.)

Or, comme la Cour l'a rappelé dans ses deux avis consultatifs de 1956 et de 1973, sa compétence en matière de réformation des jugements des Tribunaux administratifs de l'OIT et des Nations Unies est strictement limitée par les termes des articles XII et II de leur statut respectif et, en 1956, la Cour a constaté que

« Le statut du Tribunal administratif aurait pu prévoir d'autres raisons de contester la décision du Tribunal que celles énoncées dans l'article XII. Il ne l'a pas fait. C'est la raison pour laquelle, en conséquence, la Cour, dans le cadre de cet article »,

n'a pu répondre à la deuxième question que lui avait posée le Conseil exécutif de l'Unesco dans les affaires Duberg et autres (*C.I.J., avis consultatif, Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco, Recueil 1956*, p. 99; voir aussi *C.I.J. Recueil 1973*, p. 188).

En la présente espèce, la question formulée par le Comité des demandes de réformation ne se rattache à aucun des quatre motifs énumérés par l'article 11, paragraphe 1, du statut du Tribunal puisqu'elle se borne à mettre en cause la « légitimité » de la position adoptée par le Tribunal dans son jugement n° 273 concernant l'affaire *Mortished c. le Secrétaire général de l'Organisation des Nations Unies* en ce qui concerne la portée de la résolution 34/165 de l'Assemblée générale en date du 17 décembre 1979.

D'une part cette question n'indique pas les motifs sur lesquels le Comité des demandes de réformation s'est fondé pour décider que la demande présentée par les Etats-Unis d'Amérique « repose sur des bases sérieuses ». De ce fait, la Cour pourra éprouver des difficultés particulières pour exercer sa juridiction; en effet, dans les deux autres cas où elle a été saisie d'une demande de réformation d'un jugement d'un Tribunal administratif international, elle s'est considérée comme liée par le libellé des questions formulées dans la requête (*C.I.J., avis consultatif, Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco*, 23 octobre 1956, *Recueil 1956*, p. 98-99; *Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, 12 juillet 1973, *Recueil 1973*, p. 184), appliquant du reste une jurisprudence qui a une portée plus large (voir par exemple *C.I.J. Recueil 1955*, p. 71-72).

D'autre part, et d'une manière plus générale encore, on peut s'interroger sur la signification exacte de l'adverbe « légitimement », qui est employé dans la demande d'avis et l'on peut penser que si le terme « légal » renvoie au mot « droit », l'adjectif « légitime » évoque davantage le mot « pouvoir » que des phénomènes proprement juridiques. Dans ces conditions, on peut se demander si la présente demande d'avis porte réellement sur une « question juridique » au sens des articles 96 de la Charte des Nations Unies et 65 du Statut de la Cour.

4. Si le Gouvernement de la République a estimé utile de présenter ces quelques remarques en ce qui concerne tant la validité en droit de la procédure suivie dans la présente espèce que la compétence de la Cour pour donner l'avis consultatif demandé, il s'en remet entièrement à la sagesse de la Haute Juridiction pour ce qui est des suites à donner à la requête. Il souligne seulement que cette affaire permet de régler définitivement des problèmes importants sur lesquels l'hésitation est permise, depuis l'adoption par l'Assemblée générale, en 1955, des amendements au statut du Tribunal administratif des Nations Unies organisant une procédure de réformation des jugements de cette juridiction.

II. LA VALIDITÉ DU JUGEMENT N° 273

5. La Cour «peut interpréter les termes de la requête et préciser la portée des questions qui y sont posées» (C.I.J., avis consultatif, *Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, 12 juillet 1973, *Recueil* 1973, p. 184).

Il lui appartient de déterminer si dans la présente affaire elle pourrait, en s'inspirant de cette jurisprudence, interpréter la question posée de façon à la rattacher aux seuls motifs de réformation énumérés à l'article 11 du Statut du Tribunal administratif des Nations Unies.

Bien qu'elle ne soit liée que par le libellé de la question et ne soit pas juridiquement tenue de se référer à la transcription des débats des séances du Comité des demandes de réformation, la Cour pourrait dans ce cas interpréter la question qui lui est soumise par référence à ce document. Selon ce dernier, le Comité a considéré que la demande présentée par les Etats-Unis reposait sur des bases sérieuses dans la mesure où cet Etat soutenait, d'une part, que le Tribunal administratif des Nations Unies aurait commis une erreur de droit concernant les dispositions de la Charte des Nations Unies et, d'autre part, que le Tribunal aurait outrepassé sa juridiction ou sa compétence (doc. A/AC.86/(XX)/PV.2, p. 25 et 32).

Dans ces conditions, le Gouvernement de la République limitera ses observations sur le fond aux deux motifs de réformation que le Comité des demandes de réformation semble avoir retenus : d'une part, la juridiction ou la compétence du Tribunal; d'autre part, l'erreur de droit concernant les dispositions de la Charte des Nations Unies.

A. Le problème de la juridiction ou de la compétence du Tribunal

6. Il ressort clairement des travaux préparatoires de l'article 11 du statut du Tribunal administratif des Nations Unies et de la jurisprudence de la Cour que les motifs de réformation énumérés ont un caractère limitatif et qu'ils ne sont pas interchangeables.

Le texte retenu constitue un compromis entre les Etats qui souhaitent faire porter la réformation sur «toutes questions de droit importantes que soulève le jugement» (cf. la proposition de la Chine, des Etats-Unis et de l'Irak au Comité spécial chargé d'étudier la question de la réformation des jugements du Tribunal administratif, doc. A/AC.78/L.6/Rev.1) et ceux qui proposaient de limiter les cas d'ouverture de la procédure de réformation aux motifs prévus par l'article XII du statut du Tribunal administratif de l'OIT (cf. le rapport du Comité spécial, doc. A/2909, notamment n° 48 et suiv., et celui de la Cinquième Commission, notamment n° 15, 21 et 33). La solution finalement adoptée consiste à énumérer certains motifs précis sur le fondement desquels les jugements peuvent être contestés, étant cependant entendu que deux nouveaux cas d'ouverture — le non-exercice de la juridiction et l'erreur de droit concernant les dispositions de la Charte des Nations Unies — ont été ajoutés à ceux que retient l'article XII du statut du Tribunal administratif de l'OIT : l'excès de compétence et l'erreur essentielle dans la procédure suivie.

Il est donc clair que la procédure de réformation n'a pas été conçue comme un appel contre les jugements du Tribunal et que la Cour n'a pas pour mission

«de refaire le procès mais de donner son avis sur les questions qui lui sont soumises au sujet des objections soulevées contre le jugement. La Cour n'est donc pas habilitée à substituer son opinion à celle du Tribunal sur le fond de l'affaire tranchée par celui-ci. Son rôle est de déterminer s'il ressort des circonstances de l'espèce, concernant le fond ou la procédure, qu'une contestation formulée contre le jugement pour l'un des motifs mentionnés à l'article 11 est fondée» (C.I.J., avis consultatif, *Demande de réformation du*

jugement n° 158 du Tribunal administratif des Nations Unies, 12 juillet 1973, *Recueil* 1973, p. 187-188).

Il en résulte que la Cour ne saurait interpréter une demande d'avis consultatif fondée sur l'un des cas d'ouverture de la procédure de réformation prévus par l'article 11 du statut du Tribunal comme lui ouvrant la possibilité de statuer sur les autres cas d'ouverture. En effet, les développements consacrés par la Cour à sa propre compétence lorsqu'elle est saisie sur le fondement de l'article XII du statut du Tribunal administratif de l'OIT semblent en tous points transposables à l'hypothèse où un avis consultatif est demandé sur la base de l'article 11 du statut du Tribunal administratif des Nations Unies. En 1956, la Cour a déclaré :

« L'article XII du statut du Tribunal administratif prévoit une demande d'avis consultatif à la Cour dans deux cas clairement définis. Le premier se présente quand le Conseil exécutif conteste une décision du Tribunal affirmant sa compétence; le second quand le Conseil exécutif considère qu'une décision du Tribunal est viciée par une faute essentielle dans la procédure suivie. La demande d'avis consultatif présentée conformément à l'article XII n'est pas un appel quant au fond du jugement. Elle se limite à une contestation de la décision du Tribunal affirmant sa compétence ou à des cas de faute essentielle dans la procédure. En dehors de cela, il n'y a aucun recours contre les décisions du Tribunal administratif. Une contestation de l'affirmation de sa compétence ne peut être transformée en une procédure contre la façon dont la compétence a été exercée ou contre le fond de la décision. » (*C.I.J., avis consultatif, Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco*, 23 octobre 1956, *Recueil* 1956, p. 98-99.)

Et, en 1973, la Haute Juridiction a considéré que

« le texte de l'article 11 comme l'historique de son élaboration démontrent que l'on avait entendu limiter les possibilités de contester les jugements du Tribunal administratif aux motifs précis envisagés dans l'article » (*C.I.J., avis consultatif, Demande de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, 12 juillet 1973, *Recueil* 1973, p. 188.)

De même, dans la présente affaire, une contestation de la compétence du Tribunal administratif ne saurait être transformée en une procédure plus générale d'appel contre le jugement n° 273.

7. Il est exact cependant que l'article 11, paragraphe 1, du statut du Tribunal administratif des Nations Unies n'est pas rédigé exactement de la même manière que l'article XII du Tribunal administratif de l'OIT. La première de ces dispositions vise les cas dans lesquels le Tribunal « a outrepassé sa juridiction ou sa compétence », tandis que la seconde concerne la contestation d'« une décision du Tribunal affirmant sa compétence ».

Il convient cependant de ne pas attacher trop d'importance à cette différence de rédaction. Il ressort en effet des discussions du Comité spécial chargé d'étudier la question de la réformation des jugements du Tribunal administratif et des débats de la Cinquième Commission en 1955 qu'en prévoyant le premier motif de réformation des jugements du Tribunal administratif des Nations Unies les Etats participant à la discussion se référaient bien au premier motif de contestation des décisions du Tribunal de l'OIT. Au surplus, la Cour elle-même a assimilé les deux dispositions sur ce point, parlant dans les deux cas d'« excès de compétence » (*C.I.J. Recueil* 1973, p. 185 et 189).

Dès lors, il est à nouveau légitime de transposer au cas de l'espèce la position de la Cour concernant les termes « compétent pour connaître » employés dans la demande d'avis de 1956. Ceux-ci

« signifient qu'il s'agit de déterminer si le Tribunal administratif était juridiquement qualifié pour examiner les requêtes dont il était saisi et

statuer au fond sur les prétentions qui y étaient énoncées. Le fait que le Tribunal aurait bien ou mal jugé au fond, qu'il aurait bien ou mal interprété et appliqué le droit pour juger au fond n'affecte pas sa compétence. Celle-ci doit être appréciée en recherchant si la requête était de celles dont l'examen au fond relève de la connaissance du Tribunal administratif selon les dispositions gouvernant la compétence de celui-ci» (*C.I.J., avis consultatif, Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco*, 23 octobre 1956, *Recueil* 1956, p. 87).

S'agissant du Tribunal administratif des Nations Unies sa compétence est déterminée par l'article 2 de son statut aux termes duquel — si l'on fait abstraction des compétences *ratione personae* et *ratione temporis* qui ne sont pas en cause ici :

«1. Le Tribunal est compétent pour connaître des requêtes invoquant l'inobservation du contrat d'engagement des fonctionnaires du Secrétariat des Nations Unies ou des conditions d'emploi de ces fonctionnaires, et pour statuer sur lesdites requêtes. Les termes «contrat» et «conditions d'emploi» comprennent toutes dispositions pertinentes du statut et du règlement en vigueur au moment de l'inobservation invoquée, y compris les dispositions du règlement des pensions du personnel.»

Il est, en l'espèce, difficilement contestable que la requête de M. Mortished qui se fondait expressément sur plusieurs dispositions du statut du personnel (et, notamment ses articles 9.4 et 12.1 ainsi que sur son annexe IV) et sur des dispositions réglementaires adoptées par le Secrétaire général en application du statut du personnel, ainsi que sur les termes mêmes de son propre contrat d'engagement, corresponde parfaitement tant aux termes qu'à l'esprit de cet article. Il n'est donc même pas besoin, à cet égard, de se référer à l'interprétation relativement extensive de la notion de «compétence» que la Cour a adoptée dans son avis consultatif de 1956, pour constater que la compétence du Tribunal administratif des Nations Unies pour se prononcer sur la requête de M. Mortished n'était pas douteuse; elle n'avait d'ailleurs été contestée à aucun moment par le Secrétaire général durant la procédure devant le Tribunal.

Du reste, la demande présentée par les Etats-Unis au Comité des demandes de réformation ne fait elle-même aucune allusion à une quelconque contestation de la compétence du Tribunal administratif dans cette affaire (doc. A/AC.86/R.97) et la transcription des débats du Comité établit que ses membres ont procédé à une assimilation contestable entre l'éventuelle erreur de droit qu'aurait commise le Tribunal et l'excès de compétence qui lui est imputé. C'est ainsi que le représentant des Etats-Unis a indiqué que, dans son esprit, la question posée au Comité quant à l'erreur de droit qu'aurait commise le Tribunal concernant les dispositions de la Charte des Nations Unies «n'exclut aucunement, mais au contraire englobe, l'autre motif selon lequel le Tribunal a outrepassé sa juridiction ou sa compétence» (A/AC.86/XX)/PV.2, p. 26).

Mais l'article 11 du statut a une portée très précise. Le Tribunal administratif n'a en l'espèce nullement méconnu ce texte et excédé sa *juridiction* ou sa compétence. Dès lors, et en admettant que la question de la compétence du Tribunal pour se prononcer sur la requête de M. Mortished ait été posée à la Cour, le Gouvernement de la République n'a aucun doute sur la réponse qu'il convient de lui apporter.

B. Le problème de l'erreur de droit concernant les dispositions de la Charte

8. Comme le problème de l'excès de compétence du Tribunal, celui de l'erreur de droit qu'il aurait commise en ce qui concerne les dispositions de la Charte des Nations Unies n'est pas directement évoqué par la question soumise à la Cour internationale de Justice.

Cela apparaît d'autant plus clairement que la question posée par le Comité des demandes de réformation, loin de viser la Charte des Nations Unies dans son ensemble ou certaines dispositions précises de celle-ci, se borne à demander à la Cour si le Tribunal administratif des Nations Unies pouvait

«légitimement déterminer que la résolution 34/165 de l'Assemblée générale en date du 17 décembre 1979, qui subordonne le paiement de la prime de rapatriement à la présentation de pièces attestant la réinstallation du fonctionnaire dans un pays autre que celui de son dernier lieu d'affectation, ne pouvait prendre immédiatement effet».

Ce qui est allégué, ce n'est donc en aucune manière la Charte des Nations Unies, mais l'application faite par le Tribunal administratif d'une résolution de l'Assemblée générale.

Dans ces conditions, le Gouvernement français est à nouveau conduit à remarquer que la demande présentée semble procéder d'une confusion entre la procédure de réformation telle qu'elle est organisée par l'article 11 du Statut du Tribunal administratif des Nations Unies et les procédures d'appel que l'on rencontre dans les différents droits internes des Etats, ce qui n'est conforme ni au texte ni à l'esprit de cette disposition (voir n° 5 ci-dessus).

Comme le Gouvernement français l'a déjà montré, le texte de l'article 11, paragraphe 1, du statut du Tribunal administratif résulte d'un compromis entre les Etats partisans d'une large ouverture des motifs de réformation des jugements et ceux qui entendaient les restreindre au maximum. Cela est plus particulièrement vrai s'agissant de l'«erreur de droit concernant les dispositions de la Charte des Nations Unies».

Cette expression est apparue pour la première fois durant les travaux du Comité spécial chargé d'étudier la question de la réformation des jugements du Tribunal administratif et dans une proposition de compromis déposée par les représentants de la Chine, des Etats-Unis, de l'Irak, du Pakistan et du Royaume-Uni (doc. A/AC.78/L.14 et Corr.2). Le représentant de ce pays en a expliqué la portée au nom des coauteurs :

«Dans l'esprit des auteurs, la formule «erreur de droit concernant les dispositions de la Charte» visait non seulement le cas où le Tribunal administratif aurait apparemment mal interprété la Charte, mais aussi le cas où, en interprétant et en appliquant certains des articles du statut du personnel, il aurait apparemment agi d'une façon incompatible avec les dispositions du chapitre XV de la Charte.» (Rapport du Comité spécial, doc. A/2909, n° 72.)

Il s'agissait donc de donner satisfaction aux Etats qui souhaitaient que l'erreur de droit figurât dans les motifs permettant la réformation d'un jugement du Tribunal, tout en enfermant celle-ci dans des limites relativement étroites puisqu'elle ne peut s'apprécier qu'en relation avec le texte suprême de l'Organisation, la Charte des Nations Unies. Comme l'ont indiqué les auteurs du projet commun révisé, il s'agissait, conformément à l'esprit général de la réforme de 1955, «de limiter la réformation à des cas exceptionnels» (rapport de la Cinquième Commission, A/3016, n° 15).

Il est du reste significatif que le représentant des Etats-Unis, l'un des Etats les plus favorables à une conception extensive des motifs de réformation, ait indiqué qu'il se ralliait à la proposition commune de conciliation tout en regrettant que la Cour fût ainsi empêchée de connaître de toute question de droit qui pourrait se poser (doc. A/2909, n° 80; dans le même sens, voir les interventions des représentants de la Chine et de l'Irak, également coauteurs du projet, *ibid.*, n° 85). Du reste, les exemples d'«erreurs de droit concernant les dispositions de

la Charte» donnés par le même délégué américain se rattachaient tous, très directement, à un article précis de la Charte (les articles 97, 100 ou 101; *ibid.*, n° 82).

Ainsi, en dépit des affirmations contraires de certains Etats (voir par exemple les documents A/3016, n° 21, ou A/AC.78/SR.10, p. 3; etc.), il semble que l'interprétation de cette expression donnée par les coauteurs de la proposition, qui confère à celle-ci un sens utile et conforme à l'esprit de conciliation dans lequel elle avait été formulée, doive être retenue: une «erreur de droit concernant les dispositions de la Charte des Nations Unies» n'est pas n'importe quelle erreur qu'aurait pu commettre le Tribunal administratif dans l'application du droit en vigueur; elle doit avoir un rapport étroit avec l'application de la Charte sans qu'il convienne pour autant d'exiger que le Tribunal ait directement visé ou appliqué un article précis de la Charte; en particulier le fait pour le Tribunal d'avoir omis d'appliquer telle ou telle disposition de la Charte relève de ce motif de réformation.

9. C'est dans cet esprit que, de l'avis du Gouvernement français, il convient d'apprécier la portée de la question posée en l'espèce à la Cour en ce qui concerne l'erreur de droit qu'aurait commise le Tribunal.

On peut dégager les principaux griefs qui ont été formulés à l'encontre de la solution retenue par le jugement n° 273 du Tribunal administratif des Nations Unies de trois documents:

- l'opinion dissidente de M. Herbert Reis, membre suppléant de la formation de jugement (doc. AT/DEC/273, p. 23-31),
- la demande présentée par les Etats-Unis d'Amérique au Comité des demandes de réformation (doc. A/AC.86/R.97),
- les débats de ce Comité (doc. A/AC.86/(XX)/PV.1 et 2).

Bien que les erreurs de droit imputées au Tribunal n'aient pas toujours été articulées très clairement, une analyse rapide de ces textes permet de constater qu'il est principalement reproché au jugement contesté

- d'une part d'avoir écarté l'application de la résolution 34/165 de l'Assemblée générale,
- d'autre part d'avoir à tort appliqué au cas du requérant la notion de «droits acquis».

Le Gouvernement français examinera successivement ces deux points. Il tient cependant à préciser que, si le premier de ces griefs peut assez facilement être rattaché aux «dispositions de la Charte», pour les raisons précédemment exposées cela lui paraît plus douteux s'agissant du second. Ce n'est que parce que, dans les déclarations critiquant le jugement du Tribunal, les deux moyens ont en général été confondus qu'il formulera des observations sur ce dernier point.

En réalité, il apparaît que le jugement n° 273 du Tribunal administratif n'a pas écarté l'application de la résolution 34/165 de l'Assemblée générale et qu'il a fait une application particulièrement modérée de la notion de «droits acquis».

1. LE TRIBUNAL N'A PAS MÉCONNU LES RÉSOLUTIONS DE L'ASSEMBLÉE GÉNÉRALE

10. Il n'est pas contesté que le Tribunal administratif des Nations Unies, créé par une résolution de l'Assemblée générale, doit appliquer les décisions de celle-ci et le problème que pose la présente affaire n'est pas de savoir si, dans certaines hypothèses, il pourrait écarter l'application de tel ou tel texte. Il tient bien, plutôt, au fait que, pour trancher la requête de M. Mortished, le Tribunal s'est trouvé en présence de deux résolutions de l'Assemblée générale à première vue incompatibles.

D'une part, par le paragraphe 3 de la section II de la résolution 34/165, l'Assemblée générale a décidé

«que, avec effet au 1^{er} 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».

D'autre part, l'article 12.1 du statut du personnel, annexé à la résolution 590 (VI) de l'Assemblée générale, précise:

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

Or, le Tribunal a constaté que la résolution 34/165 pouvait porter atteinte à un droit acquis par M. Mortished — en l'espèce celui de recevoir la prime de rapatriement sans avoir à produire de pièces attestant qu'il se réinstallait hors de Suisse, pays de sa dernière affectation.

En l'espèce, ce droit de M. Mortished découle, de l'avis du Tribunal, de son contrat et de la disposition 109.5 f) introduite dans le Règlement du personnel en 1979; mais l'article 12.1 du statut du personnel ne fait aucune distinction entre les droits des fonctionnaires, selon qu'ils ont été «acquis» sur le fondement de textes adoptés par l'Assemblée générale ou sur la base de dispositions réglementaires établies par le Secrétaire général ou de toute autre manière.

A ce stade du raisonnement, il n'importe pas de déterminer si le Tribunal administratif a eu raison de considérer que le requérant avait «acquis» le droit contesté: comme le Gouvernement français l'a indiqué, ce problème ne concerne pas une «disposition de la Charte des Nations Unies» et, au surplus, il établira que, de toute manière, tel est bien le cas; il suffit ici de constater que le Tribunal devait appliquer deux décisions de l'Assemblée générale qui ne semblaient pas à première vue compatibles.

Dans ces conditions, le Tribunal administratif des Nations Unies aurait pu songer à écarter l'application de l'un des deux textes concurrents: peut-être serait-il alors tombé sous le coup des critiques qui lui sont adressées d'avoir «empêché que des décisions de l'Assemblée générale» adoptées en application de l'article 101 de la Charte «prennent pleinement effet» (demande présentée par les Etats-Unis au Comité des demandes de réformation, doc. A/AC.86/R.97, p. 2).

Mais ce n'est pas le parti retenu par le Tribunal puisque ce dernier s'est pour l'essentiel efforcé de concilier ces deux résolutions et s'assurer de la conformité des décisions du Secrétaire général avec ces mêmes résolutions.

11. Si le Tribunal administratif des Nations Unies doit mettre en œuvre les décisions de l'Assemblée générale, il doit les appliquer toutes. Il ne peut faire un tri arbitraire entre elles. Organe judiciaire, il doit appliquer le droit de l'Organisation sans se substituer aux organes chargés de l'élaborer.

Quant à ceux-ci, ils sont, en vertu d'un principe absolument général de droit, liés par les règles qu'ils ont établies aussi longtemps qu'ils ne les ont pas abrogées. Comme l'avait déjà déclaré devant la Cour en 1954 M. le professeur Reuter, représentant du Gouvernement de la République, dans l'affaire relative à l'Effet de jugements du Tribunal administratif des Nations Unies accordant indemnité:

«Le Gouvernement français ne saurait admettre qu'une autorité — si élevé soit son rang — soit en toute circonstance et par principe maîtresse de ne tenir aucun compte de ses propres décisions» (C.I.J. *Mémoires, plaidoiries et documents*, p. 337).

Dans son avis consultatif, la Cour a d'ailleurs partagé cette opinion puisqu'elle a considéré que l'Assemblée générale, qui a établi le Tribunal administratif en tant qu'organe judiciaire, est liée par les jugements de celui-ci, quand bien

même il lui est loisible d'en décider la suppression (cf. *C.I.J., avis consultatif, Effet de jugements du Tribunal administratif des Nations Unies accordant indemnité*, 13 juillet 1954, *passim* et, notamment, *Recueil 1954*, p. 53, 56 et 61). De plus, la Cour a estimé que lorsque l'Organisation des Nations Unies a contracté certaines obligations « d'Assemblée générale n'a pas d'autre alternative que de faire honneur à ces engagements » (*ibid.*, p. 59; voir aussi *C.I.J., avis consultatif, Certaines dépenses des Nations Unies*, 20 juillet 1962, *Recueil 1962*, p. 169).

De même, dans son jugement n° 273, le Tribunal administratif des Nations Unies a considéré que l'Assemblée générale, qui a adopté l'article 12.1 du statut du personnel, était liée par cette disposition — au moins aussi longtemps qu'elle ne l'avait pas abrogée — et a dès lors considéré qu'elle devait elle-même respecter ses propres engagements (n° IV du jugement n° 273) d'autant plus certainement 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 (*ibid.*, n° XIV).

Dès lors, il appartenait au Tribunal administratif d'interpréter la résolution 34/165 d'une manière qui fût compatible avec la précédente décision de l'Assemblée générale sur laquelle celle-ci n'était pas revenue; c'est ce qu'il a fait en considérant que, lorsqu'elle a adopté ce texte, l'Assemblée générale « s'est bornée à énoncer un principe d'action » (*ibid.*, n° XIV), dont le Secrétaire général devait tenir compte, mais sans perdre de vue l'ensemble des textes applicables.

Le Gouvernement français reconnaît qu'en interprétant ainsi la section II, paragraphe 3, de la résolution 34/165 le Tribunal administratif n'a sans doute pas pris totalement en compte les travaux préparatoires de cette disposition qui semblent indiquer que les Etats souhaitent que le principe qu'elle pose soit appliqué dès le 1^{er} janvier 1980 à tous les fonctionnaires des Nations Unies quelle que soit la date de leur entrée en fonctions. Il reste que la solution retenue par le Tribunal est la seule qui permette de concilier les deux décisions de l'Assemblée générale que celui-ci devait appliquer en conservant à chacune d'elles un effet utile — puisque le Tribunal administratif, qui admet que la résolution 34/165 constitue une « décision de l'Assemblée générale » (jugement n° 273, n° XIV), ne conteste aucunement que celle-ci s'applique immédiatement à tous les fonctionnaires qui n'avaient pas accompli douze ans de service au 1^{er} janvier 1980 (étant entendu que, selon le cas, elle s'applique totalement ou partiellement).

Au surplus, on peut observer que l'examen des travaux préparatoires d'un texte, quel qu'il soit, ne s'impose pas nécessairement à l'interprète et la Cour elle-même a, plusieurs fois, écarté le recours à cette méthode d'interprétation (cf. *C.P.J.I., avis consultatif, Compétence de la Commission européenne du Danube*, 8 décembre 1927, série A/B n° 25, p. 31, ou *C.I.J., avis consultatif, Conditions de l'admission d'un Etat comme Membre des Nations Unies*, 28 mai 1948, *Recueil 1948*, p. 63).

En revanche, l'interprétation retenue est conforme au principe essentiel selon lequel « tout instrument international doit être interprété et appliqué dans l'ensemble du système juridique en vigueur au moment où l'interprétation a lieu » (*C.I.J., avis consultatif, Conséquences juridiques pour les Etats de la présence continue de l'Afrique du Sud en Namibie (Sud-Ouest africain) nonobstant la résolution 276 (1970) du Conseil de sécurité*, 21 juin 1971, *Recueil 1971*, p. 31; voir aussi *C.I.J. Recueil 1956*, p. 91). Conformément à ces prescriptions et à celles de l'article 2 de son propre statut, le Tribunal administratif a pris en considération l'ensemble des règles édictées par l'Assemblée générale et applicables à la situation de M. Mortished.

12. Loin d'écarter l'application d'une résolution de l'Assemblée générale, le Tribunal administratif a, au contraire, imposé au Secrétaire général le respect de l'ensemble des textes en vigueur adoptés par l'Assemblée.

Comme la Cour internationale de justice l'a rappelé dans son avis consultatif de 1954, la Charte organise un système relativement complexe en ce qui concerne

les compétences respectives de l'Assemblée générale et du Secrétaire général en matière de personnel :

« Lorsque le Secrétariat a été organisé, une situation s'est présentée dans laquelle les rapports entre les fonctionnaires et l'Organisation ont été régis par un ensemble complexe de règles. Cet ensemble comprenait le statut du personnel, établi par l'Assemblée générale pour définir les droits et obligations fondamentaux du personnel, et le règlement du personnel, établi par le Secrétaire général pour donner effet au statut du personnel. » (C.I.J., avis consultatif, *Effet de jugements du Tribunal administratif des Nations Unies accordant indemnité*, 13 juillet 1954, *Recueil* 1954, p. 57; voir aussi p. 60.)

Ainsi il apparaît que, conformément aux termes de l'article 101, paragraphe 1, de la Charte des Nations Unies, le Secrétaire général est subordonné à l'Assemblée générale pour la fixation des règles générales applicables au personnel, étant cependant précisé qu'il lui appartient d'en faire application aux fonctionnaires dans chaque cas particulier.

Dans le jugement contesté, le Tribunal administratif a également rappelé ces principes fondamentaux (jugement n° 273, n° III), dont il a fait une stricte application.

Débarrassé des digressions nécessaires pour répondre aux arguments échangés par les parties sur des points de détail, le raisonnement du Tribunal peut être résumé ainsi :

- i) l'article 9.4 et l'annexe IV du statut du personnel prévoient que la fixation des conditions et des modalités de versement de la prime de rapatriement relèvent de la compétence du Secrétaire général;
- ii) à la suite des débats de l'Assemblée générale et de la Commission de la fonction publique internationale, le Secrétaire général a précisé, en 1979, à quelles conditions cette prime serait dorénavant versée aux fonctionnaires;
- iii) lorsqu'il a établi un nouveau texte à la suite de l'adoption de la résolution 34/165 par l'Assemblée générale, le Secrétaire général devait également tenir compte du principe du respect des droits acquis, garanti par l'article 12.1 du statut du personnel (et rappelé par la disposition 112.2 a) du règlement du personnel);
- iv) pour n'avoir pas opéré la nécessaire conciliation entre ces deux textes, émanés l'un et l'autre de l'Assemblée générale, le Secrétaire général a commis une illicéité dont l'Organisation doit réparer les conséquences dommageables pour M. Mortished.

En prenant cette décision, le Tribunal administratif a écarté l'application d'une mesure réglementaire du Secrétaire général non pas parce qu'elle mettait en œuvre une résolution de l'Assemblée générale mais, au contraire, parce qu'elle ne traduisait que partiellement l'ensemble des directives de l'Assemblée générale qui, aux termes de l'article 101, paragraphe 1, de la Charte, s'imposent au chef de l'administration. Il n'a donc commis aucune « erreur de droit concernant les dispositions de la Charte des Nations Unies » mais a — conformément à son statut et notamment aux articles 2 et 9 de celui-ci — ordonné la réparation du préjudice subi par M. Mortished du fait des erreurs commises par le Secrétaire général en ce qui concerne sa propre compétence, telle qu'elle est fixée par la Charte.

2. LE TRIBUNAL A FAIT UNE APPLICATION MODÉRÉE DU PRINCIPE DES DROITS ACQUIS

13. Etant arrivé à cette conclusion, le Gouvernement de la République considère qu'il devrait être inutile pour la Cour d'examiner plus avant la validité du jugement n° 273 du Tribunal administratif des Nations Unies. Il rappelle que celle-ci a déclaré que

«le texte de l'article 11 [du statut de ce Tribunal] comme l'historique de son élaboration démontrent que l'on avait entendu limiter les possibilités de contester les jugements du Tribunal administratif aux motifs précis envisagés dans l'article» (C.I.J., avis consultatif, *Procédure de réformation du jugement n° 158 du Tribunal administratif des Nations Unies*, 12 juillet 1973, *Recueil* 1973, p. 188).

Les mots ayant un sens, il ne convient pas de transformer le contrôle de «l'erreur de droit concernant les dispositions de la Charte» en une réappréciation globale par la Cour internationale de Justice de toutes les règles juridiques appliquées par le Tribunal (voir *supra*, n° 6 et 7). En particulier, la Haute Juridiction ne semble pas compétente pour trancher la controverse entre les trois membres composant la formation de jugement d'une part et le membre suppléant d'autre part et relative à l'application faite en l'espèce du principe du respect des droits acquis des fonctionnaires.

Le seul problème que la Cour pourrait peut-être examiner à cet égard serait celui de la conformité de ce principe lui-même avec les dispositions ou l'esprit de la Charte des Nations Unies. Encore faut-il remarquer que cela reviendrait à rechercher si une décision de l'Assemblée générale — en l'occurrence l'article 12.1 du statut du personnel — est valide au regard de principes supérieurs, ce que les adversaires du jugement contesté reprochent précisément — mais à tort (cf. *supra*, n° 9) — au Tribunal administratif d'avoir fait...

Quoi qu'il en soit, il ne paraît pas douteux que ce principe n'est en contradiction avec aucune disposition de la Charte des Nations Unies, et qu'il est, au contraire, rendu nécessaire par l'esprit des articles consacrés au fonctionnement du Secrétariat.

Conformément à la célèbre formule de la Cour,

«les droits et devoirs d'une entité telle que l'Organisation doivent dépendre des buts et des fonctions de celle-ci, énoncés ou impliqués par son acte constitutif et développés dans la pratique» (C.I.J., avis consultatif, *Réparation des dommages subis au service des Nations Unies*, 11 avril 1949, *Recueil* 1949, p. 180).

Et l'on ne saurait admettre qu'une entité créée pour assurer le respect du droit dans les relations internationales puisse, dans ses rapports avec ses agents, se situer en dehors ou au-dessus du droit. Le Gouvernement français partage sur ce point l'opinion du Tribunal administratif de l'OIT selon lequel, si les organes directeurs d'une organisation — il s'agissait de la FAO — pouvaient modifier sans restrictions la situation des fonctionnaires, cela signifierait

«qu'aucun contrôle ne peut être exercé sur les relations d'un organe exécutif tel que le Conseil avec le personnel de l'Organisation et il est vain de chercher à savoir si ces relations sont conformes à des règlements que le Conseil n'a nul besoin d'observer. Comme le Directeur général, dans ses rapports avec le personnel, est assujéti au contrôle du Conseil, cela signifie que le contrat du fonctionnaire ne donne à celui-ci aucun droit que le Conseil ne pourrait annuler, et en particulier que son salaire lui est versé à titre gracieux et non pas en vertu d'un contrat. De l'avis du Tribunal, tel ne saurait être le droit» (TAOIT, jugement n° 323, *Connolly-Battisti* (n° 5) c. FAO).

C'est aussi ce que disait déjà le Tribunal administratif de la Société des Nations dans son premier jugement, lorsqu'il considérait que la portée de l'article 117 du statut du personnel du BIT qui autorisait l'administration à modifier le statut du personnel

«n'a pu être de livrer le fonctionnaire à l'arbitraire de l'administration, puisque, au contraire, l'existence d'un statut s'inspire de la nécessité de

donner aux membres du personnel, pour le présent et l'avenir, des garanties légitimes quant à la stabilité et aux conditions de leur emploi» (TASdN, 1, *di Palma di Castiglione*).

On peut admettre que c'est à juste titre que, dans son opinion dissidente jointe au jugement n° 273 du Tribunal administratif des Nations Unies, M. Reis rappelle

«qu'un juriste éminent a souligné que les droits acquis des fonctionnaires internationaux devaient être protégés dans la mesure où il était de l'intérêt public de garantir la stabilité de ces droits (Hans W. Baade, «The Acquired Rights of International Public Servants», 15 *American Journal of Comparative Law* (1967), 251, 299)» (AT/DEC/273, p. 31).

Mais, précisément, M. Baade, dans l'article cité, admet que l'existence d'une fonction publique compétente et indépendante, ce qui implique un revenu décent et une situation raisonnablement stable, constitue un «intérêt public» (*ibid.*).

Le respect des droits acquis des fonctionnaires est d'ailleurs impliqué par l'article 101, paragraphe 3, de la Charte des Nations Unies elle-même, aux termes duquel :

«3. La considération dominante dans le recrutement et la fixation des conditions d'emploi du personnel doit être la nécessité d'assurer à l'Organisation les services de personnes possédant les plus hautes qualités de travail, de compétence et d'intégrité.»

Du reste, la Cour internationale de Justice, qui a admis que les fonctionnaires pouvaient faire valoir des «droits ou expectatives légitimes» (*C.I.J. Recueil 1973*, p. 205), a déclaré qu'il convenait, dans ce domaine, de s'inspirer du but en vue duquel les textes pertinents ont été adoptés,

«à savoir l'intention d'assurer à l'Organisation les services d'un personnel compétent et intègre en dotant celui-ci de garanties appropriées pour tout ce qui concerne l'observation des contrats d'engagement et des dispositions du statut du personnel» (*C.I.J., avis consultatif, Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco*, 23 octobre 1956, *Recueil 1956*, p. 98).

Il n'est pas nécessaire d'établir ici que le respect des droits acquis constitue un principe général de droit (voir M. Sørensen, «Le problème du droit intertemporel dans l'ordre international», rapport à l'Institut de droit international, *Annuaire IDI*, 1973, notamment p. 2), et il suffit de rappeler que la Cour en a fait application à plusieurs reprises et qu'il est, en tout cas, conforme à la Charte.

Il est du reste important de rappeler que, lors des débats préalables à l'adoption du statut du personnel en 1951, l'article 12.1 (repris de l'article 28 du statut provisoire) n'a fait l'objet d'aucune discussion, ni devant le Comité consultatif des questions administratives et budgétaires, ni devant la Cinquième Commission (une question du délégué de l'Inde sur le sens précis des mots «droits acquis» est demeurée sans réponse; cf. comptes rendus analytiques des séances de la Cinquième Commission, *Documents officiels de l'Assemblée générale, sixième session*, p. 307), ni devant l'Assemblée générale. Ceci témoigne clairement de la conscience commune qu'avaient les Etats Membres de la nécessité de garantir la stabilité de la condition juridique des fonctionnaires.

Dès lors que le principe du respect des droits acquis est conforme à la Charte et prévu par le statut du personnel, il appartenait au Tribunal administratif des Nations Unies de le mettre en œuvre dans le cas précis qui lui était soumis et il ne pouvait pas le vider de sa substance.

Le Gouvernement de la République répète qu'à son avis la manière dont le Tribunal a appliqué l'article 12.1 du statut du personnel ne relève pas de la

compétence de la Cour. Néanmoins, tout en étant convaincu que cela excède clairement les limites dans lesquelles la présente instance est circonscrite par les termes mêmes de l'article 11, paragraphe 1, du statut du Tribunal, le Gouvernement de la République, par souci de répondre à certaines objections qui ont été émises, montrera dans les paragraphes qui suivent que le Tribunal administratif a fait de ce principe une application particulièrement modérée, lui donnant, en quelque sorte, un sens « minimal ».

Le recours à la notion de « droits acquis » était, en effet, au cas particulier doublement justifié. D'une part, le requérant jouissait en l'espèce d'un droit contractuel à la prime de rapatriement. D'autre part, le Tribunal a pu, pratiquement, réduire l'application du principe à celui de la non-rétroactivité des règles juridiques. Bien entendu, la solution retenue par le Tribunal administratif des Nations Unies se serait imposée *a fortiori* s'il avait appliqué la jurisprudence du Tribunal de l'OIT en matière de droits acquis.

14. Comme l'a relevé le Tribunal dans le jugement contesté, M. Mortished, qui, comme tout fonctionnaire, était lié à l'Organisation des Nations Unies par un contrat d'engagement, se trouvait dans une situation juridique spéciale en ce qui concerne la prime de rapatriement. En effet, un document — que l'on peut considérer comme un complément de son contrat — lui reconnaissait un droit à la prime de rapatriement à compter du 14 février 1949 (date de son premier engagement à l'OACI) (cf. le jugement n° 273, n° VI). En d'autres termes, l'Organisation a reconnu à M. Mortished un droit à la prime de rapatriement dès son entrée en fonctions et celui-ci pouvait donc, dès cette date, compter sur le seul fait qu'à la cessation de ses fonctions il recevrait cette prime dont le versement lui avait été expressément et personnellement garanti.

Dans ces conditions, pour M. Mortished au moins, et, éventuellement, pour les autres fonctionnaires qui auraient reçu les mêmes assurances, le droit au versement de la prime de rapatriement est un droit contractuel (en même temps qu'il est, d'ailleurs, un droit statutaire — voir *infra*, n° 15). Comme tel, le Tribunal administratif des Nations Unies était inévitablement conduit à lui reconnaître le caractère d'un droit acquis, conformément d'ailleurs à sa jurisprudence constante et à celle des autres tribunaux administratifs internationaux.

Dès 1953, le Tribunal administratif interprétait les dispositions de l'article 28 du statut provisoire du personnel et de l'article 12.1 du statut actuel comme signifiant que les éléments contractuels de la situation juridique des fonctionnaires « ne peuvent être modifiés sans l'accord des deux parties » (TANU, 19, *Kaplan*); quelques années plus tard, il précisait qu'une lettre d'engagement comportant certaines réserves au droit d'amendement de l'administration « a permis que des amendements au règlement provisoire prennent effet à l'égard du requérant, à la seule condition qu'ils ne portent pas atteinte aux conditions d'emploi stipulées dans la lettre d'engagement elle-même » (TANU, 84, *Young c. Secrétaire général de l'OACI*; voir aussi les jugements n° 53, *Wallach*; 63, *Hilpern*; 68, *Bulsara*; 185, *Lawrence*). Et il en va de même s'agissant de la jurisprudence du Tribunal administratif de l'OIT (voir, par exemple, TAOIT, 292, *Molloy c. Eurocontrol*; 368, *Elsen et Elsen-Drouot c. OEB*; 369, *Nuss c. OEB*), bien que celle-ci soit beaucoup plus laxiste en la matière (voir *infra*, n° 21). Aucun de ces jugements n'a jamais été contesté, ni par le Secrétaire général ni par un Etat Membre, s'agissant des décisions du Tribunal administratif des Nations Unies, ni par le Conseil d'administration du BIT pour ce qui est des jugements de celui de l'OIT.

C'est que, en réalité, il s'agit d'une application limitée de la notion de droits acquis. Comme on l'a écrit :

« Even though an international civil servant cannot argue that his conditions of service may never be modified, he can at least invoke one of the most fundamental principles of international law — *pacta sunt servanda*. This is the basic rule — or one of the basic rules — of international law, and

an International Organization, set up by a treaty, cannot act in a manner contrary to the very rule of law from which it derives its own existence.»

(« Bien qu'un fonctionnaire international ne puisse prétendre que ses conditions d'emploi ne peuvent jamais être modifiées, il peut au moins se fonder sur l'un des principes les plus fondamentaux du droit international — *pacta sunt servanda*. Ceci constitue la règle de base — ou l'une des règles de base — du droit international et une organisation internationale, établie par un traité, ne peut agir d'une manière contraire à la règle même à laquelle elle doit d'exister. ») (M. B. Akehurst, *The Law Governing Employment in International Organizations*; Cambridge University Press, 1967, p. 238.)

La Cour internationale de Justice a du reste consacré cette façon de voir en rappelant que

« certaines obligations de l'Organisation peuvent être contractées par le Secrétaire général sous l'autorité du Conseil de sécurité ou de l'Assemblée générale et l'Assemblée générale « n'a pas d'autre alternative que de faire honneur à ses engagements » (C.I.J., avis consultatif, *Certaines dépenses des Nations Unies*, 20 juillet 1962, *Recueil* 1962, p. 169).

Il en va ainsi pour les engagements contractuels pris par le Secrétaire général vis-à-vis des fonctionnaires. En l'espèce, le Secrétaire général, ayant donné des assurances formelles à M. Mortished en 1958, ne pouvait revenir sur ses engagements vingt-deux ans plus tard ou en paralyser totalement les effets.

15. Il est vrai que l'on pourrait soutenir que M. Mortished s'est vu reconnaître, en 1958, le droit à la prime de rapatriement mais non le droit à son versement, dans le cas où, au moment où il pouvait y prétendre, il ne répondrait pas aux conditions nécessaires pour en bénéficier. L'objection est assez formelle car, précisément, au moment où le droit à la prime lui a été reconnu, son versement n'était, depuis plusieurs années, soumis à aucune autre condition que la cessation des fonctions (cf. le jugement n° 273, n° VII).

Par conséquent, le droit à la prime de rapatriement découlait à la fois des textes en vigueur (l'article 9.4 et l'annexe IV du statut du personnel) et du contrat du requérant. Quant au droit inconditionnel à son versement, il résultait d'une pratique ancienne de l'Organisation. Et la Cour internationale de Justice a clairement admis qu'une telle pratique constituait un « élément pertinent pour l'interprétation des contrats » d'engagement des fonctionnaires internationaux (C.I.J., avis consultatif, *Jugements du Tribunal administratif de l'OIT sur requêtes contre l'Unesco*, 23 octobre 1956, *Recueil* 1956, p. 91-92).

Alors qu'il l'aurait pu, le Tribunal administratif a cependant estimé qu'« eu égard à la situation propre du requérant » il n'avait pas à se prononcer sur la question de la valeur obligatoire de la pratique dont il a relevé l'existence (jugement n° 273, n° VIII).

En effet, après avoir constaté que « dès 1953, le lien entre la prime de rapatriement et le retour « dans la patrie » était rompu dans le règlement du personnel » (disposition 109.5 i), jugement n° 273, n° VII), ce qui constituait une traduction en quelque sorte « négative » de cette pratique, le Tribunal a noté qu'à la suite de longues discussions le Secrétaire général a été amené, le 22 août 1979, à modifier la disposition 109.5 f) de façon à ce que

« les fonctionnaires ayant pris leurs fonctions avant le 1^{er} 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 » (cf. jugement n° 273, n° XII).

Même en admettant que, jusqu'à cette date, il existait une dissociation entre le « droit à la prime » et le « droit au paiement » de la prime, il est clair que l'un et

l'autre se confondent à partir de la publication du nouveau texte de la disposition 109.5 du règlement du personnel par la circulaire ST/SGB/SR/1/Rev.5. par laquelle, agissant sur les instructions de l'Assemblée générale et de la Commission de la fonction publique internationale, le Secrétaire général a «consolidé» la pratique antérieure. M. Mortished, qui depuis le 14 février 1961 — soit douze ans après son entrée au service des organisations du système des Nations Unies — avait acquis le droit au montant maximal de la prime de rapatriement, a, au moins du fait de la nouvelle rédaction de la disposition 109.5 du règlement du personnel, acquis également un droit au versement de cette somme.

«En établissant un nouveau texte de la disposition 109.5, texte qui, à dater du 1^{er} janvier 1980, a remplacé le texte antérieurement en vigueur sur la base duquel le requérant pouvait obtenir la prime de rapatriement» (jugement n° 273, n° XIV) et en lui refusant le bénéfice, le Secrétaire général a bien, comme le constate le Tribunal administratif, porté atteinte à un droit acquis par M. Mortished.

Sans doute, si l'on admet que le «droit au paiement» est distinct du «droit à la prime» — ce qui ne s'impose aucunement — doit-on admettre aussi qu'à la différence du second le premier n'était pas un droit contractuel pour le requérant. Son respect ne s'en imposait pas moins au Secrétaire général en application du principe, non moins essentiel, de la non-rétroactivité des règles juridiques. On doit à nouveau constater que le Tribunal, s'y référant en l'espèce, a fait une application tout à fait limitée de la notion de droits acquis qui, comme l'a déclaré le Tribunal administratif de l'OIT, «dans son interprétation la plus restrictive, se confond avec le principe général de la non-rétroactivité» (TAOIT, 51, *Poulain d'Andecy c. FAO*).

A ce point de vue également, le Tribunal administratif des Nations Unies se borne à appliquer sa jurisprudence, traditionnelle en ce domaine, et que, jusqu'à présent, ni le Secrétaire général ni aucun Etat Membre n'ont remise en cause. Ainsi, en 1961, le Tribunal avait déclaré que «rien n'interdit une modification du règlement dont les effets ne s'appliquent qu'aux bénéfices et avantages liés aux services postérieurs à l'adoption de celle-ci» (TANU, 82, *Puvrez c. Secrétaire général de l'OACI*). Et, tout récemment, il a indiqué sans ambiguïté:

«Le respect des droits acquis signifie 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.» (TANU, 266, *Rosemille Capio*; voir aussi, par exemple, TANU, 110, *Mankiewicz c. Secrétaire général de l'OACI*; 202, *Queguiner c. Secrétaire général de l'OMCI*; 237, *Powell*).

(Les autres tribunaux administratifs internationaux appliquent les mêmes principes; voir, par exemple, TAOIT, 29, *Sherif c. OIT*; TAOEA, 13, *Alaniz et as.*; Com. rec. OCDE, 40, *Merigo*; CJCE, aff. 69/63, *Capitaine ép. Marcillat c. Com. CEEA*, Rec. X, p. 494; TA Banque mondiale, 1, *de Merode et as.*, etc.).

Dans cette acception limitée l'assimilant à la non-rétroactivité des règles juridiques non favorables, le principe des droits acquis est d'application absolument généralisée tant en droit international que dans les droits internes des Etats et la Cour internationale de Justice a eu l'occasion d'en faire application à maintes reprises. On peut même considérer qu'elle en a fait usage dans son avis consultatif relatif à l'effet de jugements du Tribunal administratif des Nations Unies accordant indemnité lorsqu'elle a déclaré qu'«il n'y a pas de motifs de droit sur lesquels l'Assemblée générale puisse se fonder pour reviser des jugements déjà prononcés par ce tribunal» (C.I.J. Recueil 1954, p. 56) ou que l'Assemblée générale pouvait prévoir «la revision des décisions futures du Tribunal» (*ibid.*, p. 61). Il n'y a aucune raison de penser que ce principe n'est pas applicable dans d'autres domaines et il paraît clair qu'une règle qui s'impose à l'Assemblée générale est, *a fortiori*, opposable au Secrétaire général.

Quel que soit le parti que l'on adopte, M. Mortished, compte tenu de la durée de ses services, avait un droit acquis au versement de la prime de rapatriement, qu'il le tienne de son contrat, ou de la pratique de l'Organisation ou des décisions du Secrétaire général. Par ailleurs le Tribunal administratif a fait, en l'espèce, une application particulièrement prudente du principe du respect dû aux droits acquis des fonctionnaires internationaux puisque, selon le parti que l'on adopte, il l'a assimilé soit au respect des droits contractuels, soit à celui de la non-rétroactivité des règles, l'un et l'autre bien établis. Sauf à priver de toute signification l'article 12.1 du statut du personnel, le Gouvernement français éprouve les plus grandes difficultés à imaginer quel sens plus restreint le Tribunal aurait pu lui donner.

16. Il lui apparaît en outre que le Tribunal aurait abouti aux mêmes conclusions s'il avait retenu la définition, infiniment plus large, que donne par ailleurs le Tribunal administratif de l'OIT à la notion de droits acquis.

La jurisprudence de cette juridiction — à laquelle se réfère M. Reis — a subi une évolution qu'il est inutile de retracer ici. Dans son état actuel, elle est clairement résumée par le jugement n° 391, *Los Cobos et Wenger c. OIT*, que cite, précisément, l'opinion dissidente :

« Un droit est acquis si son bénéficiaire peut en exiger le respect nonobstant toute modification de texte. Tel est le cas, notamment, dans une double hypothèse.

D'une part, il y a lieu de considérer comme acquis un droit conféré par une disposition statutaire ou réglementaire et assez important pour avoir déterminé un agent à s'engager au service d'une organisation. Réduire ce droit sans le consentement de son titulaire, c'est porter atteinte aux conditions d'emploi sur le maintien desquelles les fonctionnaires peuvent compter.

D'autre part, le caractère acquis de droits résulte aussi des clauses contractuelles qui les prévoient et que les parties ont tenu pour intangibles. Il s'ensuit que tous les droits contractuels ne sont pas acquis, fussent-ils de nature pécuniaire; encore faut-il que les parties aient exclu expressément ou implicitement leur restriction. Si le principe du paiement d'une indemnité peut faire l'objet d'un droit acquis, il n'en est pas nécessairement de même du mode de calcul de la prestation due, c'est-à-dire de son montant. »

Ce système — qui est combiné avec les principes de la non-rétroactivité des règles moins favorables et du non-bouleversement de l'économie générale du contrat, que le Tribunal administratif applique généralement —, et qu'il vient d'entendre encore en admettant que le respect des droits acquis s'oppose à ce que le bénéficiaire d'un droit en soit « privé arbitrairement » (TAOIT, 462, *Vyle c. FAO*) —, fait très largement appel à la subjectivité du juge. (Et il en va de même pour le raisonnement suivi par le Tribunal administratif de la Banque mondiale dans son jugement n° 1, *de Merode et as.*, qui repose sur une distinction entre les « droits essentiels » ou « fondamentaux » et ceux qui ne le sont pas.)

Quoi qu'il en soit, il est tout à fait certain que le droit de M. Mortished au versement de la prime de rapatriement litigieuse n'aurait pas manqué d'être reconnu si le Tribunal s'était fondé sur cette jurisprudence — dont il a d'ailleurs esquissé l'application dans certaines décisions récentes (cf. TANU, 195, *Sood*; 237, *Powell*) : l'importance relative de la somme en jeu (faible au regard du budget global de l'Organisation mais non négligeable pour un fonctionnaire qui prend sa retraite), le fait que le problème ait été évoqué (et réglé) au moment de l'engagement, la longueur des services du requérant et bien d'autres facteurs auraient, très vraisemblablement, emporté la conviction du juge (le Tribunal administratif de l'OIT a du reste admis que la simple diminution du montant de la retraite, la suppression du droit à promotion, de la prime d'expatriation, de l'indemnité pour frais d'éducation des enfants ou du remboursement des frais de

voyage pour congés dans les foyers constitueraient autant d'atteintes à des droits acquis — voir par exemple: TAOIT, 365, *Lamadie* (n° 2) et *Kraanen c. IIB*; 429, *Gubin et Nemo c. Eurocontrol*; 441, *Pherai c. OEB*, etc.).

Il n'appartient certainement pas à la Cour de rentrer dans de telles considérations, mais le Gouvernement français a voulu établir à titre subsidiaire que non seulement le Tribunal administratif des Nations Unies n'a commis en l'espèce aucune erreur de droit, mais encore qu'il a adopté une solution qui demeure en retrait par rapport à la construction prétorienne plus audacieuse du Tribunal administratif de l'OIT.

17. De l'avis du Gouvernement de la République, réformer le jugement n° 273 du Tribunal administratif des Nations Unies, ce serait, en fait, rejeter la quasi-totalité de la jurisprudence administrative internationale relative aux droits acquis.

Ce serait aussi, d'une certaine manière, admettre une évolution tout à fait contestable du « régime commun » dont, chaque année avec plus de vigueur, l'Assemblée générale demande le renforcement. Le Secrétaire général de l'Organisation des Nations Unies a, en effet, été le seul chef d'une administration d'une organisation du système des Nations Unies à revenir sur le mécanisme de transition ordonnée prévu en 1979 et qui demeure en vigueur au sein des institutions spécialisées, en interprétant de façon rigide le sens de la résolution 34/165 de l'Assemblée générale. Cela est du reste directement contraire à la lettre et à l'esprit de nombreuses recommandations et décisions et, notamment, de la résolution 33/119 (à laquelle la résolution 34/165 fait référence) où l'Assemblée générale

« Prie instamment les autorités compétentes de toutes les organisations qui appliquent le régime commun des Nations Unies de s'abstenir de prendre des mesures qui ne contribuent pas au renforcement et au développement de ce régime ».

Ce serait enfin encourager le Tribunal administratif des Nations Unies à faire cela même qui lui est reproché: refuser d'appliquer certaines résolutions de l'Assemblée générale alors qu'il lui appartient de contrôler que le Secrétaire général les met en œuvre, sans exclusive et dans leur ensemble. C'est ce que le Tribunal a fait dans le jugement contesté.

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18. En définitive, le Gouvernement de la République française s'en remet à la sagesse de la Cour en ce qui concerne sa compétence pour connaître de la présente demande. Au fond, il estime que le Tribunal administratif des Nations Unies n'a pas outrepassé sa juridiction ou sa compétence et n'a pas commis d'erreur de droit concernant les dispositions de la Charte des Nations Unies et demande à la Cour, si elle retient sa compétence, de répondre en ce sens à la question qui lui a été posée.

Le directeur des affaires juridiques
du ministère des relations extérieures,
(Signé) Gilbert GUILLAUME.

Le conseil,
(Signé) Alain PELLET,
agrégé des facultés de droit,
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