

implicitly recognized that under the resolutions and the Staff Regulations relating to income tax his pleas cannot be sustained. It is not for the Tribunal to express itself on the merits of the pleas beyond the application of the law as it stands.

XIV. Consequently, the application is rejected.

(Signatures)

Suzanne BASTID
President

CROOK
Vice-President

R. VENKATARAMAN
Member

James W. BARCO
Alternate Member

N. TESLENKO
Executive Secretary

New York, 3 October 1963.

Judgement No. 89

(Original : French)

Case No. 84 :
Young

Against : **The Secretary-General of
the International Civil
Aviation Organization**

Request by a former Technical Assistance official of ICAO for validation by the Joint Staff Pension Fund of service completed before his participation in the Fund.

Request for rescission of the decision refusing validation of the Applicant's prior service.—Article III of the Regulations of the Fund.—Circular of 26 February 1958 ruling that in the case of technical assistance experts validation is excluded on the basis of paragraph 4 of this article.—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.—Respondent's change of attitude in thereafter basing the refusal of validation on paragraph 1 of this article.—Obligation of the Tribunal to decide the dispute on the basis of the provision which the Respondent himself considered applicable in the circular addressed to the staff members concerned.—Examination of the Applicant's contractual status to determine whether it excludes the validation of previous service on the basis of the aforesaid paragraph 4.—An explicit exclusion clause relating specifically to participation in the Fund required.—“Omnibus clause” cannot be regarded as equivalent to such an exclusion clause.—Reservation contained in paragraph 4 not applicable to the Applicant.—Contested decision rescinded.

Award to the Applicant, in the event that the Secretary-General decides to exercise his option under article 9.1 of the Statute of the Tribunal, of an amount equal to the net financial advantage which the Applicant would have derived, under the Regulations of the Fund, from the validation of his prior service.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mrs. Paul Bastid, President ; Mr. James W. Barco ; Mr. Louis Ignacio-Pinto ;

Whereas on 8 March 1962 Maurice A. Young, former technical assistance official of the International Civil Aviation Organization, hereinafter called ICAO, filed an application to the Tribunal requesting :

(a) A declaration that by refusing the Applicant's request for validation by the Joint Staff Pension Fund of his period of employment from 2 November 1951, the date of his entry on duty, to 1 January 1958, the date of his participation in the Fund, the Respondent and the ICAO Staff Pension Committee infringed the Applicant's contract of employment and conditions of employment ;

(b) An order against the Respondent to pay to the Joint Staff Pension Fund a sum equivalent to 14 per cent of the salary received by the Applicant from 2 November 1951 to 31 December 1958, with compound interest, to enable the Fund to pay to the Applicant the benefits due to him for the entire period of his employment at ICAO ;

(c) An order for payment to the Applicant of the sum of \$7,700 if the Respondent decides to pay compensation for the injury sustained, by virtue of the option given to him under article 9, paragraph 1, of the Statute of the Tribunal ;

(d) An order for payment to the Applicant of costs in the sum of £100 sterling ;

Whereas on 11 September 1962, after hearing the parties in public session, the Tribunal rendered an initial judgement, No. 84, in which *inter alia*, it put the following questions to the parties :

“(a) What is the scope of paragraph 4 of article III of the Regulations of the Fund, as amended on 7 December 1956 ? In particular, why does the phrase ‘ contract of employment which specifically excluded... participation in the Pension Fund ’ appear in this paragraph, whereas article II, paragraph 1, which was in force at the same time, refers merely to a contract of employment by which ‘ participation is not excluded ’ ?

“(b) What is the scope and purpose of this paragraph, if one accepts the construction placed on paragraph 1 of the same article by the Respondent and by the Standing Committee of the Joint Staff Pension Board ? According to this construction, are there circumstances in which validation of a period of prior employment would be excluded by paragraph 4 without being also excluded by paragraph 1 of the same article ?

“(c) Why was the amendment to article II, which came into force on 1 January 1958, not accompanied by a corresponding amendment to article III, paragraph 1 ? How does the Respondent consider that article III, paragraph 1, and article II, paragraph 1, should be co-ordinated since 1 January 1958 ?

“(d) What is the scope of the amendment to article II of the Regulations of the Joint Fund which came into force on 1 January 1953 ? In particular, in view of the contradictory opinions expressed during the preparatory study (comments on article 2 in document JSPB/L.65, dated 3 March 1952, and paragraph 6 of document A/2203, dated 25 September 1952 *) and of the

* The English text of document A/2203 is dated 3 December 1952.

practice since adopted, do the parties consider that this amendment can have had the effect of granting to staff members of member organizations who fulfil the conditions laid down in article II, and whose contract does not contain any clause excluding their participation in the Pension Fund, the immediate and direct right to participate in the Fund ?

“(e) If an organization fails to register with the Fund a staff member who is eligible for participation under the Regulations in force, may the staff member have the period of prior employment validated on becoming a participant in the Fund at a later date ?

“(f) If a staff member has completed a certain period of employment which qualifies for later validation, does the fact that his employment was subsequently continued under a contract excluding validation affect his right to validate the earlier period of employment when he becomes a participant in the Fund at a later stage ?

“(g) Do the parties believe that the clause described by the Respondent as ‘the *omnibus* clause’ has the same implication as regards pension rights both in the Applicant’s initial contract and in the contract which came into force on 1 July 1955 ? ;

Whereas the Tribunal fixed 1 January 1963 as the time-limit for submission of the Respondent’s replies to the above questions and 1 March 1963 as the time-limit for submission of the Applicant’s replies and postponed its consideration of the case ;

Whereas in accordance with paragraph 21 of Judgement No. 84 the Executive Secretary of the Tribunal, after notifying the parties of the judgement, communicated its text to :

The Secretaries-General of the United Nations, the International Telecommunication Union, the World Meteorological Organization and the Inter-Governmental Maritime Consultative Organization ;

The Directors-General of the International Labour Organisation, the Food and Agriculture Organization of the United Nations, the United Nations Educational, Scientific and Cultural Organization and the World Health Organization ;
The Executive Chairman of the Technical Assistance Board ; and The Chairman of the Joint Staff Pension Board ;

Whereas on 10 December 1962 Mr. Robert Harpignies, a United Nations staff member, replaced Mr. Henri Cornil as counsel for the Applicant, Mr. Cornil having been relieved of his duties by the President of the Tribunal at his own request ;

Whereas on 14 December 1962 the Chairman of the Joint Staff Pension Board transmitted the observations of the Standing Committee of the Board on the above questions (a) to (f) ;

Whereas these observations may be summarized as follows :

(a) In the version of article III of the Fund Regulations which became effective on 7 December 1956, the purpose of paragraph 4 was to specify that even if a staff member met one of the conditions prescribed in paragraph 1 of the article, he could not validate his prior service if his contract of employment during that period had specifically excluded his participation in the Fund. There is no indication in the records of the Joint Staff Pension Board that any special significance was attached to the difference in wording between articles II and III

consisting in the fact that the word "specifically" appeared in paragraph 4 of the latter article. Moreover, the word has been deleted in the revised version of article III which became effective on 1 January 1963.

(b) Paragraph 4 was added to article III in order to eliminate all doubt concerning the status of staff members who had been excluded from participation in the Fund both because their contract had contained a clause specifically excluding them and because they had had a contract for less than one year or had completed less than one year of service. Without paragraph 4, doubt might have arisen as to whether such staff members were not entitled to validate their prior service in accordance with paragraph 1 of article III.

(c) The amendment to article II which came into force on 1 January 1958 was accompanied by the introduction into the Fund Regulations of a Supplementary article B relating to the category of associate participants. It was considered that the introduction of this supplementary article made it necessary to amend article III to conform to the new wording of article II.

(d) The purpose of the amendments made to article II with effect from 1 January 1953 was to make applicable to the staff of each member organization uniform rules for participation in the Fund, leaving exceptions to be dealt with by exclusions in the contracts of employment of the staff members concerned. The Standing Committee did not wish to express in its written observations any opinion on the nature of the right conferred by these amendments on the staff members concerned.

(e) The situation envisaged in question (e) poses a problem, not of validation of prior service, but of making good the loss suffered by a staff member as a result of an error committed by the organization to which he belongs. If an organization failed to register with the Fund a staff member who was eligible for participation under the Regulation in force, it would be the responsibility of that organization to place that staff member in substantially the same position as that in which he would have found himself but for the error.

(f) Article III appears to authorize the validation of service which satisfies the conditions laid down in paragraph 1 of the article even if such service was followed by a period of service excluded from validation under paragraph 4.

Whereas at the request of counsel the President extended to 17 January and 15 March 1963 respectively the time-limits fixed by Judgement No. 84 for submission of the parties' replies to the questions put by the Tribunal ;

Whereas on 18 January 1963 the Respondent replied to question (g) by maintaining that the "*omnibus* clause" had retained the same implication in the Applicant's various contracts and that its effect was that ICAO would not make any payment whatsoever beyond what was stipulated in those contracts ;

Whereas the Respondent further stated that he had no comment to make on the observations made by the Standing Committee of the Joint Staff Pension Board on questions (a) to (f) ;

Whereas the Secretary-General of the United Nations also stated that he had nothing to add to the said observations ;

Whereas the Directors-General of the International Labour Organisation, the Food and Agriculture Organization of the United Nations and the World Health Organization endorsed the Standing Committee's observations on questions (a) to (f) and the Director-General of the World Health Organization further stated that

he accepted the responsibility of his organization in the situation envisaged in question (e) ;

Whereas on 4 March 1963 the Applicant submitted his replies to questions (a) to (g) ;

Whereas the Applicant's replies were preceded by preliminary observations which may be summarized as follows :

ICAO became a member organization of the Joint Staff Pension Fund by concluding on 28 February 1951 the agreement contemplated in article XXVIII of the Regulations of the Fund. By that agreement ICAO entered into a stipulation for the benefit of third persons, namely its staff members, whereby it agreed, in particular, to take the necessary administrative steps to register the beneficiaries as participants in the Fund and to pay its share of the contributions. According to the Regulations of the Fund, a staff member may be excluded from the effects of that stipulation for the benefit of third persons only through a transitional arrangement made under article XXVIII or through an express exclusion in his contract. In the present case, there had been no transitional arrangement and no express exclusion. The Applicant had therefore acquired the status of a participant in the Fund on the expiration of his first year of service, i.e., on 2 November 1952. In consequence he satisfies all the conditions for the validation of his prior employment in accordance with the version of article III, paragraph 1, which was in force when he joined the Fund in 1958 ;

Whereas the Applicant's replies to questions (a) to (g) may be summarized as follows :

(a) The purpose of the version of article III, paragraph 4, of the Regulations of the Fund which came into force on 7 December 1956 was to prohibit the validation of prior employment performed under contracts which specifically excluded participation by the staff members concerned in the Joint Staff Pension Fund. Before that version came into force, such validation was permitted.

(b) Under the construction which the Respondent places on article III, either paragraph 1 or paragraph 4 of that article becomes meaningless. If a staff member does not satisfy the conditions which according to that construction paragraph 1 prescribes for the validation of previous service, then he falls *ipso facto* within the scope of paragraph 4.

(c) Supplementary article B, relating to the category of associate participants, establishes rules for the validation of previous service which are different from those laid down in article III. Accordingly, the introduction of that supplementary article does not explain why the authors of the Regulations refrained from amending article III to conform to the new version of article II. The explanation must be sought rather in the desire to limit the application of supplementary article B to the validation as an associate participant, of service performed after 1 January 1958, while permitting validation, as a full participant, of service performed under former article II prior to 1 January 1958.

(d) As the Standing Committee of the Board observes, the purpose of the amendments made to article II of the Regulations with effect from 1 January 1953 was to make applicable to the staff of each member organization uniform rules for participation in the Fund, while leaving exceptions to be dealt with by exclusions in the contracts of employment. So far as ICAO is concerned, however, this purpose had already been achieved through the agreement concluded with the Secretary-General of the United Nations on 28 February 1951. This agreement, as well as

article II of the Regulations, confers on staff members who fulfil the prescribed conditions an immediate and direct right to participate in the Fund. It should be noted in this connexion that paragraph 19 of the Provisional Regulations for Technical Assistance Personnel, by making an exception to the uniform rules laid down by the Regulations of the Fund, conflicted with the agreement of 28 February 1951.

(e) and (f) The Applicant concurs in the opinion expressed by the Standing Committee of the Joint Staff Pension Board on questions (e) and (f).

(g) The Applicant could have been excluded from participation in the Joint Staff Pension Fund only by a specific provision in his contract. Neither the absence from the Regulations for Technical Assistance Personnel of a provision concerning participation by such staff members in the Joint Staff Pension Fund, nor the "omnibus clause", has at any time constituted specific provision excluding the Applicant from participation in the Fund. Furthermore, the "omnibus clause" cannot even be interpreted as an implicit exclusion because it coexisted with the Provisional Regulations for technical assistance personnel, which gave the Applicant a contingent right to participation ;

Whereas on 19 September 1963 the Tribunal put a question to the parties ;

Whereas on 21 September 1963 the Tribunal held a public session during which the President informed the parties that Mr. Gros Espiell, a member of the Tribunal who had participated in the consideration of the case up to that time, having been urgently recalled by his Government, was to leave New York next day, and would be unable to take part in the final stage of preparation of the judgement ;

Whereas the parties stated that they had no objection to the delivery of judgement, in the absence of Mr. Gros Espiell, by the President, Mr. Barco and Mr. Ignacio-Pinto ;

Whereas, moreover, the parties replied to the question put to them and submitted additional arguments both during the public session and in two notes submitted on 25 and 27 September 1963 respectively ;

Whereas the Applicant's principal additional contentions are as follows :

1. The "omnibus clause" having remained in identical form in the Applicant's successive contracts, it is out of the question that its effect should have changed in the course of time. Since it did not exclude the Applicant from participation in the Joint Staff Pension Fund on and after 1 January 1958, it could not operate to exclude him before that date.

2. The "omnibus clause" referred only to payments made to the Applicant by ICAO. It could not be applied to contributions paid by the Organization to the Joint Staff Pension Fund on the Applicant's behalf or to payments made by the Fund to him ;

Whereas the Respondent's principal additional contentions are as follows :

1. The "omnibus clause" excluded any financial benefit which had not been specified in the Applicant's letters of appointment or in the regulations and manuals for technical assistance personnel. Although the wording of the clause had remained unchanged, its effect had changed in accordance with the successive amendments of the Applicant's letters of appointment and of the regulations and manuals applicable to him. He was able to participate in the Joint Staff Pension Fund from 1 January 1958 onwards because a new provision introduced into the

Manual of the Technical Assistance Board on that date gave him a right which he had not previously had.

2. The “*omnibus* clause” referred expressly to subsidies granted to the Applicant by the Organization. Any payment of contributions to the Pension Fund on the Applicant’s behalf certainly constitutes a “subsidy” granted to him and falls within the scope of the clause ;

The Tribunal, having deliberated from 17 September to 9 October 1963, now pronounces the following judgement :

I. The Applicant requests the Tribunal to find that, by refusing his request for validation by the Joint Staff Pension Fund of his period of employment from 2 November 1951, the date of his entry on duty in ICAO, to 1 January 1958, the date of his participation in the Fund, the Respondent and the ICAO Staff Pension Committee infringed his contract of employment and conditions of employment.

In Judgement No. 84 the Tribunal came to certain conclusions regarding the Applicant’s contractual status. On 1 January 1958, the date of his participation in the Pension Fund, he held a letter of appointment dated 1 June 1955, which had been extended several times and, ultimately, for a period of one year, by an agreement reached on 10 and 23 September 1957.

The letter of appointment dated 1 June 1955 specified that the Applicant was subject to the rules laid down in the Manual of Personnel Policies and Procedures issued by the Technical Assistance Board and as amended from time to time.

It also contained the following provision :

“ You will not be entitled to receive from the International Civil Aviation Organization any payments, subsidies, expenses or emoluments other than those specified in the preceding paragraphs in this letter, or as laid down in the Manual of Personnel Policies and Procedures issued by the Technical Assistance Board and as amended from time to time.”

This clause, which the Respondent terms an “*omnibus* clause”, recurs in the various contracts with the Applicant from the time he joined the staff of ICAO in 1951. The Tribunal notes that the United Nations pension scheme is not mentioned in any of these contracts.

The Tribunal pointed out in Judgement No. 84 (para. 9) that at the time of the Applicant’s entry on duty the Provisional Regulations for technical assistance personnel of ICAO, while not entitling him to participate immediately in the Pension Fund, gave him a contingent right to participate with validation of prior service if his appointment were extended to two years.

However, on 1 January 1952 these Regulations were replaced by the Manual issued by the Technical Assistance Board, of which neither the first edition nor the second edition, effective 1 January 1954, included any provision concerning participation in the pension scheme.

A third edition, however, effective 1 January 1958, dealt with the Pension Fund in article 248. This text states in general terms that eligibility and participation are subject to the Regulations of the Pension Fund and the Administrative Rules of the Joint Staff Pension Board. It provides that project personnel on long-term status shall be eligible to become participants in the Pension Fund, and lays down certain conditions, including the following :

“ (ii) No eligibility for participation exists if the terms of employment specifically exclude participation in the Fund.”

Under article 214 (e) of this new edition of the Manual, technical assistance experts who, like the Applicant, have completed five years of employment are henceforth deemed to be in long-term status.

II. The Applicant requests the Tribunal to find him entitled to the validation of his previous service on the basis of article III of the Regulations of the Fund.

The main provisions of the version of article III in effect on 1 January 1958 had been established on 7 December 1956. It reads as follows :

Article III

“VALIDATION OF NON-PENSIONABLE SERVICE

“ 1. A participant who has been in the employment of a member organization as a full-time staff member and whose participation in the Pension Fund was at that time excluded by article II of these regulations because he entered employment under a contract for less than one year, or had completed less than one year of service, may, subject to paragraph 4 of this regulation, elect within one year of the commencement of his participation to have the period of such prior employment included in his contributory service to the extent to which he pays into the Pension Fund, in accordance with the administrative rules established for this purpose by the Joint Staff Pension Board, a sum or sums equal to the contributions which he would have paid had he been subject to these regulations throughout this period, with compound interest at the rate designated in article XXIX, and provided that there has been continuity of employment. For the purposes of this article, intervals of not more than thirty calendar days in the period of employment shall not be considered as breaking the continuity of employment. The time covered by these intervals shall not be included in the period of contributory service.

“ 2. Payment into the Pension Fund of amounts equal to twice the amount of the payment so made by the participant shall be made by the member organization designated for that purpose in accordance with arrangements concluded by the member organizations.

“ 3. The earliest date from which employment with the United Nations can be validated is the first day of February 1946.

“ 4. Notwithstanding the provisions of paragraph 1 of this article, a participant may not make pensionable a period during which he was employed under a contract of employment which specifically excluded his participation in the Pension Fund.”

The Applicant claims that he is entitled to avail himself of the validation provided for in paragraph 1 and that the reservation made in paragraph 4, which relates to the specific exclusion, by the contract, of participation in the Fund, cannot be invoked against him.

He further contends that ICAO staff members have had the right to invoke the Regulations of the Fund directly since the entry into force on 1 March 1951 of the agreement concluded between ICAO and the Secretary-General of the United Nations on 28 February 1951. The Applicant maintains that he became entitled to participate in the Fund on 2 November 1952, after completing one year of service in accordance with the provisions of the Regulations of the Fund then

in force. He is also entitled, he asserts, to the validation of his previous service. He contends that he has retained these rights even though the Respondent failed to enrol him among the participants in the Fund.

III. The Respondent maintains before the Tribunal that up to 1 January 1958 the Applicant's contract excluded his participation in the Pension Fund, in virtue of the "*omnibus* clause" it contained and because the applicable regulations, to which the contract referred, included no provisions on the right to participate in the Pension Fund.

According to article II.1 of the Regulations of the Fund, effective until 31 December 1957 :

"Every full-time member of the staff of each member organization shall become a participant in the United Nations Joint Staff Pension Fund if he enters employment under a contract for one year or more, or when he has completed one year of employment, provided that he is under sixty years of age at the time of entering such employment and that his participation is not excluded by his contract of employment."

According to the arguments submitted to the Tribunal by the Respondent, article III, paragraph 1, effective 7 December 1956, provides for validation only if participation was previously excluded because of the length of the contract or the period of service. That, he claims, did not apply in the Applicant's case : the latter's previous non-participation was based on the exclusion resulting from his contract. Thus, the Respondent argues, article III, paragraph 4, which restricts the application of paragraph 1, cannot be taken into consideration in the present case since the Applicant could not invoke paragraph 1. Moreover, he has contended that the "*omnibus* clause" constitutes specific exclusion.

IV. The Tribunal notes that the question of validation of service of ICAO technical assistance experts admitted on 1 January 1958 to participation in the Pension Fund was dealt with in a document dated 26 February 1958 issued by the Director of the ICAO Technical Assistance Bureau. The subject of this document, which was addressed to "Full participants UNJSPF", was defined as follows : "Retroactive Participation in the United Nations Joint Staff Pension Fund of T.A. Personnel who accrued five years' service prior to 1 January 1958".

In this document of 26 February 1958, the Director of the Technical Assistance Bureau begins by referring to an earlier note and to the information given to technical assistance personnel concerning their participation in the Pension Fund. He then goes on to state that several experts, having completed five years' service, had "written requesting retroactive participation in the Pension Fund from the beginning of their service with the Organization". The Director, after recalling the provisions of article 248 of the Manual (third edition), which refers to the Regulations of the Fund and to its Administrative Rules, states : "The United Nations General Assembly in December, 1956, approved an amendment to the Pension Fund Regulations, the text of which is quoted hereunder for your information". Article III is then quoted in full, with paragraph 4 underlined.

This document concludes as follows :

"May I draw your attention to paragraph 4 of this article [article III of the Pension Fund Regulations], which specifically excludes you from validating your non-pensionable service by virtue of the fact that you were excluded by your contract, which was subject to the rules of the TAB Manual in which participation in the Pension Fund was not provided.

“ Your contributory service in the Pension Fund will therefore commence with effect from 1 January 1958, the date on which you became a full participant in the Pension Fund. ”

In form and content this document, which was addressed to all staff members in the Applicant's category, has the character of a general circular. Interpreting the texts that have just become effective, with a view to determining the rights of the staff members concerned, the Director rules that in the case of technical assistance experts validation is excluded on the basis of article III, paragraph 4.

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.

V. The Tribunal notes that this circular was communicated to the Applicant, who had applied for validation of his previous service as soon as he was advised of his participation in the Pension Fund. It notes further that on 31 January 1958, in advising the Applicant of his participation, the Secretary of the ICAO Staff Pension Committee added the following explanatory words : “ You will note that I have marked ‘ Not applicable ’ under Part V of the form which relates to the application for the validation of non-pensionable service. This exclusion is governed by the amendment to article III of the Pension Fund Regulations which became effective 7 December 1956 ”.

The Tribunal notes that throughout the correspondence between the Respondent and the Applicant regarding the latter's right of validation, the Respondent has maintained the position which he took in the circular of 26 February 1958, namely, that article III, paragraph 4, was applicable to the case in question.

VI. This attitude continued until 23 September 1959. On that date, a letter from the Chief of the Organization and Personnel Branch of ICAO informed the Applicant that the refusal of validation was based on the wording of the first sentence of article III, paragraph 1, of the Regulations of the Fund : it was claimed that the Applicant's previous exclusion was due not to the duration of his contract or period of service, but to the fact that the terms of service of technical assistance experts did not include pension rights.

The Chief of the Organization and Personnel Branch barred the application of article III, paragraph 4, and stated :

“ You have made reference to paragraph 4 of the same article III of the Pension Fund Regulations which provides that despite the provisions of paragraph 1 of that article a participant may not make pensionable a period during which he was specifically excluded from participation, and you have pointed out that in none of your previous contracts of service was there any clause clearly setting out such specific exclusion. Actually this paragraph 4 merely provides that even in cases where a staff member otherwise qualifies for validation of previous service (*i.e.*, because he entered employment under a contract for less than one year or had completed less than one year of service) he is still ineligible for validation of such previous service if the terms of his earlier employment specifically stated that he was excluded from participation in the Pension Fund. ”

This letter made no allusion to the circular from the Director of the Technical Assistance Bureau of ICAO mentioned above.

Since that time, and in particular before the Tribunal, the Respondent has maintained this position. He has asserted as his principal contention that article III, paragraph 4, should not be taken into consideration with regard to the validation of the Applicant's service, and has taken as his ground for barring such validation the arguments set forth in paragraph III above.

VII. The Tribunal considers that each party to a dispute has the right to advance, before the forum to which the dispute is referred, the legal argument it considers most likely to serve its cause. Nevertheless, ICAO, as Respondent, cannot properly abandon in a suit relating to an individual case the legal position which it has taken in a document of general application, intended for all the staff members concerned, with respect to the choice of the provision under which requests by these staff members for validation of their periods of service would be rejected.

The Tribunal therefore feels that it must decide the present dispute on the basis of the provision which the Respondent himself considered applicable in a general decision addressed to the staff members concerned.

VIII. Furthermore, the interpretation of article III which the Respondent asks the Tribunal to apply in the Applicant's case would make paragraph 4 of that article almost pointless. For if, to follow the Respondent's reasoning, the fact that the contract specifies that participation is excluded should be sufficient to prevent validation, even if the staff member concerned does not possess a contract of one year or has completed less than one year of service, it is impossible to understand why, when article III was amended, the insertion of paragraph 4 was considered essential. There is no doubt that the particular object of concern was the status of technical assistance experts. Such, too, was the object of the circular of 26 February 1958 mentioned above.

IX. The Tribunal has therefore to determine whether the Applicant's contractual status excludes the validation of previous service on the basis of article III, paragraph 4.

Under the terms of that paragraph, there can be no validation of past service where the participant "was employed under a contract of employment which specifically excluded his participation in the Pension Fund". The French text reads : "était employé en vertu d'un contrat excluant expressément sa participation à la Caisse".

The choice of words in both the English and the French texts shows that what is envisaged is an exclusion clause relating explicitly and specifically to participation in the Pension Fund. The implications of this language are clarified by the text of article II of the Regulations of the Fund, which, in its successive versions, has always referred merely to a contract of employment under which participation "is not excluded" (Regulations effective 1 March 1951, 1 January 1953 and 1 January 1958). The wording of paragraph 4 shows the General Assembly's intention of referring to a specific exclusion, relating explicitly to participation in the Pension Fund.

X. The Respondent contends that taken in conjunction with the absence of any reference to the Pension Fund in the Manual, the "omnibus clause" is equivalent to a specific exclusion. The so-called "omnibus clause", although it employs a number of synonymous terms, i.e., "payments, subsidies, expenses or

other emoluments”, does not specifically mention the right of participation in the Fund and cannot be regarded as a specific exclusion clause. Moreover, it bars payments to the staff member by ICAO outside the terms of the Regulations ; the English text provides : “ you will not be entitled to receive from the International Civil Aviation Organization... ”. But while the staff member’s participation in the Pension Fund of course entails the payment of a contribution to the Fund by ICAO, it is the Fund and not ICAO which, after the expiration of the staff member’s contract, will be required to make payments to him in accordance with its Regulations. Thus, it remains very questionable whether the “ *omnibus* clause ” implicitly excludes the right to participate in the Fund. However, the Tribunal does not consider it necessary to rule on that point, since the provisions of article III, paragraph 4, clearly show that it was the General Assembly’s intention to exclude validation of prior service only where the person concerned has agreed, through the inclusion in his contract of an unequivocal clause to that effect, to remain outside the United Nations pension scheme.

In the absence of such a clause in the Applicant’s contract, the Tribunal finds that the reservation contained in article III, paragraph 4, does not apply to him.

XI. Accordingly, the Tribunal rescinds, with all the legal consequences flowing from the regulations in force on the date on which the Applicant became a participant in the Pension Fund, the decision refusing validation of the Applicant’s prior service.

XII. Under article 9, paragraph 1, of its Statute, the Tribunal is required, in the event that the Secretary-General decides to exercise his option under that paragraph, to fix the amount of compensation to be paid to the Applicant by ICAO for the injury sustained. The Tribunal fixes this compensation at an amount equal to the net financial advantage which the Applicant would have derived, under the Regulations of the Pension Fund, from the validation of his prior service.

XIII. The Tribunal ruled on the request for payment of costs in its Judgement No. 84.

(Signatures)

Suzanne BASTID
President

James W. BARCO
Member

New York, 9 October 1963.

Louis IGNACIO-PINTO
Member

N. TESLENKO
Executive Secretary