Schlagworte: Gehalts- und Pensionssystem, Pension, Gleichstellung von schweizerischen und ausländischen Beamten, Diskriminierungsverbot

Mots-clefs: rémunération et système de pension, pension, égalité de traitement entre agents suisses et étrangers, non-discrimination

Key words: remuneration and pension plan, pension, equal treatment of Swiss and foreign officials, non-discrimination

1/1998

Judgment of 28 June 2000

Administrative Tribunal of the Bank for International Settlements

Prof. Dr. Robert Patry, President,
Prof. Dr. Walther J. Habscheid, Delegated judge,
Prof. David Ruzié, Panel Member,
lic. iur. Felix Heusler, Secretary of the Tribunal.

Applicants 1 - 42
all represented by Z. _____, attorney at law in Basel,

Applicants

versus

the Bank for International Settlements, international organisation with registered office in Basel,
represented by V. _____, attorney at law in Basel,

Defendant

re

equal treatment of Swiss and non-Swiss officials of the Bank for International Settlements under the pensions and savings fund.

As to the facts

A.
[...]

B.
[...]

C.
1. By letter of 6 December 1972, 105 Swiss officials had informed the Secretary General of the Bank that "le personnel suisse a depuis longtemps le sentiment que l'indemnité d'expatriation, en raison de son montant élevé, crée, entre agents suisses et agents non suisses, une disparité de traitement dont la justification ne paraît plus évidente ... Pour ces motifs, les soussignés ont l'honneur de vous demander de bien vouloir examiner la question et prendre des mesures visant à établir un rapport mieux approprié entre traitements des agents suisses et traitements des agents non suisses. Ils estiment qu'il est important, dans l'intérêt d'un bon climat de travail, qu'une catégorie de personnel ne se sente pas défavorisée en matière de

traitement par rapport aux autres agents de la Banque ... . It appears that the Bank did not act upon this letter.

On 18 August 1997 a Swiss official wrote a letter to the Secretary General of the Bank concerning the "equality of rights between male and female staff; on the one hand, and between non-Swiss and Swiss officials, on the other, in the Bank's welfare scheme" [...]. On 25 September 1997 the Secretary General replied and denied any inequality of Swiss officials.

2. In the meantime the Secretary General of the Bank had informed the members of staff on 11 September 1997:

"Service Note No. 1055
Staff Pensions and Savings Systems

In connection with the introduction of the new compensation system, it was decided to harmonise the basis on which pensions are calculated for all staff members belonging to the Bank's Staff Pensions and Savings Systems.

For this purpose, pension rights accruing as from 1st October 1997, and the corresponding contributions, shall be calculated on the basis of 125 % of the annual salary [...] As from the same date contributions to the Savings Fund for members of staff not affiliated to the A.H.V. will also be calculated on this basis.

The Pension Regulations will be amended accordingly."
(exhibit 18 to the supplementary application of 24 November 1998)

3. On 1 October 1998 the Board of Directors of the Bank adopted the new Regulations on the Pensions System and the Savings Scheme of the Bank for International Settlements announced in Service Note No 1055, together with Transitional Rules. These new Regulations acquire retroactive effect from 1 October 1997.

According to Article 2 of the Pension and Savings Regulations of 1 October 1998 the pensionable remuneration for both Swiss and non-Swiss nationals is equal to 125 % of the total annual salary, excluding all allowances, and therefore in the case of non-Swiss nationals excluding the expatriation allowance. The Bank pays contributions into the Pension Fund under Article 7, currently around 23 % of 125 % of the total annual salary. Members of staff pay a contribution of 6 % of 125 %, deducted from salary (Article 8).

Concerning the Savings Scheme regulations, Articles 21 ff apply: the Savings Scheme is open to both Swiss and non-Swiss nationals, but to Swiss nationals only if they are not affiliated to the federal AHV scheme. The Bank and the officials pay a contribution of 4.6 % of 125 % of the total salary.

The new rules apply to Pensions System participants joining the Bank from 1 October 1998 onwards. For non-Swiss nationals appointed previously, the vested rights are protected; the 125 % rule applies to them up to retirement. For Swiss nationals in the Bank's employment on the reference date of 1 October 1997 transitional rules apply, which in item 2 provide for a gradual transition of Swiss officials to the 125 % rule; as from 1 October 1997 Swiss officials pay contributions on the basis of 125 % of their salary.

D.
The Swiss official applicant 30, born on 6 July 1941, joined the Bank's Pensions and Savings System on 1 March 1977. Referring to the Secretary General's note of 15 May 1997 regarding early retirement of staff in the General Secretariat, he gave the Secretary General notice of his resignation as of 30 September 1998 by letter of 12 August 1997.

On 7 May 1998 applicant 30 together with 14 Swiss staff members submitted a request to the General Manager of the Bank under Article 15.1 of the Rules of Procedure demanding equal treatment of Swiss and non-Swiss officials with regard to retirement.

By letter of 22 September 1998 the Secretary General and the Head of Human Resources of the Bank informed applicant 30 "that the Bank will pay you as from 1 October 1998 a pension of CHF _____ a year, payable in monthly instalments. In addition, you will receive a 13th month's pension. Your total pension will therefore amount to CHF _____ a year". This total pension was calculated after the purchase of rights attaching to three additional years of participation under Article 9 of the Pension and Savings Regulations of 1 October 1998 on the basis of 103.315 % (not 125 %) of the retirement pension (68.4383 % of the last earned annual salary) in accordance with the Transitional Rules relating to the Pension and Savings Regulations of 1 October 1998. The Bank communicated this detailed pension calculation on 24 September 1998.

[...]

E.

The lawyer Z. _____ submitted a request to the General Manager of the Bank under Article 15 of the Rules of Procedure, asserting on behalf of 24 Swiss staff members that the preferential treatment of non-Swiss officials violates the principle of equality of treatment in a discriminatory manner. He accordingly requested that Swiss officials appointed before 1 October 1997 be placed on the same footing as non-Swiss nationals and that the pension therefore be calculated on the basis of 125 %. The submission also included proposed calculations for the period preceding 1 October 1997. The General Manager of the Bank rejected these petitions by letter of 8 April 1998.

Z. _____ then repeated his demand in a request of 7 May 1998, at the same time on behalf of a further 14 applicants. In his reply of 14 May 1998 rejecting the petition, the General Manager made reference to the letter of 8 April 1998.

[...]

I.
At the meeting of 2 July 1999 the President of the Administrative Tribunal informed the parties' representatives that the plenary session entertained some doubt as to whether the Administrative Tribunal had competence in a dispute to examine in the light of general principles of law the regulations adopted by the Bank.

Since the Bank's Management was unwilling to accept a restrictive interpretation of Article 4.2 of the Headquarters Agreement, an exchange of views was held with the Federal Department for Foreign Affairs. By letter of 25 August 1999 the Department's Public International Law Directorate confirmed that there was no doubt whatsoever that the Administrative

Tribunal had competence to examine in a dispute the conformity of the regulations adopted by the Bank with general principles of law.

Having regard to this exchange of views, the members of the Administrative Tribunal unanimously decided by postal vote not only to apply and interpret the regulations adopted by the Bank but also pursuant to Article 9.1 of the Statute of the Administrative Tribunal and Article 26 of the Rules of Procedure to examine their validity in the light of general principles of law.

J.
On 26 January 2000 the preliminary hearing was held by the delegated judge Prof Dr Walther Habscheid, assisted by the Secretary to the Tribunal, in the presence of the parties (in particular applicant 30) and their representatives pursuant to Article 21 of the Rules of Procedure. At this meeting the parties stated their position on the facts of the case and the legal basis. The applicants' representative reaffirmed his view that there was discrimination. The defendant's representative emphasised that only qualified unequal treatment could be construed as violating the principle of equal treatment. [...]

K.
Pursuant to Presidential Ruling No 12 of 6 June 2000, the main hearing under Article 22.2-4 of the Rules of Procedure was held on 28 June 2000 in the presence of the members of the adjudicating panel, the parties (in particular applicant 30) and their representatives at the Bank's headquarters in Basel.

Since the members of the panel had no questions to put to the parties, the parties' representatives read out the parties' submissions.

Z. _____ put forward the following expanded submissions for the applicants: The submissions in full

1. By means of Presidential Ruling No 1 of 15 June 1998 the applicants are charged under the Rules of Procedure of the Administrative Tribunal with filing adequate submissions whereby each individual applicant is to indicate precisely what he demands of the defendant Bank. To the extent possible, therefore, the applicants were to file an action for performance in respect of their claims.

Such an action was, however, only possible for applicant 30, applicant 30, who gave notice to 30 September 1998.

2. First of all, therefore, the submissions of the action for performance in respect of applicant 30 should be set forth, followed by the declaratory submissions in respect of applicants Nos. 1 to 29 and 31 to 42.

3. These are as follows:

a) The defendant be ordered to give applicant 30 as a Swiss member of the Bank's staff on his retirement on 1 October 1998 a pension on the basis of 125 % of his total final annual salary, which is decisive for calculating the pension, including the 13th month's salary, of CHF _____, that is on the basis of a duly recalculated salary of CHF _____, taking account of all the years of service since his appointment, that is since 1 March 1977, according to the calculation on pp 33 ff of the supplementary application of 24 November 1998,

b) The defendant accordingly be ordered to give applicant 30 following his retirement, that is from 1 October 1998, a pension in the monthly amount of CHF _____instead of the previous monthly amount of CHF _____, according to the calculation on pp 34-5 of the supplementary application,

c) It be established that applicant 30 would have in return to count a contribution rate of 6 % plus compound interest as staff member's contribution to the pensionable remuneration under Article 8 of the Pension Regulations of 1 October 1998 (exhibit 24 to the supplementary application) towards the 25 % share of salary claimed by him above, calculated from the beginning of his contract of employment, that is since 1 March 1977.

This be offset, however, by the defendant's contributions to the Savings Fund account of 4.6 % of pensionable salary plus compound interest, also calculated from the beginning of his contract of employment, that is since 1 March 1977, towards the 25 % share of salary not paid to him and hitherto paid additionally to the Bank's non-Swiss officials,

d) It therefore be established according to the calculations of the supplementary application on pp 35-6 that for applicant 30 the contributions of 6 % plus compound interest to the Pension Fund on the 25 % difference in salary up to 30 September 1998 amount to CHF _____and the total amount of inpayments by the defendant of 4.5 % up to 1 August 1988 and 4.6 % subsequently on the same 25 % share of salary paid for non-Swiss but not for Swiss officials is CHF _____. It therefore be established that the difference owed by applicant 30 to the defendant in respect of pension payments in the event the claim is approved is CHF 1'479.17.

To this is added the following alternative submission:

It be established, should the Tribunal accept the defendant's plea of limitation entered in the defence answer of 30 April 1999 in respect of the defendant's contributions of 4.6 % on the applicant's 25 % share of salary hitherto paid to non-Swiss but not to Swiss officials, that the defendant's claim on the applicant, in principle acknowledged by the latter, to payment of the contribution of 6 % of the pensionable remuneration on the 25 % share of salary not paid to him by the defendant, including compound interest, is also time-barred insofar as it dates back beyond 6 May 1993.

4. For applicants Nos. 1 to 29 and 31 to 42 the following declaratory submissions apply:

a) It be established in the Administrative Tribunal's judgment that the pension entitlements of applicants Nos. 1 to 29 and 31 to 42, pursuant to Federal Supreme Court decision 117 V p 318, be calculated by the defendant in a manner analogous to those of applicant 30 in accordance with the Pension Regulations applicable to each applicant on his retirement and that the defendant accordingly be ordered to award each of applicants Nos. 1 to 29 and 31 to 42 on their retirement a pension on the basis of 125 % of his total final annual salary, which is decisive for calculating the pension, including the 13th month's salary, taking account of all the years of service since each individual applicant's appointment,

b) It be established that applicants Nos. 1 to 29 and 31 to 42 would have in return, on each individual applicant's retirement, to count a contribution rate of 6 % plus compound interest

as staff member's contribution to the pensionable remuneration under Article 8 of the Pension Regulations of 1 October 1998, filed as exhibit 24 to the supplementary application, towards the 25 % share of salary not paid to them, calculated from the beginning of each individual applicants contract of employment.

This be offset, however, by the defendant's contributions to the Savings Fund account of each individual applicant of 4.6 % of pensionable salary plus compound interest, also calculated from the beginning of each individual applicant's contract of employment, towards the 25 % share of salary not paid to them and hitherto paid additionally to the Bank's non-Swiss officials,

To this is added the following alternative submission:

It be established, should the Tribunal accept the defendant's plea of limitation entered in the defence answer of 30 April 1999 in respect of the defendant's contributions of 4.6 % on each applicant's 25 % share of salary hitherto paid to non-Swiss but not to Swiss officials, that the defendant's claims on the applicants, in principle acknowledged by the latter, to payment of the contribution of 6 % of the pensionable remuneration on the 25 % share of salary not paid to them by the defendant, including compound interest, are also time-barred insofar as they date back beyond 6 May 1993.

5. The defendant be ordered to pay all ordinary and extraordinary costs of the procedure (including the preliminary procedure).

For the defendant, V. made the following submissions as previously mentioned:

I. Submissions:

All the applicants be nonsuited of their claims in their entirety.

II. Interlocutory application:

The application for stay of procedure for applicants 1-29 and 31-42 be dismissed.

The Administrative Tribunal gives consideration to the following:

1.
Under Article 25 of the Rules of Procedure the Administrative Tribunal decides upon its competence (clause 4).

a) The Administrative Tribunal was established in 1987 pursuant to the Headquarters Agreement (SR 0.192.122.971.3) in order to settle disputes arising in matters of employment relations between the Bank and its officials or former officials or persons claiming through them. Under Article 4.2 in fine of the Headquarters Agreement, "matters of employment relations shall be deemed to include all questions relating to the interpretation or application of contracts between the Bank and its Officials concerning their employment, of the regulations to which the said contracts refer, and in particular of the provisions governing the Bank's pen-

sion scheme and other welfare arrangements provided by the Bank."

In such disputes in matters of employment relations the Administrative Tribunal has exclusive and final jurisdiction (Article 4.2 of the Headquarters Agreement). As an international administrative tribunal with its seat in Basel it is independent of Swiss or other international courts. Its decisions are final and without appeal (Article 11 of the Statute of the Administrative Tribunal of 10 February 1987).

b) In the present case the applicants contest the applicability and legal validity of certain provisions of the Staff Regulations and the Regulations on the Pensions System and Savings Scheme. They allege that Swiss officials have been and continue to be discriminated against by these welfare arrangements in comparison with non-Swiss officials.

Since the question in dispute relates to the employment relations, or the claims of staff under the welfare arrangements, pursuant to Article 4.2 in fine of the Headquarters Agreement, the Administrative Tribunal has competence in principle. This, however, is subject to the particular question of whether it has competence to replace the applicable Transitional Rules under the Regulations with divergent, special rules for the applicants (see consideration 2(e) below).

2.
Pursuant to Article 25.1 of the Rules of Procedure, the Administrative Tribunal is empowered to examine the admissibility of each application and of all procedural documents.

a) The Tribunal notes first of all that it was only during the main hearing that Z. _____ filed new expanded submissions, to which the defendant was then unable to respond. This is not admissible.

It is true that during the preliminary hearings the delegated judge can invite the parties to clarify, rectify, simplify or supplement their arguments (and submissions) (Article 21.2 of the Rules of Procedure; see also the Administrative Tribunal judgment of 7 July 1997, 1/1996, consideration 2(c)). However, once the preliminary hearings have been closed, as the case may be with a further exchange of written statements and documents (supplementary statement and response), the parties may not file any further submissions.

In the present case the Administrative Tribunal is accordingly bound by the submissions contained in the supplementary application of 24 November 1998, but not those entered during the main hearing (Article 25.2 of the Rules of Procedure). This is not detrimental to the applicants, as these inadmissible submissions contain nothing new, but only complicated and unnecessary legal grounds and subsidiary applications.

b) The application for a declaration is directed against the decisions of the General Manager of 8 April 1998 (exhibit 3 of the application of 6 May 1998), 14 May 1998 (exhibit 6 of the application of 28 May 1998) and 28 May 1998 (exhibit 1 of the application of 12 June 1998). Applicants Nos. 1-23 filed an application against these on 6 May 1998, expanded by memoranda dated 28 May and 12 June 1998. The time limit set for filing the application under Article 16 of the Rules of Procedure was therefore respected. However, in their submissions the applicants did not formally request that the decisions of the General Manager be annulled.

Whether this is necessary may be questionable; the submissions could be interpreted in such a way as to indicate that revocation of the decisions is sought.

The other formal requirements of the application under Article 16.2 of the Rules of Procedure are fulfilled. That the applicants made no specific petitions in their submissions to the General Manager is immaterial, since under Article 15 of the Rules of Procedure a general request (French version "petition") suffices, which is less than the submission ("Antrag" or "conclusion") required in the supplementary memorandum under Article 16.3 of the Rules of Procedure.

The declaratory action was brought by 42 Swiss officials, including applicant; applicant 30 brought in addition an action for performance in the revised application of 24 November 1998. The latter is admissible in its present form of a joinder of parties as well as of causes of action, since it represents a joinder of several actions of the same content, the same tribunal has jurisdiction, and all applications are the same type of action (of Article 24 of the Bundesgesetz über den Bundeszivilprozess [federal law on the federal civil procedure] of 4 December 1947; BZP, SR 273). Nonetheless, this remains subject to the question of whether the Administrative Tribunal has competence to decide a declaratory action (see considerations 2 (d) and (e) below).

c) In their submission to the General Manager of 30 January 1998 a first group of 24 Swiss officials had asked for a declaration "that in future all officials of Swiss nationality appointed before 1 October 1997 will receive the same pension benefits as those of non-Swiss" (exhibit 1 of the application of 6 May 1998); this is inadmissible because these applicants have no disposal over the pension entitlements of other Swiss officials. But with the application of 6 May 1998 Z. on behalf of these 24 Swiss officials confirmed the declaratory action under Article 15 of the Rules of Procedure; surprisingly, however, one of these Swiss staff members, X. _____, declared himself no longer authorised to bring the action because "he will have retired before the end of the proceedings before the Tribunal" although he would undoubtedly have been authorised to bring an action for performance. With the request of 8 April 1998 and the application of 7 May 1998 Z. then resubmitted the declaratory action on behalf of applicant 30 and 13 other Swiss officials; and in the supplementary application of 24 November 1998 applicant 30 brought not only the declaratory action but also an action for performance because he retired on 1 October 1998. But at no time did he submit a request to the General Manager in respect of this action for performance.

The Statute of the Administrative Tribunal (Article 6.2) and the Rules of Procedure (Article 16.1) stipulate, however, that, save in exceptional circumstances at the discretion of the Administrative Tribunal, an application shall not be admissible unless the applicant has previously submitted a request on the same subject to the General Manager of the Bank.

For the Tribunal it is questionable whether an action for performance is "the same subject" ("dieselbe Angelegenheit", "même sujet", "in merito alla stessa questione") as a declaratory action and whether in the case of applicant 30 there are "exceptional circumstances". Nor has this ever been explicitly asserted by applicant 30.

Since applicant 30 did not submit a request regarding his action for performance, that action for performance should logically, and without any excessive formalism, be declared inadmis-

sible. The question can, however, remain open because it is in the interest of legal clarity for the Administrative Tribunal to decide the matter at issue definitively and finally and because the action for performance of applicant 30 is in any case unfounded and thus to be dismissed.

d) It is true that other international administrative (arbitral) tribunals have decided that a purely declaratory action is inadmissible in principle under international civil service law. However, such decisions, which relate not to an existing concrete case but to a future matter at issue, are not valid for the Administrative Tribunal of the Bank. The Tribunal is neither an arbitral tribunal nor a civil (labour) court, but an (international) administrative tribunal subject to the general principles of administrative law and of the law of administrative procedure in particular. This means that it does not automatically apply the principles of the law of civil procedure. Since the Rules of Procedure were inspired by the relevant provisions of the Swiss Bundesgesetz über den Bundeszivilprozess [federal law on the federal civil procedure] of 4 December 1947 (BZP, SR 273), however, the Administrative Tribunal draws with respect to the application for a declaration on Article 25 BZP, according to which "an action may be brought for the declaration of the existence or non-existence of a legal relationship if the applicant has a legal present interest in immediate declaration" (BGE [collection of Federal Supreme Court decisions] 122 II 98, consideration 3, and, in a case regarding the retirement pension of a federal civil servant, BGE 109 lb 83-85, consideration I; in a similar case regarding the federal occupational welfare scheme, see BGE 117 V 320-321, consideration lb; in a similar case regarding the federal occupational welfare scheme, see BGE 117 V 325, consideration 6a). Furthermore, the former President of the Administrative Law Division of the Swiss Federal Supreme Court and former President of the Administrative Tribunal of the International Labour Organization (ILO) has noted that the same principle under Article 25.2 of the Bundesgesetz über das Verwaltungsverfahren [federal law on administrative procedure] is also applicable in the area of the general law on administrative procedure: "Selon l'art. 25 al. 2 PA (VwVG), une demande en constatation est recevable si son auteur prouve avoir un intérêt digne de protection à son admission. Dans l'acception de l'art. 25. al. 2 PA, un intérêt digne de protection est à la fois actuel et concret. Autrement dit, il doit exister au moment du dépôt de la demande et viser un état de choses donné ainsi que des personnes déterminées. Suivant les circonstances, l'intérêt qui se rapporte à une situation future peut être actuel et concret. Tel est le cas si un administré entend faire constater d'avance les conséquences de l'exécution d'un projet dont l'élaboration exige des investissements. En revanche, un intérêt purement théorique ne mérite pas d'être protégé .... Les décisions en constatation ont un caractère subsidiaire, c'est-à-dire qu'en principe elles ne sont prises qu'en cas d'impossibilité d'obtenir une décision formatrice. Celui qui prétend une prestation doit réclamer son dû, plutôt que faire constater son droit .... La règle n'est cependant pas absolue: une demande de constatation se justifie, si elle porte sur la validité d'un rapport de base ou l'existence d'une obligation ..." (André Grisel, Traité de droit administratif, 2nd ed 1984, p 867).

In the present case the submissions of all the applicants relate to the content of the pension entitlement. Even if the welfare benefits for the as yet not retired applicants Nos. 1-29 and 31-42 are not yet due, there is between them and the defendant a future interest in welfare under the contracts of employment, the Staff Regulations and the Regulations on the Staff Pensions System and Savings Scheme (with the Transitional Rules under the Regulations). It is generally held that this future interest is a legal relationship capable of being the subject of a judicial declaration. Applicants Nos. 1-29 and 31-42 have a legal interest in immediate dec-

laration of the content of this legal relationship. It is unreasonable to expect them to live until the time at which benefits commence with the uncertainty as to whether they are entitled to a pension calculated on the basis of 125 % or 100 % (raised in accordance with the Transitional Rules).

The principle of subsidiarity, whereby the legal interest in a declaratory action is lacking if an action for performance is possible (of the Administrative Tribunal judgment of 7 July 1997, pp 10-11, consideration 2(e) with references), is only relevant in the case of applicant 30, and not in the case of applicants 1-29 and 31-42 who have not reached retirement.

Thus in principle the declaratory actions would be admissible. This is subject, however, to the answer given to the following question of competence (see consideration 2(e) below).

e) The Tribunal is not a constitutional court but an (international) administrative tribunal which "shall base its judgments on general principles of law and, in cases of doubt, the general principles of Swiss law. It shall take into account the customs and traditions of the Bank" (Article 9 of the Statute, Article 26 of the Rules of Procedure). Taking account of the exchange of views between the Management of the Bank and the Public International Law Directorate of the Federal Department for Foreign Affairs, the full Tribunal unanimously decided by postal vote in September 1999 not only to apply and interpret the regulations adopted by the Bank (Article 4.2 of the Headquarters

Agreement) but also pursuant to Article 9.1 of the Statute and Article 26 of the Rules of Procedure to examine their validity in the light of general principles of law. Furthermore, pursuant to Article 10 of the Statute the Tribunal may annul the contested decisions of the General Manager and, if necessary, determine the content and amount of the obligation in question.

In the area of the general law of administrative procedure, this has been confirmed by André Griset: "Au demeurant, un recours peut contester à la fois une décision et la validité de la règle générale et abstraite qui en est le fondement. Certes, dans cette hypothèse, il ne conclura utilement qu'à la modification, à l'annulation ou à la nullité de la décision. Il n'en est pas moins vrai que l'autorité de recours devra se prononcer sur la conformité de la règle générale et abstraite à une norme supérieure" (André Grisel, Traité de droit administratif, 2nd ed 1984, p 885)

In other words, in the considerations of its judgment the Administrative Tribunal must, if appropriate, declare the Transitional Rules under the Regulations on the Pensions System and Savings Scheme of 1 October 1998 to be invalid and that these abstract rules are not applicable to the applicants. However, the applicants did not formally request this in their submissions; they request that the Tribunal should determine the content of their welfare claims, which will become due at an indeterminate future date, in derogation from the rules adopted.

In fact, the Board of Directors of the Bank has sole competence to adopt new abstract transitional rules applicable to the applicants; neither the Secretary General (in Service Note No 1055 of 11 September 1997) nor the General Manager (in his negative answers of 8 April, 14 May and 28 May 1998) had or could have such rule-making authority. Accordingly, it is questionable whether the Administrative Tribunal, which may annul and modify decisions by the General Manager (Article 25.4 of the Rules of Procedure), is empowered to replace the rules

adopted with special divergent transitional rules (of BGE 117 V 325, consideration 6(a)). However, in the present case this tricky legal question can remain open because it is in the interests of legal clarity for the Tribunal to rule definitively and finally on both the declaratory actions and the actions for performance and because these actions are in any case to be dismissed on the merits (see considerations 4 and 5 below).

3.
In their supplementary application of 24 November 1998 applicants Nos. 1-29 and 31-42 formulated the following interlocutory application: "The procedure for applicants Nos. 1 to 29 and 31 to 42 be stayed until the decision concerning the present claim" (that of applicant 30) (submission (d)); in his inadmissible submissions set forth during the main hearing, Z. on behalf of the applicants did not repeat this interlocutory application. Conversely, in its defence answer of 30 April 1999 (p 3) the defendant requested that "The application for stay of procedure for applicants 1 to 29 and 31 to 42 to be dismissed ... In view of the fact that the applicants are to be nonsuited of all their claims". The Tribunal has not yet decided with regard to this stay of procedure. However, it has no cause to stay the declaratory procedures, regardless of the fact that all actions for declaration and performance are ready for decision in terms of their dismissal.

Indeed, in the applicants' submissions (e) and (f) Z. requested that "it be established in the Administrative Tribunal's judgment that the pension entitlements of applicants Nos. 1 to 29 and 31 to 42 be calculated by the defendant in a manner analogous to those of applicant 30" (see submissions (a) and (c)). This means that the Tribunal must in any case decide in the considerations of its judgment whether or not the declaratory action is well founded, before it can allow or dismiss applicant 30's action for performance in the terms of the judgment. There is therefore no point in not deciding on the same declaratory actions of the other applicants in the same judgment.

The applicants' application for stay of procedure is therefore to be dismissed.

4.
Pursuant to Article 25.2 of the Rules of Procedure, the Administrative Tribunal, like the Federal Supreme Court in administrative court appeal proceedings (Article 114.1 of the Bundesgesetz über die Organisation der Bundesrechtspflege [federal law on the organisation of the administration of federal law] of 16 December 1943; OG, SR 173.110), is not bound by the reasons put forward by the parties. It applies ex officio the contracts between the Bank and its officials concerning their employment, the regulations to which these contracts refer (Article 4.2 of the Headquarters Agreement), and the general principles of law (Article 9.1 of the Statute), and it may therefore admit or dismiss the application on other grounds than those put forward (of BGE 108 Ib 199-200, consideration 1, 106 Ib 226 consideration 1). Thus the Tribunal is not obliged to examine explicitly and in detail in its judgment all the reasons put forward by the applicants; it may dismiss the declaratory application for reasons of its own.

a) The applicants formally requested, first, that "it be established in the Administrative Tribunal's judgment that the pension entitlements of applicants Nos. 1 to 29 and 31 to 42 be calculated by the defendant in a manner analogous to those of applicant 30 and that the defendant accordingly be ordered to award each of applicants Nos. 1 to 29 and 31 to 42 on their retirement a pension on the basis of 125 % of his total final annual salary, which is decisive

for calculating the pension" and, second, that "it be established that applicants Nos. 1 to 29 and 31 to 42 would have in return, on their retirement, to count a contribution rate totalling 1.4 % ... towards the 25 % share of salary not paid to them, calculated from the beginning of each individual applicant's contract of employment, and that each of the named applicants be subject to this application" (supplementary application of 24 November 1998, pp 9-11, submissions (a), (c), (e) and (f)). In other, simpler words, the applicants request equality of treatment on retirement with non-Swiss officials and Swiss officials appointed after 1 October 1997.

In fact, the pension entitlements of applicant 30 and the future welfare interests of the other applicants Nos. 1-29 and 31-42 are based not on Service Note No 1055 of 11 September 1987, which has no normative quality, but on the Bank's welfare system as regulated by the Staff Regulations, the Regulations on the Pensions System and the Savings Scheme and the relevant Transitional Rules; these Regulations and their Transitional Rules of 1 October 1998 entered into force with retroactive effect from 1 October 1997.

Under Article 2 of the Regulations on the Pensions System and the Savings Scheme of 1 October 1998, the benefits and contributions payable under the Pensions System were calculated on the basis of the "pensionable remuneration" since 1 October 1997 (paragraph 1), which is equal to 125 % of the total last annual salary "excluding all family and expatriation allowances, tax reimbursements, special bonuses and other special payments" (paragraph 2). This new so-called 125 % rule applies both to all non-Swiss officials and to Swiss officials appointed from 1 October 1997 onwards, but not to Swiss members of staff who joined the Bank and the Pensions System before 1 October 1997. In the present case all the applicants come into this category of "old" Swiss officials, for whom a special transitional rule (item 2 of the Transitional Rules under the Regulations of 1 October 1998) provides for a gradual transition from the old 100 % rule to the new 125 % rule. Accordingly, the Bank calculated the total pension of the applicant applicant 30, who retired on 1 October 1998, including the purchase of three additional years of service (Article 9 of the Regulations of 1 October 1998) on the basis not of 125 % but of 103.315 % of the last pensionable annual remuneration (68.4383 % of the last earned annual salary).

In fact, by a request to the General Manager under Article 15 of the Rules of Procedure, the applicants asserted that the preferential treatment of non-Swiss officials infringes the principle of equal treatment in a discriminatory manner. In his replies of 8 April, 15 May and 28 May 1998 the General Manager defended the mode of calculation under the Transitional Rules as being lawful and rejected a calculation of pension on the basis of 125 % ab initio.

Since this transitional provision is clear and thus does not require interpretation, the Tribunal must examine whether it contravenes a general principle of law within the meaning of Article 9 of the Statute and Article 26 of the Rules of Procedure. To this end a judicial review is indispensable.

b) The Bank for International Settlements is an independent international organisation endowed with its own legal personality. Under Article 2 of the Headquarters Agreement, the Swiss Federal Council guarantees to the Bank the autonomy and freedom of action to which it is entitled as an international organisation. It is not bound by Swiss federal legislation or by international treaties concluded by the Swiss Confederation, nor by agreements concluded

within the United Nations system or by the jurisdiction of the International Court of Justice. This means that the Bank is not obliged to apply directly the fundamental rights under the Swiss Federal Constitution (BV, SR 101), the European Convention on Human Rights (ECHR, SR 0.101) or the UN International Covenant on Economic, Social and Cultural Rights (UN Covenant II, SR 0.103.1). Consequently, the Tribunal has no reason or obligation to have regard in its present judgment to the constitutional principle of equality of treatment (Article 4 of the old Federal Constitution of 29 May 1874, Article 8 of the new Federal Constitution, SR 101) or to the prohibition of discrimination under human rights accords (Article 14 ECHR, Articles 2 and 7 UN Covenant II). The applicants overlooked this in basing their application on a Basel-Stadt civil court judgment (BJM [Basel law reports] 1998, volume 5, exhibit 8 to the supplementary application of 24 November 1998), on the drafts for a new federal constitution (exhibits 9 and 10 to the supplementary application of 24 November 1998), and on Swiss Federal Supreme Court decisions, in particular concerning the equality of rights between men and women, which is not at issue in the present case, or concerning the principle of wage equality according to Swiss legal doctrine. Nor, for the rest, is the Bank subject in the present case to the principle of equality explicitly adopted in Article 1 of the Regulation on reimbursement of 15 December 1951 (cf Administrative Tribunal judgment of 7 July 1997, pp 17-18, consideration 3(d)), because this Regulation relates to the reimbursement of taxes to Swiss officials and is not applicable in the present dispute concerning the pensions and savings system.

Nevertheless, the principle of equality or the prohibition of discrimination is acknowledged to be a general principle of law within the meaning of Article 9 of the Statute and Article 26 of the Rules of Procedure in international public law generally and in international civil service law in particular (see C F Amerasinghe, The Law of the International Civil Service, 2nd ed, Oxford 1994, vol 1 (Chapter 22 Discrimination and Inequality of Treatment, pp 313 ff)). This is also how international administrative tribunals have ruled, especially on the question of expatriation allowances (judgments of the Administrative Tribunal of the International Labour Organization of 8 July 1997, No 1866, and 10 July 1999, No 1874). Furthermore, Article 38 of the Statute of the International Court of Justice in The Hague describes generally accepted legal principles as sources of international law. Court decisions and legal doctrine number the prohibition of discrimination among them (Wengler, Völkerrecht [international law], p 1028). The defendant itself in its memoranda explicitly acknowledged the justification of the principle of equality and the prohibition of discrimination for itself as an international organisation. "In a material respect, it must be acknowledged that the defendant, as an employer, is obliged to observe the basic principle of equal treatment. This basic principle is a fundamental element of any civilised system of laws and belongs to the universally accepted bases of international public law ... The defendant has never disputed that it is bound by the principle of equal treatment; on the contrary, it has lived up to this principle since the time of its founding" (defence answer of 30 April 1999, p 13, subsection 31).

However, the principle of equality and the prohibition of discrimination, like almost all fundamental rights, are not absolute or unrestricted. Not all inequalities of treatment represent an inadmissible infringement of the general principle of equality, but only those that are not founded on objective grounds; this was rightly emphasised by the defendant in its memoranda (defence answer of 30 April 1999, p 13, subsection 32). "In the doctrine a distinction is made between absolute and relative equality. The general principle of equality is satisfied if

an objectively plausible reason for the legal differentiation can be adduced, whereas the strict principle of equality admits differentiation only if there is a compelling reason for it. As suggested, the principle of equality requires that equal be treated equally and unequal unequally (BGE 106 lb 188, 104 la 295, 103 la 519, 102 la 43). If there are no significant actual differences, differentiation under the law is not permitted. Given significant actual differences, unequal treatment under the law is not only allowed, but even mandatory" (Arthur Haefliger, Alle Schweizer sind vor dem Gesetzte gleich [all Swiss are equal before the law], Berne 1985, pp 57-8). The same is true for the European Court of Human Rights in the area of application of Article 14 ECHR: "La différence de traitement ne devient une discrimination prohibée au sens de l'art. 14 que lorsque l'autorité introduit des distinctions entre des situations analogues ou comparables, sans que des distinctions puissent se fonder sur une justification objective et raisonnable" (Jacques Velu and Rusen Erges, La convention européenne des droits de l'homme [the European Convention on Human Rights], Brussels p 117, item 146 with references).

Thus it has to be examined whether the Regulations on the Pensions System and the Savings Scheme and in particular the Transitional Rules of 1 October 1998 are effectively founded on objective grounds (on a "justification objective et raisonnable").

c) The applicants first of all stated in the letter to the General Manager of 30 January 1998 "that members of staff of non-Swiss nationality receive an expatriation allowance in addition to salary. In other words, non-Swiss nationals who had exactly the same activity and function as Swiss had a salary that was one quarter higher. In the meantime, with effect from 1 October 1997 under Article 12.1 and 12.2 of the Staff Regulations, the expatriation allowance for married staff has been reduced to 18 % and for unmarried staff to 14 % of the annual salary. It should be noted, however, that the aforementioned reduction in the expatriation allowance does not apply to non-Swiss members of staff appointed before 1 October 1997. This therefore constituted one-sided preferential of non-Swiss as compared with Swiss officials" (request of 30 January 1998, exhibit 1 to the application of 6 May 1998, pp 2-3, items 3 and 4).

This salary differential between Swiss and non-Swiss did not represent an inadmissible infringement of the general principle of equality because the inequality of treatment was based on reasonable grounds ("justification raisonnable"). This was implicitly affirmed by the Administrative Tribunal of the International Labour Organization on two occasions (judgments of 10 July 1997, No 1666, exhibit 5 to the defence answer of 30 April 1999, and 10 July 1999, No 1874), and was explicitly acknowledged by Z. for the applicants: "The granting of an expatriation allowance by the BIS is in principle not arbitrary, but its inclusion in the basis for calculation of the pension is" (minutes of the preliminary hearing of 26 January 2000, p 3). Besides, this preferential salary treatment is not even part of the current dispute, which relates exclusively to retirement (see the application of 6 May 1998, p 3, and the applicants' submissions (a) to (f) in the supplementary application of 24 November 1998, pp 9 ff).

As regards the pension calculation basis, on the other hand, the applicants consider that "the unequal treatment consists in the fact that as from 1 October 1997 newly appointed Swiss staff are better off than Swiss staff appointed prior to that date. The longer a member of staff had already worked for the Bank, the worse off he/she is.... Transitional rules that make such a provision are arbitrary" (minutes of the preliminary hearing of 26 January 2000, p 3). In the Tribunal's view, however, the adopted Transitional Rule under the Regulations on the

Pensions System and the Savings Scheme of 1 October 1998 (item 2) not only did not violate the principle of equality, but merely applied this general principle, ie the principle of "equal equally, unequal unequally". In fact, there really is a legally significant difference between the Swiss officials appointed before 1 October 1997 on the one hand and the other members of staff on the other: the former, and this is the case of the applicants, paid their contributions to the pension fund up to this date (1 October 1997) not on the basis of 125 % like the other members of staff but only on the basis of 100 % of their pensionable remuneration. In the Tribunal's view, herein lies a difference that unconditionally justifies a differential transitional rule with regard to calculation of the pension according to the principle of "unequal unequally".

It is true that the defendant's representative did not put forward these legal grounds but instead particular arguments for the alleged "fairness of the contested rule" (see the defence answer of 30 April 1999, pp 15 ff, subsections 3.5 ff), but the Administrative Tribunal is not bound by the reasons put forward by the parties (Article 25.2 of the Rules of Procedure). In addition, the applicants themselves accept their different legal position, but without giving any grounds, by requesting that "it be established that the applicants ... would have in return, on their retirement, to count a contribution rate totalling 1.4 % ... towards the 25 % share of salary not paid to them, calculated from the beginning of each individual applicant's contract of employment, and that each of the named applicants be subject to this application" (submissions (e) and (f) of the supplementary application of 24 November 199, pp 10-11). This means in practice that the applicants recognise that they could not simply claim the full pension on the basis of 125 % of their salary but would have to make a contribution in return by means of a retroactive calculation of their payments into the pension fund. The applicants thus overlook the fact that their submissions represent unilateral retroactive effect of the 125 % rule to which they have no legal claim, and hence an unjustified modification of the contracts concluded with the Bank. Moreover, their requested solution would lead to a clearly inadmissible preferential treatment in comparison with the legal position of the other Swiss officials appointed before 1 October 1997.

d) The applicants' submissions are accordingly unfounded in fact and in law, and their action for a declaration is to be dismissed. Therefore the Tribunal has no cause to decide in the present case on the alternative defence of limitation (see the defence answer of 30 April 1999, pp 25 ff, subsections 72-9).

It must also be taken into account that it is not the Administrative Tribunal but the Bank's Board of Directors (and neither the General Manager nor the Secretary General) that is empowered to adopt a Transitional Rule under the new Regulations on the Pensions System and the Savings Scheme of 1 October 1998. The Secretary General rightly pointed out by letter of 25 September 1997, referring to Federal Supreme Court decisions, that the Bank's new pensions and savings system entailed a fundamental (inter alia, financial) revision. Thus even the Swiss Federal Supreme Court did not require, in an instance where a revision is called for in order to achieve "greater" equality, that a reform be implemented immediately, and still less retroactively, in order not to completely overturn a complex set of arrangements (BGE 123 lb, consideration 3 (c) with references). The Administrative Tribunal cannot ignore these considerations.

The contested Transitional Rule under the new Regulations on the Pensions System and the Savings Scheme of 1 October 1998 provides for a transition of Swiss members of staff employed as of 1 October 1997 to the 125 % rule. An increase of 1.16 % per year takes place until an equal footing with other officials on the basis of 125 % is reached. Thus provision is made, based on reasonable grounds, for a gradual improvement in the applicants' financial position. The solution adopted is not arbitrary; on the contrary, it is, for one thing, within the discretion of the defendant (ie of the Bank's Board of Directors) and, for another, this transitional rule is not only well founded in fact and in law but also in conformity with the principle of equality.

5.
It goes without saying that these explanations on the unfoundedness of the applicants' action for a declaration (consideration 4) also apply to applicant 30's action for performance. Consequently, this action for performance, insofar as it is admissible, is to be dismissed simply and without repetition of this consideration.

[...]

6.
In their submissions the applicants requested that "the defendant be ordered to pay all ordinary and extraordinary costs of the procedure (including the preliminary procedure)" (supplementary application of 24 November 1998, p 12).

a) Although under Article 4.2 of the Statute the Bank bears "the costs incurred in connection with the functioning of the Tribunal, as well as the costs of all proceedings", Article 27.2 of the Rules of Procedure stipulates that the costs of professional representation of the successful party only are to be reimbursed according to the scale applicable in the Swiss Federal Court (SR 173.119.1, with reference to Art 159 of the Bundesgesetz über die Organisation der Bundesrechtspflege [federal law on the organisation of the administration of federal law], OG, SR 173.110).

In the present case all the applicants' submissions are unfounded in fact and in law and are to be dismissed insofar as they are admissible. Thus the applicants are not the successful party. The applicants may not therefore claim any allowance in respect of expenses.

b) In the same way as under Swiss federal civil service legislation, it is accepted as a general legal principle that the Bank (like the Confederation) bears the costs of the proceedings even if the official bringing the action does not succeed. Therefore the costs of the proceedings before the Administrative Tribunal are to be borne by the successful defendant Bank, which must also bear the costs of its own legal representative.

Therefore the Administrative Tribunal finds

1.
Insofar as they are admissible, all claims are dismissed.

2.
No allowance shall be payable by the Bank for expenses incurred by the claimants.

3.
The Bank shall bear the cost of the proceedings before the Tribunal.

4.
This judgment is effective immediately; it is final and without appeal.

5.
The full text of the judgment, including the legal grounds for the judgment, shall be delivered to the representatives of both parties by registered letter.

A copy of this judgment shall be communicated to the members of the Administrative Tribunal.

6.
The original of the judgment and the case file shall be placed in the archives of the Bank.

Basel, 28 June 2000

The President of the Tribunal:	The Secretary to the Tribunal:
Prof. Dr. Robert Patry	lic. iur. Felix Heusler