present proceedings would constitute an impermissible duplication and lead to the rejection of the Application on that ground.

VII. For these reasons, the Application is rejected.

(Signatures)

Arnold KEAN
First Vice-President, presiding

Endre USTOR
Member

Herbert REIS
Second Vice-President

R. M. VICIEN-MILBURN
Executive Secretary

Geneva, 6 June 1986

Judgement No. 370

(Original: English/French)

Case No. 356: Molinier
Cases Nos.
359: Aggarwal
360: Akrouf
361: Davis
362: Goffman
363: Noaman

Against: **The Secretary-General of the United Nations**

Request by a staff member of the United Nations for the rescission of the decision denying her remuneration at the level of post adjustment class 12, effective 1 December 1984.—Identical requests by four staff members of UNDP and by a staff member of the United Nations containing similar pleas.

Direct submission of the applications to the Tribunal under article 7 of its statute.

The Tribunal's decision on the presence and participation of alternate members.

The Tribunal orders a joinder of the six cases which raise the same issues and include the same or similar pleas.

The Tribunal holds itself competent and rules that the applications are receivable.

Applications to intervene by six staff members.—Finding that they would not rely on evidence or arguments different from those of the Applicants.—Respondent's commitment to apply the decision to all officials who can rely on the same legal principle.—Applications rejected.

Consideration of the facts of the case.—Post adjustment system, as provided for in staff rule 103.7 and in annex I, paragraph 9, of Staff Regulations.—Question whether the Secretary-General has discretion in matters relating to post adjustment.—Purpose of the post adjustment system.—Determination of certain of its aspects by General Assembly resolutions.—Powers and functions of the International Civil Service Commission (ICSC).—Articles 11 and 10 of the ICSC statute.—Retention by the General Assembly of the power to fix two prerequisites for transition from one class to another: required percentage variation in the cost of living index and required period of time.—Noblemaire principle and the margin between the United Nations salaries and the corresponding salaries of the comparator civil service (United States).—Resolution 31/141 requesting ICSC to take conservatory measures within the operation of the post adjustment system in case of undue widening of the margin.—The Tribunal holds that a relevant General Assembly resolution, although not incorporated in the Staff Rules, is binding upon staff members as a condition of their employment (Judgements No. 67: Harris et al*; No. 236:* Belchamber*; No.*

249: Smith*).—ICSC decision to increase the New York post adjustment, leading to a widening of the margin.—General Assembly resolution 39/27 requesting ICSC to suspend the implementation of post adjustment class envisaged in New York for December 1984.—The Tribunal holds that that resolution constituted a further delegation of power to ICSC.—Applicants' contention that the General Assembly must not interfere with the exercise of its powers by a subsidiary body, based on the advisory opinion of 13 July 1954 of the International Court of Justice.—The Tribunal believes that the view of the Court was influenced by the judicial character of the Tribunal.—The Tribunal holds that the General Assembly was entitled to request ICSC to suspend the implementation of the increase in post adjustment and that it is not called upon to pronounce on the relationship between the General Assembly and ICSC.—Question of the validity of ICSC action to suspend the increase in post adjustment.—Finding that the decision was not made by the Chairman of ICSC under powers delegated to him in pursuance of article 18.2 of ICSC statute.—Chairman's statement to the Tribunal that the decision was made under rule 32 of ICSC rules of procedure.—Consideration of the circumstances in which the decision was made.—Chairman's consultation of members of ICSC by cable.—Challenge to the validity of the decision on the ground that, under the note appended to the rules of procedure, the provisions of rule 32 would not be utilized for the time being.—The Tribunal considers it unnecessary to decide this point.—The Tribunal holds that meticulous adherence to ICSC rules of procedure is a necessity, particularly in matters of importance.—Finding that the procedure required by rule 32 was not followed.—Conclusion that the decision had no legal force.—Ratification of the decision at the ICSC session in March 1985.—Such ratification dates back to the date of the decision, but without having an adverse retroactive effect on the rights accrued in the mean time.—Conclusion that the Applicants are entitled to remuneration at class 12 post adjustment from 1 December 1984 until ICSC ratified the decision in March 1985.—Challenge to the validity of the decision on the ground that the move to the next post adjustment class is automatic whenever conditions are met and cannot be suspended by ICSC.—Finding that this contention is not borne out by past practice.—The Tribunal considers it unnecessary to decide whether automaticity is the right theory.—The Tribunal holds that, by using the word "suspend" rather than "postpone", the General Assembly considered that class 12 was in force and that it had the power to regulate emoluments not yet earned.—Applicants' contention that the use of post adjustment to prevent undue widening of the margin was an abuse of power, because the post adjustment was intended for another purpose.—Consideration of the legislative history of the issue.—Contention rejected.—Contention of Applicants in cases No. 359 to 363 that ICSC statute is in the nature of a treaty and that the use of post adjustment to preserve the Noblemaire principle can only be based on the common interpretation of all the parties.—Finding that the other organizations concerned have acquiesced in this interpretation.—Contention of Applicant in case No. 356 that she had an acquired right to the post adjustment suspended by the contested decision.—Conclusion that the Tribunal's jurisprudence excludes the doctrine of acquired rights from application in the present case, as the rules of post adjustment are statutory (Judgements No. 237:* Powell, *and No. 273:* Mortished*) and as the doctrine applies only to benefits accrued through services before the adoption of the amendment (Judgement No. 82:* Puvrez*).—Contention of the same Applicant that the Tribunal must apply existing legislation until it has been changed.—The Tribunal recalls its jurisprudence that relevant resolutions of the General Assembly are binding on staff members as conditions of employment.*

The Tribunal orders the Respondent to rescind the decision refusing to pay remuneration at the level of post adjustment class 12 for four months from 1 December 1984, or to pay compensation of equivalent amount.—All other pleas rejected.

Explanatory statement by Mr. Samar Sen.—Brief description of the Noblemaire principle and of the post adjustment system.—Respective powers of the General Assembly and of ICSC.

Dissenting opinion of Mr. Roger Pinto.—Consideration of the rationale and of the functioning of the Noblemaire principle and of the post adjustment system.—Finding that, at the time of the contested decision, the rules of the post adjustment system provided for automatic change in the post adjustment class whenever the conditions (5 per cent increase in the cost of living during 4 months) were met.—Post adjustment at class 12 thus became effective in New York on 1 December 1984.—ICSC received from the General Assembly the power to suspend increases in post adjustment, but it had only the authority to freeze it at the level of class 12.—The situation changed only with effect from 1 January 1985 when, in accordance with General Assembly resolution 40/244, the automatic nature of post adjustment modifications was

discontinued in order to maintain the total salary within the desirable margin.—The Applicants were therefore entitled to class 12 post adjustment between 1 December 1984 and 31 December 1985.

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Samar Sen, President; Mr. Arnold Kean, First Vice-President; Mr. Roger Pinto, Member; Mr. Herbert Reis, Second Vice-President, Alternate Member; Mr. Luis de Posadas Montero, Alternate Member. The presence and participation of alternate members ensured that the panel would always have three members, and could avail itself of the alternates' special knowledge of the large number of details which characterize these cases.

These six cases raise essentially the same issues, even though the pleas in the case filed by the Applicant Molinier have been formulated differently. In the circumstances the Tribunal considered that all these cases should be dealt with by the same panel and that one judgement should cover all the cases, care being taken to deal with any specific differences between them. The oral hearings were also held jointly for all the cases.

A. *Case No. 356: MOLINIER*

Whereas at the request of Cecile Molinier, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent extended the time-limit for filing an application to the Tribunal until 13 July 1985;

Whereas on 10 July 1985 the Applicant filed an application, the pleas of which read as follows:

". . . With regard to its competence and to procedure, the Applicant respectfully requests the Tribunal:

"(*a*) *to find* that it is competent to hear and pass judgement upon the present application under Article 2 of its Statute;

"(*b*) *to find* that the present application is receivable under Article 7 of its Statute;

"(*c*) *to decide* to hold oral proceedings of the Tribunal on the present application in accordance with Article 8 of its Statute and Chapter IV of its Rules.

". . . On the merits, the Applicant requests the Tribunal:

"(*a*) *to find* that in accordance with the rules governing post adjustment classifications she was entitled to remuneration at the level of post adjustment class 12,* effective 1 December 1984, and consequently that the retention of her post adjustment by the Secretary-General at class 11 is not legally warranted;

"(*b*) *to find* that the Applicant had as of 1 December 1984 an acquired right to be remunerated at the level of post adjustment class 12 which the Secretary-General has failed to respect;

"(*c*) *to order* the Respondent to rescind his decision to deny the Applicant post adjustment class 12, in line with Article 9 of the Tribunal's

*As a result of the consolidation of five points of post adjustment into net base salary, post adjustment class 12 as of 1 December 1984 is equivalent to post-consolidation post adjustment class 7 as of 1 January 1985. In this Application the Applicant refers to class 12 as of 1 December 1984.

Statute, and, further, *to fix* the appropriate amount of compensation payable to her for the injury sustained by her in case the Secretary-General should decide in the interest of the United Nations that the Applicant should be compensated without further action being taken in her case."

Whereas the Respondent filed his answer on 20 December 1985;

Whereas the Applicant filed written observations on 14 March 1986.

B. *Cases No. 359, 360, 361, 362, 363: AGGARWAL, AKROUF, DAVIS, GOFFMAN, NOAMAN* (hereinafter referred to as AGGARWAL and others)

Whereas on 20 June 1985, Jagdish Pershad Aggarwal, Malika Akrouf, Gary Davis, and Qais Noaman, staff members of the United Nations Development Programme, and Ben Cyril Goffman, a staff member of the United Nations, filed applications that did not fulfil the formal requirements of Article 7 of the Rules of the Tribunal;

Whereas on 4 October 1985, the Applicants filed five corrected applications the pleas of which read as follows:

"MAY IT PLEASE the presiding member to agree to hold oral proceedings in this case.

"AND MAY IT PLEASE the Tribunal:

"1. To declare itself competent in this case;

"2. To declare and adjudge the application receivable;

"3. To order the rescission of the Secretary-General's decision to refuse the Applicant payment, with effect from December 1984, of the post adjustment amount corresponding to the classification of New York through the normal application of the rules of the post adjustment system, on the basis of the New York index of 170.86 as at 1 October 1982 (i.e., the classification of New York in class 12 for the month of December 1984, in the appropriate class after consolidation of 20 points of post adjustment into base salary for the period beginning 1 January 1985 and ending on the day on which this application was filed, and in any other class which may be applicable after that date);

"4. Accordingly, to order payment to the Applicant of post adjustment as calculated in accordance with paragraph 3 above, with effect from 1 December 1984;

"5. To determine that the amount of compensation to be awarded to each Applicant under article 7, paragraph 3 (*d*), of the Rules of the Tribunal shall be the difference between the amount of post adjustment as calculated in accordance with paragraph 3 above and the amount of post adjustment actually paid for the entire period between 1 December 1984 and the date on which the legality of the situation is restored." (Original in French)

Whereas the Respondent filed his answer on 20 December 1985;

Whereas on 27 January 1986 Michael H. S. Chan, Kenneth Walter Michael Lewis, Johannes Peter Prins, Katherine Curtis Springer and Joachim von Braunmühl filed requests to intervene in Case No. 363: *Qais Noaman*;

Whereas on 10 February 1986 Mr. Hernán Fernando Latorre filed a further request to intervene in Case No. 363: *Qais Noaman*;

Whereas the Applicants filed written observations on 18 March 1986 in which they amended their pleas as follows:

". . . Having acknowledged that the situation had changed on 1 January 1986, the Applicant[s] wish[es] to add the following subsidiary plea to his or her [their] plea[s] No. 3:

"'or, on a subsidiary basis, from 1 December 1984 to 31 December 1985.'.

". . . In addition the Applicant[s] wish[es] to add a plea No. 6 worded as follows:

"'To grant to the Applicant[s], in respect of costs, a sum payable by the Respondent estimated to date at four thousand five hundred United States dollars, subject to final calculation on completion of the procedure.'

". . . In the light of the foregoing observations, the Applicant[s] respectfully request[s] the Tribunal to accede to his or her [their] application[s] on the basis of his or her [their] pleas as enunciated in the second part of the application[s] and amended in . . . above." (Original in French)

C. *Consideration of All Joined Cases*

Whereas on 15 April 1986 the Respondent requested the Tribunal's permission to call a witness, to testify on certain matters pertaining to the post adjustment system;

Whereas on 17 April 1986 the Applicant Molinier requested the Tribunal's permission to call a witness pursuant to Article 15, paragraph 2 of the Rules of the Tribunal;

Whereas on 29 April 1986 the Tribunal granted the Applicant Molinier's and the Respondent's requests to examine a witness pursuant to Article 15, paragraph 2 of the Rules of the Tribunal;

Whereas on 7 May 1986 the Applicant Molinier and the Respondent withdrew their request for the examination of a witness;

Whereas the Tribunal held oral hearings at public sessions on 9 and 12 May 1986;

Whereas during the course of the oral proceedings, the Applicant Molinier requested the Tribunal for permission to call an expert pursuant to Article 15, paragraph 2 of the Rules of the Tribunal, a request which she subsequently withdrew;

Whereas on 21, 22 and 28 May 1986, the President of the Tribunal invited the Chairman of the International Civil Service Commission [ICSC] to provide answers to a number of questions put by the Tribunal;

Whereas on 22 May and 3 June 1986 the Chairman of the ICSC provided additional information;

Whereas at the request of the Tribunal, the Respondent submitted additional information on 24 May 1986;

Whereas the facts in all the cases are as follows:

The Applicants, Cecile Molinier, Jagdish Pershad Aggarwal, Malika Akrouf, Gary Davis, Ben Cyril Goffman and Qais Noaman are the holders of permanent appointments and are stationed in New York.

The General Assembly, in its Resolution 34/165 of 17 December 1979, had requested the International Civil Service Commission, hereinafter referred to as "the Commission", to undertake a "fundamental and comprehensive review of the purposes and operation of the post adjustment system with a view to

eliminating distortions and anomalies in the resulting levels of remuneration at the various duty stations and grade levels and thereby achieving an improved mechanism for adjusting United Nations remuneration to reflect more accurately the differences in the cost of living at the various duty stations and their evolution over time as a result of inflation and currency fluctuations . . .". The Commission entrusted the Advisory Committee on Post Adjustment Questions, hereinafter referred to as ACPAQ, a technical subsidiary body of the Commission, to examine the methodology for assessing cost of living at various duty stations and to make recommendations thereon to the Commission.

At a session, held in July 1981, the Commission approved the revisions to the cost of living survey methodology recommended by ACPAQ. In its seventh annual report (A/36/30), the Commission informed the General Assembly of its action. On the basis of the revised methodology, the Secretariat of the Commission conducted comprehensive cost of living surveys at all headquarters duty stations and in Washington D.C., between November 1982 and October 1983.

On 20 December 1983, in its Resolution 38/232 the General Assembly expressed its concern at the Commission's inability "to make corrections in the current post adjustment classifications at certain duty stations in spite of the fact that the post adjustments were found to be higher than those which the results of the new cost-of-living survey could justify". It therefore requested the Commission "to expedite, in particular, the application of the revised methodology for cost-of-living measurement called for in General Assembly resolution 34/165 of 17 December 1979" and called upon "the executive heads and the staff of the organizations of the United Nations common system to co-operate fully with the Commission in the application of the post adjustment system . . .".

At a session held in May 1984, ACPAQ considered and made recommendations to the Commission concerning various aspects of the post adjustment system. In connection with the cost of living surveys conducted at the headquarters duty stations and in Washington D.C., ACPAQ concluded that for historical and technical reasons, the post adjustment index in New York was "understated" by 9.6 per cent as of October 1982.

At its twentieth session, held in July 1984, the Commission agreed "that the anomalous situation with regard to the post adjustment index for New York must be corrected" and "decided under Article 11 (*c*) of its statute to increase the New York post adjustment by 9.6 per cent to bring it to the level of 170.86 as of October 1982 as recommended by ACPAQ". In addition, it also decided that "the adjusted index for New York should be used for the determination of post adjustment classifications of all stations with effect from 1 August 1984 . . .". Accordingly, on 9 August 1984 the Controller of the United Nations in ST/IC[INFORMATION CIRCULAR]/84/55 informed the staff of the Commission's decisions, and added ". . . the Commission has determined that a class 11 post adjustment for staff in the Professional and higher categories serving in New York should be applied from 1 August 1984. The Secretary-General has consequently authorised as of that date a class 11 post adjustment . . .". On 24 August 1984 the Chairman of the Commission informed all Executive Heads and staff representatives of the decisions taken by the Commission at its twentieth session in ICSC/CIRC[CIRCULAR]/GEN[GENERAL]/101.

In its report to the General Assembly at its thirty-ninth session (A/39/30) as well as to the legislative bodies of the other member organizations of the

common system, the Commission reported its decision. During the debate in the Fifth Committee of the General Assembly, several delegations raised questions about the decisions taken by the Commission on this matter.

On 30 October 1984 the Union of Soviet Socialist Republics and the United States of America co-sponsored a draft resolution (A/C.5/39/L.8) in which it was asserted that the Commission had "exceeded its mandate" under Article 10 of its statute when it increased the New York post adjustment index, and in which it was therefore proposed that the General Assembly "revoke" the Commission's decision and instruct the Commission to "take immediate measures . . . to eliminate unjustified over-payments" at duty stations where the level of post adjustment was higher "than the results of the latest cost-of-living survey could justify".

In the course of informal consultations on this draft resolution, chaired by the Vice-Chairman of the Fifth Committee, a new draft resolution was prepared. On Tuesday, 27 November 1984 the Chairman of the Commission addressed the Fifth Committee of the General Assembly. In his response to questions from delegations, the Chairman of the Commission expressed concern as to the legality of the proposed decisions in relation to the mandate of the Commission under Articles 10 and 11 of the Statute. He also voiced his concern that the General Assembly should take a decision on a matter that affected the common system without prior consultation with the specialized agencies of the UN.

The new draft resolution (A/C.5/39/L.10) was presented by the Vice-Chairman of the Committee on Wednesday, 28 November 1984. He indicated that it reflected a consensus conclusion of the informal consultations and that therefore the two co-sponsors of the previous draft resolution on the subject had agreed to withdraw it. The Fifth Committee adopted the draft resolution on 29 November 1984 at the thirty-seventh meeting without a vote. The General Assembly adopted the Resolution at its 81st plenary meeting held on 30 November 1984. The relevant part of the resolution reads as follows:

> "The General Assembly, . . .
>
> "*Noting with concern* that the margin between the net remuneration of the United Nations and that of the comparator civil service would widen to the order of 24 per cent following the Commission's decision to increase the post adjustment index at the base city, New York, by 9.6 per cent, which decision led to an increase of one class of post adjustment in New York in August 1984 and would entail a further class in December 1984,
>
> "1. Considers that a margin of 24 per cent is too high in relation to past levels of the margin and, consequently, requests the International Civil Service Commission to:
>
> ". . .
>
> "(*c*) Take the necessary measures to suspend implementation of the increase in post adjustment for New York envisaged for December 1984, pending receipt by the General Assembly at its fortieth session, and action thereon, of the Commission's recommendations regarding the margin and other measures referred to in subparagraphs . . . above; and take whatever related measures are required in respect of the post adjustment levels at other duty stations to ensure equivalence of purchasing power as soon as possible at all duty stations in relation to the level of net remuneration in New York."

In a cable dated 11 December 1984 addressed to the Executive Heads of the specialized agencies of the United Nations, the subsidiary organs of the General Assembly, the Federation of International Civil Servants' Association, the Co-ordinating Committee for Independent Staff Unions and Associations of the UN System and the Consultative Committee on Administrative and Budgetary Questions, the Chairman of the Commission informed them of the General Assembly's decision and stated:

> "HAVING CONSULTED OTHER COMMISSION MEMBERS EYE AM NOW IN A POSITION TO INFORM YOU THAT THE COMMISSION HAS AGREED TO IMPLEMENT THE REQUEST OF THE GENERAL ASSEMBLY ON POST ADJUSTMENTS IN ITS RESOLUTION PENDING FORMAL CONSIDERATION OF ISSUE AT ITS TWENTYFIRST SESSION IN MARCH 1985. AT THAT TIME COMMISSION WILL HAVE BENEFIT OF USUAL CONSULTATIONS WITH REPRESENTATIVES OF ORGANIZATIONS AND STAFF. THEREFORE ACTING UNDER DELEGATED AUTHORITY FROM COMMISSION EYE WILL FREEZE NEW YORK POST ADJUSTMENT AT CLASS ELEVEN AND WILL SUSPEND ANNOUNCEMENTS OF FURTHER INCREASES IN POST ADJUSTMENT CLASSES FOR OTHER DUTY STATIONS WHERE RESULTS OF PLACE TO PLACE SURVEYS UPDATED BY CPI MOVEMENTS [CONSUMER PRICE INDEX] INDICATE A HIGHER PURCHASING POWER THAN NEW YORK AT CLASS ELEVEN."

The cable went on to describe the procedures which would be followed in implementing this decision.

On 19 December 1984 the Commission issued Post Adjustment Circular No. 120 which stated in part: "On the basis of a post adjustment index of 180.3 as of August 1984, post adjustment class 12 (multiplier 80) became due in accordance with the normal rules as of 1 December 1984. However, in view of General Assembly resolution A/39/27 the implementation of this class is suspended".

The Assistant Secretary-General for Personnel Services, in ST/IC/85/3 dated 11 January 1985 formally informed the staff of the actions taken by the General Assembly during the thirty-ninth session.

On 1 February 1985, the Applicant Molinier requested the Secretary-General to rescind the administrative decision not to implement post adjustment class 12 from 1 December 1984, as that decision denied her an increase in pay which she considered herself entitled to receive. In the alternative, she requested direct submission of her appeal to the Administrative Tribunal. On 20 February and on 27 February 1985 the Applicants Aggarwal and others requested the Secretary-General to review his decision on the same grounds. In the alternative, they too, requested direct submission of their appeal to the Tribunal.

On 22 March 1985 the Assistant Secretary-General for Personnel Services informed all Applicants that their requests for the implementation of post adjustment class 12 could not be granted and that the Secretary-General agreed to direct submission of their appeals to the Administrative Tribunal.

At its twenty-first session held in March 1985 the ICSC affirmed its earlier decision regarding the suspension of class 12 post adjustment in New York.

On 10 July 1985 and 4 October 1985 the Applicants filed the applications referred to above.

Whereas the principal contentions of the Applicant Molinier are:

1. The rules governing the post adjustment system are binding upon the Secretary-General and upon the United Nations General Assembly until such time as they are validly changed.

2. The decision of the Commission to adjust the New York post adjustment index which resulted in class 12 becoming due as of 1 December 1984, taken under Article 11 (*c*) of its Statute, is binding and creates legally cognizable rights until such time as it is validly changed.

3. Although the General Assembly may change the rules and although the Commission may change its decisions concerning post adjustment classifications they cannot legally do so with retroactive effect.

4. Although the General Assembly can change the rules concerning the post adjustment system and although the Commission can change its decisions, they cannot legally do so in violation of the Applicant's acquired rights.

Whereas the principal contentions of the Applicant's Aggarwal and others are:

1. The decision taken by the Chairman of the Commission, under its authority, and announced in the cable dated 12 December 1984 was reached in violation of the Commission's rules of procedure, specifically rules 5, 8, 36 and 37. The decision was thus substantially flawed because of the irregularity of the procedure followed.

2. The Chairman of the Commission, acting under the authority which the Commission had delegated to him, misjudged its competence in taking the decision of 12 December 1984. The Commission erred on a matter of law, because it considered itself bound by the General Assembly's directive, in an area where the Commission has decision-making authority.

3. In freezing the New York post adjustment at class 11, the Commission used a procedure—post adjustment classification of duty stations—for a purpose—determination of the margin—which the Commission could not legitimately pursue through that procedure. In that sense, the Commission misused procedure.

4. The decision taken by the Commission has retroactive effects and impairs the rights and interests of international civil servants. It was taken on 12 December 1984, after the commencement of the month in which the decision was applied.

5. In freezing New York post adjustment at class 11 on 12 December 1984, the Commission violated the four-month rule. In accordance with this rule, post adjustment class 12 became due on 1 December 1984.

6. The Commission is bound by the rules it has itself laid down for as long as it has not abrogated or modified them. The four-month rule is still in effect and has not been amended.

Whereas the Respondent's principal contentions are:

1. The General Assembly may fix or limit total remuneration of UN staff, which prerogative is confirmed by the Statute of the Commission and practice thereunder.

2. The General Assembly may direct suspension of implementation of a class of post adjustment at the base of the system if implementation of that class of post adjustment would, in its opinion, unduly widen the margin between remuneration of UN staff and remuneration of staff in the comparator civil service. The General Assembly exercised this power by resolution 39/27 of 30

November 1984 and the consequent suspension by the Commission of post adjustment class 12 at New York was a proper exercise of the Commission's substantive powers.

3. The decision of 11 December 1984 by the Chairman of the Commission did not violate acquired rights of UN staff.

4. The decision of 11 December 1984 by the Chairman of the Commission was a valid exercise of his delegated powers in respect of post adjustment, and complied with Rule 32 of the Rules of Procedure of the Commission.

5. The primary responsibility for assessment of the margin between the remuneration of United Nations staff and that of the staff of the comparator civil service rests with the General Assembly. The Commission is under a duty to operate the post adjustment system within the Noblemaire principle as interpreted by the General Assembly.

6. The decision to suspend implementation of post adjustment class 12 was not retroactive because post adjustment classes are not triggered automatically but must be promulgated by the Chairman of the Commission after the definitive cost-of-living figures for the preceding four months are published during the fifth month.

The Tribunal, having deliberated from 28 April 1986 to 6 June 1986, now pronounces the following judgement:

I. The Tribunal holds itself competent to deal with these applications which allege non-observance of contracts of employment of staff members of the Secretariat of the United Nations, within the meaning of Article 2.1 of the Tribunal's Statute. The applications filed by Aggarwal and others in Cases No. 359, 360, 361, 362 and 363 raise the same issues and contain the same pleas. Accordingly the Tribunal has ordered a joinder of those cases. The application filed by Miss Molinier in Case No. 356 raises the same issues and includes similar pleas. Accordingly the Tribunal has ordered a joinder of that case with Cases 359, 360, 361, 362 and 363.

II. The applications are receivable under Article 7.1 of the Tribunal's Statute, the Secretary-General and the Applicants having agreed to submit them directly to the Tribunal.

III. Applications to intervene from Michael H. S. Chan, Kenneth Walter Michael Lewis, Johannes Peter Prins, Katherine Curtis Springer, Joachim von Braunmühl and Hernán Fernando Latorre, made under Article 19.1 of the Tribunal's Rules, are rejected. They do not disclose that the persons seeking to intervene would rely on evidence or arguments different from those of the Applicants. The Tribunal observes that the Respondent has, in reply to the applications to intervene, stated that he "will automatically apply that decision in respect of all officials who can rely on the same legal principle".

IV. The substance of the applications is that the Applicants, all of whom are employed at Headquarters in New York, are entitled, with effect from 1 December 1984, to post adjustment at class 12 as it applies to Professional staff employed in that city.

V. The facts of the case do not appear to be in dispute.

VI. In accordance with Article 101 of the Charter of the United Nations, the staff of the United Nations are appointed by the Secretary-General under Regulations established by the General Assembly. The General Assembly has established Staff Regulations and provided for Staff Rules. The relevant parts of Rule 103.7 read as follows:

"(*a*) Subject to paragraph (*d*) below [not relevant], post adjustments under annex I, paragraph 9, of the Staff Regulations shall be applied in accordance with the schedules set out in that annex in the case of staff members in the Professional category and above who are assigned to a duty station for one year or more.

". . .

"(*c*) The schedules of post adjustments referred to in paragraph (*a*) above shall be applied to each duty station according to the classification established for the purpose."

It will be observed that both subparagraphs (*a*) and (*c*) are in imperative or mandatory form, using the word "shall".

VII. Annex I referred to above, deals with post adjustment in paragraph 9, in the following terms:

"9. In order to preserve equivalent standards of living at different offices, the Secretary-General may adjust the basic salaries set forth in paragraphs 1 and 3 of the present annex by the application of non-pensionable post adjustments based on relative costs of living, standards of living and related factors at the office concerned as compared to New York. Such post adjustments shall not be subject to staff assessment. Their amounts shall be as shown in the present annex."

Unlike rule 103.7, paragraph 9 of Annex I is in permissive rather than mandatory terms. It provides that "the Secretary-General *may* adjust" (emphasis added), in French "le Secrétaire général *peut* ajuster". It would appear from this language that the Secretary-General has discretion in the matter of post adjustment, sufficient to allow him to take into consideration such matters as the instructions or wishes of the General Assembly, the budgetary or cash-flow position of the United Nations, or other matters external to the Annex. In the course of the oral hearing, Counsel for the Applicants Aggarwal and others was asked whether he considered that the use of "may" (in French "peut") conferred discretion on the Secretary-General and his reply was that these words represented an error in drafting, requiring to be supplemented by such an expression as "le cas échéant", which may be translated "if the circumstances so require". Some doubt therefore must remain whether Annex I, para. 9 confers an absolute right to payment of the relevant amounts shown in the schedule forming part of the Annex, or whether it leaves some discretion to the Secretary-General. This point is not, however, decisive, since the Tribunal's opinion is based on other considerations.

VIII. Although there is no specific provision to that effect in the Staff Regulations or Rules, the post adjustment system serves not only to adjust remuneration to the varying cost of living at different duty stations at any one time, but also to maintain the purchasing power of staff members at each duty station despite changes in the local cost of living. This includes New York, which is taken as the base of the system.

IX. Paragraph 9 of Annex I and the schedule to which it refers do not in themselves provide a complete system of post adjustment. To determine the amount payable under those provisions, it is necessary to establish the required degree of variation in the local cost of living and the period for which that variation must be maintained for transition to a new class. Advancement to the next class at present depends on whether there has been an increase of 5 per cent or more, maintained for four months. This is commonly referred to as the four-month rule. Neither the required percentage-change nor the required period of

time appears in the Letter of Appointment of staff, or in the Staff Regulations or Rules incorporated by reference in the contract of employment. Both those elements have been determined by the resolutions of the General Assembly, which originally adopted the so-called nine-month rule and then changed it to the four-month rule. As the legislative sovereign, the Assembly was able to regulate these matters by its resolutions.

X. To facilitate the determination of the prerequisites mentioned above, the General Assembly has established the International Civil Service Commission with powers and functions specified in its Statute.

XI. As regards classification of posts, Article 11 of the Statute of ICSC reads as follows:

"The Commission shall *establish* (emphasis added):

"(*a*) [not relevant];

"(*b*) [not relevant];

"(*c*) The classification of duty stations for the purpose of applying post adjustments".

It will be observed that the ICSC is to "*establish*" and not merely to recommend. The classification of duty stations is a matter of the *relative* cost of living at the different stations.

XII. By contrast with Article 11 (*c*) (which confers power to "establish" the classification of post adjustments), Article 10 of the Statute confers power to "make recommendations" to the General Assembly. It reads in part as follows:

"The Commission shall make *recommendations* (emphasis added) to the General Assembly on:

"(*a*) [not relevant];

"(*b*) The scales of salaries and post adjustments for staff in the Professional and higher categories;

"(*c*) [not relevant];

"(*d*) [not relevant]."

XIII. This reflects the retention by the General Assembly of its power, as the sovereign legislature, to fix the two prerequisites for transition from one class to another: the required percentage variation in the cost of living index and the required period for which it had to be maintained. The General Assembly exercised this power by substituting the four-month rule for the nine-month rule. If it wished to do so, the General Assembly could vary this, and could even suspend transition for the time being.

XIV. The Respondent asserts that this power was retained in the hands of the General Assembly as a necessary means of giving effect to the Noblemaire principle, by which the margin between UN salaries and corresponding salaries in the Civil Service of the United States of America ("the comparator") was to be kept within reasonable bounds. The degree of the permissible margin had not been quantified by the General Assembly at the date of the decisions of the Secretary-General which are the subject of these applications.

XV. By Resolution 31/141 of 17 December 1976, the General Assembly requested the ICSC to keep under continuous review the margin between UN and US salaries, to make recommendations to the General Assembly, or if urgent conservatory action was necessary between sessions of the Assembly to prevent an undue widening of the margin, to take appropriate conservatory measures itself *within the operation of the post adjustment system* (emphasis

added). In these terms, the General Assembly delegated to the ICSC the function of taking appropriate conservatory measures within the post adjustment system if the Assembly was not in session, in order to preserve the margin within reasonable (but not precisely specified) bounds. A relevant resolution of the General Assembly, although not incorporated in the Staff Rules, is binding upon staff members as a condition of their employment (Judgement No. 67, *Harris et al.,* para. 5; No. 236, *Belchamber,* para. XVI; No. 249, *Smith,* para. VII). However, in the event, no occasion arose before December 1984 for the ICSC to take conservatory action, and no challenge was made to the propriety or effect of its so doing.

XVI. The ICSC asked the Advisory Committee on Post Adjustment Questions (ACPAQ) to investigate post adjustment. ACPAQ made recommendations to the ICSC concerning cost of living surveys at duty stations and expressed the view that the procedures previously used had understated the New York index. After examining ACPAQ's findings, the ICSC concluded:

> ". . . that the results of the analysis carried out using three different approaches had led to the same conclusion that the events which had taken place over a period of more than 25 years had resulted in an understatement of the post adjustment index at the base of the system . . ." (Report of the ICSC, 1984, A/39/30, para. 161).

XVII. The ICSC accordingly *decided under Article 11 (c) of its Statute* to increase the New York post adjustment by 9.6 per cent as of October 1982, as recommended by ACPAQ (ibid para. 163). This would have an effect on the (relative) classification of other duty stations and would increase the post adjustment to be paid to staff in New York itself. However, it further decided that the adjusted index should be used only from 1 August 1984 (ibid para. 164).

XVIII. As stated in para. XV above, by Resolution 31/141 of 17 December 1976, the General Assembly had requested the ICSC to keep under constant review the margin between United Nations Professional remuneration and the corresponding remuneration in the United States Civil Service, in accordance with the Noblemaire principle. The ICSC, in para. 162 of its Report of 1984, noted the statement of a member of the Commission that the revision of the New York base would change the margin to approximately 24% above the salaries of the comparator.

XIX. In consequence of the ICSC's Report, the General Assembly adopted Resolution 39/27 of 30 November 1984, stating that a margin of 24% was too high and requesting the ICSC, among other things, to:

> ". . . take the necessary measures to suspend implementation of the increase in post adjustment for New York, envisaged for December 1984, pending receipt by the General Assembly at its fortieth session and action thereon of the Commission's recommendations regarding the margin and other measures . . ."

The General Assembly did not itself decide to suspend implementation of the increased post adjustment index at New York, but "requested" the ICSC to take the necessary measures to do so, evidently regarding the ISCS's decision to increase the post adjustment index as having been a valid exercise of its powers, since otherwise there would have been no need to suspend its implementation. In taking this action, the General Assembly recalled that by its resolution 31/141 of 17 December 1976 it had decided that at any time that the ICSC considered corrective action was necessary in respect of the margin between the remuneration of United Nations staff and that of the comparator civil service,

the ICSC should either recommend the necessary conservatory action or, if urgent conservatory action was necessary between sessions of the Assembly, take appropriate measures itself within the operation of the post adjustment system.

XX. Under the resolution of December 1976, the ICSC was to take measures itself only if urgent conservatory action was necessary between sessions of the Assembly; if the Assembly was in session, ICSC was to make recommendations to the Assembly. But by its resolution of 30 November 1984, the Assembly "requested" (and by implication authorized) the ICSC to take conservatory action notwithstanding that the Assembly was then in session. This was, in the Tribunal's view, a further delegation of power to the ICSC.

XXI. The Applicants have not contended that the General Assembly lacked the power to establish subsidiary organs such as ICSC, but they have asserted that, once such a body has been established, the General Assembly must not interfere with the exercise of its powers. They cite, in support of this argument, the Advisory Opinion of July 13th 1954 of the International Court of Justice on the *Effect of Awards of Compensation made by the United Nations Administrative Tribunal,* in which the Court decided that the General Assembly cannot refuse to give effect to an award of compensation made by the Tribunal in favour of a staff member of the United Nations whose contract of service has been terminated without his consent. The opinion of the International Court of Justice was based on the Court's conclusion that:

> "the Tribunal is established, not as an advisory organ or a mere subordinate committee of the General Assembly, but as an independent and *truly judicial body pronouncing final judgements without appeal* within the limited field of its functions" (page 53, emphasis added).

The judicial character of the Tribunal was apparently the special consideration which influenced the view of the Court.

XXII. The General Assembly was entitled to request the ICSC to suspend the implementation of the increase in the post adjustment for New York envisaged for December 1984 in exercise of power delegated to ICSC by the General Assembly. In any event, the ICSC accepted and complied with the expressed wishes of the General Assembly, and the Tribunal is not called upon to pronounce on the relationship between the General Assembly and the Commission.

XXIII. The question therefore arises whether the ICSC in fact took valid action to suspend the operation of the decision to increase the New York post adjustment.

XXIV. In his cable of 11 December 1984 to the Executive Heads, FICSA, the Co-ordinating Committee and CCAQ [Consultative Committee on Administrative Questions], the Chairman of ICSC stated, among other things:

> ". . . HAVING CONSULTED OTHER COMMISSION MEMBERS, EYE AM NOW IN A POSITION TO INFORM YOU THAT THE COMMISSION HAS AGREED TO IMPLEMENT THE REQUEST OF THE GENERAL ASSEMBLY ON POST ADJUSTMENTS IN ITS RESOLUTION PENDING FORMAL CONSIDERATION OF ISSUE AT ITS TWENTYFIRST SESSION IN MARCH 1985. AT THAT TIME, COMMISSION WILL HAVE BENEFIT OF USUAL CONSULTATIONS WITH REPRESENTATIVES OF ORGANIZATIONS AND STAFF. THEREFORE, ACTING UNDER DELEGATED AUTHORITY FROM COMMISSION EYE WILL FREEZE NEW YORK POST ADJUSTMENT AT CLASS ELEVEN . . . ."

XXV. Under Article 18.2 of its Statute, the ICSC may delegate to its Chairman, its Vice-Chairman or members responsibility for carrying out "specific functions under the statute other than those enumerated above." Those "enumerated above" appear in the preceding paragraph (Article 18.1), the only function of possible relevance being the formulation of recommendations under Article 10 concerning the system of salaries and allowances. This would not prohibit the delegation to the Chairman of power to freeze the post adjustment as requested by the General Assembly.

XXVI. On 16 June 1975, the Chairman of the Commission had issued a circular to participating organizations and staff representatives in which he stated, among other things:

> "The Commission decided at its first session to delegate to the Chairman the responsibility for certain on-going functions, including the approval of periodic revisions of the schedules of post adjustment classifications . . ."

XXVII. However, the decision to freeze the New York post adjustment at class 11 is not an "on-going function", but an unusual, possibly a unique, event, and the Chairman has not in fact placed reliance on the circular of 16 June 1975 as the basis for his acting on behalf of the Commission.

XXVIII. In response to an inquiry from the Tribunal, the Chairman has stated that Rule 32 of the ICSC's Rules of Procedure was applied for suspending the post adjustment in question. Rule 32 reads as follows:

> "Whenever the Chairman, after consultation with the Vice-Chairman, considers that a decision on a particular question should not be postponed until the next regular session of the Commission and does not warrant the calling of a special session, the Executive Secretary shall transmit to each member, by any rapid means of communication, a motion embodying the proposed decision with a request for a vote. Votes shall be cast during such period as the Chairman prescribes. At the expiration of the established period, or of any extended period the Chairman may prescribe, the Executive Secretary shall record the results and notify the members. If the replies do not include those of at least eight members, the vote shall be considered as without effect."

XXIX. Under Rule 32, before a vote could be taken by cabling the members of the Commission it was a pre-requisite that the Chairman, after consulting the Vice-Chairman, should have formed an opinion that a special session of the Commission was not warranted. There was in fact no Vice-Chairman at the relevant time. The Chairman had stated to the Fifth Committee on 29 November 1984 that:

> "ICSC should perhaps hold a special session, with all the financial implications that that entailed, since its next regular session would not take place until March 1985." (Summary Records of the 37th meeting, para. 2.) A/C.5/39/SR.37

This statement was not conclusive and in fact the Chairman decided to proceed otherwise. He sent a cable to the other members of the Commission on 30 November 1984. This cable did not make any reference to Rule 32 or indicate that the Chairman was of the opinion that a special session was not warranted. It offered three choices, the relevant passages of which are as follows:

> "AAA EYE WILL FREEZE NEW YORK AT POST ADJUSTMENT CLASS 11 . . . PENDING CONSIDERATION OF THIS ISSUE BY THE COMMISSION AT THE 21ST SESSION.

"BBB EYE WILL ISSUE POST ADJUSTMENT CIRCULARS AS USUAL . . . BUT ADD NOTE REFERRING TO GENERAL ASSEMBLY RESOLUTION FOR ATTENTION OF EXECUTIVE HEADS PENDING FURTHER REVIEW AT MARCH 1985 SESSION. . . .

"CCC SPECIAL SESSION, THOUGH HIGHLY INCONVENIENT, BE CONVENED AS SOON AS POSSIBLE TO CONSIDER COMMISSION'S DECISION PREFERABLY BEFORE NEXT POST ADJUSTMENT ANNOUNCEMENT FOR NEW YORK, I.E. BEFORE 21 DECEMBER 1984. ADVANTAGE SPECIAL SESSION WOULD BE CONSULTATION AMONG MEMBERS AND PARTICIPATION REPRESENTATIVES ORGANIZATIONS AND STAFF WHO HAVE RIGHT TO BE CONSULTED."

Under Rule 5 of the Commission's Rules of Procedure, a special session would have required two weeks notice.

XXX. According to information supplied to the Tribunal by the Chairman, of the 13 members to whom the cable was sent 11 responded, an "overwhelming majority" being in favour of course A, which the Chairman followed. The precise number voting in favour has not been stated to the Tribunal, which however concludes that an "overwhelming majority" of eleven, when the Chairman's vote was added, must have amounted to the eight affirmative votes required by Rule 30.2 of the Commission's Rules of Procedure.

XXXI. In the cable of 11 December 1984, communicating the decision to suspend the post adjustment, there is no reference to this having been done under Rule 32.

XXXII. The validity of the decision under Rule 32, had been challenged on various grounds. The first is that appended at the end of the Rules is a Note containing comments on certain rules which it [the Commission] "decided should constitute authoritative interpretations of these rules . . .". A comment on Rule 32 in the Note reads as follows:

> "Rule 32: The provision regarding voting without a meeting was approved, but on the understanding that it would not be utilized for the time being." (in French, "pour l'instant")

In the view of the Tribunal this goes beyond the ordinary meaning of an "authoritative interpretation" and is rather a purported suspension of the use of the rule for a period imprecisely specified by the expression "for the time being." Its legal effect is therefore a matter of doubt. The Tribunal further questions whether "the time being" is to be interpreted as suspending the use of the rule for as much as the nine or more years that had elapsed between May 1975 (when the Rules were adopted by the Commission) and December 1984. The Tribunal understands from the Chairman that Rule 32 had in fact been used prior to 11 December 1984.

It has, however, been argued that, in the absence of a contrary decision by the Commission prior to that date, the Note was still in force in December 1984 and effectively prevented the use of Rule 32. The Tribunal does not find it necessary to decide this point, for reasons which will appear in the subsequent paragraphs.

XXXIII. Counsel for the Applicants Aggarwal and others also relies on the argument that, "even if Rule 32 had been in effect, the Chairman would have had no legal justification for applying it in the present case". He concedes that the Chairman enjoys wide powers of discretion in such cases, but contends that, even so, "he could not have legitimately avoided calling a special session, which was clearly warranted by the importance of the question". He adds that,

in his view, "any other decision by him [the Chairman] would have constituted a blatant error of judgement." It is not for the Tribunal to substitute its own judgement on such a matter for that of the Chairman; but if the Chairman could not reasonably, in all the circumstances, have decided that the holding of a special session was not warranted (the French text of Rule 32 has "justifiée"), or if the procedures of Rule 32 were not adhered to, the use of Rule 32 cannot stand.

XXXIV. The conclusion must be drawn that the Chairman, appreciating the inconvenience and financial implications of holding a special session, felt some uncertainty whether in all the circumstances a special session was warranted and decided to seek the views of the other members of the Commission, by proposing a special session as one of the three options offered to them in his cable of 30 November 1984. Their vote in favour of a freeze was taken as conclusive and as making a special session unnecessary. Post adjustment at class 12 was therefore suspended by the Chairman, pending consideration of the issue at the Commission's regular session in March 1985.

XXXV. Rule 32 does not contemplate that a decision that a special session is not warranted can be made *after* the result of a cable vote is known. The decision is a condition precedent to the taking of a cable vote. Furthermore, as Counsel for Aggarwal and others has observed, Rule 32 requires the submission of a motion embodying the proposed decision, on which the members are to vote, and does not contemplate the submission of three options, in which the holding of a special session is presented as an alternative to two substantive decisions. He also asserted that the Commission's Executive Secretary did not record the result of the vote or notify the members as required by Rule 32. In the Tribunal's view, the Chairman's cable to the members, dated 11 December 1984, only partially remedied these formal omissions by notifying them that a "majority" (unspecified) had preferred option A, which was to freeze the post adjustment at class 11 pending consideration of the issue by the Commission at its 21st session. However, the Tribunal doubts whether these *ex post facto* omissions would in themselves be sufficient to invalidate the vote.

XXXVI. The Tribunal finds nothing in the record to raise any doubt that the Chairman of the Commission acted otherwise than from the highest motives and in the interests of the United Nations system. Nevertheless, meticulous adherence to the Commission's Rules of Procedure is a necessity, particularly in a matter of such importance affecting the interests of thousands of staff members of the United Nations system all over the world. In this case, the procedure required by Rule 32 was not followed.

XXXVII. The Tribunal concludes that the Commission's decision, conveyed in the Chairman's cable of 11 December 1984, had no legal force because the requirements of Rule 32 were not complied with. However, at its next regular session held in March 1985, the Commission "after reconsidering the issue, agreed to confirm its earlier decision regarding the suspension of class 12" (Report of ICSC, 1985, (A/40/30), para. 106).

XXXVIII. Confirmation by the ICSC at its session in March 1985, must be regarded as ratification by the Commission of the Chairman's decision of 11 December 1984. In accordance with the general principles of law, such ratification dates back to the date of the action ratified, but without having an adverse retroactive effect upon rights which have accrued in the meantime. Accordingly the Tribunal's view is that the Applicants are entitled to such remuneration as would have accrued to them had class 12 post adjustment been

applied to New York from 1 December 1984 until the Commission ratified the Chairman's decision at its session in March 1985. In the absence of evidence as to the precise date on which the Commission ratified the Chairman's decision, the Tribunal considers it to have been confirmed by the end of March 1985, when the Commission adopted its report.

XXXIX. A challenge to the validity and effect of the Commission's suspension of the increase in the New York post adjustment is based on the argument that the function of the ICSC is to ascertain the increase in the cost of living, and the period it has been in effect, these being facts which automatically trigger the move to the next class in the post adjustment schedule. That being so, the argument continues, the ICSC cannot suspend the move to class 12 which has occurred automatically. However, automaticity of this kind has not in practice been the rule in the case of post adjustment. A fall in the index has hitherto not invariably been treated by the ICSC as automatically requiring the deductions specified in section (ii) of the schedule of post adjustments attached to Annex A to the Staff Rules; in the case of Geneva in 1980 (para. 146 of ICSC Report, 1980, A/35/30) the adjustment was frozen until the index caught up. At the oral hearing, counsel for all the parties confirmed that downward revision of post adjustment is not normally given effect to, but is suspended. Similarly, the ICSC, which has power under Art. 25.3 of its Statute to determine the date from which its decisions are to have effect, postponed until 1 August 1984 the effective date of its decision to increase the New York post adjustment by 9.6 per cent as of October 1982. This is recorded in paragraphs 163 to 165 of the Report of the ICSC, 1984. In para. 187 of its report to the General Assembly, 1976 the ICSC recorded, without dissent, that

> ". . . Some members of the Commission emphasized the negative consequences of the automatic application of adjustments, which leads to a widening gap between the level of United Nations remuneration and that of the United States Civil Service".

The Commission in para. 188 of its Report of 1976 also made a recommendation to the General Assembly which was accepted by resolution 31/141 of 17 December 1976, authorizing and requiring the Commission, if urgent conservatory action became necessary to prevent an undue widening of the margin of United Nations remuneration over that of the United States Civil Service, to take appropriate corrective measures itself, "within the operation of the post adjustment system". The conclusion may be drawn that the General Assembly did not consider that automaticity was a binding principle from which there was no escape. Indeed, to bind the hands of the General Assembly and the ICSC in this way would, in some circumstances, have such grave consequences that this Tribunal would be reluctant to apply a theory which would have that effect, in the absence of compelling and specific legislation leaving no alternative.

XL. It is unnecessary, for the purposes of this case, to decide whether "automaticity", as described, is or is not the correct theory. It is sufficient that, in this case, the General Assembly requested the ICSC to suspend the application of post adjustment class 12 pending a further study. The use of the word "suspend" rather than "postpone" implies that class 12 was considered to be in force. In the Tribunal's view, the General Assembly had unquestionable power to regulate in this way emoluments not yet earned, if it regarded suspensory action as necessary in the circumstances.

XLI. The Applicants have also argued that to freeze post adjustment for the purpose of preventing the undue widening of the margin under the Noblemaire principle is an abuse of power, because the post adjustment system was not intended for that purpose but as a means of ensuring equality of purchasing power in different posts at all times. The post adjustment system has always served the additional purpose of enabling remuneration to keep pace with changes in the local cost of living, subject to certain modalities not relevant to the point at issue. In calling upon the ICSC to take corrective action, within the post adjustment system, to preserve the Noblemaire principle, the General Assembly evidently contemplated that the post adjustment system could properly be used for that purpose in addition to the purpose stated by the Applicants. General Assembly resolution 31/141 of 17 December 1976 authorized and required the Commission to "*take appropriate measures itself within the operation of the post adjustment system*". In resolution 32/200 of 21 December 1977, the Assembly had noted:

> "the assurance given by the International Civil Service Commission that, in compliance with the request made in section I, paragraph I, of General Assembly resolution 31/141 B of 17 December 1976, it will continue to keep under continual review the relationship between the levels of remuneration of the comparator national civil service and of the United Nations common system . . ."

The resolution also called upon the Commission

> "to report on such steps as it may have taken to bring about appropriate corrective action either under the authority and with the means already at its disposal or by submitting a recommendation to the Assembly".

There was, in response, the Commission's assurance, in para. 141 of its 1978 Report (A/33/30), that in the case of an undue widening of the margin the Commission itself could take action:

> "to decide that *an increase in the post adjustment class for New York which was becoming due under the rule of the system should be temporarily withheld.* The withholding of a class could remain in effect either until circumstances show that it could be granted . . . or, failing this, until the problem was submitted to the General Assembly at its next session". (emphasis added)

It therefore seems to the Tribunal to be beyond doubt that from the early days of the Commission (which was established in 1974) both the General Assembly and the Commission, as a matter of historical fact, contemplated the use of the post adjustment system for the preservation of the Noblemaire principle and had foreseen considerable flexibility rather than "automaticity" in establishing classes for the purposes of the post adjustment system. There is, accordingly in the Tribunal's view, no valid basis for regarding this use as an abuse of power.

XLII. Counsel for the Applicants Aggarwal and others has also argued that the Commission's Statute is in the nature of a treaty and that the purpose of the post adjustment system can be defined only on the basis of a common interpretation by the parties. It is true that both the Statute of the ICSC and any amendments made to it by the General Assembly require acceptance by the specialized agencies and other international organizations which participate in the United Nations common system (Articles 1 and 30 of the Statute). However, the use of the post adjustment system for the preservation of the Noblemaire principle has been consistently approved by the General Assembly, without

objection from the other organizations concerned, which must be taken to have acquiesced in this interpretation.

XLIII. It was argued by Counsel for the Applicant Molinier that she had an acquired right to the post adjustment suspended by the decision of 11 December 1984. Counsel for the other Applicants did not wish to argue this point, his view being that the doctrine of acquired rights can apply only when there has been a change in the relevant legislation. However that may be, the jurisprudence of the Tribunal excludes the doctrine of acquired rights from application in this case for two reasons—first, because the rules of post adjustment are statutory (Judgement No. 237, *Powell*; Judgement No. 273, *Mortished*); and secondly, because the doctrine can apply only to benefits accruing through services before the adoption of the amendment and not to remuneration for future services (Judgement No. 82, *Puvrez*, a case concerned with an amendment of the post adjustment system then applied by the International Civil Aviation Organization). The Tribunal, having considered the practices of other international administrative tribunals in respect of acquired rights is of the opinion that it should adhere to its own jurisprudence pending further examination of the problems involved, which cannot be considered in isolation from problems of retroactivity and legitimate expectancy.

XLIV. It was also argued on behalf of the Applicant Molinier that the Tribunal must apply existing legislation until it has been formally amended. This does not mean that the Tribunal must ignore the interpretation or implied amendment of the relevant Staff Rules by resolutions of the General Assembly, which in this case specifically requested and by implication authorized (if further authorization was needed) the action taken by the Commission in suspending the implementation of class 12 post adjustment. According to the established jurisprudence of the Tribunal, referred to in paragraph XV above, relevant resolutions of the General Assembly, although not incorporated in the Staff Rules, are binding on staff members as conditions of their employment.

XLV. In all circumstances and for the foregoing reasons, the Tribunal orders the Respondent to rescind his decision to refuse to pay to each of the Applicants remuneration at the level of post adjustment class 12 in respect of the period of 4 months from 1 December 1984. Should the Respondent decide to take no further action, the Tribunal fixes the amount of compensation to be paid to the Applicants as the additional amount which would have been due in consequence of the application of post adjustment at class 12 from 1 December 1984 for a period of 4 months, taking into account the consolidation into salary of 20 post adjustment points in effect from 1 January 1985.

XLVI. All other pleas of the Applicants are rejected.

XLVII. The Tribunal wishes to express its gratitude to the Chairman of the International Civil Service Commission and to Counsel on both sides for their helpfulness in dealing with this particularly complicated case.

(Signatures)

Samar SEN
President

R. Maria VICIEN-MILBURN
Executive Secretary

Arnold KEAN
Vice-President

Geneva, 6 June 1986

EXPLANATORY STATEMENT BY MR. SAMAR SEN

I should like to give below a brief background and a few short comments relating to these cases to explain in part my understanding of the judgement which I have signed. (The introductory part of Mr. Roger Pinto's dissenting opinion contains much valuable information.)

Brief Background

The legal problems in these cases are numerous and complex, and involve a multitude of administrative practices and procedures, some of which have been dealt with in the judgement itself.

Ever since the establishment of the United Nations, a principle known as the Noblemaire principle has been pursued. (Noblemaire was the Chairman of a Committee established by the League of Nations in 1920.) This principle requires that the UN Staff remuneration should be more (how much more was not even roughly indicated until late 1985) than that of the most highly paid civil service in the world today, that is the Federal Civil Service of the USA; that country is often referred to as the "comparator". The purpose behind the Noblemaire principle is to ensure "the highest standards of efficiency, competence and integrity" in the recruitment of Professional and higher categories of staff (Article 101.3 of the UN Charter). There has been much discussion, but no conclusion, on how the totality of remuneration of the UN staff is to be compared to that of the US Federal Civil Servants. The difference between the US scale of remuneration and that of the UN is referred to as the "margin".

Also from the beginning, it has been recognized that since the UN staff are sent all over the world, it must be ensured that the earning of each person in Professional and higher categories in the salary structure is so adjusted that a staff member retains the same purchasing power of his emoluments, no matter in what place he works or what nationality he has: this system has come to be known as post adjustment.

In translating these two principles into concrete action, a large number of technical, administrative and financial problems had to be faced; while it is not necessary to discuss and analyse them in detail, the main difficulties which arose had to be kept in mind in order to comprehend the pleas and arguments of the parties as also the considerations (and reasoning) on which the Tribunal's conclusions and judgement have been based.

The post adjustment implies that there have to be a base city and a base date, providing the starting points for measuring divergences, upwards and downwards, of the purchasing power of the US dollar (in which salaries and also post adjustment amounts are calculated). The base city at present is New York and the index for the base year, 1979 (December) is 100. Statistics of price movements are collected in different posts and care is taken to ensure that the consumption and expenditure patterns of staff members are accurately reflected in these statistics which provide the cost of living index in any station or post. Measured from a base year, whenever an index rises (or falls) by 5 per cent or more and remains at that level over a period of at least four months (the 4-month rule), the classification of the affected station is changed. For simplifying the application of these changes, a "multiplier" is used—the multiplier being the percentage change required for any class over the base. The classes and the multipliers have been worked out as follows:

"Class	*Multiplier*
D	−20
C	−15
B	−10
A	− 5
0	0
1	5
2	10
3	16
4	22
5	28
6	34
7	41
8	48
9	55
10	63
11	71
12	80
"	"
"	"
"	"
"	"
25	238

"For cost of living increases, movement of the index is given in terms of whole classes, but for post adjustment levels due to exchange rate movements, post adjustment is expressed in fractions of classes. Thus a post adjustment of class 6/+5 indicates class 6 (i.e. multiplier 34) plus 5 giving index 139 or multiplier 39."

Since the posts are compared all the time with New York for ensuring that all staff members have equivalent purchasing power, a large change in New York means much greater change throughout the system than the simple movements of prices in any given station.

All this work was being done "pragmatically" (meaning presumably *ad hoc* adjustment in any station on the basis of available reports and figures rather than on statistical methodology accepted by the ICSC and the General Assembly) before the International Civil Service Commission was established in 1974 "for the regulation and co-ordination of the conditions of service of the United Nations Common System."

It has always been accepted as desirable that the United Nations and the Specialized Agencies (Article 57 of the UN Charter) should follow the same system (the Common System) for the remuneration and other related conditions of service of the Staff. Since the Specialized Agencies have entered into special relations with the UN (Article 63 of the UN Charter), this adoption of the post adjustment system, as at present worked out by the ICSC and finally accepted and approved by the General Assembly, was achieved and continues to be achieved through persuasion and negotiation, and not through any superior legislative sanction, inasmuch as each Specialized Agency has its own legislative organ. This was a practicable way of applying the Common System.

For many years now the question of how post adjustment may affect the "margin" has been a concern not only of the General Assembly and the ICSC

but of various expert and advisory bodies. Thus, in 1976, the ICSC stated that "in the opinion of the majority of the members of the Commission, it would be inappropriate to define a precise optimum margin. . . . To do so would risk tying United Nations remuneration in too rigidly mathematical a manner to that of a single country" (paragraph 184 of the 1976 ICSC Report to the General Assembly). On receiving this Report, the General Assembly showed concern and requested the ICSC to take action to prevent "undue widening of the margin".

In 1977 detailed studies of the problems involved were undertaken, but in 1978, ICSC held the view that the "risk of widening the margin is . . . rather remote" and stated "it could take conservatory action within the authority it had under article 11 (*c*) of its Statute. . . . That action might be to decide that an increase in the post adjustment class for New York which was becoming due should be temporarily withheld".

In 1979 the General Assembly requested the ICSC "to begin urgently a fundamental and comprehensive review of the purposes and operation of the post adjustment system". While studies and discussions continued, the ICSC did not in 1981, in view of the widening margin, recommend any increase in salary as desired by the Staff Union. In 1982 the ICSC reported that there was no agreement on the level of remuneration for the staff and the General Assembly requested the Commission "to review further the basis for the determination of the level of remuneration" and to make its recommendations in 1984.

In 1983 the General Assembly expressed concern that the ICSC "was unable to make correction in the current post adjustment classification at certain duty stations in spite of the fact that the post adjustments were found to be higher than those which the results of the new cost of living survey could justify".

However, by 1984 several important changes had taken place. The ICSC accepted that for a variety of reasons, New York had been "understated" by 9.6 per cent and therefore agreed to bring it to the level of 170.86 (class 11) with effect from 1 October 1982.

In implementing this adjustment, the Commission declined to give it retroactive effect and decided that "the adjusted index for New York should be used for the determination of post adjustment classification of all stations with effect from 1 August 1984". New York thus entered class 11 on that date, having reached class 10 on 1 June 1984 and class 9 in May 1983. Meanwhile, New York prices continued to rise and made New York eligible for class 12 from 1 December 1984. The movement of New York to class 11 had two consequences—it absorbed 5% of the 9.6% "understatement" and the balance was expected to be absorbed later. It was calculated that the application of class 12 to New York would have increased the margin to about 24%. The second consequence was that with the upward revision of the New York index by 9.6% the earlier disparity between New York and some of the duty stations was reduced.

In 1984, it was further decided that 20 points of post adjustment should be "consolidated" with the base salary and therefore the staff members would receive from 1 January 1985 higher salary and less post adjustment.

It was against this general background, only a few elements of which have been indicated, that the General Assembly adopted resolution 39/27 of 29 November 1984.

Comments

(1) The General Assembly did not say or suggest that class 12 was not applicable to New York from 1 December 1984. Indeed, on the basis of statistics presented by the ICSC, such a non-application would have been difficult; the General Assembly, rather than follow that course, requested the ICSC to "suspend" implementation of the increase. The word "suspend" would normally imply that it would otherwise have entered into force.

(2) In the context of post adjustment *vis-à-vis* the Noblemaire principle, any attempt to denude the General Assembly of its power or to bind the hands of the ICSC could give rise to a fundamental error of law or procedure. This, in turn, may occasion a failure of justice.

(3) But for the suspension ordered by the Commission at the end of March 1985, class 12 could be deemed to have become applicable from 1 December.

(4) The ICSC was within its rights (under Article 11 (*c*) of its Statute) to suspend the movement of the base city into a higher class. If Article 11 (*c*) is not to be interpreted as a mechanical device, discretion must be presumed to have been left to the Commission (ICSC) to establish when and in what class a particular post should belong.

(5) While the Tribunal's award is governed by Article 10 of its Statute, the General Assembly may take, in exercise of its sovereign power regarding the budget of the United Nations, such action as it considers appropriate to solve its financial problems. Meanwhile, the rights of the Staff in respect of post adjustment must be held to continue to subsist, until they were affected by the decision of the ICSC in March 1985.

(Signatures)

Samar SEN
President

R. Maria VICIEN-MILBURN
Executive Secretary

Geneva, 6 June 1986

DISSENTING OPINION OF MR. ROGER PINTO

(Original: French)

I cannot associate myself with the Tribunal's reasoning or with the operative part of its judgement for the following reasons:

I. At a time when the Tribunal is ruling on the applications submitted to it, it cannot ignore the critical, even dramatic, circumstances which the United Nations and the international specialized agencies have to confront. The United Nations General Assembly has the necessary authority to solve the present financial crisis. As Counsel for one of the Applicants remarked in the course of the oral proceedings, the Assembly has "full control in matters of salaries". It can reduce them. It can also decide to make temporary deductions from salaries, as some international organizations have done. It is not the Tribunal's role, nor would it be able, to remedy the serious political and financial problems which exist today. These problems are exclusively within the competence of the political and financial organs and, in the final analysis, of the States members of the organizations concerned. The Tribunal's competence is limited to proclaiming the law, the whole law and nothing but the law, in each case which comes before it.

II. The applications raise questions which are easily stated, but the legal solution which the questions call for is difficult. The first question concerns the rules applicable to the determination of the total compensation of international civil servants as compared with that of national civil servants—in accordance with the "Noblemaire" principle (I). The second concerns the rules applicable to the adjustment of international civil servants' salaries to take account of variations in the cost of living in the various headquarters of the international organizations and at other duty stations (Post adjustment system (II)).

I

The "Noblemaire" principle

III. The first question concerns the application of the "Noblemaire" principle, which was conceived at the time of the establishment of the League of Nations. According to this principle, the remuneration of international civil servants in the Professional and higher categories must be established by comparison with that of national civil servants.

In order to recruit staff of the highest calibre and to take account of the constraints peculiar to the international civil service (in particular, expatriation and mobility), it was deemed necessary to grant additional remuneration to international civil servants in the form of a "margin" added to the highest national remuneration.

IV. The Charter of the United Nations expressly states, in Article 101.3:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity".

It is not surprising, therefore, that the "Noblemaire" principle has been applied by the Organization since its creation. The United States federal civil service, being regarded as the best paid, was chosen as a basis of comparison in determining United Nations salary scales.

V. The margin existing at the outset between the salary scales of United States civil servants and those of international civil servants was liable to change in the light of the development of the additional allowances attached to the salaries of international civil servants. Moreover, this margin was not uniform. In late September 1976, the International Civil Service Commission (ICSC), established by the General Assembly (resolutions 3042 (XXVII) of 19 December 1972 and 3357 (XXIX) of 18 December 1974), estimated its actual level at 13.75. ICSC considered that it was not advisable to define "a precise optimum margin between United Nations remuneration and that of the United States" (*Official Records of the General Assembly, Thirty-first Session, Supplement No. 30* (A/31/30), para. 184).

VI. At that time and until 1985, as acknowledged by the Respondent, "the acceptable level of this margin was determined pragmatically and was not fixed at any precise level" (para. 4 of the answer).

VII. ICSC, in its 1976 report, thus rejected the establishment of an automatic mechanism to control the extent of the margin. It noted that:

> ". . . that would suppose that a given margin had been numerically defined as an optimum; moreover, in the opinion of most members, an automatic mechanism to trigger off increases or decreases [of the margin] was undesirable and unnecessary in the light of the Commission's role as a

standing body to keep the situation under surveillance" (ICSC report cited above (1976), para. 183).

VIII. The General Assembly also paid attention to the evolution of the margin. It did not want an excessive margin to be established between the total remuneration of an international civil servant and that of a United States civil servant.

IX. Thus, in resolution 31/141 B of 17 December 1976, the Assembly:

"I

1. *Decides* that the International Civil Service Commission, as a standing body, should keep under continual review the relationship between the levels of remuneration of the comparator civil service, at present the United States Civil Service, and the United Nations system, having due regard to all relevant factors, including the differences between the two services, and decides that at any time when the Commission considers corrective action is necessary it should either *recommend* such action to the General Assembly or, if *urgent conservatory action is necessary* between sessions of the Assembly to prevent an undue widening of the margin of the United Nations remuneration over that of the comparator civil service, *take appropriate measures itself within the operation of the post adjustment system*" (emphasis added).

X. In 1984, the General Assembly found that, following certain decisions of ICSC raising by 9.6 the base index for New York, which served as a reference for calculation of the cost-of-living allowance (and which the Tribunal will examine below (para. XXXIX)), the margin had reached 24 per cent. It considered that margin to be too high. By resolution 39/27 of 30 November 1984, the General Assembly:

"*Noting with concern* that the margin between the net remuneration of the United Nations and that of the comparator civil service would widen to the order of 24 per cent following the Commission's decision to increase the post adjustment index at the base city, New York, by 9.6 per cent, which decision led to an increase of one class of post adjustment in New York in August 1984 and *would entail a further class in December 1984,*

"1. *Considers* that a margin of 24 per cent is too high in relation to past levels of the margin and, consequently, requests the International Civil Service Commission to:

"(*a*) Re-examine, in the light of the views expressed in the Fifth Committee at the current session, what would constitute a desirable margin between the net remuneration of the United Nations in New York and that of the comparator civil service and its effect on the operation of the post adjustment system;

"(*b*) Submit its recommendations to the General Assembly at its fortieth session on:

"(i) A specific range for the net remuneration margin, together with a concise summary of the methodology applied in calculating that margin, taking into account that, on average, the margin in the past has been within a reasonable range of 15 per cent;

"(ii) The technical measures which would be applied by the Commission to ensure that the post adjustment system operates within the framework of the defined margin range" (emphasis added).

XI. ICSC thus undertook in 1985 a review of the margin, and the establishment of a range within which the margin should be maintained and consequently the necessary measures to ensure that the "post adjustment system" operates within the range.

XII. This review prompted the Commission to make the following recommendations in its report to the fortieth session of the General Assembly:

"117. . . . the Commission decided to recommend to the General Assembly a range of 110 to 120 for the net remuneration margin, and considered that the midpoint of around 115 would constitute a desirable level around which the net remuneration margin should be maintained over a period of time" (*Official Records of the General Assembly, Fortieth Session, Supplement No. 30* (A/40/30)).

XIII. The Commission was finding it desirable to propose new modalities for the operation of the post adjustment system within the limits of the range established for the margin. It was becoming necessary to anticipate a situation where, if one class of post adjustment "became due", the Commission would have to examine the effect which the increase or reduction of the post adjustment would have on the margin and take adequate measures to bring the margin within the range.

XIV. The Commission thus decided that:

". . .

"(*b*) The General Assembly should be requested to approve a range for the net remuneration margin of 110 to 120, with a desirable level of around 115;

"(*c*) The General Assembly should be requested to approve the procedure outlined under paragraphs 120 through 122 above, which would enable the Commission to operate the post adjustment system within the approved range for the net remuneration margin" (para. 131 of the report).

XV. By resolution 40/244, of 18 December 1985, the General Assembly approved the Commission's proposals concerning the margin and the modalities for the operation of the post adjustment system within the margin in the following terms:

". . .

"2. *Approves* the range of 110 to 120 with a desirable mid-point of 115 for the margin between net remuneration of officials in the Professional and higher categories of the United Nations in New York and officials in comparable positions in the United States federal civil service, on the understanding that the margin would be maintained at a level around the desirable mid-point of 115 over a period of time;

"3. *Requests* the Commission:

"(*a*) . . .

"(*b*) To further elaborate procedures for the operation of the post adjustment system within the approved range of the margin of net remuneration, which would enable the Commission to maintain the margin at a level around the desirable mid-point of 115 over a period of time, and to report thereon to the Assembly at its forty-first session".

XVI. Thus as from 1 January 1986, the date of implementation of resolution 40/244, the Commission is obliged to intervene in order to maintain the margin within the range defined by decision of the General Assembly. Up to that time the Assembly had established no rule setting forth precise criteria for the Commission for the purposes of determining the margin.

XVII. This new situation could not fail to have substantial legal effects on the rules applicable to the post adjustment system.

II

The rules relating to the post adjustment system

XVIII. The Staff Regulations established by the General Assembly provide in regulation 3.1:

"Salaries of staff members shall be fixed by the Secretary-General".

The Secretary-General fixes salaries in accordance with the provisions of annex I to the Staff Regulations.

XIX. Annex I, concerning staff members in the Professional and higher categories, as worded at present, states:

"9. In order to preserve equivalent standards of living at different offices, the Secretary-General may adjust the basic salaries set forth in paragraphs 1 and 3 of the present annex by the application of non-pensionable *post adjustments based on relative costs of living, standards of living and related factors at the office concerned as compared to New York.* Such post adjustments shall not be subject to staff assessment. *Their amounts shall be as shown in the present annex*" (emphasis added).

XX. In its judgement No. 182 (*Harpignies*) (1974), the Tribunal emphasized the objectives of this system for the adjustment of salaries to the cost of living:

"XV. The adjustment of salaries to the varying cost of living at various duty stations has been a constant concern of international organizations, and the post adjustment system was introduced precisely to take care of such differences. However, it should be noted that the system also facilitates changes in the postings of staff members who may be called upon to work in all countries of the world".

XXI. In 1980, ICSC defined the principles, purpose and application of the post adjustment system.

"The post adjustment system serves the basic principle which is at the heart of the whole United Nations system of remuneration, namely, that staff members of the international civil service must be equally paid for work of equal value, irrespective of their nationality or of levels of pay in their own countries" (1980 ICSC report, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 30* (A/35/30), annex VI, para. 3).

XXII. In paragraph 4 of this annex, the Commission makes the following clarification:

"The function of the post adjustment system is thus to add to or to subtract from the universal base salary the amounts necessary to ensure, to the fullest extent possible, that the remuneration of staff members of equal grade and step has an equal real value, or purchasing power, in all duty

stations. It is consequently an integral part of the overall system of remuneration . . ." (*ibid.*, para. 4).

XXIII. The evolution of the post adjustment system since its establishment in 1956, however, has not modified the basic rules relating to its operation:

A. Existence of a schedule of post adjustments established by the General Assembly on the recommendation of ICSC since 1975;

B. Determination of the post adjustment index for duty stations in relation to the base city, effected by ICSC since 1975;

C. Conditions of variation in the cost of living and its duration which trigger an increase or decrease in the cost-of-living adjustment (known as post adjustment), determined by the General Assembly on the recommendation of ICSC.

A. *Schedule of post adjustments*

XXIV. The amount of the adjustments is fixed by the General Assembly and set forth in annex I to the Staff Regulations. This schedule comprises two parts:

"(i) Additions (where cost of living is higher than at the base)" and

"(ii) Deductions (where cost of living is lower than at the base)".

This amount is periodically adjusted by the General Assembly.

XXV. Since its establishment in 1975, ICSC has been competent to make recommendations to the General Assembly concerning:

"(*b*) The scales of salaries and *post adjustments* for staff in the Professional and higher categories" (Commission's statute, art. 10 (*b*)) (emphasis added).

XXVI. The most recent schedule of post adjustments was proposed by the Commission to the General Assembly in its 1984 report. It entered into force on 1 January 1985 and is in force at present (General Assembly resolution 39/69 of 13 December 1984).

The Commission had recommended these gross salary scales and amounts of post adjustment in order to take into account "the consolidation [into net base salary] of 20 points of post adjustment with effect from 1 January 1985" (report, para. 137).

XXVII. The previous post adjustment schedules which determined the amount of post adjustments had been amended by the General Assembly on the proposal of ICSC as from 1 July 1978 (resolution 32/200 of 21 December 1977) and as from 1 July 1981 (resolution 35/214 of 17 December 1980). No change in the schedule was made by the General Assembly between 1 January 1981 and 1 January 1985.

XXVIII. It follows from the foregoing that the schedules of post adjustments, like the salary scales, are determined by the highest authority of the Organization. ICSC has not received from the Assembly any authority to amend the schedule or to suspend its application. It is called upon to make *recommendations* to the Assembly concerning the scales of salaries and post adjustments (Commission's statute, art. 10 (*b*)).

B. *Post adjustment index for the various duty stations*

XXIX. On the other hand, ICSC has been given authority to determine:

"(*c*) The classification of duty stations for the purpose of applying post adjustments" (*ibid.*, art. 11 (*c*)).

XXX. The classification of duty stations is effected by comparing the data concerning them with the data concerning relative costs of living, standards of living and related factors established for a given duty station and at a date selected as a reference point.

XXXI. Annex I, paragraph 9, of the Staff Regulations, as amended by the General Assembly in resolution 1095 (XI), paragraph 7, stipulated that the reference duty station would be Geneva and the date 1 January 1956. Previously, New York had been designated as the base for the common system.

XXXII. In November 1973, the General Assembly changed the base. New York again became the base for reference purposes as from 1 January 1974 (General Assembly resolution 3194 (XXVIII)).

XXXIII. In accordance with the authority conferred on it under article 11 (*c*), ICSC has thus periodically established the classification of duty stations for the purpose of applying post adjustments.

XXXIV. Under the powers delegated to him by the Commission, the Chairman of ICSC announces the movements of post adjustment classification in all duty stations for the purposes of applying post adjustments. All the organizations in the common system are informed of these movements by means of monthly circulars.

XXXV. When it establishes a new classification, the Commission takes account of all relevant factors in deciding the date of application of the new post adjustment index.

XXXVI. Thus, in 1980, after extensive investigation by a technical body (Advisory Committee on Post Adjustment Questions (ACPAQ)), the Commission decided to reduce the post adjustment index for Geneva by one class from its October 1979 level—from 244.1 to 232.5. But at the same time the Commission decided that the new index would take effect only when, as a result of the operation of the rules applicable to cost-of-living allowances (increase of 5 per cent maintained for four months), the new index of 232.5 had reached the earlier level of 244.1 (Report, Thirty-fifth Session, Supplement No. 30 (A/35/30), para. 146; Report, Thirty-seventh Session, Supplement No. 30 (A/37/30), para 141).

XXXVII. In 1983, ICSC decided to approve ACPAQ's recommendations concerning "time-to-time adjustments to post adjustment indices for New York and Washington" (*Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 30* (A/38/30), para. 35 (*b*)).

XXXVIII. In 1984, following complex technical studies concerning the level of the post adjustment index at the base (New York), the Commission found that in the past, in 1964 and 1974, "serious distortions" had led to an understatement of the post adjustment index for New York. After examination, it agreed that "the anomalous situation . . . must be corrected". It therefore decided, under article 11 (*c*) of its statute, to increase the New York post adjustment by 9.6 per cent to bring it to the level of 170.86 as of October 1982, as recommended by ACPAQ (*Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 30* (A/39/30), paras. 152, 153 and 163).

XXXIX. The Commission then took a decision on "the implementation of the adjustment to the New York index". It did not agree to proposals from the staff to the effect that the increase in post adjustment resulting from the correction of the index to 170.86 should be paid to staff members at certain duty stations from 1 October 1982 and in other duty stations from 1 August 1983 (report cited above, para. 164).

XL. The Commission decided that the adjusted index for New York should be used for the determination of post adjustment classifications of all stations with effect from 1 August 1984 only (report cited above, para. 165).

XLI. The decisions of the Commission were communicated by its Chairman to the organizations concerned in a circular dated 24 August 1984 (ICSC/CIRC/GEN/101). The circular stated that the change in the post adjustment index for New York involved the following changes in the indices for six headquarters duty stations and Washington:

Geneva	−0.3 per cent
London	5.5 per cent
Montreal	8.4 per cent
Paris	−0.6 per cent
Rome	−1.7 per cent
Vienna	−5.2 per cent
Washington	10.5 per cent

XLII. In the exercise of its competence for determining the classification of duty stations, the Commission has a margin of discretion. It is not bound by strict criteria specified and imposed by its statute. It thus decided that the downward adjustment of the Geneva post adjustment index would enter into force not on the date when it should have been applied, but only when the new index reached the level of the old index. It also decided that the upward adjustment of the New York post adjustment index would be applied not on the date when it should have come into force (1982), but only as from 1 August 1984.

In both cases the Commission acted in such a way that these downward or upward adjustments of the post adjustment index took effect only for the future.

XLIII. A clear distinction should be drawn between the Commission's function in classifying duty stations for the purpose of post adjustments, and the application of the rules relating to increases in post adjustment. These rules establish as a pre-condition a cost-of-living increase of at least 5 per cent maintained for a period of four months. These rules, for which the legal régime is different, will be examined below.

XLIV. As I have noted above (para. X), the adjustment of the New York post adjustment index led to a substantial widening—to approximately 24 per cent—of the "margin" between the salaries of international civil servants and those of United States civil servants.

XLV. Two member States considered that the Commission, in deciding to revise the New York post adjustment index had "exceeded its mandate". On 30 October 1984, they submitted a draft resolution (A/C.5/39/L.8), under which the Assembly:

> "*Decides* to revoke the above decision of the International Civil Service Commission".

XLVI. This draft resolution was not adopted by the General Assembly. It is therefore not appropriate, in my view, for the Tribunal to take a position on the competence of the Assembly to revoke decisions of ICSC. I note that the Commission's decision concerning the classification of New York resulting from the adjustment of the New York index in 1984 was thus maintained.

C. *Conditions relating to variation in the cost of living (5 per cent) and its duration*

XLVII. The applications essentially raise the problem of the conditions for the establishment and application of the rules relating to the increase (or reduction) of the post adjustment as a result of variations in the cost of living.

XLVIII. The existence of a schedule of post adjustments, established by the General Assembly on the recommendation of ICSC, and the periodic determination by ICSC of the post adjustment index at the base city (New York) and in the other duty stations are the necessary but not sufficient conditions for determining the post adjustment.

XLIX. An increase in post adjustment is due only if there is an increase of 5 per cent or more in the cost-of-living index maintained for a period of nine months until 1963 and for a period of four months since then.

L. This system was described by ICSC in the following terms in 1980. When the cost-of-living index:

> "increases by 5 per cent above the level corresponding to the class of post adjustment currently being paid, the mechanism for the granting of an additional class is triggered. In headquarters duty stations (and other main duty stations in Europe) the new class only becomes effective after a waiting period of four months, during which the [cost-of-living] index must not have fallen below the threshold level corresponding to the new class. In other duty stations, a change of class is implemented whenever the results of a comparative survey (place-to-place (P/P) or time-to-time (T/T)) . . . become available or on the occasion of a review of all such duty stations made very four months." (ICSC report, *Official Records of the General Assembly, Thirty-fifth Session, Supplement No. 30* (A/35/30), annex VI, para. 12).

LI. Originally, the rule concerning the variation in the price index for a specific period was established and modified by General Assembly resolutions, adopted on the recommendation of various organs set up by the Assembly. This was the case with the adoption by the General Assembly in 1957 (resolution 1095 (XI) of 27 February 1957) of the rule concerning the movement of the cost-of-living index by five points maintained for a period of nine months.

LII. However, when in 1963 the Secretary-General proposed that the nine-month period should be reduced to four months, with the agreement of the competent bodies of ILO, UNESCO, FAO and WHO, he considered that a General Assembly decision was not required:

> "45. The Secretary-General therefore proposes to apply the four-months rule as from 1 January 1964. No amendment to the Staff Regulations or Rules would be required, but the Secretary-General suggests that this change in procedure be noted in the report of the Fifth Committee" (A/C.5/979).

LIII. The Fifth Committee took the following decision:

"26. At its 1040th meeting the Committee decided, upon the recommendations of the Advisory Committee, to take the actions outlined below. Its decision in respect of subparagraph (*c*) [was taken] without objection . . . (*c*) to endorse the Secretary-General's proposal to apply with effect from 1 January 1964 a revised procedure of post adjustment changes" (A/C.5/979, para. 42) (A/5645 of 9 December 1963).

LIV. Until 1978, the classes of post adjustment corresponded to five index points. ICSC proposed that they should represent five percentage points of the previous level.

LV. This recommendation is worded as follows in its 1977 report (*Official Records of the General Assembly, Thirty-second Session, Supplement No. 30* (A/32/30), para. 57):

"The Commission recommends that the General Assembly should:

"(*a*) *Decide* that, with effect from 1 July 1978, the system of post adjustment be revised to provide that changes in classes of post adjustment be based on index [of cost of living] movements of 5 per cent rather than of five points; . . ."

LVI. By resolution 32/200 of 21 December 1977, the General Assembly endorsed this recommendation by ICSC in the very words of the Commission's recommendation.

LVII. The decision-making procedure thus followed in order to amend the post-adjustment rules conforms to the procedure in force before the establishment of ICSC. What is in fact involved are rules which concern salaries in a related fashion. Article 10 (*b*) of the ICSC statute provides that the Commission shall make recommendations to the General Assembly on "the scales of salaries and post adjustments". The Assembly takes a decision on these recommendations.

LVIII. At the General Assembly's thirty-ninth session, the Fifth Committee, when considering the desirable margin between net remuneration of the United Nations in New York and that of the comparator civil service, took the view that the increase in post adjustment for New York envisaged for December 1984 should be suspended until such time as ICSC made recommendations to it concerning the margin and other necessary related measures.

LIX. The General Assembly adopted by consensus resolution 39/27, which on this point states:

"The General Assembly . . . *requests* the International Civil Service Commission to:

". . .

"(*c*) Take the necessary measures to suspend implementation of the increase in post adjustment for New York envisaged for December 1984 . . . and take whatever related measures are required in respect of the post-adjustment levels at other duty stations to ensure equivalence of purchasing power as soon as possible at all duty stations in relation to the level of net remuneration in New York . . .".

LX. In opposing the Applicants' requests, the Respondent submits, first, that the General Assembly, by virtue of the above-mentioned resolution 39/27, took the decision to suspend the application of the class of post adjustment due following fulfilment of the above-mentioned conditions (5 per cent increase in the cost-of-living index maintained for four consecutive months).

Secondly, he submits that this decision to suspend the post adjustment is fully within the competence of the General Assembly, which can determine or limit the total remuneration of United Nations staff members, of which post adjustments form a part.

LXI. On the first point, the General Assembly did not take a decision. It requested the Commission to take the decision which it desired. In this respect, it suffices to compare the terms used by the General Assembly in the same resolution 39/27 in order to take a decision. In paragraph 1, the General Assembly "*requests*" the Commission; in paragraph 2, the Assembly "*decides*".

LXII. Similarly, the General Assembly, in resolution 40/224 of 1985, simply noted the decision taken by the Commission.

"The General Assembly . . .

"1. *Notes* the action taken by the International Civil Service Commission in response to resolutions 39/27 of 30 November 1984 and 39/69 of 13 December 1984".

LXIII. The General Assembly had noted that the application of the rules relating to post adjustments—in particular, the revision of the New York base index—had, in its opinion, led to an intolerable distortion of salaries in favour of international civil servants in relation to United States civil servants. It accordingly decided that a change in these rules was necessary.

LXIV. However, the Assembly did not decide on such a change immediately, but invited ICSC to submit to it specific proposals for reform of the salary system for international civil servants—through the establishment of a fixed margin—and by the amendment of the rules relating to conditions for changes in the post adjustment which the establishment of such a margin would entail.

LXV. Pending those proposals, the Assembly considered it necessary to suspend the post adjustments resulting from the rules concerning the cost-of-living increase. However, it did not take that decision itself. It referred it to ICSC.

LXVI. In these circumstances, it is not appropriate for the Tribunal to rule on the second point raised by the Respondent or to determine whether the General Assembly would have had competence to take a decision which it did not in fact take.

LXVII. On the other hand, by resolution 39/27, the General Assembly conferred on the Commission the power to take a decision to suspend post adjustments, a decision which did not expressly fall within its sphere of competence. Under article 10 of its statute, ICSC "shall make recommendations to the General Assembly on: . . . (*b*) The scales of salaries and *post adjustments*". The General Assembly decides on action to be taken on such recommendations by the Commission.

The rules relating to post adjustments resulting from an increase in the cost of living fall within this category.

LXVIII. I would note that this extension of the competence of ICSC is of a limited and temporary character. It relates only to the suspension of post adjustments following an increase in the cost of living and does not concern the amount of the adjustments. It is conferred only until such time as the General Assembly takes a decision, at its fortieth session, on the Commission's recommendations concerning the margin and the rules of post adjustment. This extension of the Commission's competence is, moreover, justified by the urgency of the situation. Such an urgent situation had already been envisaged in

resolution 31/141 B of 17 December 1976, which has been referred to above (para. IX).

LXIX. In these circumstances, the General Assembly has not infringed the Commission's statute as accepted by the various organizations which apply the United Nations common system (statute, arts. 1 and 30).

LXX. I conclude that the Commission was competent to decide to suspend the post adjustment due under the rule concerning the 5 per cent increase in the cost-of-living index maintained for a period of four months.

LXXI. On 11 December 1984, the Chairman of ICSC took a decision which was communicated to the parties concerned by telegram and included the following:

> "HAVING CONSULTED OTHER COMMISSION MEMBERS, EYE AM NOW IN A POSITION TO INFORM YOU THAT *THE COMMISSION HAS AGREED TO IMPLEMENT THE REQUEST OF THE GENERAL ASSEMBLY* ON POST ADJUSTMENTS IN ITS RESOLUTION . . . . THEREFORE, ACTING UNDER DELEGATED AUTHORITY FROM COMMISSION, *EYE WILL FREEZE NEW YORK POST ADJUSTMENT AT CLASS 11 AND WILL SUSPEND ANNOUNCEMENTS OF FURTHER INCREASES IN POST ADJUSTMENT CLASSES* FOR OTHER DUTY STATIONS WHERE RESULTS OF PLACE-TO-PLACE SURVEYS, UPDATED BY CPI MOVEMENTS, INDICATE A HIGHER PURCHASING POWER THAN NEW YORK AT CLASS 11" (emphasis added).

LXXII. The Commission confirmed this decision in late March 1985.

LXXIII. The Applicants maintain that, by this decision, the Chairman and the Commission have misjudged their competence by considering themselves bound by the General Assembly's request. This claim is without foundation. The Chairman of the Commission undertook consultations with his colleagues and the Commission agreed to take action. The urgent invitation issued by the General Assembly certainly influenced the Commission's decision as well as a set of circumstances justifying that decision. There is no indication that the Commission did not, in law, exercise independent judgement.

LXXIV. The Applicants assert that there was a misuse of procedure (*détournement de procédure*). The Commission is alleged to have exercised its powers under article 11 (*c*) of the statute—classification of duty stations for the purpose of applying post adjustments—in order to determine the "margin". In the Applicants' view, the purpose of article 11 (*c*) is not to establish the margin which should exist between the total remuneration of international civil servants and that of United States civil servants.

LXXV. I note that the Commission's decision was not based on article 11 (*c*) of the statute. It falls under article 10 (*b*) concerning the scales of salaries and post adjustments. In this matter, taking the margin into consideration is justified. Moreover, the Commission has been specifically and regularly empowered to take such a decision by the General Assembly (see para. LIX).

LXXVI. Lastly, the Applicants maintain that the Commission has given retroactive effect to its decision and thereby violated their acquired rights.

LXXVII. The Commission's decision was taken after 1 December 1984, on a date when, under the rule concerning the 5 per cent change in the cost of living maintained for a period of four months, class 12 post adjustment was due. In the Applicants' view, the freezing of the post adjustment could, therefore, on that date relate only to class 12 and not to the previously applicable class, class 11.

LXXVIII. The Respondent maintains that movement from one class of post adjustment to another class does not depend solely on fulfilment of the two conditions envisaged in the applicable rule:

(*a*) Cost-of-living increase of at least 5 per cent;

(*b*) Maintenance of this increase for a period of four months.

The Respondent further maintains that, in addition, a decision by the Chairman and ICSC is necessary in order to create entitlement to a post-adjustment increase after those two conditions have been fulfilled.

LXXIX. However, in the course of the oral proceedings, the Respondent admitted that, before ICSC was established, the right to an increase in post adjustment was acquired as soon as the two above-mentioned conditions were fulfilled.

LXXX. Indeed, before the establishment of ICSC, the fulfillment of these two conditions automatically entailed an increase in post adjustment through a change of class as of right. The Secretary-General's report to the General Assembly at the time of the 1963 change in the waiting period—which was reduced from nine to four months—is perfectly clear on this point. It stated that, if the change was adopted

> "any change in post classification would become due when the cost-of-living index had, for four consecutive months, been at or beyond—that is five points above—the previous change-point" (document A/C.5/979, para. 42).

LXXXI. This was also the position of the Administrative Committee on Co-ordination (ACC):

> "The Secretary-General, upon recommendation of the Expert Committee on Post Adjustment and in agreement with ACC, proposes, effective January 1964, to substitute for the nine-month formula a new four-month provision whereby a change in classification would occur when the local index had reached the required five-point level and had remained at or beyond that level for four consecutive months. *As in the case of the nine-month formula, the change in classification would become effective on the first day of the following month*" (document A/5579, para. 24, of 25 October 1963) (emphasis added).

LXXXII. In its 1972 report to the General Assembly, the Special Committee for the Review of the United Nations Salary System described the post-adjustment mechanism in the following terms:

> "The post-adjustment system *automatically compensates* United Nations Professional staff for each 5 index points rise in cost of living so that occasional base pay increases for Professional staff need not be of the magnitude characteristic of pay systems in national services or of the General Service staff pay system which do not have *automatic cost-of-living adjustments*" (document A/8728, para. 11 of the conclusions) (emphasis added).

LXXXIII. No additional condition—namely a decision by the Chairman of ICSC with the effect of triggering the change of class—has been added since the establishment of the Commission.

LXXXIV. In its 1976 report, the Commission noted that the *Special Committee for the Review of the United Nations Salary System* (1971-1972) had recommended that a study of the post-adjustment system should be undertaken:

"(*a*) The feasibility of instituting a system *without automatic increase at the base*" (ICSC report (1976), *Official Records of the General Assembly, Thirty-first Session, Supplement No. 30* (A/31/30), para. 194) (emphasis added).

In 1976, no decision to that effect had yet been taken.

LXXXV. Similarly in 1978, the report of ICSC noted that United Nations staff members benefited from automatic adjustment "in accordance with the rules of the system to compensate for the rising cost of living", whereas that was not the case with United States civil servants, whose salaries were "not adjusted automatically on the basis of the movement of cost of living" (ICSC report, *Official Records of the General Assembly, Thirty-third Session, Supplement No. 30* (A/33/30), para. 127). That situation was liable to cause distortion of the margin. Thus "most members believed that a solution to that problem should be sought, 'such as, perhaps, removing *the automatic protection of purchasing power* at the base of the system . . .'" (*Ibid.*).

LXXXVI. If the rules of the system would have to be changed in order to eliminate the automatic protection of the purchasing power of international civil servants against cost-of-living increases, then this means that such protection still existed in 1978.

LXXXVII. The judgement (para. XLI) quotes from the 1978 report of ICSC (para. 141) to show that the Assembly and the Commission were aiming at "flexibility" rather than "automaticity" in establishing classes for the post-adjustment system. In fact, this conclusion stems from the constant confusion which I find in the judgement between "the classification of duty stations for the purpose of applying post adjustments", which falls within the Commission's sphere of competence (art. 11 (*c*) of the ICSC statute), and the rules governing increases in post adjustment class as a result of increases in the cost of living during a specific period (four months), which are decided by the General Assembly on the recommendation of the Commission (art. 10 (*b*)). It is the latter which have an effect, as of right. It is the latter to which the Commission refers and which it expressly considers to have automatic effect. This is made clear by paragraph 127 of the same report, in which the Commission, in comparing the United States system with that of the United Nations, noted:

"Since United States civil service salaries were *not adjusted automatically on the basis of the movement of the cost of living,* but, rather, by a once-yearly increase decided by the President, the relationship between the levels of remuneration of the two services could diverge—in either direction" (emphasis added).

As it does in all the documents to which we have referred, the Commission takes it for granted that the rule concerning a cost-of-living increase of at least 5 per cent maintained for four consecutive months produces its effects automatically, *ipso facto,* as of right.

LXXXVIII. A study of the subsequent reports of ICSC from 1980 to 1984 shows that the problem remained under scrutiny, but at no time were the rules of operation of the post-adjustment system amended so as to eliminate the automatic protection accorded to international civil servants in the event of an increase in the cost of living (1981 report (A/36/30), paras. 10 and 95-98; 1982 report (A/37/30), paras. 12 and 125).

LXXXIX. Following the adoption of General Assembly resolution 39/27 of 30 November 1984, the Chairman of ICSC, in his circular to participating organizations and staff representatives (ICSC/CIRC/PAC/120 of 19 December

1984), expressly confirmed that the rules relating to an increase in post adjustment—5 per cent rise in the cost of living maintained for a period of four months—took effect as of right, automatically, when the conditions for its application were fulfilled. The Chairman noted, in note 6 on page 3 of that circular, that

> "on the basis of a post adjustment index of 180.3 as of August 1984, post adjustment class 12 (multiplier 80) became due in accordance with the normal rules as of 1 December 1984. However, in view of General Assembly resolution 39/27, the implementation of this class is suspended".

XC. At the hearing on 12 May 1986, the representative of the Respondent admittedly contested the accuracy of the above-mentioned note 6. In so doing, he based his argument on paragraph 44 of the Commission's 1985 report, which was said to have been more carefully worded. The wording in that report was that class 12 "*was due to go into effect*".

XCI. I consider that the wording used in note 6 reflects the law in force at the time. It was repeated in the memorandum from the Chief, Salaries and Allowances Division of the Commission, of the same date as the circular—19 December 1984 (ICSC/DEC/PAC/153, p. 3):

> "The Chairman of ICSC, following consultations with other members of the Commission, has decided to suspend implementation of post adjustment class 12 (multiplier 80) which became due as of 1 December 1984 on the basis of a post adjustment index of 180.3 and in accordance with the four-month rule."

It would be difficult to maintain that the Chairman of the Commission and the Chief of the Salaries and Allowances Division did not correctly enunciate the applicable rule of law. They note expressly that the change from class 11 to class 12 was acquired on 1 December 1984.

XCII. It was only in 1985, by its resolution 40/244 adopted on the recommendation of ICSC, that the General Assembly eliminated the automatic protection granted to international civil servants and conferred on the Commission the power to take steps to prevent the rules relating to a post-adjustment increase in the event of a rise in the cost of living of at least 5 per cent maintained for a period of four months from adversely affecting the margin defined by the same resolution.

XCIII. The rules applicable since 1 January 1986 were set out by ICSC in paragraphs 122 and 123 of its 1985 report (A/40/30).

XCIV. Before the approval of these new rules by the General Assembly in its resolution 40/244, neither the Commission nor its Chairman was competent to prevent an increase in the post adjustment when the required conditions had been met: an increase in the cost-of-living index of at least 5 per cent for a period of four months.

XCV. The Respondent is thus mistaken concerning the legal nature of the decisions taken in this area by the Chairman of ICSC. He considers that such decisions require "promulgation" of increases of post-adjustment.

In fact, it is very much a case of verifying that the necessary conditions occurred on the date in question—a verification of facts followed by a notification. The Chairman of the Commission has no discretionary power to refuse to promulgate the adjustments if they are due. His competence is bound. He is obliged to promulgate them.

XCVI. During the oral proceedings, the representative of the Respondent used a very pertinent expression: he spoke of "publication". Publication does not in itself create a right. It brings to the knowledge of the persons concerned an established legal situation.

XCVII. In these circumstances, neither the Chairman of the Commission, in December 1984, nor the Commission itself in March 1985, had the power validly to suspend the right to class 12, which came into being for the benefit of the Applicants, on 1 December 1984 by the normal application of the 5 per cent and four-month rule.

XCVIII. Such a suspension derogates from the principle of non-retroactivity established by the Staff Regulations and the statute of ICSC. The principle has been applied by the invariable jurisprudence of the Tribunal.

XCIX. By Staff Regulation 12.1, the General Assembly has reserved to itself the power to supplement or amend the Regulations but "without prejudice to the acquired rights of staff members". With the same reservations, the General Assembly has authorized the Secretary-General to amend the Rules in a manner consistent with the Staff Regulations (rule 112.2 (*a*)). It has thus established the principle of non-retroactivity of amendments to the Staff Regulations and Staff Rules. Regulation 12.1 and rule 112 (*a*) are legally binding as long as they have not been amended or abrogated.

C. Respect for the acquired rights of staff members and, consequently, the principle of non-retroactivity are confirmed by the statute of ICSC:

> "The Commission, in making its decisions and recommendations, and the executive heads, in applying them, shall do so *without prejudice to the acquired rights of the staff* under the staff regulations of the organizations concerned." (art. 26).

CI. The Tribunal has constantly held, in its jurisprudence, that those provisions establish the principle of non-retroactivity. In its Judgement No. 82 (*Puvrez*) of 1981, the Tribunal stated as follows:

> "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. 202 (*Quéginer*), 1975, pp. 322-323).

CII. It is an established fact that no amendment has been made by the General Assembly to the rules concerning post-adjustment increases in the event of a rise of 5 per cent in the cost of living for a period of four months. These rules thus produced their legal effect on 1 December 1984. The right to a post-adjustment increase, as defined by the change from class 11 to class 12, came into being on that date.

CIII. ICSC, by deciding after 1 December 1984 to maintain the legal situation in existence before 1 December, took a decision that was contrary to the rules in force concerning the right to post adjustment.

CIV. Nevertheless, as I have noted, the General Assembly authorized ICSC, by its resolution 39/27, to suspend provisionally the application of these rules. ICSC was empowered to take such a decision but only for the future and without modifying the existing legal situation at the time of its decision, after the implementation of class 12. The effect of its decision was to freeze post adjustment class 12 that had already been acquired.

CV. Consequently, for service subsequent to 1 December 1984, the post adjustment must be calculated on the basis of class 12, in accordance with the salary scales and schedules of post adjustments in force.

CVI. It would be a denial of the legal situation created on 1 December 1984 to calculate the amount of the post adjustment, resulting from class 12, up to the date of the decision by the Commission (end of March 1985) and from then on to calculate the amount of the adjustment in terms of class 11, which had ceased to produce its effects on 30 November 1984.

CVII. By agreeing to a return to the *status quo ante,* the Tribunal endorses and itself exceeds its powers by amending the rules fixing the amount of the post adjustment and its method of calculation. Only the General Assembly has the power to amend the conditions for granting post adjustment and the amount of post adjustment. It did not exercise that power by its resolution 39/27 but authorized ICSC to suspend provisionally the increase of the new class due. The class due on the date of the Commission's decision was class 12, which was acquired on 1 December 1984.

CVIII. Even the changes made to the rules for granting post adjustments by resolution 40/244 of 1985 maintain in force the earlier provisions concerning the conditions for a change in class in the case of an increase in the cost of living of 5 per cent for four months.

CIX. The changes made in 1985 consist exclusively of the introduction of a third condition—maintenance of the margin within the limits of the 110-120 range—which was approved by the General Assembly, and of the power conferred upon ICSC for that purpose.

CX. The "services performed" rule (*règle du service fait*) requires that only staff members who have performed their service are entitled to their salaries and their post adjustments—calculated in accordance with the rules in force on the date on which payment is due. According to the rules in force, the right to class 12 came into being on 1 December 1984. It cannot be retroactively cancelled.

CXI. This situation continued until the adoption, by the General Assembly on the recommendation of ICSC, of new conditions for the granting of post adjustments as from 1 January 1986 (resolution 40/244). The staff members who were entitled to the previous régime cannot continue to avail themselves of that régime after the entry into force of the provisions adopted by the General Assembly (Judgement No. 82 (*Puvrez*) of 1961, confirmed by Judgement No. 110 (*Mankiewicz*) of 1967). An increase of at least 5 per cent in the cost-of-living index maintained for a period of four months no longer results in an automatic increase in the post adjustment as of right.

CXII. The Tribunal has rightly not accepted the plea of the Applicants who claimed an increase in the post adjustment during 1985 by the application of the rule setting forth as conditions for such increase the rise of 5 per cent in the cost of living for a period of four months. The effects of that rule have been validly suspended by ICSC. *A fortiori,* the Applicants have no right to the automatic application of this rule after 1 January 1986.

CXIII. In my opinion, however, the judgement rendered in this case suffers from three serious flaws:

(1) Inconsistency in the Tribunal's reasoning, constituting a fundamental error in procedure which has occasioned a failure of justice;

(2) An excess of authority (*excès de pouvoir*);

(3) A violation of the principle of non-retroactivity.

CXIV. (1) The inconsistency in reasoning resides in the fact that the Tribunal acknowledges the automatic nature of the application of the rules concerning adjustments for cost-of-living increases and at the same time it denies its existence.

CXV. Indeed, on the one hand, at several points the judgement recognizes that class 12 entered into force on 1 December 1984. This entry into force can result only from the existence, as of 1 December 1984, of the two conditions required for a post-adjustment increase and hence of the automatic nature of such entry into force. In paragraph XXXVIII of the judgement, the Tribunal states:

> "Accordingly, the Tribunal's view is that the Applicants are entitled to such remuneration as would have accrued to them had class 12 post adjustment been applied to New York from 1st December 1984."

Paragraph XL of the judgement reads as follows:

> "XL. . . . the General Assembly requested the ICSC to suspend the application of post adjustment class 12 pending a further study. The use of the word 'suspend' rather than 'postpone' *implies that class 12 was considered to be in force*" (emphasis added).

In paragraph XLV, this automatic effect of the existence of the two conditions required is also acknowledged by the Tribunal when it decides:

> ". . . the Tribunal fixes the amount of compensation to be paid to the Applicants as the additional amount *which would have been due in consequence of the application of post adjustment at class 12* from 1 December 1984 for a period of four months . . .".

The award in the judgement of class 12 post adjustment from 1 December 1984 to the end of March 1985 can be based on no other legal ground than the automatic entry into force of the post adjustment on 1 December 1984, as a matter of law.

CXVI. On the other hand, however, the judgement does not recognize the automatic effect—as of right—of the rule concerning a 5 per cent increase in the cost of living for four months by stating the following:

> "XXXIX. A challenge to the validity and effect of the Commission's suspension of the increase in the New York post adjustment is based on the argument that the function of the ICSC is to ascertain the increase in the cost of living, and the period it has been in effect, these being facts which automatically trigger the move to the next class in the post adjustment schedule. That being so, the argument continues, the ICSC cannot suspend the move to class 12 which has occurred automatically. However, *automaticity of this kind has not in practice been the rule in the case of the post adjustment*" (emphasis added).

CXVII. I thus note an inconsistency in the reasoning underlying the judgement. The Tribunal acknowledges and at the same time denies the entry into force of class 12 on 1 December 1984.

CXVIII. (2) The Tribunal endorses and itself commits in addition "excès de pouvoir" (excess of power) by deciding, after applying the class 12 post adjustment from 1 December 1984, that class 11 is restored after the end of March 1985. Such a decision exceeds the scope of the Tribunal's jurisdiction.

CXIX. (3) Lastly, the suspension of class 12 which the Tribunal has decided should take place after the end of March 1985 entails, as I have indicated earlier, a breach of the principle of non-retroactivity.

CXX. In conclusion, I hold that the Tribunal should have decided that the Applicants were entitled to class 12 post adjustment from 1 December 1984 to 31 December 1985, in accordance with the salary scales and schedules of post adjustment established successively by the General Assembly and which entered into force on 1 July 1981 and 1 January 1985, and that all other pleas of the Applicants must be rejected.

(Signatures)

Roger PINTO
Member

R. Maria VICIEN-MILBURN
Executive Secretary

Geneva, 6 June 1986