Schlagworte: Pension (aufgeschobene, vorbezogene), Erwerb zusätzlicher Pensionsansprüche, Kündigung (Entschädigung), Pensionssystem, Grundsatz von Treu und Glauben

Mots-clefs: pension (différée, anticipée) acquisition de droits à pension supplémentaires, licenciement (indemnité), système de pension, principe de bonne foi

Key words: pensions (deferred, early), acquisition of additional pension rights, termination (indemnity), pension plan, principle of good faith

1/1999

Judgment of 23 October 2001

Administrative Tribunal of the Bank for International Settlements

Prof. Dr. Robert PATRY, President,
Prof. Dr. Jacques-Michel GROSSEN, Delegated Judge,
Prof. David RUZIE, Panel Member, and
Me Felix Heusler, Secretary of the Tribunal,

X. _____,
represented by Z. _____, attorney at law in Geneva,

Applicant

versus

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

Defendant

re

the acquisition of deferred pension rights.

As to the facts:

A.
[...]

B.
[...]

C.
Born on _____, X._____ entered the service of the Bank on 1 March 1989 as _____, subsequently named Information Systems Services; on 1 November 1990, he was promoted to the rank of assistant manager. In April 1996, a new staff classification system was adopted, with the new scale ranging from category A to category J; the Applicant's position corresponded to category H, and hence X._____ formed part of the highest level of management in the Bank.

In autumn 1997, le Secretary General had a discussion with the Applicant concerning a change in the latter's responsibilities, proposing that he switch from _____ to the post of _____ […], which X._____ accepted.

The Applicant's personal situation within the Bank was to be reviewed after a period of two to three years. It emerged from a series of conversations that took place in spring 1999 between the Secretary General and the Applicant that it would be difficult to retain the Applicant in his current position, and also difficult to find him a position within the Bank that would assure him of the maintenance of his acquired rights, and in particular his position in category H. Thus the solution of voluntary redundancy was envisaged. In this connection, it was proposed that the Applicant take advantage of the provisions of Service Note No 1067 (exhibit A8 or B13).

D.
During the negotiations that were undertaken on this basis, it emerged that the Applicant attached particular importance to the matter of purchasing years of insurance and the cost-of-living adjustment of the pension rights thus acquired.

Following discussions extending over a period of several months, the Secretary General and the Head of Human Resources submitted to the Applicant the following offer dated 9 November 1999:

"Dear X._____,

We refer to the various conversations you have had with Y. _____ [the Secretary General] over the last months regarding your present positions as _____.

As you know, this position was created for a limited period of time and it will now be abolished in the context of the reorganisation of ITS. It also appeared during the conversations that no other position suitable for your qualifications is available at the Bank. Following these conversations, the Bank is prepared to make you the following offer without recognising any legal obligation of the Bank to do so;
– Your employment with the BIS will end on 30 September 2000; you may leave your workplace on 1 April 2000.
The Bank will make you a discretionary payment of CHF _____ on 30 September 2000.
The Bank will provide outplacement advice focused on setting up your own company.

In addition, as we understand that you wish to acquire additional pension rights under the Bank's pension system, the Bank is exceptionally prepared to waive the restriction in Article 9 of the Pension Regulations of 1 October 1998. This will allow you to purchase additional pension rights provided that the total of your accrued and purchased pension rights do not exceed 75%. As a further exception, the Bank is prepared to allow you, as requested, to purchase these rights in one of two ways:
1) by application of Tariff A;

2) by extending the terms of Article 3 of the Transitional Rules to permit you to make a lump-sum payment equivalent to a number of monthly payments at 23%, subject to the condition set out in (a) below.

Any such purchase must take place on 30 September 2000. Moreover the outstanding balance in connection with the additional rights already purchased is also due on this date.
3) If you also decide to opt for a continuation of insurance in accordance with Article 3 of Transitional Rules dated 1 October 1988 [recte 1998], your attention is drawn to the following:

a) this transitional rule stems from Article 19 of the Pension Regulations of 1 January 1992 and paragraph (4) of this article excludes that part of the pension so acquired from any general adjustment in pension;

b) as long as you continue the insurance, you are a participant of the pension system and the pensionable remuneration remains stable; should you stop such contributions and opt for a deferred pension, your pension entitlement, subject to (a) above, will be adjusted in line with other pensions from that date on.

This offer is open for acceptance for fifteen days. If you wish to avail yourself of this offer (rather than the severance benefits as laid down in Service Note No 1067), please sign and return the duplicate of this letter to HR by 25 November 1999 at the latest."
(exhibit A1)

By letter dated 2 December 1999, the Applicant wrote to the Secretary General and the Head of HR stating that he formally and unconditionally accepted the Bank's offer (exhibit A15 or B6). However, X._____ indicated that he intended to ask the General Manager to clarify the question of whether the Bank had to make a cost-of-living adjustment to the pension rights acquired on the basis of the Transitional Rules of 1 October 1998.

The same day, 2 December 1999, X. _____ addressed to the General Manager a letter whose essential passage reads as follows:

"The question on which I seek clarification is whether the Bank ought to make the cost of living adjustments of Article 3 of the Regulations on the Pension System dated 1 October 1998 on any pension arising from pension rights I would acquire under Article 3 of the Transition Rules dated 1 October 1998."
(exhibit A 2)

The General Manager replied to this letter on 18 December 1999 essentially in the following terms:

"As I see it, the transitional rules of the pension regulations give a staff member two options for acquiring additional pension rights: (i) to remain in the pension scheme at his last pensionable salary, making monthly payments of 23% of salary into the scheme (the 23% represents an actuarial estimate of the cost to the scheme of providing the associated benefits); or (ii) to make a lump-sum payment under a special tariff (Tariff A) to purchase additional years of service, whose pension entitlement would be cost-of-living protected from the date of acquisition ... Years of service purchased under Tariff A are more costly than those acquired under (i) above.

... It is natural that pension rights with full cost of living protection should be more costly than those without protection."
(exhibit A 3)

Writing to the General Manager again on 23 December 1999, the Applicant indicated that he did not share his opinion as regards his interpretation of the Transitional Rules and saw no other course but to refer the matter to the Administrative Tribunal of the Bank (exhibit B1).

For his part, the General Manager wrote again on 6 January 2000 (exhibit B2) and 17 January 2000 (exhibit A16 or B5) offering the Applicant the possibility of combining the two methods of acquisition indicated in the offer dated 9 November 1999, or even, should he prefer, of applying the ordinary rules. At the close of his letter dated 6 January 2000, the General Manager also stated the following:

"If after having considered the terms of my letter and the note, you still wish to take this matter up with the Administrative Tribunal, I would ask you to submit a formal request to me, as set out in Article 6, para (2)(a) of the Statute of the Tribunal."
(exhibit B 2)

In fact, X._____ did not follow up on this letter from the General Manager dated 6 January 2000. As announced in his letter dated 13 January 2000, he had already addressed to the Registrar of the Tribunal, by registered letter dated 29 December 1999, a letter worded as follows and accompanied by four documents:

[...]

E.
[...]

Noting that a judgment on the merits could not be delivered before 30 September 2000, the date on which the Applicant was to purchase his pension rights, the President of the Tribunal considered that pursuant to Article 17 paragraph 2 of the Rules of Procedure it was necessary for him to decide regarding the provisional measures requested by the Applicant by authorising him to choose, provisionally, from among the various means of acquiring pension rights offered to him, while reserving the right to revisit this choice after the Tribunal had judged on the substance of the matter at issue.

On 16 August 2000, therefore, the President of the Tribunal made – and notified – the following decision on provisional measures (giving summary reasons):

1. A copy of the letter from the representative of the Respondent dated 13 July 2000 shall be communicated to the representative of the Applicant.

2. The Applicant is authorised, provisionally, to acquire as of 30 September 2000 pension rights up to the amount of 75% of his pensionable remuneration in application of Tariff A provided for in Article 9 of the Regulations on the Pensions System of 1 October 1998. After receipt of the judgment on the substance of the matter at issue, the Applicant may, should the case arise, choose the other method of acquiring pension rights in accordance with the agreement of 2 December 1999, subject to reimbursement by the Bank of any excess payment received in respect of the acquisition of pension rights as of 30 September 2000.

3. The Tribunal will decide on costs and expenses in respect of the present procedure regarding provisional measures in its judgment on the merits.

4. The present decision on provisional measures, which is final and without appeal, is legally binding from the time of its notification to the parties.

In fact, the Applicant did make use of the opportunity thereby provided to him: drawing on his savings account, his severance payment and a loan granted by the Bank, X._____ acquired, for a total amount of CHF _____, all the rights attaching to his pension payable as of _____, up to the limit of 75% of his last pensionable remuneration, in application of Tariff A as provided for in Article 9 of the Regulations on the Pensions System of 1 October 1998. He accordingly purchased the missing years of service, namely _____ years and _____ months at 1.25% and _____ years and _____ months at 2.5% (see the certificate provided on 13 November 2000 by the Head of HR and filed on the occasion of the preliminary hearings of 22 February 2001).

F.
The Respondent had been given until 15 September 2000 to respond to the substantive claims of the application (pursuant to item 3 of Order No 4 of 14 June 2000), but the President of the Tribunal was obliged to extend this deadline to 16 October 2000; it was on this date that the Bank's representative filed the response and the documentary evidence produced by the Respondent. Although the application instituting the proceedings appeared to him to be inadmissible, the Bank's representative waived the possibility to plead such inadmissibility; based on the substance of the matter at issue – relating to the question of inflation protection – he entered the following claims:

Principally

1. The Applicant's claims of 31 March 2000 shall be dismissed.

2. It shall be established that the pension rights which the Applicant may acquire in application of item 2 of the Respondent's offer dated 9 November 1999, accepted unconditionally by the Applicant on 2 December 2000 and set out more precisely in item 1 of the General Manager's letter dated 17 January 2000, are not inflation-protected.

3. The Applicant shall be given 60 days as from the date of delivery of the judgment in which to decide how he wishes to acquire pension rights in accordance with the Respondent's offer of 9 November 1999.

Subsidiarily

1. The Applicant's claims of 31 March 2000 shall be dismissed.

2. It shall be established that that part of the agreement concluded between the parties relating to the acquisition of pension rights is vitiated by a fundamental error on the part of the Respondent and, for that reason, that part of the contract is invalid.

3. The Applicant shall be given 60 days as from the date of delivery of the judgment in which to decide on how he wishes to acquire pension rights, which by virtue of the invalidity of the special agreement will have to take place following the ordinary rules, namely the Pension Regulations of 1998, the Transitional Rules of 1998, and Service Note No 1067.

Costs and expenses

According to Article 27 of the Rules of Procedure of the Administrative Tribunal, the costs of the proceedings shall be borne by the Bank. Given that the Applicant's claims are to be dismissed, an allowance in respect of expenses in his favour is excluded in application of that same Article of the Rules of Procedure.
(Response of 16 October 2000, pp 36 and 37)

G.
In execution of the mandate given to him by the President of the Tribunal by Order No 5 of 6 November 2000, the Delegated Judge conducted the preliminary hearings, assisted by the Registrar of the Tribunal, who drew up the record based on a full recording of the two hearings. The session of 22 February 2001 was chiefly devoted to hearing the Secretary General of the Bank […] and the Applicant; this hearing covered in particular the Secretary General's room for manoeuvre in dealing with X._____'s particular case, the negotiations that had led to the agreement of 2 December 1999, and the meaning of the reservation – or the request for clarification – which the Applicant had expressed in his letter of 2 December 1999. Then, after having mentioned the question of the admissibility of the application, the Delegated Judge gave the representatives of the two parties the possibility to state the grounds on which they proposed to base their claims.

Initially scheduled for 16 March 2001, the hearing of Z._____– as witness – took place on 12 June 2001. This expert in matters of welfare schemes described the circumstances in which the Bank had consulted him to calculate the actuarial values of the different proposals made to the Applicant with a view to resolving the problem of the cost-of-living adjustment of the pension. On this subject, the Applicant filed various documents provided to him by the agency VZ Vermögenszentrum in August 1999 (exhibits A17).

H.
In his reply of 15 August 2001, the Applicant made the following claims:

Principally

1. X._____ shall be authorised to acquire additional pension rights within the BIS pensions system up to the level of 75% of his last pensionable remuneration by payment of CHF _____value 30 September 2000.

2. It shall be established that the pension rights thereby acquired shall be inflation-protected as from 1 October 2000.

3. The BIS shall be ordered, as necessary, to offset the rise in the cost of living by regularly adjusting the amounts of the pensions and annuities paid out under the BIS pensions system to X._____ or persons claiming through him.

4. The BIS shall be ordered to refund to X. _____ the amounts levied in excess in connection with the execution of the provisional measures ordered on 16 August 2000, i.e. the sum of CHF _____plus interest at 5% per annum as from 1 October 2000.

5. Any other or contrary claims of the BIS shall be dismissed.

6. Costs and expenses, including the expenses for provisional measures, shall be awarded against the BIS, together with a fair litigation allowance by way of contribution to the fees of his legal representative.

Subsidiarily

X. _____ shall be instructed to prove by any suitable means the claims put forward by these presents and shall be enabled to refute such claims of the other party that are not strictly in conformity with his own.

In addition, the Applicant produced various other pieces of documentary evidence (exhibits A18 to A24).

On 1 October 2001, the Respondent filed its rejoinder and an extract of the transcription of the preliminary hearing of 22 February 2001 (exhibit B17). In response to the Applicant's claims, the Respondent submitted the following claims:

Principally

1. The Applicant's claims of 15 August 2001 shall be dismissed.

2. It shall be established that the pension rights which the Applicant may acquire in application of item 2 of the Respondent's offer dated 9 November 1999, accepted unconditionally by the Applicant on 2 December 2000 and set out more precisely in item 1 of the General Manager's letter dated 17 January 2000, are not inflation-protected.

3. The Applicant shall be given 60 days as from the date of delivery of the judgment in which to decide how he wishes to acquire pension rights in accordance with the Respondent's offer of 9 November 1999.

Subsidiarily

1. The Applicant's claims of 15.8.2001 shall be dismissed.

2. It shall be established that that part of the agreement concluded between the parties relating to the acquisition of pension rights is vitiated by a fundamental error on the part of the Respondent and, for that reason, that part of the contract is invalid.

3. The Applicant shall be given 60 days as from the date of delivery of the judgment in which to decide on how he wishes to acquire pension rights, which by virtue of the invalidity of the special agreement will have to take place following the ordinary rules, namely the Pension Regulations of 1998, the Transitional Rules of 1998, and Service Note No 1067.

Costs and expenses

According to Article 27 of the Rules of Procedure of the Administrative Tribunal, the costs of the proceedings shall be borne by the Bank. Given that the Applicant's claims are to be dismissed, an allowance in respect of expenses in his favour is excluded in application of that same Article of the Rules of Procedure.

In application of Article 21 paragraph 4 of the Rules of Procedure, the Delegated Judge, by Order No 9 of 5 October 2001, brought the preliminary hearings to a close, such that the final claims of the two parties became definitive. In addition, he communicated to the members of the Panel the report provided for in Article 22 paragraph 1 of the Rules of Procedure.

I.
Pursuant to the provisions of Article 22 of the Rules of Procedure, the main hearing took place on 23 October 2001 at the offices of the Tribunal, in the presence of all the members of the Panel, the Respondent and representatives of the Applicant, and their respective attorneys.

The Panel having waived a further hearing of the parties and witnesses, the President of the Tribunal invited the attorneys to read out their final claims and to plead their case; he gave them authorisation to file their written pleading notes within a short period. At the end of the hearing, X._____ was given leave to make a short personal statement, to which the Secretary General of the Bank briefly replied.

The President of the Tribunal then brought the hearing to a close and informed the parties that the terms of the judgment would be communicated to them in writing.

J.
The same day, having deliberated in secret and voted – unanimously – on each of the orders made and on the main grounds for the judgment, in accordance with Article 23 paragraphs 1 and 2 of the Rules of Procedure, the Panel drew up the text of the orders of the judgment, which was notified to the representatives of the two parties by registered mail on 29 October 2001.

In accordance with Article 24 of the Rules of Procedure, the full text of the judgment was circulated to the members of the Panel for approval.

The legal aspects

1.
When contentious proceedings are instituted before it, the Tribunal – in the form of the Panel constituted to judge the case – decides upon its own competence (Article 25 paragraph 4 of the Rules of Procedure).

a) The Tribunal was created by the Headquarters Agreement concluded between the Swiss Federal Council and the Bank for International Settlements (RS 0.192.122.971.3). Its mission is to settle disputes arising in matters of employment relations between the Bank and its Officials or former Officials, or persons claiming through them. Article 4 paragraph 2 in fine of this Headquarters Agreement states that “Matters of employment relations shall be deemed to include ... all questions relating to the interpretation or application of ... the provisions governing the Bank’s pension scheme and other welfare arrangements provided by the Bank.”

In the case in point, the Applicant bases his claims on his interpretation of the provisions governing the pensions system and on the agreement made between the two parties on 2 December relating inter alia to methods of acquiring pension rights; the Respondent also refers to these provisions and this agreement.

Insofar as the dispute relates to questions of interpretation of an agreement referring to the Bank's pensions system, it therefore falls within the exclusive jurisdiction of the Administrative Tribunal.

b) In this area, the Panel has exclusive and final jurisdiction (Article 4 paragraph 2 of the Headquarters Agreement). As an international court of law seated in Basel, the Administrative Tribunal is independent not only of the Swiss courts but also of other international tribunals. Its judgments are final and without appeal (Article 11 of the Statute of the Tribunal), such that they may not be appealed, save as provided for in Articles 12 and 13 of the Rules of Procedure on revision and interpretation.

c) The Bank's Administrative Tribunal is not a constitutional court, nor an arbitral tribunal, nor even a civil court or industrial tribunal, but an international administrative tribunal.

It bases its judgments on general principles of law and, in cases of doubt, on the general principles of Swiss law; but it also takes into account the customs and traditions of the Bank (Article 9 paragraph 1 of the Statute of the Tribunal; Article 26 paragraph 1 of the Rules of Procedure). In addition, taking account of the exchanges of views between the Management of the Bank and the International Law Directorate of the Federal Department of Foreign Affairs, the Tribunal decided in September 1999 not only to apply and interpret the rules enacted by the Bank (Article 4 paragraph 2 in fine of the Headquarters Agreement), but also to examine such rules with respect to their compatibility with the general principles of law (Article 26 paragraph 2 of the Rules of Procedure, as amended on 30 November 2000).

In practice, this means that in the present proceedings the Panel must examine ex officio whether the agreement of 2 December 1999 referred to by the parties and the rules enacted by the Board of Directors of the Bank regarding the pensions system are valid in light of the general principles of law.

2.
Before giving a ruling on the merits of the case, the Tribunal must first "examine ex officio the admissibility of the application and all procedural documents" (Article 25 paragraph 1 of the Rules of Procedure). It is of little importance, therefore, that the Respondent waived assertion of the inadmissibility of the application instituting proceedings (see the response of 16 October 2000, p 4), for the parties themselves cannot decide whether the application is admissible or not; the decision rests solely with the Tribunal.

a) At first sight, the Applicant appears to have respected the purely formal conditions of admissibility (inter alia in terms of time limits); the President of the Tribunal admitted as much in his order dated 31 January 2000 (Order No 1, p. 2). Thus, the Applicant sent a letter dated 2 December 1999 to the General Manager, who replied to him on 18 December 1999, and, before expiration of the time limit of 30 days, viz. on 29 December 1999, he filed with the

Registrar of the Tribunal his application instituting proceedings, accompanied by the documents required under Article 16 paragraph 3 of the Rules of Procedure.

It is true that the Applicant did not produce a power of attorney, but in his application of 29 December 1999 X._____ had himself designated his representative in the person of Me Z. _____, attorney-at-law in Geneva. Moreover, at the request of the Delegated Judge, the two attorneys regularised their situation by each filing a power of attorney.

It is also true that the Applicant did not make any claims in his letter of 29 December 1999, but this is not a condition of admissibility of the application: it sufficed that the application instituting proceedings contained a "description of the subject matter of the dispute" (Article 16 paragraph 2 (b) of the Rules of Procedure); it is in the additional memorandum provided for in Article 16 paragraph 4 of the Rules of Procedure that the Applicant must state his claims.

b) The essential question, however, is whether the letter of 2 December 1999 may be regarded as a preliminary request (within the meaning of Article 6 paragraph 2 (a) of the Statute of the Tribunal and Article 15 of the Rules of Procedure) and whether the Bank's General Manager actually, in his letter dated 18 December 1999, "in writing, rejected this request wholly or in part" (Article 6 paragraph 2 (b) of the Statute). This is what the Applicant claimed in his memorandum of 31 March 2000 (p 2 and 10, item 35). But in this connection the Respondent in its response (p 4, item III/5), and the Delegated Judge in the preliminary hearings, expressed serious doubts about the admissibility of the application.

The Statute of the Tribunal provides that this "application – i.e. the application instituting proceedings – shall not be admissible, save in exceptional circumstances at the discretion of the Administrative Tribunal, unless: (a) the applicant has previously submitted a request on the same subject to the General Manager of the Bank and (b) the Bank has, in writing, rejected this request wholly or in part" (Article 6 paragraph 2). Moreover, the Rules of Procedure specify that a "copy of the preliminary request and, where applicable, of the General Manager's decision, … shall be appended to the application" (Article 16 paragraph 3) and that the Tribunal shall "give a ruling on the merits of the case, annulling or modifying, where appropriate, the decision contested" (Article 25 paragraph 4 in fine).

Hence the application instituting proceedings and, above all, the decision (rejection) by the General Manager play an important role in the contentious proceedings before the Administrative Tribunal; they constitute (material) conditions for the admissibility of the application. The same is true, for the rest, in general administrative law, notably according to the general principles of administrative proceedings (see the Federal Law on Administrative Procedure (RS 172.021); see also the Law on the Federal Civil Procedure (RS 273)), which inspired the Statute of the Administrative Tribunal and the Rules of Procedure (see the Tribunal's judgment of 28 June 2000 in case No 1/1998, p 19, consideration 2d).

"La décision joue un rôle essentiel dans le domaine de la juridiction administrative ... Définie par la loi sur la procédure administrative, elle constitue l'acte susceptible d'être attaqué par un recours." ["The decision plays an essential role in the area of administrative jurisdiction ... Defined by the law on administrative procedure, it constitutes the act that is liable to be challenged"] (André GRISEL, Traité de droit administratif, 2nd ed., p. 854). "Lorsqu'une loi ne crée pas, par elle-même un régime juridique directement applicable pour les particuliers, il

est nécessaire de la concrétiser et de l'individualiser. L'acte par lequel une norme est ainsi mise en oeuvre dans une situation particulière et par rapport à une personne déterminée est en général une décision, même si le droit public connaît aussi la forme du contrat pour exécuter des lois de droit public ... La décision et la loi ont en commun d'être unilatérales et obligatoires. Elles se distinguent en ce que la décision est individuelle et concrète alors que la loi est abstraite et générale." ["Where a law does not by itself create a judicial regime directly applicable to private persons, it is necessary to put it into concrete and individual form. The act by which a norm is thereby implemented in a particular situation and in relation to a given person is in general a decision, even if there also exists in public law the form of a contract to execute public law statutes ... The decision and the law have this in common, that they are unilateral and binding. What distinguishes them is that the decision is individual and concrete while the law is abstract and general"] (Blaise KNAPP, Précis de droit administratif, 4th ed., p. 214). Moreover, the Federal Law on Administrative Procedure itself specifies that "sont considérées comme décisions les mesures prises par les autorités dans des cas d'espèce, fondées sur le droit public fédéral et ayant pour objet : a. de créer, de modifier ou d'annuler des droits ou des obligations..." ["considered as decisions are measures taken by the authorities in cases in point, based on federal public law and having as their object: a. to create, modify or annul rights or obligations"] (Article 5 of the Federal Law on Administrative Procedure).

In addition, the Tribunal makes reference to previous rulings by international administrative tribunals, according to which a letter that gives the requester the possibility of choosing from among various options does not constitute an act causing injury (see, with regard to cessation of work due to illness, Judgment No 85 – in re Jurado – of the ILO Administrative Tribunal). Similarly, the ILOAT considers that "A decision by an international organisation is challengeable before the Tribunal only if it causes the complainant injury. One that has no effect on his position is not, for example an act which is not operative but a mere declaration of intent" (see ILOAT Judgment No 764, consideration 4, in re Berte No 2).

c) In fact, in the letter he addressed to the Secretary General and the Head of HR on 2 December 1999 (exhibit A15), following an e-mail note of 26 November 1999, X._____ declared his formal and unconditional acceptance of the offer made to him by detailed letter dated 9 November 1999, but at the same time he applied to the General Manager to obtain clarification as to whether the Bank was obliged to make cost-of-living adjustments to pensions pursuant to Article 3 of the 1998 Pension Regulations for rights acquired on the basis of Article 3 of the Transitional Rules of 1 October 1998: at the end of this letter, he did not ask the General Manager to take a decision capable of being contested before the Tribunal, since he made reference neither to Article 6 of the Statute, nor to Article 15 of the Rules of Procedure, but simply asked the General Manager to clarify the situation by giving his opinion ("and I would be grateful for your clarification and opinion").

This was, in sum, a simple request for information that cannot substitute for the preliminary request within the meaning of Article 15 of the Rules of Procedure. Furthermore, in his reply of 18 December 1999, the General Manager gave him his opinion; far from refusing anything, he offered the Applicant at the close of his letter another possibility in addition to those that had already been given him, namely that of applying the ordinary rules of the Pensions System instead of implementing the agreement made on 2 December 1999 (exhibit A2).

The Applicant, even though advised by legal counsel, was therefore wrong in thinking that the General Manager's reply of 18 December 1999 was a decision that could be contested before the Tribunal. Moreover, in reply to another letter from the Applicant (dated 23 December 1999, exhibit B1), the General Manager, by letter dated 6 January 2000, wished to clear up the misunderstanding and, to further clarify the situation, announced that a note would shortly be submitted by the Legal Service; he stated the following: "If after having considered the terms of my letter and the note, you still wish to take this matter up with the Administrative Tribunal, I would ask you to submit a formal request to me, as set out in Article 6, para (2)(a) of the Statute of the Tribunal" (exhibit B2). In other words, the General Manager gave the Applicant clearly to understand that he would take a formal decision if the Applicant sent him a request – the preliminary request – in accordance with the provisions of Article 6 paragraph 2 of the Statute of the Tribunal.

In actual fact, X._____ did not act upon this invitation at all; he did not submit such a preliminary request, nor did he even file an application instituting proceedings, assuming that the further letter from the General Manager dated 17 January 2000 (exhibit B5) can be considered to be a decision that could be contested before the Tribunal.

d) In these circumstances, the Tribunal can only declare the application instituting proceedings filed by the Applicant on 29 December 1999 to be inadmissible for want of a preliminary request and of a decision that may be contested before the Tribunal.

In this regard, it must be borne in mind that, while an explicit reference to the provisions of the Statute (Article 6) or of the Rules of Procedure (Articles 15 and 16) is not a formal condition for the validity of the preliminary request, the Tribunal cannot allow the Applicant to dispense with a preliminary request to the General Manager: the exception provided for in Article 15 paragraph 2 of the Rules of Procedure is inapplicable, because the General Manager did not, of his own initiative, take a decision that could be contested before the Tribunal. Nor, moreover, were there any "exceptional circumstances" (within the meaning of Article 6 paragraph 2 of the Statute or of Article 16 paragraph 1 of the Rules of Procedure) that would have allowed the Tribunal to waive the explicit requirements laid down by the Statute and the Rules of Procedure for rendering the application admissible. For the rest, the Applicant himself at no time alluded to any such exceptional circumstances, and the fact that the Respondent declared that it waived the assertion of inadmissibility of the application does not in itself constitute such an exceptional circumstance.

Finally, it should also be noted that the condition of a preliminary request followed by a rejection represents a reasonable requirement, useful for purposes of binding the proceedings and easy to satisfy, all the more as in the case in point X._____ had taken counsel from his attorney. Therefore, the Tribunal is in no way being excessively formalistic in declaring the application to be inadmissible.

In the present case, the Tribunal cannot leave open the question of admissibility, as it had decided in its judgment of 28 June 2000 in case No 1/1998 (p 21, consideration 2e). It must take a clear decision on this question in order to avoid inadmissible applications being filed in the future.

3.
Normally, when declaring an application to be inadmissible, the Tribunal does not examine the substance of the dispute, leaving it up to the Applicant to validly institute new proceedings.

a) In this particular case, however, the Panel cannot ignore the fact that, following the decision on provisional measures announced by the President of the Tribunal on 16 August 2000 upon the X. _____'s request and with the agreement of the Respondent, the two parties ask in their claims that the matter in dispute be definitively settled.

In fact, the Applicant was authorised, provisionally and for the purpose of safeguarding his rights, to acquire the pension rights in application of Tariff A provided for in Article 9 of the 1998 Pension Regulations by paying the sum of CHF _____ on 30 September 2000, in order to be certain of benefiting from inflation protection. However, in his decision of 16 August 2000 (item 2 paragraph 2), the President of the Tribunal left him the possibility of revisiting his choice after the judgment on the substance of the matter at issue and "should the case arise, of choosing the other method of acquiring pension rights in accordance with the agreement of 2 December 1999" by paying an appreciably smaller amount; for its part, the Respondent also entered claims to that effect (principal claim No 3; see response, p 36, and rejoinder, p 15). However, the two parties' opinions diverge on the question of the adjustment of pension benefits for the cost of living (see, on the one hand, the reply dated 15 August 2001, claims 1 and 2, and, on the other hand, the rejoinder of 1 October 2001, p 15, principal claim No 2).

b) It is, however, precisely with regard to this matter in dispute that the Applicant is awaiting the judgment on the merits before making his final choice.

In these circumstances, were the Panel to confine itself to declaring the application inadmissible, X._____ would be obliged to institute new proceedings, that is, to address a new preliminary request to the General Manager and hence, as the case might arise, to file a new application with the Tribunal, insofar as he still has the right to do so, which is at least doubtful.

c) It is for this reason that, considering that the matter is already capable of being judged on the merits, the Tribunal deems it to be opportune not only to rule on the inadmissibility of the application (pursuant to Article 6 paragraph 2 of the Statute), but also, for reasons of economy, to judge the substance of the matter at issue. It is, moreover, able to do so all the more easily in that, in any event, the application is ill-founded.

4.
Like the Swiss Federal Tribunal in administrative court appeal proceedings (see Article 114.1 of the Federal Law on the Organisation of the Administration of Federal Law, OJ, RS 173.110), the Administrative Tribunal "may not go beyond the claims of the parties to their advantage or disadvantage", but "it shall not be bound by the reasons put forward by the parties" (Article 25 paragraph 2 of the Rules of Procedure). It decides by applying ex officio the provisions governing the Bank's pensions scheme (Article 4.2 in fine of the Headquarters Agreement) and the general principles of law (according to Article 9.1 of its Statute), and it may therefore admit or dismiss the application on other grounds than those put forward by

the parties (cf Swiss Federal Tribunal judgments 108 Ib 199-200, consideration 1, and 106 Ia 226, consideration 1). Thus the Tribunal is not obliged to examine in detail in its judgment all appeals raised by the parties (cf Gérard CORNU, Vocabulaire juridique, Moyen, p. 512) but bases its judgment on its own reasoning (see the judgment of 28 June 2000 in case No 1/1998, p. 22, consideration 4).

a) The two parties are agreed in admitting that a contract was concluded between them by virtue of X._____'s acceptance on 2 December 1999 of the offer the Bank made to him on 9 November and supplemented on 26 November 1999. They do not call into question the agreement that had been reached on the Applicant's date of departure, his severance payment, the assistance in seeking employment, or the interest-free loan granted to the Applicant to enable him to acquire the pension rights in application of Tariff A under Article 9 of the 1998 Pension Regulations. Above all, the Respondent has, throughout the duration of the proceedings, confirmed that X._____ today still has the possibility to choose between the two methods of acquiring pension rights mentioned in the offer of 9 November 1999, one in application of the 1998 Pension Regulations, the other in accordance with Article 3 of the Transitional Rules of 1 October 1998.

In fact, the matter in dispute is only the question of whether, whatever the means – or the price – of acquisition, the pension payable to X._____ as from will_____ be subject to cost-of-living adjustment across the board. This is the view taken by the Applicant, whereas for the Respondent such adjustment would be due only in respect of the rights – or that proportion of the rights – acquired at the high price, that is, in application of Tariff A.

The possibility of acquiring pension rights by means of a payment equivalent to the total of monthly contributions of 23% is not provided for in the ordinary rules, whether in the 1992 or the 1998 Pension Regulations, or in the Transitional Rules of 1 October 1998. This possibility was only created by the agreement concluded between the parties with a view to satisfying the wishes of the Applicant.

Accordingly, the question is whether – and to what extent – the Bank's Management is at liberty to deviate from the ordinary rules relating to the pensions system, as adopted by the Board of Directors, to the benefit or disadvantage of a member of the staff of the Bank.

b) In its judgment of 28 June 2000, the Bank's Administrative Tribunal judged that only the Board of Directors has the power to enact, by means of regulations, norms that fix the rights and obligations of the Bank and its officials with respect to the pensions system; neither the General Manager nor the Secretary General may derogate from these rules to the benefit or disadvantage of a certain member of staff or a certain category of staff members (judgment in Case No 1/1998, consideration 2e).

In the case in point, the question is, first, to establish whether, in applying Service Note No 1067 on restructuring and its consequences (of 16 May 1999, exhibit A8 or B13), the Secretary General could validly grant the Applicant special conditions on his leaving the Bank, notably the payment of salary for a further 6 months after his actual departure (1 April 2000) as well as making a severance payment (of CHF _____). In fact, insofar as X._____ may be considered to qualify for the measures provided for in favour of "only the incumbents of positions which disappear" (see Service Note No 1067 p. 2, item 4 (c)), it may be admitted

that the Secretary General – in his capacity as Chief Administrative Officer (in charge of "all matters relating to staff", according to Article 2 of the Staff Regulations) – had a certain degree of discretion and that he did not exceed its bounds, with the proviso, however, that he did not give the Applicant preferential treatment in financial terms over "a staff member for whom no internal alternative could be found" (see Service Note No 1067 p. 2, item 4 (b) in fine). Regarding those elements of the offer of 9 November 1999 which do not concern the pensions system, therefore, there is no reason to call into question the agreement concluded between the parties.

Conversely, as regards the second part of this agreement, relating to the methods of acquiring pension rights, the Secretary General formulated an offer that was not entirely in conformity with the rules (1992 and 1998 Pension Regulations, Transitional Rules of 1 October 1998) enacted by the Board of Directors (see exhibits B3, B12 and B4).

At the time his employment with the Bank terminated – 30 September 2000 – X._____, born on _____ and having joined the Bank's pensions scheme on 1 March 1989, had fulfilled the necessary conditions (Articles 1 and 3 of the Transitional Rules of 1 October 1998) to have a claim to early retirement or continuation of his insurance in accordance with Article 19 of the 1992 Pension Regulations or Articles 13 and 14 of the 1998 Pension Regulations.

In fact, it emerges from the preliminary hearings, notably from the filing of the Secretary General dated 22 February 2001 and that of the expert – M._____ – of 12 June 2001, that the Applicant, at the time he left the Bank, did not wish to receive in addition to his severance payment (of CHF _____) a lump-sum payment in settlement of pension rights already acquired or to be acquired, nor even the payment of an early retirement pension as from 1 October 2000. On the contrary, he wished to be able to use his severance payment and the capital corresponding to his total pension rights, already acquired and to be acquired through the purchase of additional years of service, in order to obtain, as from 1 February 2015, a pension equal to the maximum of 75% of his pensionable remuneration. And what was important for him was to have the assurance that this deferred pension would be adjusted for the cost of living.

In truth, as regards the first method of acquiring pension rights in application of Tariff A, the fact should perhaps be mentioned that the Secretary General deviated somewhat from the ordinary rules, since Article 1 of the Transitional Rules provides for the possibility of an early retirement pension, not a deferred pension. In so doing, however, the Secretary General was merely interpreting this transitional rule – applicable in the case in point – admittedly in a way that was very favourable to the wishes of a member of staff who had been one of his closest colleagues, but without causing financial damage either to the Pension Fund or to the rights of the other members of the staff of the Bank; nor, moreover, is this contested by anyone, neither the Respondent, nor the Applicant, nor even the expert (M._____).

Furthermore, the Tribunal cannot ignore the fact that, with the authorisation of the President of the Tribunal (see the decision on provisional measures of 16 August 2000, item 2 paragraph 1) and in conformity with the claims of the Respondent which are binding upon the Tribunal (Article 25 paragraph 2 of the Rules of Procedure), X._____ was effectively able to acquire additional pension rights up to the maximum of 75% of his pensionable remuneration; by the payment of CHF _____ that he made on 30 September 2000, the Applicant thus

acquired the right to receive, as from 1 February 2015, the regular payment of a deferred early retirement pension that will be adjusted for the cost of living.

In these circumstances, the Tribunal considers that there is no reason to call into question that part of the agreement concluded on 2 December 1999.

c) As regards the possibility of acquiring pension rights through a lump-sum payment equivalent to the monthly contributions of 23% of the pensionable remuneration, it must be stated that this is not provided for under the applicable rules. In his letter dated 9 November 1999, the Secretary General had intimated as much in specifying that he was formulating the offer not by applying but “by extending the terms” of Article 3 of the Transitional Rules (see exhibit A1).

This transitional rule, enacted by the Board of Directors at the same time as the Pension Regulations of 1 October 1998, provides, on certain conditions which the Applicant fulfilled at the time of his leaving the Bank, solely for the continuation of insurance, such that X._____, after leaving the Bank’s service, could have remained affiliated to the Pensions System subject to a monthly contribution of 23 % of his last pensionable remuneration (comprising his own participant’s contribution and that of the Bank – see Articles 7 and 8 of the 1998 Pension Regulations). This possibility had, moreover, also been offered, but the Applicant does not wish to avail himself of it.

In fact, the Secretary General felt able to interpret broadly Article 3 of the Transitional Rules in order also to offer the Applicant the possibility of acquiring his additional pension rights through payment of a premium equivalent to the monthly contributions of 23% of his last pensionable remuneration, but specifying that the rights acquired in this manner – in contrast to the application of Tariff A – would not be adjusted for the cost of living. The offer formulated in this manner was admittedly not entirely in conformity with the regulations, but the Tribunal may consider the Secretary General still to have acted within the limits of his discretionary power insofar as, by ruling out the indexation of pension rights acquired other than on the basis of Tariff A, the Bank’s Management was precisely concerned to avoid the concession granted to X._____ having an adverse financial impact on the Pension Fund.

In these circumstances, the Tribunal may, in accordance with the claims of the two parties that are binding upon it (Article 25 paragraph 2 of the Rules of Procedure), confirm the decision on provisional measures taken by the President of the Tribunal on 16 August 2000 (item 2, paragraph 2) and give the Applicant the possibility of choosing, within a period of 60 days from notification of the present Judgment, this other method of acquisition than the one which he used provisionally through his payment dated 30 September 2000, subject to reimbursement by the Bank of any excess payment received.

It is true that the Applicant raised the fact that, at his hearing before the Delegated Judge, in reply to a question put to him by a representative of the Applicant, the expert, M._____, stated that “there are cases similar to that of X._____, that is, where the Bank undertook to pay more than is provided for in the regulations”, while making it clear “that, in general, all extra-regulatory arrangements are paid for by the Bank” and not the Pension Fund (minutes of the preliminary hearings of 12 June 2001, p. 4).

However, the principle of equality, which the Tribunal has already recognised as one of the general principles of law within the meaning of Article 9 paragraph 1 of the Statute (see the Judgment in case No 1/1998 of 28 June 2000, p 24, consideration 4b), does not authorise the authority which has in isolated instances already accorded officials unlawful benefits to persist with such illegality in favour of another official; there is no right to equality in inequality, save in exceptional circumstances which do not apply in the present case: according to Swiss Federal Tribunal precedent, “der Umstand, dass das Gesetz in andern Fällen nicht oder nicht richtig angewendet worden ist, gibt dem Bürger grundsätzlich keinen Anspruch darauf, ebenfalls abweichend vom Gesetz behandelt zu werden” [“the circumstance that in other cases a law that not been applied, or applied incorrectly, does not give the citizen the right in principle also to be treated in a manner that deviates from the law”] (Swiss Federal Tribunal judgments 104 Ib 372 consideration 5; 108 Ia 214 consideration 4a; see also, in the doctrine, André GRISEL, Traité de droit administratif, 2nd ed. Vol. I, p. 363, ch. 2 lit. d; Blaise KNAPP, Précis de droit administratif, 4th ed., p. 104, No 491; Ulrich HAEFELIN / Georg MULLER, Grundriss des schweizerischen Verwaltungsrechts, p. 89, No 412; Arthur HAEFLIGER, Alle Schweizer sind vor dem Gesetze gleich, p. 73; Jean-François AUBERT, Traité de droit constitutionnel suisse, p. 58, No 1830; Jörg Paul MULLER, Die Grundrechte der schweizerischen Bundesverfassung, 2nd ed. p. 224).

This is, moreover, a principle that has been constantly applied by international administrative tribunals: “equality in law does not mean equality in the breach of it” (see in this regard ILO Administrative Tribunal judgments No 614 in re Ali Khan No 3, consideration 7; No 622 in re van der Peet; No 1194 in re Vollering; No 1366 in re Kigaraba; No 1536 in re Rauf; see also, implicitly, the decision of the NATO Appeals Board of 14 January 1993, No 279 X).

d) For the rest, one reaches the same conclusion – that the application is to be rejected – if the agreement of 2 December 1999 can be considered as validly concluded between the parties, admitting that the Secretary General was able to deviate from the regulations in making the offer of 9 November 1999, accepted formally and unconditionally by the Applicant.

In their letter of 9 November 1999, the Secretary General and the Head of HR had drawn X._____’s attention to the fact that Article 3 of the Transitional Rules stemmed from Article 19 of the 1992 Pension Regulations, which, according to paragraph (4), excludes the pension acquired in this way from any cost-of-living adjustment (“and para (4) of this article excludes that part of the pension so acquired from any general adjustment in pension”; exhibit A1). Moreover, the Applicant acknowledged having known, at the latest on 29 September 1999, that the Bank refused to accept any obligation to make cost-of-living adjustments to pensions acquired on the basis of Article 3 of the Transitional Rules (see the memorandum attached to the letter of 2 December (exhibit A2, Annex p. 3, item 2 in fine)). In addition, in his own record of the discussion he had had with the Secretary General on 8 November 1999, X._____ reported that the Bank was ready to accept his proposal, that is, to enable him to acquire rights through continuation of the insurance by making a single lump-sum payment on 1 October 2000, rather than by making monthly payments thereafter, but “the proportion of pension rights acquired in this manner would not be adjusted for cost of living increases, however” (exhibit A14 or B14).

It was, in sum, a solution sui generis that was agreed between the parties after lengthy negotiations. Largely influenced by the Applicant’s own wishes, it was more favourable to him

than would have been the sole application of the regulations. The Secretary General only offered it because it was his intention to accommodate wherever possible – and even beyond – the wishes and suggestions of the Applicant, who accepted it because he recognised its advantages. Equally, X._____ was careful, in his letters of 2 December 1999, not to write that he only accepted the Bank's offer if he was promised that his pension rights would be adjusted for cost-of-living increases, whatever the method by which these rights were acquired. Besides, he could no longer discuss the contents of this offer which the Secretary General had clearly formulated in order to put an end to the negotiations, specifying that the offer had to be accepted within a fortnight at the latest ("this offer is open for acceptance for fifteen days"; exhibit A1). And, as he had been requested, X._____ indicated his agreement by returning on 2 December 1999 the duplicate of the letter of 9 November 1999, which he signed.

It is true that, on 2 December 1999, after having thereby accepted the Bank's offer formally and unconditionally, X._____ yet attempted to pursue the negotiations further: in his letter to the General Manager, he asked for clarification of the question whether the Bank should make the cost-of-living adjustments pursuant to Article 3 of the 1998 Pension Regulations on pension rights acquired under Article 3 of the Transitional Rules. Both subjectively and objectively, this request for clarification could not be likened to a reservation, the very notion of which would be at odds with the adverb unconditionally which the Applicant used in the preceding paragraph, as it would with the notion of acceptance, which according to the general principles of the law of contract must be pure and simple in order to perfect the contract (see notably Pierre ENGEL, Traité des obligations en droit suisse, p. 144, No 43: "le contrat est non avenu si l'acceptation n'est pas conforme à l'offre, si elle en rejette certains éléments, si elle les modifie ou en ajoute" ["the contract is void if the acceptance is not in conformity with the offer, if it rejects certain elements thereof, if it modifies them or adds to them"]; see also Eugen BUCHER, Schweizerisches Obligationenrecht, Allgemeiner Teil, p. 108, Marcel PLANIOL, Georges RIPERT et Jean BOULANGER, Traité élémentaire de droit civil, volume II Le contrat p. 126, No 327).

In other words, objectively speaking, the behaviour adopted by the Applicant on the advice of his counsel cold not be understood otherwise than as the pure and simple acceptance of the offer received from the Bank.

Accordingly, it is in vain that the Applicant invokes the principle of trust for, according to this general principle of the law of obligations, "il est possible d'imputer à une partie le sens objectif de son comportement, même si celui-ci ne correspond pas à sa volonté intime" ["it is possible to ascribe to a party the objective meaning of his behaviour, even if this does not correspond to his innermost wishes"] (Swiss Federal Tribunal Judgment 127 III 287 consideration 1c ee with the following references: WIEGAND, Commentaire bâlois, note 8 ad art. 18 CO; KRAMER, Commentaire bernois, notes 101 ss. Ad art. 1 CO; ENGEL, Traité des obligations en droit suisse, 2nd ed., pp. 216 ss.). The clauses of this agreement – supposing it was possible to validly conclude it – ought to be applied as regards both their advantageous and their disadvantageous elements.

e) For all these reasons, the Tribunal must reject the claims of the application, which has no foundation in fact or in law. Hence, no cost-of-living adjustment will be applied to that proportion of the pension rights which the Applicant may decide to acquire other than by appli-

cation of Tariff A, by following the second approach – which remains open to him – namely of making, in derogation from Article 3 of the Transitional Rules, a lump-sum payment corresponding to the total contributions (of 23% of his pensionable remuneration) which he would have had to pay each month after leaving the services of the Bank up until the time at which he could begin to draw an early retirement pension.

5.
In his reply of 15 August 2001, the Applicant alleged that "what precedes, as well as the demonstration that follows, reinforces the feeling which emerges from analysis of the file and the witnesses' depositions of a special treatment ... that owes more to a personal grudge than to the conciliatory spirit that is supposed to motivate the parties in their negotiations". However, this reproach is totally unjustified, and the Applicant is wrong in invoking the principle of equal treatment.

a) Indeed, if equality was violated, it was done so in favour of X._____, to whom the Bank granted benefits not provided for under the regulations. In reality, the Secretary General showed no grudge against an official who had been one of his closest colleagues; quite the contrary, throughout the negotiations, the Bank did everything to give the Applicant satisfaction where at all possible, but it was nonetheless constrained in its freedom to define the contents of its offer: in particular, it was not possible to protect the pension against inflation regardless of the method of acquisition of pension rights. For his part, the Applicant manifestly wished to disregard the fact that, as far as the financial terms of his early retirement were concerned, it was not a question of concluding a simple private-law contract, but of implementing regulations established in an objective manner in the framework of the international civil service. Yet it has been demonstrated that a cost-of-living adjustment of that proportion of the pension which X._____ wishes to acquire through a payment equivalent to the total of monthly contributions of 23% of his last pensionable remuneration (i.e. an amount which the Applicant puts at CHF _____) would be bound to entail a sizeable imbalance in the accounts of the Pension Fund, which would be to the detriment of the other participants in the Pensions System.

b) On this subject, the Applicant attacks in his Reply the calculations of P._____, pointing out that exhibit B7, signed par M._____ on 7 October 2000, was only drawn up after his institution of proceedings before the Tribunal. By means of his own calculations, he seeks to demonstrate that this imbalance, or this advantage he gained from the Bank's offer, would be small or even non-existent, but these calculations are not based on the actual situation. It may be the case that, at the time they drew up their offer, on 9 November 1999, the Secretary General and the Head of HR did not have a such a clear idea of the actuarial figures as that produced by the letter and tables addressed to the Bank on 7 October 2000 (exhibit B7). However, the Bank started from the conviction, which it affirmed and reaffirmed, and was repeated by the Secretary General at his hearing on 22 February 2001, that guaranteeing the cost-of-living adjustment of the pension necessarily involved the application of the higher tariff, that is, Tariff A. The Applicant was aware of this conviction; it did not dissuade him from accepting the Bank's offer as it was.

The Tribunal may consequently refrain from entering into a mathematical controversy that is more a matter of actuarial science than of law, all the more as, while putting forward his own

figures, the Applicant draws no conclusion from them from the legal standpoint, and at no time did he assert that he agreed under the influence of an error.

c) In these circumstances, the argument which the Applicant apparently wishes to derive from an alleged inequality of treatment rebounds upon him. Moreover, the Tribunal must also point out that, in any event, he was also given the possibility of requesting that the ordinary rules be applied; X._____ did indeed make use of this, since he paid the sum of CHF _____ on 30 September 2000 to acquire, pursuant to the regulations (notably Tariff A), the right to an inflation-protected pension.

6.
In his application and reply, and in the main hearing, the Applicant demanded that the Respondent be ordered to pay “costs and expenses, including the expenses for provisional measures, together with a fair litigation allowance by way of contribution to the fees of his legal representative” (see reply of 15 August 2001, claim No 6, p. 16).

a) According to Article 14 paragraph 2 of the Statute of the Tribunal, “The costs incurred in connection with the functioning of the Administrative Tribunal, as well as the costs of all proceedings, shall be borne by the Bank.” However, the Rules of Procedure specify, in Article 27 paragraph 2, that “When the applicant or the intervening party represented by a professional representative succeeds in his claim, a full or partial allowance in respect of expenses, to be charged to the Bank, shall be paid to him, which allowance shall reflect the scale applicable in the Swiss Federal Tribunal” (Tariff for expenses payable to the opposing party in cases brought before the Federal Tribunal of 9 November 1978, revised on 5 August 1992; RS 173.119.1).

In the case in point, the application is declared to be not only inadmissible but also unfounded. Not having succeeded in his claim, the Applicant is therefore not entitled to an allowance in respect of expenses for the substantive proceedings.

b) The same applies to expenses in respect of provisional measures, which the President of the Tribunal had reserved for the judgment on the merits (see the decision of 16 August 2000, item 3), firstly because in reality the Applicant himself had linked the two procedures, formulating his request in his supplementary application of 31 March 2000 without asking for a special allowance, and secondly because the Respondent straightaway declared that it did not oppose this request for provisional measures.

In these circumstances, the Tribunal considers that it would be inequitable to award expenses to the Applicant for proceedings that have been fruitless. In so doing, it is applying by analogy the rule under Article 159 of the Federal Law on the Organisation of the Administration of Federal Law (RS 173.110) to which the Tariff for expenses before the Federal Tribunal explicitly refers (see the judgment of 7 July 1997 in case No 1/1996, p. 29, consideration 7a). Thus, paragraph 1 of this article specifies that “le Tribunal décide, en statuant sur la contestation elle-même, si et dans quelle mesure les frais de la partie qui obtient gain de cause seront supportés par celle qui succombe” [“the Tribunal itself, in judging the matter at issue itself, shall decide if and to what extent the costs of the successful party will be borne by the unsuccessful one”]. It is, precisely, the fact that the Respondent was not unsuccessful, either in the substantive proceedings or in the proceedings on provisional measures.

c) As under federal law and in several international organisations, it is a general principle, stated in Article 27 paragraph 1 of the Rules of Procedure (see the judgment of 28 June 2000 in case No 1/1998, p. 29 consideration 6b), whereby the State or the international organisation bears the cost of the proceedings.

As a result, the Respondent bears not only the costs of the Tribunal, but also its own costs and the fees of its counsel. The unsuccessful Applicant is not entitled to reimbursement of his own costs, nor of what he owes his counsel; on the other hand, even while being unsuccessful, X. _____ does not have to bear the costs of the Tribunal, nor those of the Respondent.

Therefore

having deliberated in camera and voted unanimously on each of the orders made and on the main grounds for the judgment the Administrative Tribunal finds

1.
Instituted by registered letter dated 29 December 1999, the application is declared inadmissible; in any case, it is ill-founded.

2.
Such pension rights as the Applicant may acquire in execution of item 2 of the Respondent's offer dated 9 November 1999 and specified in item 1 of the letter from the General Manager dated 17 January 2000 shall not be protected against inflation.

3.
In accordance with item 2 paragraph 2 of the decision on provisional measures made by the President on 16 August 2000, the Applicant has the possibility of choosing another method of acquiring his deferred pension rights than that which he used provisionally through his payment made on 30 September 2000.

The Applicant has sixty days from the receipt of the full text of the judgment in which to indicate his choice; depending on the choice he makes, the Respondent shall reimburse to him any excess payment received with interest at 5% per annum as from 1 October 2000.

4.
No allowance shall be payable for expenses incurred by the Applicant.

5.
The costs of the Administrative Tribunal shall be borne by the Respondent.

6.
This judgment is final and without appeal; it is effective immediately.

7.
The present judgment shall be delivered by registered letter dated 28 February 2002 to the representatives of both parties and communicated to all the members of the Tribunal.

Basel, 23 October 2001

The President:

Prof. Dr. Robert Patry

The Secretary:

lic. iur. Felix Heusler