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Part Three. Judicial decisions on questions relating the United Nations and related intergovernmental organizations

Chapter VII. Decisions and advisory opinions of international tribunals

Chapter VII

DECISIONS AND ADVISORY OPINIONS OF INTERNATIONAL TRIBUNALS

Arbitration Tribunal constituted by the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization to consider the question of the tax regime governing pensions paid to retired UNESCO officials residing in France

AWARD

The Arbitration Tribunal composed of:

Mr. Kéba Mbaye, *Presiding Arbitrator*

Mr. Jean-Pierre Quéneudec, *Arbitrator*

Mr. Nicolas Valticos, *Arbitrator*

After deliberation, *makes the following award:*

1. On 2 July 1954, the French Republic and the United Nations Educational, Scientific and Cultural Organization (UNESCO) signed an agreement regarding the headquarters of UNESCO and its privileges and immunities on French territory (hereinafter "Headquarters Agreement" or the "Agreement"). Article 22 of that Agreement, entitled "Officials and experts", states:

> "Officials governed by the provisions of the Staff Regulations of the Organization
>
> "(*a*) Shall be immune from legal process in respect of all activities performed by them in their official capacity (including words spoken or written);
>
> "(*b*) Shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization;
>
> "(*c*) Subject to the provisions of article 23, shall be exempt from all military service and from all other compulsory service in France;
>
> "(*d*) Shall, together with their spouses and the dependent members of their families, be exempt from immigration restrictions and registration provisions relating to foreigners;
>
> "(*e*) Shall, with regard to foreign exchange, be granted the same facilities as are granted to members of diplomatic missions accredited to the Government of the French Republic;
>
> "(*f*) Shall, together with their spouses and dependent members of their families, be accorded the same facilities for repatriation as are granted to members of diplomatic missions accredited to the Government of the French Republic in time of international crisis;

"(*g*) Shall, provided they formerly resided abroad, be granted the right to import free of duty their furniture and personal effects at the time of their installation in France;

"(*h*) May temporarily import motor cars free of duty, under customs certificates without deposits."

2. The Agreement was thus signed following the decision to establish the headquarters of UNESCO, a specialized agency of the United Nations, in Paris.

3. A number of UNESCO officials subsequently decided to reside in Paris after retirement. It appears that 1,867 retired UNESCO officials have a mailing address in France, and in addition 1,877 beneficiaries of retired UNESCO officials reside in France.

4. UNESCO does not have its own staff pension fund. It is affiliated with the United Nations Joint Staff Pension Fund, along with a number of other organizations in the United Nations system.

The Joint Staff Pension Fund provides for a retirement benefit, early retirement benefit, deferred retirement benefit, disability benefit, child's benefit, widow's or widower's benefit, secondary dependant's benefit, withdrawal settlement or residual settlement.

Enrolment in the Fund is not mandatory, although it is rare that staff members do not participate. However, at the time of recruitment a staff member may opt out. This provision is mentioned in the UNESCO Staff Regulations and Staff Rules.

5. The full title of the 1954 Agreement is the "Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory".

The third preambular paragraph of the Agreement reads as follows:

"*Desiring* to regulate, by this Agreement, all questions relating to the establishment of the permanent headquarters of the United Nations Educational, Scientific and Cultural Organization in Paris and consequently to define its privileges and immunities in France".

6. Prima facie, therefore, it would seem that the purpose of the Agreement with respect to privileges and immunities was to define those accorded to UNESCO in France. However, the Agreement could not deal only with headquarters questions. At that time, France had not acceded to the Convention on the Privileges and Immunities of the Specialized Agencies of 1947. It was therefore necessary, as France notes, for the two Parties to include provisions in the Headquarters Agreement relating to the privileges and immunities to be enjoyed by officials of UNESCO.

7. Relations between France and UNESCO have been generally trouble-free. Nevertheless, it appears that differences between the Parties emerged between 1975 and 1980 concerning the interpretation and application of article 22(*b*) of the Agreement. Its deliberations up to now do not enable the Tribunal to ascribe the emergence of the dispute either to a reversal of French practice or, on the contrary, to the implementation of a stated policy by the authorities. However, it seems to the Tribunal that there was a period during which circumstances were such that a difference on the question now at issue between UNESCO and France arose between the Parties to the 1954 Agreement.

* * *

8. Be that as it may, a dispute did definitely arise in the 1980s and 1990s over the application of article 22(*b*) of the 1954 Agreement. The subparagraph reads as follows:

> "Officials governed by the provisions of the Staff Regulations of the Organization
>
> "(*a*) . . .
>
> "(*b*) Shall be exempt from all direct taxation on salaries and emoluments paid to them by the Organization".

The dispute concerns the interpretation of the above-cited provisions.

9. The view of UNESCO is that ". . . article 22(*b*) of the 1954 Headquarters Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

10. The Tribunal will deal later with the subsidiary claim of UNESCO and what divides the parties on that issue.

11. According to France, the Headquarters Agreement governs the obligations of the host State, not the obligations of the State of residence of former officials. In that regard, it states in its counter-memorial that:

> "[A]rticle 22(*b*) of the Agreement between the Government of the French Republic and the United Nations Educational, Scientific and Cultural Organization regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory . . . does not apply to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

12. In agreeing to submit their dispute to arbitration, the Parties had reference to article 29 of the Headquarters Agreement.

Article 29 of the Agreement reads as follows:

> "1. Any dispute between the Organization and the Government of the French Republic concerning the interpretation or application of this Agreement, or any supplementary agreement, if it is not settled by negotiation or any other appropriate method agreed to by the parties, shall be submitted for final decision to an arbitration tribunal composed of three members; one shall be appointed by the Director-General of the Organization, another by the Minister of Foreign Affairs of the Government of the French Republic and the third chosen by those two. If the two arbitrators cannot agree on the choice of the third, the appointment shall be made by the President of the International Court of Justice.
>
> "2. The Director-General or the Minister of Foreign Affairs may request the General Conference to ask an advisory opinion of the International Court of Justice on any legal question raised in the course of such proceedings. Pending an opinion of the Court, the two parties shall abide by a provisional decision of the arbitration tribunal. Thereafter, this tribunal shall give a final decision, taking into account the advisory opinion of the Court."

In accordance with that article, the Parties set up an Arbitration Tribunal ("the Tribunal") composed of three members. UNESCO appointed Mr. Nicolas Valticos and France appointed Mr. Jean-Pierre Quéneudec. These two arbitrators chose a third, Mr. Kéba Mbaye, to serve as presiding arbitrator.

13. The Parties then signed an agreement to arbitrate the dispute ("Arbitration Agreement") on 19 April 2001 in Paris. Article II of the Arbitration Agreement defined the mandate of the Tribunal as follows:

> "Ruling in accordance with international law and in particular with international civil service law, the Tribunal is asked to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund."

14. With the approval of the parties, the Tribunal adopted a mission statement, part III of which summarizes the matter in these terms:

> "The Parties, being unable to agree as to the application of the Agreement between France and UNESCO regarding the Headquarters of UNESCO and the Privileges and Immunities of the Organization on French Territory signed in Paris on 2 July 1954 (the 'Agreement'), decided to establish an arbitration tribunal to resolve the dispute. The Arbitration Agreement signed on 19 April 2001 in Paris by the Parties stipulates in article II that, '[r]uling in accordance with international law and in particular with international civil service law, the Tribunal is asked to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund'."

15. Each Party appointed an agent. UNESCO appointed Mr. Stany Kol and France appointed Mr. Ronny Abraham.

The place of arbitration is Paris.

The language of arbitration is French.

The Tribunal appointed Mr. Ousmane Diallo, Clerk, to assist it.

16. In accordance with the provisions of article VI of the Arbitration Agreement and part V(*c*) of the mission statement, the following pleadings were submitted during the written phase:

(*a*) Memorial by UNESCO on 16 August 2001;

(*b*) Counter-memorial by France on 12 December 2001;

(*c*) Reply by UNESCO on 12 March 2002;

(*d*) Rejoinder by France on 10 June 2002.

17. The written proceedings were declared closed by the Tribunal on 30 August 2002.

The oral proceedings were conducted in hearings in camera on 30 August 2002 in Paris.

During the hearings the following persons presented oral arguments and replies:

- On behalf of UNESCO, Mr. Stany Kol, Mr. Christian Dominice and Mr. Witold Zyss;
- On behalf of France, Mr. Ronny Abraham and Mr. Jean-Pierre Cot.

The Tribunal then commenced its deliberations on 31 August 2002.

* * *

18. The following submissions were put forward during the written proceedings and reiterated at the conclusion of the oral proceedings:

19. On behalf of UNESCO

In its memorial

- As its principal submissions:

(1) That article 22(*b*) of the Headquarters Agreement of 2 July 1954 is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) That, in consequence, retired officials are exempt from any direct tax on the said pension;

(3) That the amount of the said pension should not be considered in determining the tax rate on the income subject to direct tax;

(4) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

- As its subsidiary submissions, in the event that complete exemption is not recognized:

(1) That by application of article 22(*b*) retired officials are exempt from any direct tax on a portion of their pension which shall not be less than 70 per cent;

(2) That only the taxable portion of the pension shall be considered in determining the tax rate on the income subject to direct tax;

(3) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

In its reply

- As its principal submissions:

(1) That article 22(*b*) of the Headquarters Agreement of 2 July 1954 is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) That, in consequence, retired officials are exempt from any direct tax on the said pension;

(3) That the amount of the said pension should not be considered in determining the tax rate on the income subject to direct tax;

(4) That a withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

- As its subsidiary submissions, in the event that complete exemption is not recognized:

(1) That by application of article 22(*b*) retired officials are exempt from any direct tax on a portion of their pension, which shall not be less than 70 per cent;

(2) That only the taxable portion of the pension shall be considered in determining the tax rate on the income subject to direct tax;

(3) That the withdrawal settlement paid in lieu of all or part of a pension is also exempt from any direct tax.

20. On behalf of France

In its counter-memorial [it asked the Tribunal]:

(1) To find that article 22(*b*) of the Agreement of 2 July 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

(2) To hold that it is not a matter for the Tribunal to decide whether there exists a general rule of international law exempting from tax the pensions paid to former international civil servants;

(3) Subsidiarily, to find that in any event there is no general rule of international law requiring France to exempt from tax the retirement pensions paid to former UNESCO officials residing in its territory;

(4) To reject the subsidiary submissions of UNESCO regarding the exemption of a portion of the retirement pension.

In its rejoinder [it asked the Tribunal]:

(1) To find that article 22(*b*) of the Agreement of 2 July 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund, whether that pension is paid periodically or in the form of a withdrawal settlement in lieu of all or part of the pension;

(2) To reject the subsidiary submissions regarding the exemption of a portion of the retirement pension as having no basis in law.

* * *

21. During the oral proceedings, each of the Parties reiterated its final written submissions and developed them.

After closure of the hearings, France distributed the notes of the oral arguments of Mr. Ronny Abraham and Mr. Jean-Pierre Cot.

On the instructions of the Tribunal, the Clerk advised UNESCO that it too was allowed to transmit to the Tribunal the notes of its oral arguments. That was done. UNESCO transmitted its notes by letter dated 3 September 2002. Previously, it had furnished the Tribunal and the other Party with a document containing its submissions as set out in its reply.

* * *

22. The Tribunal, having been authorized by the Parties to determine its own procedure, subject to the provisions of the Arbitration Agreement, and to decide any question concerning the conduct of the arbitration, indicated that "it would, if necessary, to determine a question of procedure, resort mutatis mutandis to the rules applicable to the International Court of Justice". The Tribunal takes "rules" to mean not only the Statute of the International Court of Justice and its Rules of Court but also the Resolution concerning the Internal Judicial Practice of the Court, the Tribunal being empowered to interpret the phrase "mutatis mutandis".

* * *

23. The question submitted to the Tribunal is as follows: the Parties have asked it:

> ". . . to say whether article 22(*b*) of the Agreement is applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund".

24. Although the Parties agree on the definition of the point in dispute and the general jurisdiction of the Tribunal, their positions nevertheless diverge on some points.

25. In the view of UNESCO, the Tribunal should arrive at its interpretation according to the rules and principles now prevailing, as it would in interpreting agreements that in one way or another concern international civil servants; and if two different interpretations are possible, it should choose the one that is consistent with the rules and principles that apply in the legal realm of international organizations and that govern their agents.

26. France declares itself in agreement with that statement.

27. In the view of UNESCO, the Tribunal should carry out its mandate within the limits of article II of the Arbitration Agreement, but taking into consideration everything it mentions. There is an important component of the definition of its mandate that the Tribunal may not neglect. It must decide what is meant by the phrase in the Arbitration Agreement, "ruling in accordance with international law and in particular with international civil service law".

UNESCO adds, with reference to the scope of application of the Headquarters Agreement, that article 22(*b*) should be understood in the light of the state of the economy and the content of the Agreement.

28. In the view of France, the question at hand is the applicability of article 22(*b*) to a specific situation, and the Headquarters Agreement sets forth the obligations of the host State of UNESCO, not those of the State of residence of former UNESCO officials.

France stresses that the object and purpose of the Agreement, as a headquarters agreement, is to specify the conditions under which UNESCO is to operate in French territory, rather than to regulate the tax position of former UNESCO officials.

France, then, draws a distinction between the host State and the State of residence and their different obligations, a point that UNESCO notes but argues is irrelevant to the case in hand. In the view of France, it is not the task of the Tribunal to determine whether there exists a general rule of international law requiring any State in which a former international civil servant resides to exempt such a person from tax on his or her retirement pension.

29. UNESCO is in agreement on the latter point.

30. In short, France considers it sufficient to decide whether article 22(*b*) is meant to apply only to active officials or to former officials as well.

France thus urges the Tribunal to consider the issue of its jurisdiction and to speak solely to the question of the applicability of article 22(*b*) of the 1954 Agreement to former UNESCO officials.

31. The positions of the Parties have therefore moved closer together but are not identical on every point.

UNESCO objects that France would limit the Tribunal's reliance on international law and in particular international civil service law merely to the rules of treaty interpretation. Recalling a recent judgment of the International Court of Justice in

the case concerning *Kasikili/Sedudu Island* (*Botswana/Namibia*) (Judgment of 13 December 1999, *I.C.J. Reports 1999*, p. 1045), UNESCO cites article I of the arbitration agreement in that case and points out that the Court, responding to Botswana's argument that the reference to the "rules and principles of international law" covered only the "rules and principles of treaty interpretation", notes:

> "Even if there had been no reference to the 'rules and principles of international law', the Court would in any event have been entitled to apply the general rules of international treaty interpretation for the purposes of interpreting the 1890 Treaty. It can therefore be assumed that the reference expressly made, in this provision, to the 'rules and principles of international law', if it is to be meaningful, signifies something else. In fact, the Court observes that the expression in question is very general and, if interpreted in its normal sense, could not refer solely to the rules and principles of treaty interpretation." (*I.C.J. Reports 1999*, p. 1102).

On that basis, UNESCO argues that the Tribunal should ascribe the proper meaning to the opening phrase of article II of the Arbitration Agreement, following the principle that the terms used by the Parties in a treaty provision should be interpreted in accordance with their ordinary meaning.

However, in the present dispute, "UNESCO acknowledges that the expression appearing in article II of the Arbitration Agreement has a special meaning". According to UNESCO, the article is structured somewhat differently from article I of the arbitration agreement between Botswana and Namibia.

Lastly, UNESCO merely maintains that the expression used in article II of the Arbitration Agreement in the present case "sheds light on the interpretation to be given to article 22(*b*) of the Headquarters Agreement". UNESCO does not claim that there is a legal basis other than article 22(*b*) of the Headquarters Agreement on which the Tribunal could formulate the answer to the question put to it. Moreover, UNESCO denies that it has invoked an alleged custom regarding former officials.

Therefore, on the point discussed above, the Parties are in agreement.

France for its part concludes its arguments by maintaining that "nothing prevents a host State from assuming obligations in the headquarters agreement that are not connected with the functioning of the organization". Moreover, it acknowledges that international agreements may create subjective rights for former officials. It points out, however, that, the organization may be bound by certain obligations (such as reimbursement by the United Nations of the tax collected on pensions of former officials) without there being a parallel obligation on the member States, since the "internal rules of the international organization are not ipso facto binding on member States".

* * *

32. It is not disputed that the Tribunal should interpret article 22(*b*) "in accordance with international law and in particular with international civil service law".

33. To do so raises a series of questions, which the Tribunal will examine one at a time.

First of all, the Tribunal must examine its mandate and determine the limits of its jurisdiction, as the Parties have asked it to do.

34. In its memorial, speaking of the Tribunal's mandate, UNESCO argues:

> "[A]rticle 22(*b*) of the Headquarters Agreement, the scope of application and effects of which the Tribunal is asked to determine in article II of

the Arbitration Agreement, stipulates that the salaries and emoluments paid to UNESCO officials shall be exempt from taxation. The appropriate interpretation to be given to this provision will later be thoroughly examined. What should be emphasized here is that the reference to article 22(*b*) definitely covers the tax regime on retirement pensions in all its aspects. The Tribunal thus has full powers to assess the matter."

35. In its counter-memorial France states:

"The Tribunal does not have a mandate to rule definitively on the tax regime on retirement pensions in all its aspects, and its power to make an assessment is not unlimited."

It goes on to clarify:

"It is not its task to determine whether there exists a general rule of international law requiring any State in which a former international civil servant resides to exempt such a person from tax on his or her retirement pension."

36. In its reply UNESCO, reverting to the topic of the Tribunal's mandate, says:

"[T]he Tribunal's jurisdiction and the limits placed on it are determined by the Arbitration Agreement between the Parties and in particular by article II of that Agreement."

Hence, UNESCO, like France, considers that the Arbitration Tribunal should not exceed the jurisdiction conferred upon it by the Parties but should exercise that jurisdiction to its full extent.

* * *

37. The Tribunal notes that the Parties are ultimately in agreement that, as UNESCO puts it in its reply:

"The issue is thus the tax regime applicable to such a pension; it must be determined whether the pension should enter into the calculation of the tax that must be paid by a former official who continues to reside in the host State of the organization."

38. The question before the Tribunal, therefore, is to decide whether article 22(*b*) of the Headquarters Agreement is or is not applicable to retirement pensions. The Tribunal will focus on this question. In that regard, it observes that article 22(*b*) does not elaborate on the nature of the "salaries and emoluments" that it exempts from tax, except to state that they pertain to officials.

* * *

39. The interpretation the Tribunal is called upon to make of article 22(*b*) of the Agreement in the light of international law and in particular international civil service law is to decide whether it applies to former officials of the organization residing in France and drawing a pension.

It should be recalled that, when the parties to a dispute have signed an arbitration agreement, the scope and limits of the jurisdiction of the arbitration tribunal called upon to settle the dispute must be looked for in that agreement. The International Court of Justice recalls the principle, notably in the case concerning the *Continental Shelf (Libyan Arab Jamahiriya/Malta)* (*I.C.J. Reports 1985*, p. 23, para. 19).

In the present case, the Arbitration Agreement signed by the Parties has not been amended, so that the Tribunal has only to apply it as it was signed.

40. The jurisdiction of the Tribunal is clearly defined. With regard to the significance it should give to the words "ruling in accordance with international law and in particular with international civil service law", it considers that the definition of its jurisdiction, while specific, includes the obligation to apply (and thus to respect) international law and in particular international civil service law. This means that in arriving at its interpretation it cannot ignore or violate a principle or law of international law that applies to its mission. But that obligation also has limits, in that the answer to the question submitted to the Tribunal in the Arbitration Agreement is to be sought in article 22(*b*) and only there. The task of the Tribunal is not, therefore, on the basis of some principle or rule of general international law, to alter what the Parties have decided. Such an approach, reminiscent of an annulment proceeding, would clearly exceed the power that the Parties have conferred on the Tribunal in the Arbitration Agreement. That power is limited to determining, in the light of international law, what the Parties have decided and to spell it out. In other words, the power of the Tribunal does not authorize it to say that the Parties could not have taken such and such a decision because it would have been contrary to this or that principle or rule of international law, but merely to elucidate what the Parties really decided, clarifying it in the light of international law and in particular international civil service law. These are two different approaches, which the Tribunal understands that it should not confuse.

More specifically, the Tribunal wishes to clarify at the outset that it does not see its task as one of seeking and applying a principle or rule of international law that would allow it to confirm (or deny) that the retirement pension paid by the United Nations Joint Staff Pension Fund to former UNESCO officials residing in France is taxable. This is what the Parties meant by saying that they are not maintaining that there exists a legal basis for exempting retirement pensions from taxation other than article 22(*b*) of the Headquarters Agreement.

The jurisdiction of the Tribunal thus focuses on a limited aim, which is, once again, to interpret article 22(*b*). It involves determining whether the term "officials" is meant to include "retired officials" and whether the phrase "salaries and emoluments" is meant to include "retirement pensions". The answer to one of these two questions will, as we shall see below, largely determine the interpretation the Tribunal is called upon to make.

41. To answer these questions, the Tribunal must first take into account that it is interpreting a treaty. In its task of interpretation it will therefore have to apply the rule set forth in article 31 of the Vienna Convention on the Law of Treaties of 1969 and the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations of 1986. That article applies in this case, as the Tribunal will explain below, despite article 4 of the 1969 Convention, which limits its scope "to treaties which are concluded by States after the entry into force of the present Convention with regard to such States".

As the International Court of Justice has had occasion to recall (*Kasikili/Sedudu Island, I.C.J. Reports 1999*, p. 1059), article 31 expresses a rule of customary law. According to article 31, paragraph 1, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The first thing to consider, then, is the ordinary meaning to be given to the word "officials" (*fonctionnaires*), first of all, and then to the words "salaries" (*traitements*) and "emoluments" (*émoluments*).

42. Next, in an effort to determine the intent of the Parties, the Tribunal will try to discover what they mutually intended when they framed the wording of article 22(*b*). With the same aim, it will research the subsequent practice of the Parties or any other legal element that can be taken to be an amendment of the provisions of article 22(*b*) or a mutual interpretation of its scope.

43. As indicated earlier, the claim of UNESCO is in two parts, a principal part and a subsidiary part. The Tribunal will consider the parts in that order.

44. First, the Tribunal will recall the positions of the Parties, which it summarizes as follows:

UNESCO maintains that the exemption of officials from taxation as provided in article 22(*b*) extends to retired officials residing in France.

France considers that article 22(*b*) applies only to officials in active service.

45. Article 31 of the Vienna Convention on the Law of Treaties recommends that, in interpreting a treaty, the terms of the treaty should be given their ordinary meaning "in their context and in the light of its object and purpose".

The 1954 Agreement is the UNESCO Headquarters Agreement. It should also be recalled (as mentioned earlier) that the entire text of article 22 of the Headquarters Agreement relates to "officials governed by the provisions of the Staff Regulations of the Organization".

46. The Tribunal's first step should be to determine the "ordinary meaning" of the terms employed in article 22(*b*) of the Agreement.

47. The Tribunal must first consider the meaning of the word "official". In that regard, one can say that in its current and commonly accepted meaning, the word "officials" (in the plural) does not include officials who are no longer in active service. In the Arbitration Agreement, the Parties themselves speak of "former officials". That expression does not seem, even for them, to be synonymous with "officials".

The Tribunal considers that the ordinary meaning of the word "officials" does not include former officials.

The *Petit Larousse* defines an "international official" [or "international civil servant"] as an "agent of an international organization under a statutory or specific contractual regime". According to this definition, when the agent is no longer an agent of the organization, he or she ceases to be an official. In effect, the link that endows the individual with the status of an official is broken upon retirement. It can no longer be said that the former official is governed "by a statutory or specific contractual regime". The fact that the individual may maintain certain ties to the organization, or that the staff regulations may make reference to former officials, is not sufficient reason to conclude that the person retains the status of official (or contractual staff member).

According to the *Dictionnaire de la terminologie du droit international* (edited by Jules Basdevant), Sirey, 1960, "international official" [or "international civil servant"] is a "term introduced in the modern era to designate a person who is entrusted with carrying out on a regular basis certain functions of international significance by virtue of an intergovernmental agreement on behalf and under the supervision of several States or an international organization".

The *Dictionnaire de droit international public* (edited by Jean Salmon), Bruylant, 2001, states that an "international official" [or "international civil serv-

ant"] is a "person entrusted, on the basis of an agreement among States or by an international organization, with carrying out functions of international significance on their behalf and under their supervision, on a statutory basis, for a fixed or indefinite term".

It is also useful to consider the notion of retirement. In that regard, the explanation cited below shows that the position of the official and that of the retiree (or former official) are so different as to be incompatible.

As it happens, *Le vocabulaire juridique* published by the Association Henri Capitant (edited by Gérard Cornu), Presses Universitaires de France, 1987, after defining "retirement", goes on to say that, "for military officers, *unlike civilian officials*, retirement is a statutory position characterized by the continuance of their status beyond their separation from service with the armed forces" (italics added by the Tribunal).

It therefore appears to the Tribunal that the term "officials" used in article 22(*b*) does not extend to former officials. That is its first conclusion.

48. Second, the Tribunal must consider how the words "salaries and emoluments" (*traitements et émoluments*) are to be understood.

"*Traitement*" [rendered in English as "salary"] is the word that has traditionally been used in French to refer to the remuneration associated with the performance of a civil service function, either in government or in an international organization.

The Tribunal should not make too much of the fact that in the internal rules of some organizations, including UNESCO, and in French administrative law the retirement pension is often presented as an extension of the salary. In that very line of thought, in any case, it is clear that the terms, in their ordinary meaning, are not synonymous. Moreover, even on the assumption that the modern notion of "salary benefits" includes not only the pay received during active service but also the retirement benefits, for purposes of weighing the attractiveness of the job, the Tribunal has been presented with no evidence that that would alter the ordinary meaning that should be given to the words "salaries" and "emoluments" in article 22(*b*) of the 1954 Agreement. The Tribunal is obliged to adhere to the ordinary meaning of the words, which does not include the notion of retirement pension in the context and in the light of the purpose of the Agreement. That purpose, as the Tribunal has already noted, was to set forth the privileges and immunities of UNESCO.

In the view of the Tribunal, the problem at hand does not hinge on whether the retirement pension is or is not in reality an extension of the salary. All the Tribunal has to decide is whether, in the application of the provisions of article 22(*b*) and in the light of international civil service law, the retirement pension is a salary. Its answer to that question is no.

49. The term "emoluments" (*émoluments*) is less precise than the word "salaries". In the singular, "*émolument*" [in French] is any sum paid by way of benefit, profit, interest or gain. In the plural [and in English usage], as it appears in article 22(*b*) of the Agreement, it is generally understood to mean income resulting from an employment or office and any sum paid by way or in lieu of a benefit. According to the *Dictionnaire de l'Academie*, "*émoluments*" means "all sums received by an official when, in addition to his or her fixed salary, subject to the withholding of a pension contribution, are added compensation and allowances not subject to such withholding". A straightforward reading of this definition shows that the recipient of the emoluments in question already receives a "fixed salary, subject to the with-

holding of a pension contribution"; the reference is to an "official" and reinforces the meaning that the Tribunal has attributed to the word "official". A pension is clearly not included among the examples of emoluments. Therefore, it is difficult to conclude that the word "emoluments" used in the 1954 Headquarters Agreement covers anything other than the various forms of compensation and allowances that constitute supplementary elements of remuneration and may be granted in addition to the official's salary in the strict sense.

In the Tribunal's view, the term "emoluments" used in the Agreement comprises only the various forms of compensation and allowances paid to officials as reflected in the phrase in Article 32, paragraph 8, of the Statute of the International Court of Justice, which provides that the "salaries, allowances and compensation" of the judges and the Registrar shall be free of all taxation.

Moreover, a look at the context of the disputed provision shows that all the other provisions of article 22 of the Agreement are applicable only to officials in active service. Since the chapeau of the article heads subparagraphs (*a*) to (*h*), all those provisions should apply to former officials as well if they were intended to be included in the term "officials". It appears that that is not the case.

It is important to note that an agreement concluded between the same parties, which was signed in Paris on 14 November 1974 and entered into force on 21 January 1976 (*Journal officiel de la République française*, 1 March 1976, p. 1398), concerning the establishment and operation of the International Centre for the Registration of Serial Publications, in article 15, paragraph 1, expressly stipulates:

> "Staff members of the Centre with permanent appointments in categories I, II and III, as defined in annex II to this Agreement [the Director, officials of the Centre, administrative and technical personnel] shall be exempt from all direct taxation on salaries and emoluments paid to them for their activities at the Centre, excluding retirement pensions or survivors' benefits."

50. It could be argued that the fact that retirement pensions and survivors' benefits are expressly excluded in the above provision and not in the 1954 Agreement means that the Parties intended to include them in the latter case.

The Tribunal does not share that view. It could also be argued that the 1974 agreement shows that the use of the term "staff members of the Centre" leaves a doubt as to the status of such staff members that must be clarified, whereas when the Parties use the term "officials", as in the 1954 Agreement, there is not a shadow of a doubt in their minds what they mean by the word.

In the provision cited above, the terms "salaries and emoluments" are juxtaposed with the terms "retirement pensions" and "survivors' benefits". This confirms that UNESCO and France are not confusing the words in quotation marks with one another.

Thus, by excluding retirement pensions from the notion of "salaries and emoluments" in another agreement, the Parties show that retirement pensions are not salaries or emoluments.

The example of other headquarters agreements that do include retirement pensions in the exemption from taxation, such as the Agreement between the Republic of Austria and the United Nations regarding the Seat of the United Nations in Vienna of 29 November 1995, which superseded the Agreement regarding the Headquarters of the United Nations Industrial Development Organization (UNIDO) of 13 April 1967, are instructive in this regard. In those cases, the parties are exercising the

freedom allowed them by the Convention on the Privileges and Immunities of the United Nations of 13 February 1946 (hereinafter "the General Convention") to decide what provision they wish to make regarding exemption of retirement pensions from taxation. In relation to Austria, moreover, UNESCO expresses that idea when it states that "exemption of the pensions of retired international officials is a matter of political will".

The same reasoning applies to the European Union regulations exempting retirement pensions from tax. An express provision is required to institute the exemption.

51. In the light of the above, the Tribunal concludes that, based on the ordinary meaning of the terms of the Agreement and their context, the word "officials" does not include retired officials and the words "salaries and emoluments" do not cover retirement pensions.

* * *

52. Notwithstanding the above conclusion, the Tribunal must now consider whether the Parties nevertheless intended retired officials to be covered by the term "officials" and their pensions to be covered by the terms "salaries and emoluments" as used in article 22(*b*) of the Agreement.

The Tribunal will now address this question.

53. In other words, even though the Tribunal has arrived at the conclusion that the word "officials" does not apply to retired officials and the words "salaries and emoluments" do not apply to pensions drawn by retired officials residing in France, it is possible that the Parties, at the time they signed the 1954 Agreement, meant for the benefits of the provisions of article 22(*b*) to extend to retired officials.

The Tribunal has to consider whether that is the case and must determine whether the Parties intended to give a special meaning, in the sense of article 31, paragraph 4, of the Vienna Convention on the Law of Treaties, to the terms "officials" and "salaries and emoluments".

54. The Parties are in agreement that article 22(*b*) is modelled on article V, section 18 (*b*), of the General Convention of 1946. They do not dispute the fact that the latter provision does not exempt retirement pensions. They admit that the Subcommission on Privileges and Immunities established by the Sixth Committee of the United Nations, after considering the question of exempting retirement pensions from taxation, reserved the right to revert to the issue, if necessary, and decided that provisions to that effect should not be included in the General Convention.

55. Clarifying the situation, the Secretary-General of the United Nations, in a report on the proposal concerning staff pension and provident funds and related benefits, said that every agreement concerning tax exemption should include a clause exempting from taxation the allowances payable by way of pensions or family allowances, even if domestic laws did not exempt them.

He concluded that it was advisable to include in agreements on tax immunity an article providing for such immunity for payments made under the regulations and rules of the pension fund, family allowances and education grants.

In other words, he left it to the parties to an agreement on privileges and immunities to decide what provision to make in that regard. This is the path followed by the parties to an agreement of that type, particularly with regard to the exemption of retirement pensions from taxation.

56. During the negotiations leading to the 1954 Agreement, did France and UNESCO discuss the question of exempting pensions from taxation?

57. According to UNESCO, it was hardly aware of the problem of the eventual taxation of retirement pensions by the host State. Its records offer no evidence on that point, although they reveal that the wording of other aspects of the Agreement received careful scrutiny. The question, according to UNESCO, never seems to have held the attention of the negotiators.

UNESCO explains that that fact is readily understandable given the context. When UNESCO was established in 1946, it was decided that a provisional agreement should be concluded pending the adoption of a convention on privileges and immunities that would be applicable to France and UNESCO. With the adoption of the Convention on the Privileges and Immunities of the Specialized Agencies in 1947, the General Conference authorized the Director-General to negotiate a definitive agreement, in the event the 1954 Agreement, envisaged as complementary to that Convention, which, it was believed at the time, France would quickly ratify.

According to UNESCO, another reason was that the number of retired officials was still negligible when the 1954 Agreement was concluded, and no one dreamed at the time how much the retirement system would grow. The expansion has been great, to the point that today there are 68,935 participants in the United Nations Joint Staff Pension Fund and the benefits paid out amount to US$ 1,997,654,590.

UNESCO acknowledges that the explicit inclusion of a provision in the Convention on the Privileges and Immunities of the United Nations to exempt retirement pensions from taxation, although originally contemplated, was deferred. But it explains that, at the time that France and UNESCO concluded their provisional agreement and later their definitive agreement, the question did not appear to have assumed any importance in the elaboration of the texts and there did not seem to be any intention of dealing with it.

UNESCO deduces from this that it would be surprising if the negotiators of the 1954 Agreement did in fact have a clear idea, whether for or against exemption, about the tax status of the pensions that future retired officials of UNESCO would be drawing.

It notes, moreover, that other aspects of international civil service regulations were still in the process of being worked out and would be defined only little by little.

58. According to France, on the other hand, in 1954 the two Parties could have included a provision in the Headquarters Agreement exempting retirement pensions, if that had been their intention. By way of example, France cites the headquarters agreement between Austria and UNIDO, which did provide for such an exemption. It adds that most headquarters agreements adopt the formula of the General Convention of 13 February 1946 and do not make retirement pensions tax-exempt.

In France's view, derogations from the norm are always made explicit, and the negotiators of the 1954 Agreement were well aware of what was at stake. Yet they opted to adhere to the formula taken from the General Convention.

* * *

59. The two views sketched out above bear on the question of whether the Parties, at the time they negotiated the Headquarters Agreement, did or did not de-

liberately decide that pensions would not be included in the exemption from taxation stipulated in article 22(*b*).

Posed in this way, the question cannot be answered yes or no, although UNESCO argues that the negotiators of the Agreement ignored the question of the retirement pensions, since it did not seem important at the time. In any event, it is a fact that at the time the 1954 Headquarters Agreement was being negotiated, the General Convention had been adopted, and the *travaux préparatoires* that had preceded it were in existence.

60. In this matter, the problem as the Tribunal sees it is the following: Is it reasonable to assume that in 1954 the negotiators of an agreement as important as the Headquarters Agreement between France and UNESCO were unaware of the events surrounding the negotiations that led to the General Convention of 1946?

61. The Tribunal can answer this question easily. It cannot accept the hypothesis that the Parties in 1954 were unaware that in 1946 the issue of exempting pensions from taxation had been raised, that it had not been resolved in the General Convention and that, in the light of subsequent developments, the issue had been referred to individual future agreements. That would be tantamount to accusing the negotiators and the Parties they represented of a degree of negligence inconceivable at that level of responsibility. Parties to a treaty are presumed to know the rules of international law that are current at the time they are negotiating and making decisions and in particular to know the rules likely to affect their future obligations. To reject such a principle would be to leave the door open to an unacceptable level of legal uncertainty. The Tribunal, therefore, is not asking whether the Parties in fact, when negotiating the Headquarters Agreement, did or did not discuss the state of international civil service law at the time with particular reference to the issue of retirement pensions. What matters to the Tribunal is that such law existed and that they were aware of it. The Parties are presumed to have been aware of the state of international civil service law at the time they negotiated and to have taken it into account. That presumption is one of the keys to illuminating the meaning of article 22(*b*), as the Parties have asked. The Tribunal is forced to the conclusion that, if the Parties had wished article 22(*b*) to apply to retired officials and their retirement pensions, they would specifically have said so, in accordance with the rules applicable to the matter that they were regulating by mutual agreement. Therefore, the Tribunal believes that France and UNESCO were fully aware of what they were doing when they framed the wording of article 22(*b*) as it stands.

The Tribunal deduces that in 1954 France and UNESCO, which could not have been unaware that the issue of exemption of retirement pensions from taxation had been raised during the elaboration of the General Convention of 1946 and yet had not been resolved in that Convention, chose not to address it. That is sufficient reason for the Tribunal to conclude that article 22(*b*) does not cover the issue. Hence, the Tribunal finds that the Parties did not intend to give the terms "officials" and "salaries and emoluments" a special meaning different from the ordinary meaning it identified above.

62. Having thus resolved the problem of the intention of the Parties at the time the Agreement was concluded, the Tribunal must consider that the Parties, in their subsequent practice, might have given the terms in question a different interpretation. It now has to examine whether they altered the meaning they had given to the terms originally through a decision or through their behaviour. Such a modifica-

tion could have resulted from a subsequent agreement between the parties or from mutual practice.

There has been no agreement of a kind just described between the Parties. It should be recalled, however, that in the agreement mentioned earlier concerning the establishment and operation of the International Centre for the Registration of Serial Publications, concluded between the same Parties at Paris on 14 November 1974, the "staff members of the Centre with permanent appointments in categories I, II and III, as defined in annex II" are identified as being "the Director, officials of the Centre, administrative and technical personnel". According to the same provision, these staff members are "exempt from all direct taxation on salaries and emoluments paid to them for their activities at the Centre, excluding retirement pensions and survivors' benefits." It appears from these provisions, as the Tribunal has already noted, that as between the Parties retirement pensions and survivors' benefits are excluded from salaries and emoluments.

What has been the subsequent practice of the Parties?

This is the question that the Tribunal will now consider.

63. If a practice has been established in the application of the 1954 Agreement involving an interpretation which tends to extend the provisions of article 22(*b*) to retired UNESCO officials resident in France, the Tribunal must take due account of it.

64. Before verifying that hypothesis, it should be noted that the Parties are in disagreement regarding the nature of the practice subsequent to the Agreement, which must be taken into account.

65. UNESCO argues that the practice of a State consists of the acts, attitudes and conduct of all its organs, including the administration. It maintains that in this case, the important issue is the day-to-day attitude of the administration, whether or not it was strictly applying a particular directive. In fact, retired UNESCO officials did benefit from a liberal attitude for some 40 years, and they could in good faith consider that attitude as being, if not the rule, which was the position of UNESCO as such, at least so solidly established that it had a bearing on the choice of residence made by many of them on reaching retirement age.

UNESCO does not deny that the French authorities neither recommended nor supported or confirmed that practice of the tax administration. It therefore sees a difference between the stated position and the observed practice. It argues that, when France recalls that its tax system is declaration-based (so that there may be de facto non-taxation, even where the person concerned would normally be subject to taxation), it is essentially imputing the long-standing practice of the tax administration to the actions of UNESCO or to the conduct of some of its retired officials. UNESCO further states that the real situation is totally different from that described by France and that one might wonder why, if the French administration merely lacked the necessary information to tax the retirement pensions, it waited so long before taking action aimed at taking them.

UNESCO observes that there is a coincidence between the steps that have been taken and the changes in position towards the retired officials. UNESCO further points out that article 170 of the General Tax Code, which states that only taxable income is to be declared, is the reason why many retirees did not indicate the amount of their pension on their tax declarations, especially since, under the long-standing practice of the tax administration, those pensions were not taxed.

66. The position of France, on the contrary, is that the practice followed by the tax administration was at most a form of tolerance or courtesy and that, in relation to the concept of "subsequent practice" (since an international obligation is involved), only the positions of authorities competent to enter into commitments on behalf of the State should be taken into account when seeking to determine whether the Parties have made a treaty interpretation. As France sees it, the authorities have officially taken a position in that regard on a number of occasions. France points out that in 1956 the Secretary of State for the Budget, replying to a parliamentary question, stated that the pensions of former UNESCO officials were indeed subject to national taxation. Furthermore, the same position was stated before the Senate in 1994. In explanation of the attitude of the tax administration, France recalls that the French tax system is declaration-based and that as a result taxation cannot take place if no declaration is forthcoming. If the relevant information is received subsequently from other sources, a tax adjustment takes place.

France argues that the obligation to provide details of the payees and the amounts paid lies with the "paying party". However, on two occasions, in 1988 and 1991, UNESCO rejected requests from the French administration to inform it of the amounts paid to its former officials. France goes on to argue that this is the reason why for many years many retired officials could not be charged income tax in France.

67. The Tribunal therefore has to decide a preliminary issue: it must determine who should be the originators of a practice that, if the two Parties agree, can be considered as an interpretation of the Agreement. This problem clearly has two aspects. The first relates to the status of the originators of the relevant practice; the second concerns the agreement of the Parties upon the practice in question.

68. The Tribunal sees the situation as follows: in explanation of the period during which, and the cases in which, the pensions of the retired officials were not taxed, France adduces its taxation system and the negative attitude of UNESCO towards the tax administration. As to the authorities competent to enter into commitments on behalf of the State, its position has not changed.

69. UNESCO considers that the tax administration, by not taxing the retired officials, established a practice, which UNESCO itself has tacitly accepted, so that it does not have to provide information to enable the taxation of its former officials.

70. The Tribunal holds that the supposed interpretation of a provision of a treaty by the parties to that treaty, and which may result from "subsequent practice", must be based on an unequivocal common position of the parties. The purpose of recourse to subsequent practice as a means of interpretation of an agreement is to establish the unequivocal agreement of the parties regarding the interpretation of a clause of that treaty. The Tribunal resorts to subsequent practice only to verify the correctness of the conclusion it has reached as to the intentions of the Parties. This observation might prima facie give the impression that the Tribunal is inclined to favour the opinion whereby such an interpretation can be revealed only by the authorities competent to bind the State internationally.

That is not the case.

71. The Tribunal considers that the solution to the aforementioned problem is less clear-cut. This is demonstrated by analysis of the jurisprudence of the International Court of Justice and of its predecessor, the Permanent Court of International Justice, and by an examination of legal doctrine.

Recourse to "subsequent practice" as a means of interpretation was solidly established in the practice of treaty interpretation prior to the 1969 Vienna Convention on the Law of Treaties, with just a few reservations. This can be seen, for example, in the advisory opinion of the Permanent Court of International Justice on the *Competence of the International Labour Organization to Regulate Agricultural Labour* (*P.C.I.J., 1922*, Series B, No. 2, p. 39) or the judgment of the International Court of Justice in the *Corfu Channel* case (*Corfu Channel, Merits, Judgment, I.C.J. Reports 1949*, p. 25). This is why the International Law Commission included subsequent practice in article 3, paragraph 3, of the 1969 Vienna Convention as an "authentic element of interpretation" to be taken into account together with any agreement regarding the interpretation of the treaty (*Yearbook of the International Law Commission, 1966*, vol. II, p. 221). In its commentary, the Commission states that "an agreement as to the interpretation of a provision reached after the conclusion of the treaty represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation" (ibid., para. 14). It goes on to state: "The importance of such subsequent practice in the application of the treaty, as an element of interpretation, is obvious; for it constitutes objective evidence of the understanding of the parties as to the meaning of the treaty." However, the Commission stated no explicit opinion as to who could be the originator of the practice in question.

72. The question under consideration by the Tribunal has been dealt with by the International Court of Justice in a number of decisions, such as the case concerning *Sovereignty over Certain Frontier Land* (*I.C.J. Reports 1959*, pp. 227-230) and the case concerning the *Temple of Preah Vihear* (*I.C.J. Reports 1952*, pp. 32-33). The same is true of the case concerning *Kasikili/Sedudu Island (Botswana/Namibia)* (*I.C.J. Reports 1999*, pp. 1075-1092).

73. Thus, the Court has had to consider the conduct of organs other than those competent to bind the State internationally, in looking for practice having the effect of an interpretation of a treaty.

74. The Tribunal holds that the determining factor is the unequivocal expression of the position of the State. This position can arise equally out of declarations or acts of the authorities invested with treaty-making power or those of administrative organs responsible for applying the agreement. In either case, however, the position of the contracting State must be unequivocal, particularly in the case of a treaty which entails an obligation. For a State to be under an obligation as a result of an agreement, it must be possible to deduce that obligation clearly from the terms of the agreement as originally drafted or as amended or interpreted by the parties concerned.

In the present case there is a sharp discrepancy, which UNESCO itself has pointed out, between the declarations of authorities competent to express the position of the French State, on the one hand, and, on the other, the attitudes of the French tax administration. Moreover, in the case of the latter, it is not possible to deduce from its conduct an unequivocal position which would indicate its belief that article 22(*b*) of the 1954 Headquarters Agreement applies to retired UNESCO officials resident in France. Its stance has been anything but consistent from one place to another and has also varied over time.

It is therefore of little importance that UNESCO was not called upon to state its position one way or the other. The Tribunal holds that, where there is a difference between the conduct of the administration and that of the authorities competent to express the position of a State, precedence should be given to the latter.

Furthermore, for a practice as defined in article 31, paragraph 3(*b*), of the Vienna Convention on the Law of Treaties to be deemed to exist, there must be an indisputable concordance between the positions of the parties, and those positions must be such as to establish the meaning of a provision of the treaty.

75. UNESCO recognizes that there has been no such concordance; indeed, it states that the agreement of the Parties regarding interpretations of article 22(*b*) is not to be sought in subsequent practice.

UNESCO adds that the fact that the French tax authorities refrained from taxing the pensions, a situation which continued until recently, is the reason why UNESCO took no action, that it is self-sufficient and that there is no need for UNESCO to agree to it "in one way or another".

In any case, since the Tribunal has chosen to give greater weight to the conduct of the authorities competent to speak for France, the fact that UNESCO chose to express its position by remaining silent in response to the practice of non-taxation of retirement pensions by the tax administration would, in the case in hand, have no legal consequence for the Agreement.

76. The Tribunal is forced to the conclusion that, since the French authorities have always maintained that retired UNESCO officials do not benefit from the provisions of article 22(*b*) of the 1954 Agreement (although there have been lapses in the tax administration, on the one hand, and although UNESCO for its part has, as it were, remained silent until relatively recently), there has been no "subsequent practice" which can be considered as constituting an interpretation of the Agreement in a sense other than that which clearly derives from its terms and which coincides with the intentions of the Parties at the time of the negotiations.

77. Thus, the Tribunal concludes that, in relation to the application of article 22(*b*) of the 1954 Agreement, there has been no practice between France and UNESCO from which it could be deduced that an agreement has existed regarding an interpretation whereby the provisions of that article would apply to retired UNESCO officials residing in France. This conclusion is in conformity with the object and purpose of the Agreement and with the rule according to which tax exemption is functional and is justified by the desire to ensure the independence of the international civil service.

78. In this regard, the Tribunal emphasizes that the letter of 28 September 1987, in which the Minister-Delegate to the Minister of State for the Budget wrote that "the lump-sum settlement which some retired United Nations officials are entitled to request at the time of their retirement is not subject to income tax", does not change the conclusion it has reached. The Minister-Delegate's statement falls outside the scope of the question submitted to the Tribunal.

It should be recalled that the Tribunal has not been asked to determine whether the sums paid to retired UNESCO officials residing in France are wholly or partially subject to income tax. All the Tribunal has to do is to determine whether the exemption provided for under article 22(*b*) of the 1954 Agreement between France and UNESCO for the benefit of officials in active service is also applicable to officials who have retired from UNESCO and are residing in France.

79. The Parties have put forward several other arguments based on certain principles. Although it does not think that these principles are capable of altering the conclusions it has reached, the Tribunal nevertheless believes that it should consider them briefly, since the Parties have invoked them in support of their positions.

Specifically, the principles invoked are the following:

80. Equality of States.

This principle is invoked by UNESCO. The argument runs that, since the public funds available to international organizations consist of the contributions of States members of the organizations, it would be contrary to the principle of equality of States for one of them to take a portion of the funds in the form of taxes and so enrich itself to the detriment of the other States.

The Tribunal considers that the principle of equality of States, while incontestable, has no direct bearing on the question it is called upon to answer. The Tribunal is asked to determine what the Parties decided and expressed, with no subsequent amendment, in article 22(*b*) of the 1954 Agreement.

81. The principle of non-taxation of foreign public funds.

This principle, if indeed it is one, derives directly from the principle of equality of States. It was invoked by counsel for UNESCO.

The Tribunal holds that such a principle has no bearing on the mandate conferred by the Parties, the limits of which, as already emphasized, are relatively narrow.

82. The rule whereby the provisions of a treaty may create subjective rights for individuals.

Both Parties recognize the existence of this rule.

The rule is found in modern international law. It has often been applied by the International Court of Justice. In itself, however, it does not resolve the problem submitted to the Tribunal; nor can it substitute for one of the Parties to the 1954 Agreement a different natural or legal person, in this case the former officials of UNESCO residing in France. The problem submitted to the Tribunal, to repeat, is to decide whether the Agreement signed between France and UNESCO in 1954 did or did not give former UNESCO officials residing in France the right to be exempted from tax on their retirement pensions. Even if we follow the reasoning of UNESCO, the conclusion reached does not change the fact that the Parties to the 1954 Agreement are France and UNESCO, and that it is their mutual intention that the Tribunal must seek to determine in interpreting article 22(*b*).

83. The Noblemaire principle.

This principle is invoked by UNESCO.

According to the Noblemaire principle, conceived by the League of Nations and taken up by the United Nations, international officials (civil servants) should receive salaries equal to those offered in the highest-paid national civil service. The principle concerns both the States that establish an organization and the organization itself. Prospective international civil servants certainly take it into consideration when they choose their careers. However, it has no specific bearing on the line of reasoning the Tribunal is following in order to answer the question posed in article II of the Arbitration Agreement.

84. The continued existence of ties between the international organization and its officials even after their retirement.

UNESCO cited this rule or practice.

Although it is not contested that certain ties are maintained, notably the duty of discretion (as set forth in regulation 1.5 of the Staff Regulations and Staff Rules

of UNESCO), that finding has no bearing on the Tribunal's determination of the limits of the scope of article 22(*b*) of the 1954 Headquarters Agreement, which deals with the exemption from taxation of the salaries and emoluments of officials of UNESCO.

85. The principle of equal treatment.

This principle was invoked by UNESCO as applicable to its former officials.

The Tribunal finds that, although some States exempt all or part of the retirement pensions from income tax, in France that is not the case. In the view of UNESCO, that situation violates the principle of equal treatment that should protect international officials.

In the present case, bearing in mind the Tribunal's observation that each State undertakes such commitments with respect to former officials as it agrees upon with the particular organization for which it is the host country, the principle of equal treatment in this case applies only to the treatment France metes out to the various former UNESCO officials residing in its territory. And, in fact, it does not discriminate among them. Moreover, since the Tribunal holds that it is a matter for the parties to an agreement that deals with the exemption of the salaries and emoluments of officials to decide whether or not to extend the benefit to retired officials, the argument based on the principle of equal treatment has no bearing on the Tribunal's reasoning.

86. The Parties have stressed that the arbitration question entrusted to the Tribunal is of considerable importance and will have an impact on basic questions affecting the situation of international civil servants.

The Tribunal does recognize the importance of the present arbitration proceedings. It cannot be persuaded, however, to rule on matters outside the scope of what the Parties have asked it to do, or to base its decision on principles that have no bearing on its mandate. In any case, its award will have only the relative effect of any arbitral award.

* * *

87. Although the arguments set forth above, together with the principles or rules on which they are based, as well as some of the other arguments advanced by the Parties (including the sharp drop in the standard of living of retirees, the restriction of the freedom of retirees to settle where they choose, the creation of disparities among retired international civil servants or the measures taken by the United Nations or UNESCO by way of compensation, particularly the reimbursement of staff members for tax collected by States and the increase in the base for calculating the pension), are of considerable interest, the Tribunal nonetheless does not deem that they have any real bearing, one way or the other, on the answer to the specific question put to it, which it has answered. For that reason, it judges it unnecessary to present a detailed analysis that would be irrelevant in this case to the accomplishment of its task.

* * *

88. The Tribunal will now consider the subsidiary claim of UNESCO.

It will be recalled that in its subsidiary submissions UNESCO asks the Tribunal to find that, by application of article 22(*b*), retired UNESCO officials residing in France are exempt from any direct tax on a portion of their pension which shall not be less than 70 per cent. UNESCO explains that the reason for the percentage is that the Joint Staff Pension Fund, in its management of the retirement funds, brings in interest on them equivalent to approximately 30 per cent of the amount of the pension. UNESCO maintains, furthermore, that only the taxable portion of the pension should be considered in determining the tax rate on the income subject to direct tax

and that the withdrawal settlement paid in lieu of all or part of a pension should be exempt from any direct tax.

The Tribunal will now examine this subsidiary claim.

89. As UNESCO sees it, a portion of the pension is principal. The principal portion can be estimated at approximately 70 per cent, for the reasons stated above (in paragraph 88). In consequence, it should not be subject to income tax.

The deduction applies with even greater force, according to UNESCO, to a withdrawal settlement. In that case, it believes, the entire amount received by the retired official should escape taxation.

90. As France sees it, if the principal paid out to former officials is a pension, it should be subject to the normal regime for pensions: that is, it should be taxable. If, on the other hand, it is not a pension, the problem that UNESCO raises is outside the jurisdiction of the Tribunal, since the latter's mandate is limited to deciding whether article 22(*b*) of the 1954 Agreement is applicable to pensions of former UNESCO officials residing in France.

91. The Tribunal has already determined that article 22(*b*) of the Headquarters Agreement is not applicable to the retirement pensions of former UNESCO officials residing in France. With that conclusion it has fulfilled its mandated task.

92. The Tribunal reiterates that the question submitted to it is very specific. The Tribunal is asked to say whether article 22(*b*) of the 1954 Agreement between France and UNESCO is applicable to pensions paid to former UNESCO officials residing in France.

Therefore, it cannot follow UNESCO into a debate about whether a portion of the pension is principal and constitutes an emolument of the official or about what happens when the retiring official receives a lump-sum payment upon retirement in lieu of a pension. It is obliged to refrain from considering these questions for fear of straying outside the bounds of its jurisdiction. Moreover, UNESCO says (and France did not contest it prior to these arbitration proceedings, at least insofar as the withdrawal settlement is concerned) that "despite the reversal of position with regard to pensions, that so far has not been called into question". The aim of UNESCO, therefore, is simply to have the exemption confirmed, but that task would exceed the Tribunal's mandate.

93. The conclusion to be drawn from the foregoing is that the Tribunal is unable to consider the subsidiary claim of UNESCO because it is not competent to do so.

* * *

94. The Tribunal believes that the answer it has given to the question submitted to it is not contrary to the practices of international organizations or the decisions of international administrative courts.

For these reasons,

THE TRIBUNAL

1. Finds that article 22(*b*) of the Headquarters Agreement of 1954 is not applicable to former UNESCO officials residing in France and drawing, after separation from service, a retirement pension paid by the United Nations Joint Staff Pension Fund;

2. Declares that it is not competent to rule on the subsidiary submissions of UNESCO;

3. Rejects all other submissions of the Parties;

4. Decides that the costs, expenses, fees and compensation of the present arbitration proceedings shall be shared equally by UNESCO and the Government of the French Republic and that each of the Parties shall bear all its other expenses;

5. Orders the Clerk to make the final disbursements, close the accounts of the Tribunal and divide the balance equally between the two Parties.

DONE in French at Paris in the Palais de la Sorbonne on 14 January 2003 in three copies, one to be placed in the archives of the Tribunal and the other two to be given to the Parties.

(*Signed*) Kéba MBAYE
Presiding Arbitrator

(*Signed*) Jean-Pierre QUÉNEUDEC
Arbitrator

(*Signed*) Nicolas VALTICOS
Arbitrator

Mr. Nicolas Valticos, availing himself of the right conferred by article VII, paragraph 2, of the Arbitration Agreement, has appended to the award a separate opinion.

SEPARATE OPINION OF NICOLAS VALTICOS ON THE ARBITRAL AWARD

I concur at the legal level with the opinion of the other members of the Arbitral Tribunal and do not deny that it is well founded in law. There is, however, a point on which I wish to add an observation, namely, the considerable length of time that elapsed in some cases between the start of retirement of UNESCO officials now residing in France and the point at which they were contacted by the tax administration of the French Government. While we may make allowances for the French tax system and the circumstances cited by the Government, it is nonetheless striking that the period during which, despite its well-known efficiency, the French tax administration failed to tax the retirement pensions was often very long, although this certainly should not lead us to go so far as to postulate a point of tacit agreement constituting "subsequent practice" of the Parties. Such long delays, however, may for some time have given the impression that the French Government had tacitly consented to the idea of non-taxation of the pensions of retiring UNESCO officials and may have created expectations which subsequently proved to be unfounded.

That being the case, now that the issue has clearly been resolved by the Arbitral Tribunal on the strictly legal level, the Parties might perhaps consider consulting together in order to draw the appropriate conclusions from the situation. The solution might reasonably, indeed legitimately—in order to compensate for the delays, misunderstandings and disappointed expectations, and more generally to bind up the wounds—entail adopting one or more formulas which would grant certain relief to retired officials who have clearly suffered from the dashing of their optimistic expectations as a result of the sometimes lengthy delays before the tax administration took action. Even allowing for the French tax system, it is difficult to deny that those delays in some respects entailed a degree of negligence. Such a formula could to some extent compensate the retired officials concerned or at any rate alleviate their situation, and encourage those still in service to continue to fulfil their tasks efficiently at UNESCO headquarters.

(*Signed*) Nicolas VALTICOS