

(Signatures)

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President

Suzanne BASTID

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Vice-President

New York, 20 October 1978

Endre USTOR

Alternate Member

Jean HARDY

Executive Secretary

Judgement No. 237

(Original: English)

Case No. 234:

Powell

Against: The Secretary-General
of the United Nations

Request for tax reimbursement on a partial lump sum commutation of pension benefits.

The very special legal situation in which the Tribunal is called upon to render its judgement.—Various essential facts relating to the implementation of the principle of immunity from taxation of United Nations staff are recalled.—Reimbursement of tax payable in respect of commuted retirement benefits.—Financial consequences for the United States.—Representations by the United States Government to the Secretary-General.—Origin of reimbursement of taxes payable by United Nations staff members.—Article 105 of the Charter.—General Assembly resolution 13 (I).—Means used to attain the objectives set in that resolution.—Section 18 of the Convention on the Privileges and Immunities of the United Nations.—Reservation of the United States.—General Assembly resolutions 239 A (III) and 239 C (III).—The Tax Equalization Fund system.—General Assembly resolutions 973 (X) and 1099 (XI).—Staff Regulation 3.3.—The Secretary-General's discretionary power in framing the Staff Rules and in applying the Staff Regulations.—Force and effect of administrative orders and information circulars issued by the Secretary-General.—Information Circular ST/ADM/SER.A/1828.—Legal effect of the circular.—Previous decisions of the Tribunal relating to the legal effect of information circulars and the rights flowing therefrom.—Decision of the Tribunal that the information circular in question created a right which the Applicant could claim.—Previous decisions of the Tribunal relating to the meaning of respect for acquired rights.—Conclusion of the Tribunal that the right to reimbursement established in the Applicant's favour must be respected by the Respondent.—The Tribunal is not competent to rescind erga omnes a decision in the nature of a regulation.—The Tribunal has to examine the validity of the system of tax reimbursement on partial commuted lump sum retirement benefits.—Respondent's contention that the tax levied on a one-third commuted lump sum pension benefit cannot be reimbursed as it does not constitute either salaries or emoluments within the meaning of Staff Regulation 3.3 (f).—This contention assumes that the payment in question is a pension payment.—Question whether the payment partakes of the character of other lump sum payments under articles of the Pension Fund Regulations or of periodic payments of retirement benefits.—Examination of the relevant provisions of the Pension Fund Regulations and the practices followed by the United Nations.—Conclusion of the Tribunal that the law and practice applicable to full lump sum payments apply with equal force to partial lump sum payments.—The one-third lump sum payment may be regarded as a terminal payment.—Respondent's contention that a retired staff member

does not qualify for tax reimbursement.—Former staff members are to be regarded as staff members for tax reimbursement purpose.—Respondent's contention that the entitlement to tax reimbursement arises only where a staff member is subject both to staff assessment and to national income taxation in respect of salaries and emoluments.—Interpretation of Staff Regulation 3.3 (f) in practice.—Conclusion of the Tribunal that the absence of staff assessment by itself does not bar tax reimbursement.—Respondent's contention that the specialized agencies have not reimbursed national taxes levied on one-third commuted lump sum pension benefits.—The Tribunal's ruling is confined to the tax reimbursement régime of the United Nations.—Reference of the Respondent to the practice prevailing in some countries other than the United States.—Any applications for reimbursement from nationals of those countries must be decided on merits.

The validity of Information Circular ST/ADM/SER.A/1828.—The Tribunal is not competent to rescind the bulletins suspending reimbursement of the taxes in question.—The Applicant is entitled to reimbursement of national income taxation on the one-third lump sum payment.—The requests for accrued interest and special damages are rejected.—The Applicant is awarded \$2,000 as costs.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. R. Venkataraman, President; Madame Paul Bastid, Vice-President; Mr. Francisco A. Forteza; Mr. Francis T. P. Plimpton, Vice-President, alternate member;

Whereas, on 7 December 1978, William Charles Powell, a former staff member of the United Nations, filed an application in which he requested the Tribunal to:

“1. Order the rescission of ST/SGB/167 dated 16 July 1978 pursuant to article 9(1) of the Statute of the Administrative Tribunal.

“2. Order the payment of tax reimbursement on partial lump sum commutation of benefits from the United Nations Joint Staff Pension Fund.

“3. Order that interest at the prevailing rate be added to tax reimbursement, paid pursuant to paragraph 2 of this section, such interest to be computed from the date that the recipient would have been reimbursed but for the issuance of ST/SGB/167.

“4. Order the Secretary-General to reimburse the Applicant for all fees, costs and disbursements incurred in the preparation and presentation of this case, including reasonable attorney's fees, such amount to be computed and fixed by the Tribunal on the basis of documentary evidence to be submitted upon the completion of these proceedings.

“5. Order the payment to the Applicant of an indemnity pursuant to article 9(1) of the Statute of the Administrative Tribunal for incidental and consequential damages incurred by the Applicant as a result of the issuance of ST/SGB/167, such amount to be computed and fixed by the Tribunal on the basis of documentary evidence to be submitted upon the completion of these proceedings.”;

Whereas the Respondent filed his answer on 2 January 1979;

Whereas the Applicant requested oral proceedings on 5 January 1979;

Whereas the United States Government submitted an *amicus curiae* brief on 8 January 1979;

Whereas the Applicant filed written observations on 29 January 1979;

Whereas, on 30 January 1979, the Tribunal, having recognized that the United States

Government might be affected by any decision in the present case, decided under article 27 of its Rules that the *amicus curiae* brief referred to above was receivable and that the United States Government might, if it so wished, make a brief statement at the public hearing;

Whereas, on 31 January 1979, the Tribunal decided at the request of the Respondent that, since annexes 130 and 131 of the Applicant's written observations were not signed or authenticated, they could not be regarded as forming part of the record;

Whereas the Applicant submitted an additional document on 1 February 1979;

Whereas the Tribunal heard the parties and a representative of the United States at a public hearing held on 2 February 1979;

Whereas additional information was submitted at the request of the Tribunal by the Applicant on 2 February 1979 and by the Respondent on 2 and 6 February 1979;

Whereas the Applicant submitted a statement on costs on 6 February 1979;

Whereas the facts in the case are as follows:

The Applicant, a United States national born on 4 August 1917, entered the service of the United Nations on 17 June 1946 as an Administrative Assistant and was subsequently granted a permanent appointment. He reached the mandatory age of retirement on 4 August 1977. At the request of the Secretary-General, however, his appointment was successively extended to 28 February 1978 and to 30 June 1978, when he retired as Director of the Press and Publications Division of the Office of Public Information.

On 13 June 1978, in an Aide-Mémoire presented to the Legal Counsel, the United States Mission to the United Nations stated that the United States had been reviewing the question of the propriety of tax reimbursements on one-third lump sum pension payments and had reached the preliminary conclusion that the Tax Equalization Fund should not be used to reimburse taxes on one-third lump sum pension payments because such taxation (a) did not constitute a "double taxation" and (b) one-third lump sum pension payments should not be considered "salaries and emoluments" for purposes of article 18 (b) of the Convention on the Privileges and Immunities of the United Nations or General Assembly resolution 973 C (X). Upon the request of the Secretary-General, the Aide-Mémoire was examined by the Under-Secretary-General for Administration and Management, the Legal Counsel and the Controller, who jointly advised the Secretary-General that they had come to the conclusion that the views of the Government of the United States on the law of the matter were sound and recommended that the decision be taken to discontinue forthwith the practice of reimbursement of taxes on pension benefit withdrawals. On 30 June 1978 the United States Mission confirmed to the Secretary-General that the legal views concerning non-reimbursement of national taxes on one-third lump sum pension payments set forth in the Aide-Mémoire constituted the definitive conclusions of the Government of the United States on the law of the matter. On 12 July 1978 the United States Mission confirmed to the Secretary-General that the United States Government shared the view of the Legal Counsel that there was no legal basis for reimbursing national taxes on lump sum pension payments from the Tax Equalization Fund, and that, as a consequence, the practice of reimbursement of such taxes should stop immediately as of that date. On 16 July 1978 the Secretary-General issued the following Bulletin (ST/SGB/167):

"1. Questions have been raised recently as to the legality of reimbursing, out of the Tax Equalization Fund, the national taxes paid by retired or retiring staff

members on the one-third lump sum payment which they are entitled to opt to receive out of the Joint Staff Pension Fund.

"2. Consequently, legal opinions on this question were obtained. These opinions confirm that there are serious grounds for questioning the legality of the practice referred to, which has been in effect for a number of years.

"3. It has, therefore, been decided that in order to clear up any doubts as to the legality of the practice, the question should be referred immediately for an advisory opinion to the United Nations Administrative Tribunal. The Tribunal is therefore being asked to examine and advise on the question as a matter of urgency.

"4. Until such time as the Tribunal has rendered its opinion, it will be necessary to suspend immediately, as from 16 July 1978, further reimbursements out of the Tax Equalization Fund with respect to national taxes paid by retired or retiring staff members on one-third lump sum payments received out of the Joint Staff Pension Fund.

"5. The foregoing decision does not affect the right of staff members to exercise the option of withdrawal from the Pension Fund of the one-third lump sum payment. It applies exclusively to the question of reimbursement of taxes paid on these amounts from the Tax Equalization Fund."

On 12 August 1978 the Applicant requested in a letter to the Secretary-General that the administrative decision set out in the Bulletin quoted above be reviewed; his letter read in part:

"I retired from the United Nations Secretariat on 30 June 1978 and received my lump sum payment on 14 July 1978.

"It is my understanding from your bulletin that I shall not receive any tax advances on 15 September 1978 or 15 January 1979 and no final payment in April 1979 with respect to the one-third lump sum payment.

"When I opted in June 1978 for the one-third lump sum payment I had no indication or warning that a decision was about to be made to change the practice of tax reimbursement which had been in effect for a number of years. If I had been so notified I would have seriously considered the alternative of taking my full pension since the decision not to reimburse me has a very adverse effect on my financial position. Further, I believe I am being discriminated against on the grounds of my nationality since non-U.S. staff members do not have to pay income tax on their one-third lump sum pension withdrawals.

"Should my request for reconsideration of the administrative decision be denied, I seek your agreement to bypass the Joint Appeals Board and take my case directly to the Administrative Tribunal.

"Finally, I learned of the contents of the bulletin to the staff number 167 only by accident. I consider the failure of the Administration to notify formally those who have recently retired and who are affected by this decision a serious defect in procedure."

By a blanket reply dated 31 August 1978 from the Assistant Secretary-General for Personnel Services, the Applicant and all other staff members concerned were advised that the Secretary-General was not in a position to change his decision and that he agreed to waive the requirement to proceed first through the Joint Appeals Board in order to permit the staff members concerned to submit their cases directly to the Tribunal. On 29 Sep-

tember 1978 the Tribunal decided that it had no competence to entertain the Secretary-General's request for an advisory opinion. On 29 November 1978 the Secretary-General issued the following bulletin (ST/SGB/169):

"1. By a bulletin of 16 July 1978 (ST/SGB/167), the staff was informed of the serious question that had been raised concerning the legality of reimbursing national taxes paid by retired and retiring staff members on commuted retirement benefits from the United Nations Joint Staff Pension Fund, and that, pending the receipt of an advisory opinion that was to be requested from the Administrative Tribunal, such reimbursement payments would be suspended.

"2. The Administrative Tribunal has decided that it has, under its statute, no competence to entertain a request for an advisory opinion. It will thus be necessary that the matter be resolved in the course of appeals regularly submitted to the Tribunal.

"3. Consequently, it has been decided to continue the suspension of reimbursements of national taxes paid on any commuted retirement benefit received from the United Nations Joint Staff Pension Fund which has been in effect since 16 July 1978. . . ."

On 7 December 1978 the Applicant filed the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The fundamental principles of the independence of international civil servants and the equality of treatment of staff members mandate tax reimbursement. An analysis of the historical development of the tax reimbursement system demonstrates, conclusively, the consistent intent of the General Assembly to ensure that all United Nations staff members be free to exercise their duties as international civil servants independently and be treated equally regardless of the tax policies of the Member States.

2. Tax reimbursement on lump sum withdrawals from the Pension Fund is consistent with the governing principles of equal pay for equal work.

3. One-third lump sum retirement benefits qualify for reimbursement under Staff Regulation 3.3 (f):

- (i) One-third lump sum retirement benefits constitute "salaries and emoluments";
- (ii) The one-third lump sum pension distribution is paid by the United Nations;
- (iii) One-third lump sum distributions are payable to staff members or officials subject to both staff assessment and national income taxation.

4. The principle of past practice requires continuation of tax reimbursement on one-third lump sum withdrawals from the Pension Fund.

5. The Secretary-General has improperly interfered with the acquired rights of the staff by discontinuing tax reimbursement on one-third lump sum withdrawals.

6. Although the one-third lump sum Pension Fund distribution is not subject to double taxation, it is nevertheless properly subject to tax reimbursement.

7. The failure of the Secretary-General to consult with the Staff Council and/or the Joint Advisory Committee prior to the issuance of the 16 July 1978 Bulletin requires the reinstatement of tax reimbursement payments.

8. Discontinuance of tax reimbursement on one-third lump sum distributions violates fundamental notions of equity and justice.

Whereas the Respondent's principal contentions are:

1. The *travaux préparatoires* of the Convention on the Privileges and Immunities of the United Nations establish that pensions paid to former officials were not intended to be covered by section 18 (b) of the Convention.

2. The conclusion that pensions are not exempt from national income taxation under the Convention is borne out by subsequent practice.

3. No sufficient legal basis exists for drawing a distinction between periodic pension payments, and a part of those payments taken, at the pensioner's option, as a lump sum (i.e. partially commuted retirement benefits), which would warrant the conclusion that the former benefits are taxable and the latter are not.

4. The conclusion that there is no sufficient basis for a distinction of the nature just mentioned is borne out by practice, as exemption from taxation for such commuted benefits has not been asserted and reimbursements have not been paid, except for a brief period between the end of 1974 and the middle of 1978, and then only within the United Nations and not, for the most part, within the other organizations that form part of the "common system".

5. The evidence now available shows that the liability of commuted retirement benefits to income tax is not confined to the United States, but is established also in certain other countries, some of which are host States to specialized agencies and are parties, without reservation on matters of taxation, to the Convention on the Privileges and Immunities of the United Nations and the corresponding instruments relating to other common system organizations.

6. Even if the Convention had provided for immunity from taxation of pension benefits, which is not the case, an automatic right to reimbursement of taxes on commuted lump sum payments does not arise in the United Nations, as Staff Regulation 3.3 (f) only authorizes reimbursement, with specified exceptions, when the sums concerned are "subject both to staff assessment and to national income taxation".

7. The Applicant presents no evidence that would support an assertion that he was given any specific undertaking by the Respondent that the Staff Regulations and Rules or administrative practices in general, or the tax reimbursement régime in particular, applicable to him on the date he would normally have retired (31 August 1977), would not be changed to his disadvantage during the period of extended service.

The Tribunal, having deliberated from 29 January 1979 to 13 February 1979, now pronounces the following judgement:

I. The parties are in agreement on the facts relating to the situation of the Applicant: he has United States nationality, he retired from the United Nations on 30 June 1978 and, in accordance with his request submitted in June 1978, he received on 14 July 1978, pursuant to article 29 (d) (i) of the Pension Fund Regulations, approximately \$152,000 representing one third of the actuarial equivalent of his pension.

Having "learned by accident" of the existence of the Secretary-General's Bulletin ST/SGB/167 of 16 July 1978, addressed to the members of the staff, in which it was stated that it had been decided to suspend immediately, as from that date, "further reimbursements out of the Tax Equalization Fund with respect to national taxes paid by retired or retiring staff members on one-third lump sum payments received out of the Joint Staff Pension Fund", the Applicant understood from that Bulletin that he would not receive from the United Nations any tax advances on 15 September 1978 or 15 January

1979 and no final payment in April 1979 to cover the taxes which he would owe the United States authorities on the sum received on 14 July 1978.

On 12 August 1978 the Applicant accordingly requested the Secretary-General to reconsider in so far as he was concerned the decision not to provide reimbursement, which would have "a very adverse effect on [his] financial position".

This request was denied on 31 August 1978 in a blanket reply addressed to the Chairman of the group representing the staff members affected by the Secretary-General's decision. That reply authorized the staff members concerned to submit their cases directly to the Administrative Tribunal.

As the suspension of reimbursement was continued in accordance with the decision referred to in the Secretary-General's Bulletin ST/SGB/169 of 29 November 1978, the Applicant filed his application on 7 December 1978.

II. Before examining the requests submitted by the Applicant, the Tribunal notes, on the one hand, that the legal situation in which it is called upon to render a decision is a very special one and, on the other hand, that this situation, which has given rise to strong reactions among certain elements of the staff, had its origin in representations made to the Secretary-General by the United States Government and is related to the difficult problem of the scope of the immunity from taxation of United Nations staff members. Certain preliminary observations on these two questions must be made.

III. The facts which make the present legal situation a very special one are the following:

(a) The Secretary-General's Bulletins ST/SGB/167 and 169 have the effect of preventing the application of the procedure for reimbursement of United States taxes on partial lump sum payments. However, the decision is a provisional one of "suspension".

(b) The decision is expressly based on the fact that "questions have been raised recently as to the legality of reimbursing, out of the Tax Equalization Fund, the national taxes paid by retired or retiring staff members on the one-third lump sum payment".

Thus what is involved is a provisional measure resulting from a challenge to the legality of a practice which the United Nations had followed since 16 December 1974.

(c) The Secretary-General thought at first that it would be possible to refer the matter to the Administrative Tribunal for an advisory opinion to clear up any doubt as to the legality of the practice. The suspension of reimbursement as envisaged in Bulletin ST/SGB/167 was to continue until such time as the opinion requested was rendered.

The Tribunal having informed the Secretary-General on 2 October 1978 that under its Statute it had no competence to render an advisory opinion, Bulletin ST/SGB/169 stated: "It will thus be necessary that the matter be resolved in the course of appeals regularly submitted to the Tribunal". In his answer, the Respondent expressed "the very strong hope . . . that the Tribunal will proceed to give an authoritative ruling on whether or not the Secretary-General is authorized to reimburse national income taxes on the payments here in question".

In addition to the present application, two other applications have been filed by staff members who are still in service.

IV. The Tribunal must examine each application in accordance with its Statute and render in each case a judgement taking into consideration the situation of each Applicant.

It is for the Secretary-General to take the necessary action with a view to the adoption

by the appropriate authorities of the measures which may be required in the light of the Tribunal's judgement.

V. Because of the conditions in which it arose and the reactions which it has provoked, the question under consideration cannot be examined without first recalling certain essential facts relating to the general problem of the practical implementation of the principle of immunity from taxation of United Nations staff members.

Reimbursement of taxes on all commuted retirement benefits was envisaged in Information Circular ST/ADM/SER.A/1828 of 16 December 1974 from the Controller to "members of the staff who are liable to pay income taxes on United Nations salaries and emoluments". This circular expressly mentioned (para. 15) "the taxable portion of partial and full lump sum amounts received from the United Nations Joint Staff Pension Fund" among the sums received in 1974 and subject to tax reimbursement. It also contains (paras. 16 and 17) information on the tax treatment applicable. Information Circular ST/IC/77/90 of 30 December 1977 concerning taxes payable for the year 1977 contains (paras. 14, 16 and 17) the same information.

In March 1977 the Office of Legal Affairs issued a guide to national taxation applicable to United Nations Pension Fund benefits, for use by the offices of the United Nations concerned and the beneficiaries. This guide, which replaced a similar document of 1 April 1968, refers in particular to the United States legislation and expressly affirms the principle of reimbursement of taxes on all commuted retirement benefits (paras. 5, 22 and 25).

Lastly, the Tribunal notes that at the "pre-retirement programme" organized in April 1978 with the participation of staff members from the competent services, a senior official of the Office of Legal Affairs stated that the United Nations "has from the beginning reimbursed taxes on full lump sum settlements as on withdrawal benefits, and has since 1974 also reimbursed taxes on . . . the so-called one-third partial lump sum".

The practical importance of the reimbursement has been noted by both parties. The Applicant has stated that the tax on the sum of \$152,000 which was paid to him would amount to \$60,000, or about 40 per cent. This figure has not been questioned in the course of the proceedings.

It is clear from the above that for United States staff members approaching retirement, the prospect of reimbursement of taxes presented by the Information Circular of 16 December 1974 may justifiably have been a consideration in opting for the lump sum payment of one third of their pension benefits.

VI. The Tribunal notes that while the titles of the Information Circulars on the subject are very general, their provisions deal exclusively with the situation of staff members who are United States citizens or who have signed a waiver of immunities. The "Guide to national taxation of UNJSPF benefits" issued in March 1977 was prepared "with special reference to United States taxes".

Thus the documents relating to reimbursement envisage, in effect, reimbursement of taxes levied by the United States. However, through the Tax Equalization Fund, as will be explained later in the judgement, the United States actually bears the financial burden of such reimbursement. In view of this fact the United States Government considered it appropriate and justifiable to inform the Secretary-General of its doubts concerning the legality of the practice of reimbursement under the Information Circular of 16 December 1974, and to ask that reimbursement be discontinued.

VII. The Applicant seems to question the propriety of such action under Article 100 of the Charter. Whatever may have been the effect of the representations of the United States Government on the decision taken by the Secretary-General, the Tribunal has only to consider the legality of reimbursement under the Information Circular of 16 December 1974.

VIII. In earlier judgements the Tribunal recalled the origin of the reimbursement of taxes payable by United Nations staff members (Judgements Nos. 67, *Harris*, 88, *Davidson*, 207, *Squadri*).

When Article 105 of the Charter concerning the privileges and immunities of the Organization was drawn up, it was stated by the Rapporteur of Committee IV/2 of the United Nations Conference on International Organizations that "the terms privileges and immunities indicate in a general way all that could be considered necessary to . . . the independent exercise of the functions and duties of [the] officials [of the Organization's organs]: *exemption from tax . . .*" [Emphasis added.] While recognizing that it was not necessary to specify in the Charter itself the list of such privileges and immunities, the Rapporteur added: "if there is one certain principle it is that no Member State may hinder in any way the working of the Organization or take *any measures the effect of which might be to increase its burdens, financial or other*". [Emphasis added.]

In the report by the Executive Committee to the Preparatory Commission of the United Nations, the proposals concerning the rates of salaries were "based on the assumption that the official salaries and allowances of officials will be free of tax in all countries" (chap. VI, sect. 2, para. 68). However, the same report, noting that certain Governments imposed taxes on the salaries of their nationals, also indicated (chap. V, para. 8): "This has . . . raised the question whether the United Nations should not pay some special allowance to those of its employees who are paying income tax, *in order to produce equality*". [Emphasis added.]

During the first part of its first session, the General Assembly took a clear position in resolution 13 (I): "there is no alternative to the proposition that exemption from national taxation for salaries and allowances paid by the Organization is indispensable to the achievement of equity among its Members and equality among its personnel". To this basic principle two elements were added, namely: "Pending the necessary action being taken by Members to exempt from national taxation salaries and allowances paid out of the budget of the Organization, the Secretary-General is authorized to reimburse staff members who are required to pay taxation on salaries and wages received from the Organization"; and "In the case of any Member whose nationals in the service of the Organization are required to pay taxation on salaries and allowances received from the Organization, the Secretary-General should explore with the Member concerned methods of ensuring as soon as possible the application of the principle of equity among all Members".

The Applicant's first letter of appointment, dated 17 June 1946, stated expressly: "Any taxation levied on your salary by your national government will be refunded to you by the United Nations Organization", and Information Circular IC/68 of 17 June 1946 provided: "The tax refund provision is simply part of a contract between the United Nations and the individual staff member employed thereunder."

IX. The General Assembly sought to attain the objectives set in resolution 13 (I) by various means.

First, a provision concerning immunity from taxation was included in the Convention

on the Privileges and Immunities of the United Nations adopted on 13 February 1946, section 18 of which provides: "Officials of the United Nations shall . . . (b) be exempt from taxation on the salaries and emoluments paid to them by the United Nations."

When in 1970 the United States acceded to the Convention, which is currently in force in respect of most of the Member States, it made the following reservation:

"Paragraph (b) of section 18 regarding immunity from taxation . . . shall not apply with respect to United States nationals and aliens admitted for permanent residence."

The United States was thus adhering to its traditional principle that all United States nationals and resident aliens should be taxed on the same basis and that there should be no exceptions by reason of governmental service, whether domestic or international. Consequently, the provisions of section 18 (b) are not binding on the United States.

X. Without awaiting the entry into force of the Convention and in view of possible reservations to section 18 (b), the General Assembly considered it necessary to reaffirm the principle of immunity from taxation and to authorize the Secretary-General to reimburse national taxes paid by staff members.

At its third session the General Assembly, in addition to the reference to the basic objectives of equity among the Member States and equality among members of the staff of the Organization, introduced a new theme deriving directly from its decision to impose on United Nations staff members a direct assessment comparable to national income taxation. Resolution 239 (III) A provided that "the assessment . . . shall be collected by the United Nations by withholding it from payments". Such assessment was taken into consideration when, in resolution 239 (III) C relating to exemption from national income taxation, the General Assembly requested the Member States "to grant relief from double taxation" to their nationals. The latter consideration thus came only into play three years after the Secretary-General had been authorized to reimburse national taxes.

XI. The introduction of staff assessment led after a number of years to a change in the method of financing the reimbursement of national taxes. The first reimbursement authorizations given to the Secretary-General did not specify the sources of the funds needed to reimburse staff members. The funds were paid from the regular budget of the Organization. From 1949 to 1952 the necessary authority was granted in the Working Capital Fund resolution of the year. In 1953 and 1954 such authority was included under the title "common staff costs" in the resolutions dealing with supplementary estimates. Thus up to that time the reimbursement was financed by funds provided by all Member States. Furthermore, according to resolution 239 (III) A concerning staff assessment, "revenue derived from the assessment shall be applied as an appropriation-in-aid of the budget".

The paradox resulting from that situation was noted by the Secretary-General in a report to the ninth session of the General Assembly: "A Member State which has not granted either tax exemption or relief from double taxation to its nationals who are staff members benefits twice: first from the national taxes it levies on such nationals, and secondly, from the income derived from the Staff Assessment Plan. On the other hand, a Member State which has granted tax exemption or relief from double taxation to its nationals who are staff members shoulders an additional burden in contributing to the budget appropriation for reimbursement of national income tax levied by other Member States."

On the proposal of the Secretary-General, General Assembly resolution 973 (X) established a Tax Equalization Fund in which the revenues from staff assessment are credited to accounts for each Member State as a potential credit against its assessed contributions. Whenever any staff member paid from the regular budget is subjected to both staff assessment and to national income taxation in respect of the salaries and emoluments paid to him by the United Nations, the Secretary-General is authorized to refund to him by way of double taxation relief the amount of such taxes, charging such payment against the credit of the Member State imposing the tax.

In resolution 1099 (XI) the General Assembly decided that the same system would be applied to local and state income taxes, obviously taking into account the situation of the United States and wishing to ensure that the burden of reimbursement of an amount estimated at \$160,000 for 1956 would not be borne by the regular budget of the United Nations.

The Tribunal notes further that, taking into account "the purpose of the United Nations income tax reimbursement system as a device to avoid placing taxable staff members at a disadvantage in comparison with tax-exempt staff with whom they serve, the Secretary-General concluded that the amount of the refund of the income tax paid by a staff member in respect of his official income, which the Secretary-General is authorized to make under Staff Regulation 3.3 (f), should be deemed to include the difference between the amount of the social security tax the staff member is required to pay as an employee of the United Nations and the amount he would have paid as an employee of a taxable employer" (document A/6491, para. 9). The Secretary-General stated that this solution afforded "reasonable relief", that it dealt equitably with the staff concerned and that no additional charge would be borne by the Organization.

Thus the Tax Equalization Fund system was used to provide a remedy for the particular circumstances of United States staff members even though the situation was not one which had originally been foreseen.

XII. It was not until the tax reimbursement system had been established on a permanent basis that the provisions relating to staff assessment and to tax reimbursement were introduced by General Assembly resolution 1095 (XI) into the Staff Regulations as Regulation 3.3. This text generally followed resolution 973 (X), with the addition of the last subparagraph which provides for reimbursement of national income tax in respect of dependency benefits and post adjustments even though they are not subject to staff assessment.

The current text of the Regulation reads as follows:

"REGULATION 3.3:

" . . .

"(f) Where a staff member is subject both to staff assessment under this plan and to national income taxation in respect of the salaries and emoluments paid to him by the United Nations, the Secretary-General is authorized to refund to him the amount of staff assessment collected from him provided that:

"(i) The amount of such refund shall in no case exceed the amount of his income taxes paid and payable in respect of his United Nations income;

"(ii) If the amount of such income taxes exceeds the amount of staff assessment, the Secretary-General may also pay to the staff member the amount of such excess;

- “(iii) Payments made in accordance with the provisions of the present regulation shall be charged to the Tax Equalization Fund;
- “(iv) A payment under the conditions prescribed in the three preceding subparagraphs is authorized in respect of dependency benefits and post adjustments, which are not subject to staff assessment but may be subject to national income taxation.”

Thus the legal basis of the right of staff members to reimbursement is now to be found in that Regulation and not, as formerly, in successive resolutions of the General Assembly which, moreover, invited the Secretary-General to omit from all personnel contracts any clause which bound the Organization to refund national income taxation in the absence of annual authorization of the General Assembly.

XIII. The Tribunal notes that under Article 97 of the Charter the Secretary-General is the chief administrative officer of the Organization. Under Article 101 the staff shall be appointed by the Secretary-General under regulations established by the General Assembly. The Staff Regulations of the United Nations state under the title “Scope and purpose” that the Secretary-General, as the Chief Administrative Officer, shall provide and enforce such staff rules consistent with these principles *as he considers necessary*. [Emphasis added.] Thus the Secretary-General has discretion in framing the Staff Rules and in applying the Staff Regulations. In the exercise of these functions, the Secretary-General issues administrative orders and information circulars which the Tribunal has held to have the same force and effect as the Staff Rules unless inconsistent with the Staff Regulations. In the present case, such a circular, namely Information Circular ST/ADM/SER.A/1828 of 16 December 1974 extending tax reimbursement to one-third lump sum payments, was issued.

XIV. The Tribunal has therefore to examine the legal effect of the Information Circular of 16 December 1974 which provided that “the taxable portion of partial . . . lump sum amounts received from the United Nations Joint Staff Pension Fund” should be included in the same statement of taxable earnings as regular salary (gross), allowances and additional salary payments upon separation.

This circular, which was addressed to the “members of the staff who are liable to pay income taxes on United Nations salaries and emoluments”, stipulated that “A staff member who owes such taxes for 1974 and is entitled to payments from the United Nations may apply for United Nations cheques, which will be paid as provided for in Staff Regulation 3.3 (f)”.

In a letter of 22 April 1975 addressed to a former staff member who had requested retroactive application of the circular the Controller, in denying the request, defined the circular as an “administrative decision, taken after legal advice and consultation”. The Controller noted that this decision constituted a “change in the system”, that “the evolving of a system, over time, . . . was the best if not the only way to provide administrative relief for the nationals of those Member States which had not adhered to or which had reserved their positions on the tax portions of the Convention on Privileges and Immunities”, and that “the changes made in 1974” were “a further step toward achieving still more equity between the staff members of different nationalities”.

XV. The Tribunal has often been called upon to rule on the legal effect of circulars and on the rights flowing therefrom. In Judgement No. 89 (Young), it stated with reference to a circular of general scope:

“Each of the staff members in question was entitled to expect that his individual legal status would be determined on the basis of the interpretation given in that circular, which had been issued by the competent authority and was binding on the latter until properly amended.

“The Tribunal considers that the Respondent is not justified in barring in an individual case the application of the interpretation of the relevant provisions he has given in a circular of general scope.”

In Judgement No. 195 (*Sood*), the Tribunal acknowledged that the document in question enunciated “a new policy . . . designed to bring about a fundamental change in the future conditions of employment of precisely that category of staff into which the Applicant fell. It is the view of the Tribunal that document . . . created rights for staff members in this category even though they may not have been aware of the existence of the document or of the rights which it created.”

In conformity with those precedents, the Tribunal decides that the Information Circular of 16 December 1974, the legality of which will be passed upon later, had created a right which the Applicant could claim when he opted for a one-third lump sum payment.

XVI. In Judgement No. 202 (*Quéguiner*), the Tribunal explained the meaning of respect for acquired rights in cases other than those in which a contractual stipulation exists:

“Respect for acquired rights also means that the benefits and advantages accruing to a staff member for services rendered before the entry into force of an amendment cannot be prejudiced. 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 only to benefits and advantages accruing through service after the adoption of such amendment (Judgement No. 82, *Puvrez*).”

This principle prohibits the application of Bulletins ST/SGB/167 and 169 suspending reimbursement of national taxes with respect to the Applicant's right to a commuted retirement benefit from the Pension Fund. The Tribunal reaches the conclusion that the right to reimbursement established in the Applicant's favour must be respected by the Respondent.

XVII. The Tribunal observes that under its Statute it is competent to hear and pass judgement upon applications submitted in individual cases. When the Tribunal rescinds a contested decision, it does so in relation to the case of an Applicant and must fix compensation should the Secretary-General decide not to comply with the order of rescission. However, the Tribunal has not been given competence to rescind *erga omnes* a decision which is in the nature of a regulation. In view of its general scope, the suspension ordered by the Secretary-General in Bulletins ST/SGB/167 and 169 is of the nature of a regulation and as such cannot be rescinded by the Tribunal.

XVIII. The Tribunal observes that the Respondent has sought a ruling of the Tribunal on the legality and validity of the position taken in 1974 with regard to tax reimbursement on partial commuted lump sum payments. The United States Mission to the United Nations has stated on 12 July 1978 that “there is no legal basis for reimbursing national taxes on lump sum pension payments from the Tax Equalization Fund, and that, as a consequence, the practice of reimbursement of such taxes should stop immediately

as of this date.” The Applicant, on the other hand, contends that the suspension of tax reimbursement on the one-third lump sum payment is violative of the principle of equality of treatment among staff members of the United Nations.

The Applicant states that only the United States among all Member States taxes partial commutation benefits. He points out that United States and non-United States staff members of the United Nations with identical appointments and identical length of service would receive different partial commutation benefits in the absence of tax reimbursement. He observes that General Assembly resolution 13 (I) recognized that exemption from national taxation for salaries and allowances paid by the Organization was indispensable to the achievement of equity among its members and equality among its personnel and, pending necessary action by members, authorized the Secretary-General to reimburse staff members who were required to pay taxation on salaries and wages received from the Organization. The representative of the United States, hereafter called the *Amicus*, states that nearly all States which are parties to the Convention on the Privileges and Immunities of the United Nations tax periodic pension payments, a fact which is not in dispute. He is not able to deny that one-third lump sum payments are not taxed by most countries. The *Amicus* states: “Many States party are not confronted with the question since many countries do not tax income earned outside of their borders. Since the one-third lump sum pension payment may be received by a former staff member shortly after retirement and before he had re-established residence in his country, the one-third lump sum may be treated as exempt from taxation, not because of the General Convention but because of national tax laws regarding income earned abroad.”

Both the Respondent and the *Amicus* resist the claim of the Applicant based on the principle of equality between staff members on the ground that the principle by itself affords no right to reimbursement of taxes in the absence of specific authorization by the General Assembly such as resolution 13 (I), resolution 239 (III), resolution 973 (X) and Staff Regulation 3.3 (f).

Hence the Tribunal has to examine with reference to the relevant provisions the validity of the system of tax reimbursement on partial commuted lump sum retirement benefits introduced by the Secretary-General in Information Circular ST/AIM/SER.A/1828 of 16 December 1974.

XIX. The Respondent and the *Amicus* contend that Staff Regulation 3.3 (f) constitutes the only authority for reimbursement of national income taxation suffered by the staff member and that the tax levied on a one-third lump sum payment cannot be reimbursed as it does not meet the criteria mentioned in the Regulation. They urge that the Regulation only authorizes reimbursement of national income taxation in respect of “salaries and emoluments” paid to the staff member by the United Nations and that one-third lump sum payments do not constitute either salaries or emoluments. In support of this contention, they argue that section 18 (b) of the Convention on the Privileges and Immunities of the United Nations provides that officials shall be exempt from taxation on salaries and emoluments paid to them by the United Nations, that the intention of the General Assembly is to place a staff member who is subject to taxation in the position in which he would have been if his Government had acceded to section 18 (b) of the Convention, that Staff Regulation 3.3 (f) also provides for reimbursement of taxes on “salaries and emoluments” paid by the United Nations and that therefore the term “salaries and emoluments” used in Regulation 3.3 (f) should bear the same interpretation as the identical phrase in section 18 (b) of the Convention. The Respondent, relying on

a report of the Sixth Committee to the General Assembly (document A/43/Rev.1) reading in part:

“The Sub-Committee on privileges and immunities examined another proposal submitted by the Advisory Group of Experts on administrative and budgetary matters, made with a view to exempting all members of the staff of the Organization from taxation on retirement benefits and exempting their beneficiaries from taxation on death benefits, either in the form of a lump sum or benefits paid by the Organizations to widows and orphans. The Sub-Committee decided, without prejudice to this question being taken up and considered separately at a later stage, that a provision to this effect should not be included in the general Convention.”,

argues that the *travaux préparatoires* of the Convention clearly excluded pension paid to former staff members from section 18 (b) of the Convention and that pension payments are therefore not eligible for reimbursement. It is further contended that “There can be no doubt that one-third lump sum payment is a pension payment”. On the foregoing premises, the Respondent argues that one-third lump sum payments are not “salaries or emoluments” eligible for reimbursement under Staff Regulation 3.3 (f).

The Tribunal considers that the Respondent’s contention assumes that a one-third lump sum payment is a pension payment and thus begs the question. Whether a one-third lump sum payment partakes of the character of other lump sum payments under articles 29 (d) (ii), 29 (e), 30 (c), 31 (c) (ii) and 32 of the Pension Fund Regulations or of periodic payments of retirement benefits the first of which is a one-third lump sum, has to be ascertained from the relevant provisions of the Pension Fund Regulations, the practices in the United Nations and the like.

XX. In support of the contention that a one-third lump sum payment is a pension payment, the Respondent and the *Amicus* argue that, under article 29 (d) (i) of the Pension Fund Regulations, a participant has the option of commuting into a lump sum to the extent of one third the actuarial equivalent of his retirement benefit and that a one-third lump sum is simply a commutation of the periodic pension payments. In order to examine the validity of this argument, it is necessary to examine the relevant provisions of the Staff Regulations and Rules and of the Pension Fund Regulations. Part V of the Pension Fund Regulations deals with such benefits. According to article 28 (b), “Retirement, early retirement and deferred retirement benefits shall be payable at periodic intervals for life.” It is admitted by the parties that such periodic payments are subject to national taxation without reimbursement by the United Nations.

Article 29 which deals with retirement benefits runs as follows:

“Article 29

“RETIREMENT BENEFIT

“(a) A retirement benefit shall be payable to a participant whose age on separation is sixty years or more and whose contributory service was five years or longer.

“(b) The benefit shall, subject to (c) below, be payable either:

“(i) At the standard annual rate which is obtained by multiplying the years of the participant’s contributory service, not exceeding thirty, by 1/50 of his final average remuneration, and his years of contributory service in excess of thirty, not exceeding two, by 1/100 of his final average remuneration, or

“(ii) At the minimum annual rate which is obtained by multiplying the years of the participant’s contributory service, not exceeding ten, by the smaller of 180 dollars or 1/30 of his final average remuneration, if the benefit so calculated would be greater than the amount under (i) above.

“(c) The annual rate of the benefit shall nevertheless not be less, when no other benefit is payable on the account of the participant under these Regulations, than the smaller of 300 dollars or the final average remuneration of the participant.

“(d) A benefit payable at the standard annual rate may be commuted by the participant into a lump sum:

“(i) If the rate is 300 dollars or more, to the extent of one third of its actuarial equivalent or the amount of his own contributions, whichever is greater, or

“(ii) If the rate is less than 300 dollars, to the extent of its full actuarial equivalent; if a participant is married, the prospective benefit payable to his spouse may also be commuted at the standard annual rate of such benefit.

“(e) A benefit payable at the minimum annual rate or at the rate under (c) above may be commuted into a lump sum as in (d) above, if the participant elects to receive it instead at the standard annual rate.”

Under paragraph (d) (i) of the article quoted above, a retiring staff member is entitled to commute his benefit to the extent of one third of its actuarial value if the standard annual rate is \$300 or more. If the standard annual rate is less than \$300, the retiring staff member may commute the full actuarial equivalent. It is not in dispute that the United Nations reimburses taxes, if any, on the full lump sum withdrawal under article 29 (d) (ii).

Paragraph (c) of article 29 provides for payment of a minimum annual benefit to certain categories of less paid employees. Article 29 (e) authorizes commutation of the said benefit into a full lump sum. National income taxes, if any, on the aforesaid lump sum are also reimbursed by the United Nations.

Under article 30 of the Pension Fund Regulations, a staff member retiring at or after the age of 55 but before 60 is entitled to commute his benefit into either a one-third lump sum or a full lump sum according to article 29 (d). It is admitted by the parties that any national taxes on the commuted full lump sum are reimbursed by the United Nations.

Under article 31, a retiring staff member whose age on separation is less than 60 but whose contributory service was five years or longer is entitled to a deferred retirement benefit which may be commuted into a lump sum equal to his own contributions if the rate of the benefit is \$300 or more, or commuted into a full lump sum if such rate is less than \$300. Any national taxes on the latter full lump sum payment are also reimbursed.

Under article 32, staff members whose age on separation is less than 60, or those aged 60 or more but not eligible for a retirement benefit, are entitled to a withdrawal settlement which consists of the participant’s contributions increased by 10 per cent for each year of contributory service in excess of five up to a maximum of 100 per cent as a full lump sum payment. Any national taxes on this withdrawal settlement are also reimbursed.

In response to a question put by the Tribunal, the Respondent summed up the provisions regarding commutation of retirement benefits as follows:

“A. Limited commuted lump sums are payable under articles 29 (d) (i), 29 (e) (if sufficiently large), 30 (c) (if sufficiently large) and 31 (c) (i). . . .

“B. 100 per cent commuted lump sums are payable under articles 29 (d) (ii), 29 (e) (if sufficiently small), 30 (c) (if sufficiently small) and 31 (c) (ii). . . .

“C. A withdrawal settlement is payable under article 32,”

It is thus seen that items mentioned in B and C above have always been treated as eligible for tax reimbursement and have always been reimbursed for over thirty years.

The Applicant argues that there is not, nor can there be, any distinction between a full lump sum payment of the actuarial equivalent of a retirement benefit and a partial lump sum payment of the same benefit and that, when national taxes on the former have been reimbursed without objection, the same principle should apply to partial lump sum payments also. The Respondent contends that a full lump sum withdrawal settlement entirely terminates the participant's connexion with the Pension Fund and eliminates any future claims for benefits from it and that, in contrast, the partial or one third lump sum commutation retains an entitlement to periodic pension to himself and to his survivors. The Tribunal, while recognizing the difference between partial lump sum withdrawal and full lump sum withdrawal as regards future relationship with the Pension Fund, notes that both benefits are payable by the Pension Fund and that there is no legal basis for the difference between a partial lump sum payment and a full lump sum payment.

The Respondent states that full lump sum payments are generally small amounts while one-third lump sum payments are always large. The Tribunal considers that the size of payment cannot constitute a legal basis for granting or refusing reimbursement of taxes. Also, the Tribunal observes that in both cases under Regulation 29 (d) (i) and 29 (d) (ii) the method of ascertainment of the standard annual rate and the calculation of the benefit on the basis of the actuarial equivalent are the same. The Tribunal therefore considers that the law and practice applicable to full lump sum payments apply with equal force to partial lump sum payments.

XXI. The Respondent argues that the partial lump sum payments do not fall under the expression “salaries and emoluments” which alone qualify for tax reimbursement under Staff Regulation 3.3 (f).

The Tribunal observes that in chapter 2, section 23 of the Administrative Manual (1 July 1951) dealing with “income tax reimbursement policy”, it is stated: “‘salaries and allowances’ or ‘earnings’ *for purposes of this section* include . . . lump sum distribution from the Pension Fund in excess of staff member's contributions . . .”. Again in Information Circular ST/ADM/SER.A/1657 of 14 December 1972, it is stated in paragraph 15 that “salary and emoluments include . . . the taxable portion of the Pension Fund withdrawal benefit . . .”.

It appears from the two above documents that the United Nations Administration has always considered full lump sum withdrawals from the Pension Fund as emoluments of the staff.

XXII. The Tribunal further notes that, in paragraph 218 of its report (document A/4427), the Pension Review Group set up by General Assembly resolution 1310 (XIII) recognized that the conditions in international organizations were not wholly comparable

to those in national administrations. They went on to say: "We agree that an official returning to his own country after a period of expatriate service may have valid reasons for requiring a cash sum exceeding that which can be provided under the salary and allowances system. We are prepared to recommend, therefore, that a withdrawing participant should be entitled . . . to receive in cash the amount of his own contributions with interest, and to receive as a deferred annuity the balance of the actuarial value of his earned retirement benefit on a single-life basis."

It appears to the Tribunal that the facility of partial lump sum withdrawal was afforded by the General Assembly to retiring staff members to meet difficult situations such as reintegration into their own national life. From that point of view, the one-third lump sum payment may also be regarded as a terminal payment which under Staff Regulation 3.3 (f) is eligible for reimbursement.

XXIII. The Respondent and the *Amicus* argue that a retired staff member does not qualify for tax reimbursement and that Staff Regulation 3.3 (f) only envisages refund to a staff member subject to national income taxation. It is true that articles 29, 30 and 32 of the Pension Fund Regulations contemplate payment of the respective benefits after retirement or separation from service. The Tribunal however observes that refunds in respect of salaries, terminal payments, lump sum withdrawals and withdrawal settlements from the Pension Fund are made to former staff members after separation. As the Respondent himself acknowledges in paragraph 36 of his answer: "this is frequently necessary, because on the one hand an exact settlement of all emoluments due can frequently not be made on the last day of service . . . and on the other a definitive tax reimbursement cannot be made until a tax return is due some months after the end of the tax year." The Tribunal notes that tax reimbursements on full commuted retirement benefits and withdrawal benefits can be made only to former staff members and that the same principle would apply to tax reimbursements on partial commuted retirement benefits. The Tribunal is fortified in the view it takes by the statement of income tax reimbursement policy contained in chapter 2, section 23 of the Administrative Manual (1 July 1951) where under the heading "Definitions" staff members are defined as follows: "The term 'staff members', for the purposes of this section includes separated staff members." Thus the Administration has clearly recognized that for the purposes of reimbursement of taxes, the term "staff members" also included former staff members.

The Tribunal therefore holds that the Respondent's contention that former staff members are not entitled to reimbursement of national income taxation under Staff Regulation 3.3 (f) lacks validity.

XXIV. The Respondent and the *Amicus* contend that the entitlement to tax reimbursement arises only where a staff member is subject both to staff assessment and to national income taxation in respect of the salaries and emoluments paid to him by the United Nations. According to them, Staff Regulation 3.3 (f) becomes operative only as a relief against a double taxation, namely staff assessment on the one hand and national income tax on the other. Since no staff assessment is levied on a one-third lump sum payment, they argue that no reimbursement should be made of the national income taxation levied on such payment. The Applicant contends that Staff Regulation 3.3 (f) requires that the staff member should be subject to staff assessment and to national income taxation and not that the particular receipt should be subject to staff assessment.

The Tribunal considers that the real point for determination is whether Staff Regulation 3.3 (f) is exhaustive and does not admit of other items than those mentioned

therein for tax reimbursement. Subparagraph (iv) of the Regulation provides that national taxes on dependency benefits and post adjustments, "which are not subject to staff assessment but may be subject to national income taxation", may be reimbursed. It is not in dispute between the parties that besides the aforesaid items reimbursement of national taxes on other allowances—for children's education, installation, travel, rental, repatriation and expatriation—which are not subject to staff assessment has always been made. Similarly, national income taxation on withdrawal settlements under article 32 and on full lump sum payments under articles 29, 30 and 31 of the Pension Fund Regulations has always been reimbursed even though those payments are not subject to staff assessment. In Judgement No. 67 (Harris), the Tribunal observed: "Nevertheless during the hearing before the Tribunal, the Respondent has stated that national taxes are also refunded in respect of certain payments which are not subject to assessment; the examples mentioned were *ex gratia* payments and part of the actuarial equivalent of retirement benefit payable to staff members who cease to perform their functions after more than five years' service with the United Nations. The Tribunal notes, therefore, that the requirements stipulated in resolution 973 C (X) are in fact waived in certain cases."

The Tribunal therefore reaches the conclusion that the absence of staff assessment by itself does not bar tax reimbursement under Staff Regulation 3.3 (f). In view of the admitted fact that national income taxation on full lump sum withdrawals from the Pension Fund has always been reimbursed on the authority of Regulation 3.3 (f) even though those withdrawals have not been subject to staff assessment, the Tribunal holds that the reimbursement of such taxation on partial lump sum withdrawals from the Pension Fund is likewise legal and justified under the said Regulation.

XXV. The Respondent argues that the specialized agencies have not reimbursed national taxes on one-third lump sum payments and that therefore there is no equality of treatment in this behalf within the United Nations and the specialized agencies. The Tribunal observes that all the relevant information regarding the practices in the specialized agencies, the taxes if any that their staff members suffer on one-third lump sum payments and the respective national laws to which they may be subject is not before the Tribunal to enable it to make a meaningful comparison between the specialized agencies and the United Nations. The case before the Tribunal raises questions relating to the Staff Regulations and Rules of the United Nations, the practices in the United Nations and information circulars issued from time to time by the Secretary-General of the United Nations.

The Tribunal therefore makes it clear that the ruling in this case is confined to the tax reimbursement régime of the United Nations.

XXVI. The Respondent has referred to the practice prevailing in four countries, namely Canada, France, the Netherlands and the United Kingdom, of taxing lump sum withdrawals by nationals of those countries. The Tribunal notes however that, with the exception of a single request from a national of the Netherlands, the United Nations has not received any request for reimbursement of national taxes on a one-third lump sum payment from non-United States nationals. The Tribunal considers that applications, if any, from such nationals for tax reimbursement by the United Nations will have to be decided on merits.

XXVII. For the foregoing reasons, the Tribunal holds that the authorization under Information Circular ST/ADM/SER.A/1828 of 16 December 1974 to reimburse national taxes on partial commuted retirement benefits is valid.

XXVIII. In conclusion:

(a) The Tribunal rules that Information Circular ST/ADM/SER.A/1828 of 16 December 1974 is valid;

(b) For the reasons stated in paragraph XVII above, the Tribunal is not competent to rescind Bulletin ST/SGB/167 of 16 July 1978 or Bulletin ST/SGB/169 of 29 November 1978;

(c) The Applicant is entitled to reimbursement of national income taxation on the one-third lump sum payment under paragraph XVI above;

(d) As the Applicant has not established that he has paid national income taxation on the one-third lump sum payment, no claim for accrued interest arises;

(e) As the Applicant has not established that he has suffered any incidental or consequential damages as a result of the suspension of tax reimbursement on one-third lump sum payments, no claim for special damages arises.

XXIX. As regards costs, the Tribunal has declared in its statement of policy contained in document A/CN.5/R.2 dated 18 December 1950 that, in view of the simplicity of its proceedings, the Tribunal will not, as a general rule, grant costs to Applicants whose claims have been sustained by the Tribunal. Nor does the Tribunal order costs against the Applicant in a case where he fails. In exceptional cases, the Tribunal may, however, grant costs if they are demonstrated to have been unavoidable, if they are reasonable in amount, and if they exceed the normal expenses of litigation before the Tribunal.

The Applicant has requested payment of \$108,219.85 as costs on the basis set out in his statement submitted on 6 February 1979. Taking all the above factors into consideration, the Tribunal awards the Applicant \$2,000 as costs.

(Signatures)

R. VENKATARAMAN
President

F. A. FORTEZA
Member

Suzanne BASTID
Vice-President

Jean HARDY
Executive Secretary

New York, 13 February 1979

STATEMENT BY MR. PLIMPTON

I have participated in the consideration of the above case and have concurred as to the substance of the Tribunal's judgement, except as to its award of costs.

(Signature)

Francis T. P. PLIMPTON

New York, 8 February 1979