INTERNATIONAL COURT OF JUSTICE

REPORTS OF JUDGMENTS
ADVISORY OPINIONS AND ORDERS

APPLICATION FOR REVIEW OF JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

ADVISORY OPINION OF 27 MAY 1987

1987

COUR INTERNATIONALE DE JUSTICE

RECUEIL DES ARRÊTS,
AVIS CONSULTATIFS ET ORDONNANCES

DEMANDE DE RÉFORMATION DU JUGEMENT N° 333 DU TRIBUNAL ADMINISTRATIF DES NATIONS UNIES

AVIS CONSULTATIF DU 27 MAI 1987

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APPLICATION FOR REVIEW OF JUDGEMENT No. 333 OF THE UNITED NATIONS ADMINISTRATIVE TRIBUNAL

Request for advisory opinion by the Committee on Applications for Review of Administrative Tribunal Judgements — Article 11 of the Statute of the United Nations Administrative Tribunal.

Competence of the Court — Propriety of the Court's giving the opinion — Nature and scope of the advisory opinion requested — Determination by the Court of the meaning and implications of questions submitted for advisory opinion — Power of Court to ascertain and state legal questions really in issue — Scope of questions submitted to Court.

Objection to Judgement on ground of failure by Administrative Tribunal to exercise jurisdiction vested in it — Determination whether the Tribunal addressed its mind to a point as test of whether the Tribunal failed to exercise jurisdiction — Significance of opinions appended to the Judgement.

Objection to Judgement on ground of error on a question of law relating to the provisions of the United Nations Charter — Task of the Court — Meaning of error "on a question of law relating to the provisions of the Charter" — Duty of Court to enquire into such error whether or not the error would have affected the disposal of the case by the Tribunal — Charter, Article 101, paragraph 1 — Article 100, paragraph 1 — Article 101, paragraph 3 — Article 8 — Article 2, paragraph 1 — Article 100, paragraph 2.

ADVISORY OPINION

Present: *President* NAGENDRA SINGH; *Vice-President* MBAYE; *Judges* LACHS, RUDA, ELIAS, ODA, AGO, SETTE-CAMARA, SCHWEBEL, Sir Robert JENNINGS, BEDJAOUI, NI, EVENSEN, TARASSOV; *Registrar* VALENCIA-OSPINA.

In the matter of the Application for Review of Judgement No. 333 of the United Nations Administrative Tribunal,

THE COURT,

composed as above,

gives the following Advisory Opinion:

1. The questions upon which the advisory opinion of the Court has been asked were laid before the Court by a letter dated 28 August 1984, filed in the Registry on 10 September 1984, from the Secretary-General of the United Nations. By that letter the Secretary-General informed the Court that the Committee on Applications for Review of Administrative Tribunal Judgements had, pursuant to Article 11 of the Statute of the United Nations Administrative Tribunal, decided on 23 August 1984 that there was a substantial basis for the application made to that Committee for review of Administrative Tribunal Judgement No. 333, and had accordingly decided to request an advisory opinion of the Court. The decision of the Committee, which was set out *in extenso* in the Secretary-General's letter, and certified copies of which in English and French were enclosed with that letter, read as follows:

> "The Committee on Applications for Review of Administrative Tribunal Judgements at the 4th meeting of its twenty-fourth session on 23 August 1984 decided that there was a substantial basis, within the meaning of article 11 of the statute of the Administrative Tribunal, for the application for review of Administrative Tribunal Judgement No. 333 delivered at Geneva on 8 June 1984.
>
> Accordingly the Committee on Applications for Review of Administrative Tribunal Judgements requests an advisory opinion of the International Court of Justice on the following questions:
>
> '(1) In its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?
>
> (2) Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?'"

2. In accordance with Article 66, paragraph 1, of the Statute of the Court notice of the request for an advisory opinion was given by a letter from the Deputy-Registrar dated 28 September 1984 to all States entitled to appear before the Court; a copy of the Secretary-General's letter setting out the decision of the Committee was transmitted to those States.

3. Pursuant to Article 65, paragraph 2, of the Statute and to Article 104 of the Rules of Court, the Secretary-General of the United Nations transmitted to the Court a dossier of documents likely to throw light upon the question; these documents reached the Registry in English on 20 December 1984 and in French on 3 January 1985. On 6 March 1987, on the instructions of the Court the Registrar requested the Secretary-General to supply certain background information to supplement the dossier; the information was supplied on 27 April 1987.

4. The President of the Court decided on 13 September 1984 that the United Nations and its member States were to be considered as likely to be able to furnish information on the question. Accordingly by a letter of 28 September 1984, the Deputy-Registrar notified the Organization and its member States, pursuant to Article 66, paragraph 2, of the Statute of the Court, that the Court would be prepared to receive written statements from them within a time-limit fixed at 14 December 1984 by an Order of the President dated 13 September 1984.

5. At the request of the Secretary-General of the United Nations, the President of the Court, by Order of 30 November 1984, extended that time-limit to 28 February 1985.

6. Within the time-limit as so extended, written statements were received from the Governments of Canada, Italy, the Union of Soviet Socialist Republics and the United States of America, and from the Secretary-General of the United Nations; in addition, the Secretary-General transmitted to the Court, pursuant to Article 11, paragraph 2, of the Statute of the Administrative Tribunal, a statement setting forth the views of Mr. Vladimir Victorovich Yakimetz, the former staff member to whom the Judgement of the Administrative Tribunal relates.

7. By a letter from the Registrar, dated 5 March 1985, copies of these statements were communicated to the United Nations and to the States which had presented such statements, in accordance with Article 66, paragraph 4, of the Statute.

8. By the same letter of 5 March 1985, Canada, Italy, the Union of Soviet Socialist Republics and the United States of America, as well as the United Nations, were informed that the President of the Court, pursuant to Article 66, paragraph 4, of its Statute, had decided to permit any State or organization having presented or transmitted a written statement to submit comments in writing on the statement made or transmitted by any other, and had fixed 31 May 1985 as the time-limit for the submission of such comments. The time-limit was subsequently extended to 1 July 1985; within the time-limit as so extended, comments were received in the Registry from the Secretary-General, who also transmitted the comments of Mr. Yakimetz, and from the United States of America.

9. On 8 July 1985, copies of these comments were communicated to the United Nations and to the States which had presented written statements, and by a letter from the Registrar, dated 3 November 1986, they were informed that the Court did not intend to hold any public sitting for the purpose of hearing oral statements in the case.

* *

10. The Judgement of the United Nations Administrative Tribunal (Judgement No. 333) which was the subject of the application to the Committee on Applications for Review of Administrative Tribunal Judgements resulting in the present request for advisory opinion was given on 8 June 1984 in case No. 322, *Yakimetz* v. *the Secretary-General of the United Nations*. The facts of that case, as found by the Tribunal, and as set out in the documents submitted to the Tribunal, may, for the purposes of the present opinion, be summarized as follows. On 20 July 1977, in a letter

addressed to the Assistant Secretary-General for Personnel Services, the Deputy Permanent Representative to the United Nations of the Union of Soviet Socialist Republics recommended Mr. Vladimir Victorovich Yakimetz (hereinafter called "the Applicant"), a national of the USSR who had been employed by the United Nations in 1969-1974, for a post of reviser (P-4) in the Russian Translation Service of the United Nations. On 23 November 1977 the Applicant was offered "a five-year fixed-term appointment, on secondment from the USSR Government, at step IV of the First Officer (P-4) level, as Reviser in the Russian Service". The letter of appointment, which took effect on 27 December 1977, was issued on behalf of the Secretary-General on 28 December 1977 and accepted by the Applicant on 24 January 1978; it did not mention secondment, and under "Special Conditions" specified "None". On 5 October 1981 the Applicant was transferred as Programme Officer to the Programme Planning Section, Programme Planning and Co-ordination Office, Department of International Economic and Social Affairs. On 6 December 1982 the Applicant was recommended for promotion to P-5. The Applicant's appointment was then extended for one year, expiring on 26 December 1983; the letter of appointment, dated 8 December 1982, included a "special condition" that he was "on secondment from the Government of the Union of Soviet Socialist Republics", which he accepted without comment.

11. On 8 February 1983 the Assistant Secretary-General for Programme Planning and Co-ordination informed the Applicant that it was his intention to request an extension of his contract after the current contract expired on 26 December 1983, since he believed that "it would be in the interests of the Office to have your services continue" and asked him whether he would be in a position to accept such an extension. The Administrative Tribunal found that "evidence was available" that about this time

> "the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant"

and that

> "It was suggested to him that he should leave for Moscow early in 1983 for this purpose, but his application for leave was refused by the United Nations." (Judgement, para. XI.)

On 9 February 1983 the Applicant applied for asylum in the United States of America. On 10 February 1983 he informed the Permanent Representative of the USSR to the United Nations that he was resigning from his position with the Ministry of Foreign Affairs of the USSR and from all

other official positions he held in the Soviet Government, and that he had made an application to the Government of the United States of America requesting asylum. By a letter of the same date the Applicant notified the Secretary-General, under Staff Rule 104.4 *(c)*, of his intention to acquire permanent resident status in the United States of America, and informed him that he had applied for asylum and resigned "from all official positions I hold in the Government of the Soviet Union"; in that letter he assured the Secretary-General of his "wish and intention to continue to perform all my obligations under my employment contract". On 28 February 1983 the Director of the Division of Personnel Administration informed the Applicant that the Secretary-General had decided to place him on special leave with full pay, effective 1 March 1983 and until further notice, in accordance with Staff Rule 105.2 *(a)*, and that any other decision pertaining to his case would be taken by the Secretary-General at a later stage. On 1 March 1983, in a letter to the Director of the Division of Personnel Administration, the Applicant asked to be advised of the precise reasons as to "why the leave had been granted", and asked for clarification on a number of points. On 11 March 1983, following a communication from the Executive Assistant to the Secretary-General addressed to the Director of the Division of Personnel Administration, the latter informed the Applicant that the Secretary-General had also "determined that, at this juncture and pending further review, it is in the best interest of the Organization that [the Applicant] do not enter the premises of the United Nations", with immediate effect and until further notice. In that letter the Director also dealt with the questions put by the Applicant on 1 March 1983.

12. On 17 March 1983 the Applicant wrote to the Secretary-General asking for a review under Staff Rule 111.3 *(a)* of the decision to place him on special leave, and reiterating his request for a written explanation as to why it was considered in the best interest of the Organization that he did not enter the premises of the United Nations; he added, however, that on the advice of his counsel and under protest, he would of course comply with the Secretary-General's decision. On 29 June 1983 the Applicant was promoted to P-5 with effect from 1 April 1983.

13. On 25 October 1983 the Applicant addressed a memorandum to the Assistant Secretary-General for Programme Planning and Co-ordination, recalling that his fixed-term contract with the United Nations was due to expire on 26 December 1983, and expressing the hope that it would be found possible on the basis of his performance to recommend a further extension of his contract with the United Nations, "or even better a career appointment". On 8 November 1983 the Assistant Secretary-General replied, praising the Applicant's performance and concluding:

> "From my perspective as head of this Office, I find no difficulty in recommending a further extension to your contract and intend to do so at an appropriate time."

On 23 November 1983 the Deputy Chief of Staff Services informed the Applicant, "upon instruction by the Office of the Secretary-General", that it was not the intention of the Organization to extend his fixed-term appointment beyond its expiration date, i.e., 26 December 1983. On 29 November 1983 the Applicant protested against the decision in a letter to the Assistant Secretary-General for Personnel Services, in which he referred to his "acquired rights under the General Assembly resolution 37/126, IV, paragraph 5"; that text, quoted in the letter, provides that the General Assembly

> "*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment."

On 2 December 1983 the Assistant Secretary-General for Programme Planning and Co-ordination, in a letter addressed to the Assistant Secretary-General for Personnel Services, stated, *inter alia*, that he found it "extraordinary that such a decision should be taken without consulting the head of the Office concerned". On 13 December 1983 the Applicant requested the Secretary-General to review the decision not to extend his appointment beyond its expiration date; he again expressly invoked his rights under General Assembly resolution 37/126, IV, paragraph 5.

14. In a reply dated 21 December 1983, the Assistant Secretary-General for Personnel Services stated:

> "The Secretary-General has given careful consideration to the issues raised in your request for administrative review dated 13 December 1983 . . . as well as in your earlier letter dated 29 November 1983, in connection with the communication, dated 23 November 1983, that 'it is not the intention of the Organization to extend your fixed-term appointment beyond its expiration date, i.e., 26 December 1983'.
>
> In your letters, after referring to your service record and the evaluations of your supervisors, you state that under such conditions 'most staff members would have an expectancy that their candidacy for a career appointment would be "given every reasonable consideration", as General Assembly resolution 37/126 IV requires'.
>
> Your situation, however, is not similar to that of 'most staff members' with comparable service records, because your present contract

was concluded on the basis of a secondment from your national civil service. At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned.

Furthermore, you are serving under a fixed-term appointment, which, as expressly provided in staff rule 104.12 *(b)* and reiterated in your letter of appointment, 'does not carry any expectancy of renewal or of conversion to any other type of appointment'.

In view of the foregoing, the reasons advanced by you in your memorandum of 13 December do not require the Secretary-General to alter the decision communicated to you by letter of 23 November 1983. That decision is maintained and, therefore, the Secretary-General is not in a position to agree to your request 'that the Administrative decision be withdrawn and [your] name forwarded to the appropriate Appointment and Promotion body for reasonable consideration' for career appointment.

Should you wish to pursue your appeal, the Secretary-General is prepared to agree to the direct submission of your case to the Administrative Tribunal."

On 6 January 1984 the Applicant filed the application to the United Nations Administrative Tribunal in respect of which Judgement No. 333 was given.

15. A development which occurred after the filing of the Application to the United Nations Administrative Tribunal, and which was not referred to by the Tribunal in its Judgement (though it was mentioned in the pleadings before the Tribunal) was a further application by the Applicant for employment by the United Nations. On 9 January 1984, according to the Applicant's statement of views transmitted to the Court by the Secretary-General, he forwarded a new P-11 Personal History Form to the Division of Recruitment, Office of Personnel Services, "applying for a job at the United Nations". Under Item 4 (Nationality(ies) at birth), he wrote "USSR". Under Item 5 (Present nationality(ies)), he wrote "USA, pending". Under Item 16 (Have you taken up legal permanent residence status in any country other than that of your nationality? If answer is "yes", which country?), he wrote "Yes. USA". Under Item 17 (Have you taken any legal steps towards changing your present nationality? If answer is "yes", explain fully:), he wrote "I have applied for US citizenship. The bill No. S.1989 is now before US Senate." The Applicant stated that he received no acknowledge-

ment of this application, and this has not been contradicted by the Respondent.

16. The Applicant made this further application for United Nations employment after Mr. J. Sills, a spokesman for the Secretary-General, replying to a question at a press conference on 4 January 1984, had said that

> "If Mr. Yakimetz chose to apply for a position with the United Nations he would be given every consideration along with other applicants for any position, including his old position."

The *New York Times* of the same day carried an article on the non-renewal of the Applicant's contract; in the article the Executive Assistant to the Secretary-General, Mr. Emilio de Olivares, was quoted as follows:

> "'We didn't extend it because we can't', Emilio de Olivares, a senior aide to Mr. Pérez de Cuéllar, said of the Yakimetz contract.
>
> Mr. Olivares said that by Soviet law, Mr. Yakimetz remains a Soviet citizen . . . Moreover, like all Soviet employees of the Secretariat, he was officially 'seconded' from his home Government . . .
>
> To have the contract extended, Mr. Olivares said, Soviet consent was essential. But, he said, 'the Soviets refused'."

Mr. Patricio Ruedas, Under-Secretary-General for Administration and Management, wrote a letter to the *New York Times*, published on 25 January 1984, commenting on the above newspaper report. He mentioned other eminent officials who had been seconded and United States legislation permitting secondment, and concluded:

> "The United Nations endeavors to obtain qualified staff from every one of its member States. Direct employment as well as loans from governments have been used, and continue to be used, as normal recruitment procedures. The main difference between the two is that a person who is on loan returns to his government unless that government agrees otherwise — a principle applicable in all cases, and not only those involving the USSR."

17. The Applicant's principal contentions before the Tribunal were summed up by the Tribunal as follows:

> "1. No legal impediment existed at the time of the contested decision, or exists now, to the continuation of the Applicant's service with the United Nations:

(a) the Applicant was not in any legally cognizable sense on secondment;
(b) after 10 February 1983, the Respondent had neither the obligation nor the right to solicit or receive instructions as to the Applicant from any authority extraneous to the Organization;
(c) no legal constraint existed, after 26 December 1983, on the Applicant's further appointment to the United Nations;

2. The Applicant had a legally and morally justifiable expectancy of continued United Nations employment, and a right to reasonable consideration for a career appointment.

3. The Applicant was denied the reasonable consideration for further employment to which he had a right."

18. The Tribunal then similarly summarized the principal contentions of the Respondent as follows:

"1. The Applicant has no entitlement, including any legally cognizable expectancy, as regards continued employment on expiry of his fixed-term contract:

(a) the fixed-term contract excludes any expectancy;

(b) no circumstances outside the scope of the contract gave rise to legally cognizable expectations:

(i) the circumstances relating to secondment could not have created an expectancy. The separation from government service during period of United Nations appointment did not result in new terms of contract with United Nations;

(ii) the commendations by supervisors did not commit the Secretary-General to extend the appointment. The pre-conditions to consideration of reappointment by the Appointment and Promotion Board were not fulfilled;

(iii) General Assembly resolution 37/126, IV, paragraph 5, did not effect a change in procedure on appointment.

2. The Secretary-General's decision against re-appointment was within his sole authority under the Charter and Staff Regulations:

(a) in reaching his decision, the Secretary-General took into account all the circumstances in the case;
(b) in taking his decision in the case, the Secretary-General acted in the interest of the Organization."

19. The Tribunal then stated that the legal issues involved in the case were the following:

"*(a)* whether the Applicant's work with the United Nations in different periods created a legal expectancy for further service with the United Nations;

(b) whether, and if so to what extent, paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982 which reads

'*Decides* that staff members on fixed-term appointments upon completion of five years of continuing good service shall be given every reasonable consideration for a career appointment'

has been carried out;

(c) the consequences of the application of United Nations rules and regulations in relation to the United States law on resident status and citizenship."

20. The Judgement of the Administrative Tribunal will be examined in detail later in the present Opinion (paragraphs 33 ff., below), the following brief summary being sufficient for the present. On the first issue identified by the Tribunal, it found, contrary to the contention of the Applicant, that during his period of service with the United Nations the Applicant was under secondment (Judgement, paras. III and XIII) and that there was no "evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment" (para. VI). The Tribunal rejected the argument of the Applicant that the Secretary-General, by his actions in relation to the Applicant after 10 February 1983 when he resigned from the service of the USSR Government, created a new, although tacit, agreement in which the Soviet Government was not in any way involved (para. VIII). As to the question whether the terms of General Assembly resolution 37/126 had been carried out, the Tribunal found that the Secretary-General was bound by it, but that the resolution was silent on who should give "every reasonable consideration" and by what procedure. The Tribunal considered the letter addressed to the Applicant on 21 December 1983 (quoted in paragraph 14 above), and drew from it "the plain and simple inference ... that the Respondent had given the required (i.e., 'every reasonable') consideration for a career appointment for the Applicant" (para. XVI). It found that the procedure of offering a probationary appointment to a candidate was at the time applicable, that the Secretary-General had the sole authority to decide what constituted "reasonable consideration" and whether the Applicant could be given such an appointment. The Tribunal concluded:

> "He apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given 'every reasonable consideration' to the Applicant's career appointment." (Para. XVIII.)

The Tribunal went on to reject the suggestion that the Secretary-General had sought instructions from any member State or had in any manner let the wishes of a member State prevail over the interests of the United Nations, contrary to Article 100, paragraph 1, of the Charter. The Tribunal's treatment of the third legal issue it identified (para. *(c)* quoted in paragraph 19 above) will be examined later in this Opinion (paragraphs 83 and 84).

21. The Tribunal, while thus rejecting the application made to it, expressed

> "its dissatisfaction with the failure of the Respondent to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution" (para. XX),

but considered that this had not caused any discernible injury to the Applicant. To the Judgement was appended a statement by the President of the Tribunal, Mr. Endre Ustor, recording his disagreement with this statement of disapproval and stating his view that the doctrine of the Tribunal on secondment "precludes not only the extension of a seconded fixed-term appointment but also its conversion to any other type of appointment without the consent of the Government concerned". Also appended was a dissenting opinion by a Vice-President of the Tribunal, Mr. Arnold Kean, expressing the view that

> "the Repondent's decision was flawed by fundamental mistakes of fact or law and requires to be set aside, and that the Tribunal should accept the Applicant's plea that he was illegally denied his right to reasonable consideration for a career appointment".

This conclusion was based on, *inter alia,* the view that the writer of the letter of 21 December 1983 mistakenly believed that, if the Applicant had no expectancy of renewal of his fixed-term appointment, there was no possibility of his receiving a career appointment in pursuance of General Assembly resolution 37/126 (para. 7 of Mr. Kean's opinion).

* *

22. On 21 June 1984, the Applicant presented an application for review of the Judgement to the Committee on Applications for Review of Administrative Tribunal Judgements, in which he requested the Committee to request an advisory opinion of the Court on all four of the grounds set out in Article 11 of the Tribunal's Statute (that the Tribunal has exceeded its jurisdiction or competence, that it has failed to exercise jurisdiction vested in it, that it has erred on a question of law relating to the provisions of the Charter of the United Nations, or that it has committed a fundamental error in procedure which has occasioned a failure of justice). On 10 August 1984, the Secretary-General presented his comments on that Application. At a public meeting held on 28 August 1984 the Committee announced its decisions: it decided that there was not a substantial basis for the application on two of the grounds advanced (that the Tribunal had exceeded its jurisdiction, or that the Tribunal had committed a fundamental error in procedure which had occasioned a failure of justice); in respect of the other two grounds, it held that there was a substantial basis for the application and decided to submit two questions to the Court for advisory opinion. It then announced the text of those questions, as reproduced in paragraph 1 above. The results of and the participation in the votes taken during the private deliberations of the Committee were then formally announced, and five members of the Committee made statements for the record (A/AC.86/XXIV/PV.5).

* *

23. The competence of the Court to give an advisory opinion at the request of the Committee on Applications for Review of Administrative Tribunal Judgements (hereinafter called "the Committee") derives immediately from Article 11, paragraphs 1 and 2, of the Statute of the United Nations Administrative Tribunal, which provides as follows:

> "1. If a Member State, the Secretary-General or the person in respect of whom a judgement has been rendered by the Tribunal (including any one who has succeeded to that person's rights on his death) objects to the judgement on the ground that the Tribunal has exceeded its jurisdiction or competence or that the Tribunal has failed to exercise jurisdiction vested in it, or has erred on a question of law relating to the provisions of the Charter of the United Nations, or has committed a fundamental error in procedure which has occasioned a failure of justice, such Member State, the Secretary-General or the person concerned may, within thirty days from the date of the judgement, make a written application to the Committee established by paragraph 4 of this article asking the Committee to request an advisory opinion of the International Court of Justice on the matter.
>
> 2. Within thirty days from the receipt of an application under paragraph 1 of this article, the Committee shall decide whether or not there is a substantial basis for the application. If the Committee

decides that such a basis exists, it shall request an advisory opinion of the Court, and the Secretary-General shall arrange to transmit to the Court the views of the person referred to in paragraph 1."

The fundamental text in this respect is however Article 96 of the United Nations Charter:

"1. The General Assembly or the Security Council may request the International Court of Justice to give an advisory opinion on any legal question.

2. Other organs of the United Nations and specialized agencies, which may at any time be so authorized by the General Assembly, may also request advisory opinions of the Court on legal questions arising within the scope of their activities."

Similarly, Article 65, paragraph 1, of the Statute of the Court provides that

"The Court may give an advisory opinion on any legal question at the request of whatever body may be authorized by or in accordance with the Charter of the United Nations to make such a request."

24. In two previous advisory opinions (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 166; *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982,* p. 325), the Court has examined the question of its competence under these provisions. In one of these cases the request for opinion originated, as in the present case, from an application by a staff member; in the other the request originated from an application to the Committee by a member State. In the first of those cases, the Court concluded that

"the Committee on Applications for Review of Administrative Tribunal Judgements is an organ of the United Nations, duly constituted under Articles 7 and 22 of the Charter, and duly authorized under Article 96, paragraph 2, of the Charter to request advisory opinions of the Court for the purpose of Article 11 of the Statute of the United Nations Administrative Tribunal. It follows that the Court is competent under Article 65 of its Statute to entertain a request for an advisory opinion from the Committee made within the scope of Article 11 of the Statute of the Administrative Tribunal." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 175, para. 23.)

That conclusion presupposes that in any specific case the conditions laid down by the Charter, the Statute, and the Statute of the Administrative Tribunal are complied with, and in particular that a question on which the opinion of the Court is requested is a "legal question" and one "arising

within the scope of [the] activities" of the requesting organ. The question whether a judicial body failed to exercise jurisdiction is clearly a legal question, as is also the question whether it erred on a question of law. Furthermore, the questions put to the Court by the Committee in the present case

> "clearly arise out of the performance of [its] primary function of screening the applications presented to it. They are therefore questions which, in the view of the Court, arise within the scope of the Committee's own activities; for they arise not out of the judgements of the Administrative Tribunal but out of objections to those judgements raised before the Committee itself." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 174, para. 21.)

*

25. It is of course well established that

> "Article 65, paragraph 1, of the Statute, which establishes the power of the Court to give an advisory opinion, is permissive and, under it, that power is of a discretionary character." (*I.C.J. Reports 1975,* p. 21, para. 23.)

It is equally well established that the reply of the Court to a request for opinion represents its participation in the activities of the United Nations and, in principle, should not be refused. When considering the proper exercise of its discretion in this respect, it is however essential for the Court to focus its attention on the question or questions to which it is asked to reply, rather than on such related or ancillary questions as may have arisen in connection with the problem put to the Court. In the present case the Government of the United States has advanced the view that

> "it is ... important for the Court to clarify the meaning and nature of secondment in the light of its increasing use in staffing international organizations generally and the United Nations in particular, even though this case does *not* turn on the question of whether the Applicant was in fact seconded to the United Nations during his second continuous period of service there from 27 December 1977 to 26 December 1983".

Similarly the Government of Italy has drawn attention to the uncertainty created by Judgement No. 333 as to the position of staff members on secondment and to the consideration which weighed with the Court to give its opinion in a previous review case, namely the "stability and efficiency of international organizations" (*I.C.J. Reports 1982,* p. 347, para. 45). The request addressed to the Court is however not for an opinion on the "meaning and nature of secondment", so that it is only if, or to the extent

that, it proved necessary for the Court to determine the meaning and nature of secondment in order to be able to reply to the one or the other of the two specific questions put to it that such an examination would properly form part of its advisory opinion.

26. However, leaving aside for this reason the asserted desirability of an authoritative legal opinion on the nature of secondment, the Court considers that there is clear legal justification for replying to the two questions put to it by the Committee. When a request was first made to the Court for an advisory opinion pursuant to Article 11 of the Statute of the Administrative Tribunal, the Court subjected the machinery established by that Article to critical examination, in order to satisfy itself that it would be right to give an opinion in such a case. Inspired by its own previous approach to the question of reviewing in an advisory opinion a decision of the ILO Administrative Tribunal, it was reluctant to "imperil the working of the régime established by the Statute of the Administrative Tribunal for the judicial protection of officials" and concluded that

> "although the Court does not consider the review procedure provided by Article 11 as free from difficulty, it has no doubt that, in the circumstances of the present case, it should comply with the request by the Committee on Applications for Review of Administrative Tribunal Judgements for an advisory opinion" (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 183, para. 40).

This conclusion is qualified by a reservation as to the merits of the procedure established by Article 11 of the Tribunal's Statute. In its 1973 Advisory Opinion the Court examined a number of criticisms addressed to this procedure, and in particular the fact that "being composed of member States, the Committee is a political organ", yet discharged "functions which, in the Court's view, are normally discharged by a legal body" (*I.C.J. Reports 1973,* p. 176, para. 25). Ultimately the Court however considered that it should give an advisory opinion at the request of the Committee established under Article 11 : it noted that

> "A refusal by the Court to play its role in the system of judicial review set up by the General Assembly would only have the consequence that this system would not operate precisely in those cases in which the Committee has found that there is a substantial basis for the objections which have been raised against a judgement." (*Ibid.*, p. 177, para. 28.)

Similarly in the present case it is clear from the request made by the Committee, from the written statements submitted to the Court by the Government of Italy and the Government of the United States of America, and from the statement of views of the Applicant transmitted to the Court, that

objections have been raised against Judgement No. 333, and that their examination is appropriate to secure "the judicial protection of officials" of the United Nations. Accordingly, while renewing reservations made in previous cases as to the procedure established by Article 11, the Court concludes that it should give an advisory opinion in the present case.

* *

27. The two provisions of Article 11 of the Statute, specifying grounds of objection in respect of which in this case the Committee found that there was a substantial basis for the application for review, have been considered by the Court before, in two previous advisory opinions, in 1973 and 1982, on cases referred to it by the Committee. In those opinions the Court established a principle as to the scope of its action in response to such requests, and a limited exception to the principle in the case of one of the two grounds considered. In the case of the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal,* the Court established the principle that the role of the Court in review proceedings is not to retry the case, but added that this

> "does not mean that in an appropriate case, where the judgement has been challenged on the ground of an error on a question of law relating to the provisions of the Charter, the Court may not be called upon to review the actual substance of the decision" (*I.C.J. Reports 1973,* p. 188, para. 48).

The Court in 1982, in its opinion on the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,* quoted this passage, and went on to examine carefully the question of its proper role when asked for an advisory opinion in respect of the ground of objection concerning error on a question of law relating to provisions of the Charter. It observed that the answer to that question must depend "not only upon the terms of Article 11, but also upon several other factors including, first of all, the Court's Statute, the case-law of the Court, the general requirements for the exercise of the judicial function", as well as upon the exact terms of the particular question asked of the Court by the Committee (*I.C.J. Reports 1982,* p. 355, para. 57). It re-emphasized that "the Court's proper role is not to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal" (*ibid.,* p. 356, para. 58). That principle must continue to guide the Court in the present case. It will therefore not necessarily have to deal with the problems raised by certain administrative steps taken, or which should have been taken, by the Secretariat, and which have been the subject of criticism, at the same time as the Tribunal's Judgement No. 333. Taking into account the limits of its competence set by the applicable texts, the Court should not express any view on the correctness or otherwise of any finding of the Tribunal in

Judgement No. 333, unless it is necessary to do so in order to reply to the questions put to it.

* * *

28. The Court now turns to the first of the two questions submitted to it by the Committee, namely:

> "In its Judgement No. 333 of 8 June 1984 (AT/DEC/333) did the United Nations Administrative Tribunal fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983?"

With regard to the wording of this question, the Court should first observe that there is, or at least there appears to be, a discrepancy between the English version, which refers to a "legal impediment . . . to the *further employment* in the United Nations" and the French version, which refers to an "obstacle juridique au *renouvellement de l'engagement* du requérant à l'Organisation des Nations Unies". The French text seems to refer only to the narrow hypothesis of a mere extension or renewal of the contract held by the Applicant up to 26 December 1983. However, according to the Report of the Committee (A/AC.86/30, para. 13), the decision of the Committee was based on a proposal, in English, made by the representative of the United Kingdom (A/AC.86/R.120), which used the expression "legal impediment . . . to the further employment". Accordingly, the words in the French version "obstacle juridique au renouvellement de l'engagement" must be taken to have been a translation of this expression, and therefore to refer to a legal impediment to a "further appointment" or "re-appointment" of the Applicant to the Organization, including both the case of a prolongation of an existing contract, and that of an appointment distinct from the pre-existing contractual relationship.

29. The question whether a "legal impediment" existed to the further employment of the Applicant was raised from the outset when the Applicant, in his application to the Administrative Tribunal, requested it "To adjudge and declare that no legal impediment existed to his further United Nations employment after the expiry of his contract on December 26, 1983". While contending that "no legally valid secondment took place", or that after 10 February 1983 there was a "new contractual arrangement", he conceded that "Having resigned from all positions he might have held in the USSR Government, he was clearly not eligible for an extension of secondment, nor would he have consented to one". On the other hand, he contended that "There was no legal bar, however, to his eligibility for a new fixed-term contract, or a probationary appointment", and that he "had a legally and morally justifiable expectancy of continued

U.N. employment, and a right to reasonable consideration for a career appointment".

30. In his Answer, the Respondent stated in response to the plea concerning the question of a "legal impediment":

> "With respect to plea C, Respondent does not dispute that it was within the Secretary-General's authority and discretion to re-appoint the Applicant after the expiry of his contract." (Para. 27 *(c)*.)

In the circumstances obtaining at the time of the letter of 21 December 1983, "further appointment on the basis of secondment was obviously out of the question", but at the same time "In those circumstances, there was no contractual or otherwise legally based prohibition on the Secretary-General, either to grant or withhold another appointment". Before the Tribunal therefore, the Secretary-General committed himself to the view that there was no "legal impediment" to the grant of a career appointment; and asserted that "The decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case . . ." and that this constituted "reasonable consideration" within the meaning of General Assembly resolution 37/126. In his formal "Observations on Applicant's Pleas and Conclusions", the Secretary-General asserted

> "With respect of plea E, Respondent requests the Tribunal to conclude that Applicant had no 'right' to *favourable* consideration for a career appointment and did, in fact, receive such consideration as was *reasonable*."

31. In his "Observations on the Answer of the Respondent", the Applicant did not refer at all to the recognition by the Secretary-General, in paragraph 27 *(c)* of his Answer, quoted above, that there was no "legal impediment" to a re-appointment; he merely took issue with the assertion that "reasonable consideration" was given, submitting that "The Secretary-General, due to a misapprehension of the Applicant's contractual status, cannot have given every reasonable consideration to his candidature". Quoting the letter of 21 December 1983, the remarks of the spokesman for the Secretary-General, Mr. Sills, at the press briefing of 4 January 1984, the reported remarks of Mr. de Olivares on the same date, and the letter from Mr. Ruedas published in the *New York Times* on 25 January 1984 (see paragraph 16 above), the Applicant concluded:

> "If he was under the impression, as [the statements quoted] indicate, that any extension of the Applicant's appointment without gov-

ernment consent was beyond the scope of his discretionary powers, the Secretary-General cannot have given every reasonable consideration to a career appointment, in violation of the Applicant's rights.

If he was not under such impression, then the reasons given by the officials quoted above were specious."

In other words, the Applicant invited the Tribunal to find that the analysis of the legal position expressed in paragraph 27 *(c)* of the Secretary-General's Answer was not the view he, or his responsible officials, had held at the time that the "reasonable consideration" was supposed to have been given; and that the view which actually *was* held at that time, that the secondment did give rise to a "legal impediment" to any further employment, was incorrect, and was such that no "consideration" on that basis could be "reasonable" within the meaning of resolution 37/126.

*

32. A preliminary point arises from the wording of the first question put to the Court by the Committee, whereby the Court is asked specifically whether the Administrative Tribunal failed to exercise jurisdiction "by not responding to the question whether a legal impediment existed" to the Applicant's further employment. It has been suggested that the Committee intended the Court to take as established that the Tribunal did in fact not respond to that question, and to give its opinion solely on the legal question whether the Tribunal thus failed to exercise jurisdiction. This problem is one of interpretation, in the sense that it is appropriate to ascertain what the Committee intended to ask of the Court; but it is also one relating to the respective competences of the Committee and of the Court. In the view of the Court, it is in fact the latter consideration which prevails. Such a restrictive interpretation of the Committee's question as suggested above seems *prima facie* unlikely, and "It is not to be assumed" that the body requesting an opinion of the Court "would thus seek to fetter or hamper the Court in the discharge of its judicial functions" (*Certain Expenses of the United Nations, I.C.J. Reports 1962,* p. 157). Even if such had been the intention of the Committee, however, in the view of the Court it would nevertheless be bound to examine the question in all its aspects: "the Court must have full liberty to consider all relevant data available to it in forming an opinion on a question posed to it for an advisory opinion" *(ibid.).* The Court cannot therefore simply assume that the Tribunal did in fact fail to respond to the question of the alleged legal impediment, and consider solely whether by not doing so it failed to exercise jurisdiction.

33. The Tribunal's handling of this question is not entirely clear. The

Court however considers that this was because it was obliged to deal first with other contentions set out in the application made to it by the Applicant. The argument in that application is set out under the three main headings which the Tribunal listed at the beginning of its Judgement (see paragraph 17 above). One of these, mentioned second by the Applicant, was that he "had a legally and morally justifiable expectancy of continued United Nations employment, and a right to reasonable consideration for a career appointment". The Tribunal disregarded the question of moral justifiability and concentrated on the idea of legal justifiability of the expectancy. As a matter of logic, it was appropriate to deal first with this question of a "legal expectancy", since if the Applicant could show that he possessed such an expectancy, then in the words of the Tribunal in an earlier case "such legal expectancy created a corresponding obligation on the part of the Respondent to provide continuing employment to the Applicant within [the Organization]" (Judgement No. 142, *Bhattacharyya,* para. X).

34. It was in the context of its examination of the claim to a "legal expectancy" that the Tribunal found, contrary to the Applicant's first contention, that "during the period of his service with the United Nations the Applicant was under secondment" (para. XIII) and that the Respondent had concluded — correctly, in the view of the Tribunal — in the letter of 21 December 1983 that "since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible in the circumstances" (para. IV). The Tribunal noted that the Respondent relied on the provision in Staff Rule 104.12 *(b)* that "The fixed-term appointment does not carry any expectancy of renewal or of conversion to any other type of appointment", and found that "it does not appear that the Applicant has produced evidence of circumstances sufficient to establish that he had a legal expectancy of any type of further appointment following the end of his fixed-term appointment" (para. VI). The Tribunal found further that "In so far as [the Applicant] was on secondment from the USSR Government, none of the actions he took could bring about any legal expectancy of renewal of his appointment" (para. XII), the actions of the Applicant referred to being his resignation from the USSR posts, and his application for asylum in the United States. In what was clearly an allusion to the *Bhattacharyya* case, the Tribunal added:

> "If his fixed-term appointment were not based on secondment he could, in the jurisprudence of the Tribunal, have in certain circumstances expectation of one kind or another for an extension, but such a situation did not arise." (Para. XII.)

Before setting out its conclusion on the question of "legal expectancy", the Tribunal included a passage in its reasoning referring to the effect of a change of nationality effected by a staff-member, and quoting from an-

other of the Tribunal's Judgements (No. 326, *Fischman*). The Court will have occasion to consider this part of the Judgement later, in the context of the second of the two questions put to it.

35. It should be noted that it was only in the context of the Tribunal's examination of the question of the claim to a legal expectancy that it quoted (in para. V) the provision in Staff Rule 104.12 *(b)* set out above. The Court therefore does not consider that by doing so the Tribunal intended to suggest that this rule would prevent the "reasonable consideration" required by General Assembly resolution 37/126 from leading to the grant of, or "conversion to" a career appointment in the circumstances contemplated by that resolution. Resolution 37/126, part IV, paragraph 5, of which was intended specifically to be applied to staff members on fixed-term contracts, had to be interpreted together with Staff Rule 104.12 *(b)* since the latter remained in force. The resolution could not of course confer any expectancy, legal or otherwise, "of renewal or of conversion to any other type of appointment" as long as Rule 104.12 *(b)* stood; therefore "reasonable consideration" could not imply an expectancy involving any obligation on the part of the Secretary-General to appoint the Applicant. But on the other hand the existence of the Staff Rule obviously was no bar to the giving of "reasonable consideration" for a career appointment.

36. The Tribunal concluded "that during the period of his service with the United Nations the Applicant was under secondment", and that the consent of his national Government was required to modify that situation. With its conclusions on these points "in mind", the Tribunal turned to "the Applicant's plea that he was entitled to, but was denied, the right to receive 'every reasonable consideration' in terms of paragraph 5 of General Assembly resolution 37/126, IV" (para. XIV). After noting that the Secretary-General was bound by the terms of that resolution, and that "the Tribunal has to decide how and to what extent he carried out his obligations under it", the Tribunal continued:

> "The Respondent's letter dated 21 December 1983, addressed to the Applicant in reply to his counsel's letter of 13 December 1983, states that he has 'given careful consideration to the issues raised in your request for administrative review', and since these issues are particularly related to the provision of the General Assembly resolution in question, the plain and simple inference is that the Respondent had given the required (i.e., 'every reasonable') consideration for a career appointment for the Applicant." (Para. XVI.)

37. The Tribunal then dealt with the issue of whether or not the appropriate form for such consideration was reference of the matter to the Appointment and Promotion Board; this part of the Judgement will be examined in greater detail in the context of the second question put to the Court (paragraphs 67 ff. below). After noting that resolution 37/126 "is silent on who should give 'every reasonable consideration' and by what procedure", it concluded that

> "the existing procedure of offering a probationary appointment to a candidate remains applicable, and that in the absence of such an appointment it is left to the Respondent to decide how 'every reasonable consideration' for a career appointment should be given to a staff member under General Assembly resolution 37/126, IV, paragraph 5" (para. XVIII).

Its conclusion on the question of "reasonable consideration" is as follows:

> "In the present case, the Respondent had the sole authority to decide what constituted 'reasonable consideration' and whether the Applicant could be given a probationary appointment. He apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment. He thus exercised his discretion properly, but he should have stated explicitly before 26 December 1983 that he had given 'every reasonable consideration' to the Applicant's career appointment." (Para. XVIII.)

38. It will thus be apparent from this analysis of the Judgement why the Tribunal did not deal first of all with the first of the Applicant's contentions, namely the absence of any "legal impediment". It did not take the view either that there was or that there was not an absolute impediment, barring further employment; rather, it found there could be no *legal* expectancy (i.e., that there was in this respect a "legal impediment"), but there was no such impediment to "reasonable consideration" being given to the grant of a career appointment. To put the matter another way, there was, in the view of the Tribunal, no "legal impediment" to the grant of a career appointment if the Secretary-General in the exercise of his discretion saw fit to offer one, and the Secretary-General was bound by resolution 37/126 to give "every reasonable consideration" to the possibility. The Tribunal considered that the fact of secondment excluded (and did as it were constitute a legal impediment to) a "legal expectancy" of the Applicant's further employment, which would have entailed an obligation on the Secretary-General, not merely to give "every reasonable

consideration" but actually to "provide continuing employment", on the basis of the *Bhattacharyya* precedent.

39. Much of the criticism (e.g., in the written statement of Italy, and the comments of the United States) addressed to the Judgement of the Tribunal is in fact based, explicitly or implicitly, on the idea that the existence or otherwise of a "legal impediment" to further employment — any further employment — of the Applicant by the United Nations constituted in some sense a preliminary question which the Tribunal was obliged, as a matter of procedure or as a matter of logic, to answer before going on to other questions. This however would only be so if the legal impediment, if it existed at all, would be absolute: i.e., if the choice was between holding that there was no legal impediment at all, or that there was such an impediment and that it excluded a staff member from all further United Nations employment. On the view of the matter which emerges from the Tribunal's Judgement, however, it was clearly more logical to deal with the question of legal impediment as an aspect of each of the two questions of "legal expectancy" and "reasonable consideration".

40. The "dissatisfaction" expressed by the Tribunal (para. XX) at the Secretary-General's "failure to record sufficiently early and in specific terms the fact that he had given the question of the Applicant's career appointment 'every reasonable consideration' as enjoined by the General Assembly resolution" is also significant, since it throws light on the Tribunal's interpretation of the letter of 21 December 1983 (set out in paragraph 14 above). The Applicant argues that in the mind of the writer of that letter, "he was ineligible for 'every reasonable consideration' without an expectancy of renewal" and that the letter indicates that the writer "believed a secondment contract bestows a right on a government to veto further employment under any other form of contract and thus taint the seconded employee in perpetuity". This was however not the way in which the Tribunal interpreted that letter. While it considered that the Secretary-General had exercised his discretion properly, it found that "he should have stated explicitly before 26 December 1983 that he had given 'every reasonable consideration', to the Applicant's career appointment" (para. XVIII). If the Tribunal had read the letter of 21 December 1983 as signifying that, in the view of the Secretary-General, the Applicant was ineligible for "every reasonable consideration", it could hardly have criticized the Secretary-General for failing to say that he had given such consideration.

41. This criticism expressed by the Tribunal cannot however have any further impact on the Court's opinion regarding the answer to the ques-

tion put to it. The Tribunal, of course, also interpreted the letter to mean that the Respondent "apparently decided, in the background of secondment of the Applicant during the period of one year from 27 December 1982 to 26 December 1983, that the Applicant could not be given a probationary appointment" (para. XVIII). But for the purposes of this Advisory Opinion, it is of little importance what were the reasons underlying the Respondent's decision since the Tribunal was satisfied that the Respondent had given every reasonable consideration to the Applicant's case. The Tribunal held that the Secretary-General did not fail to apply the resolution, but was only blameworthy for failing to inform the Applicant at the proper time of exactly what he had done.

42. The first question put to the Court in the present proceedings is whether the Tribunal failed to exercise jurisdiction "by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant". However, this was not the real complaint of the Applicant against the Tribunal: the objection of the Applicant was that, in examining the question of "reasonable consideration" it paid no, or insufficient, attention to the indications that the Secretary-General had thought that there was a legal impediment to any further employment, so that his "reasonable consideration" either never took place or was vitiated by a basic assumption later conceded to be incorrect. Thus in his application to the Committee, the Applicant explained:

> "The Applicant therefore requested the Tribunal to determine whether any legal impediment existed to his further United Nations employment after the expiry of his contract on 26 December 1983. *In other words,* did the Respondent err in his belief that having once served under a contract labelled 'secondment', the Applicant was thereby permanently disabled from further United Nations service under any other form of contract or appointment. It was well within the Tribunal's jurisdiction to make such a determination.
>
> The Majority Judgement of the Tribunal completely omits this threshold question from the legal issues to which it addresses itself." (Emphasis added.)

The expression "In other words" is used to imply that one and the same question is being stated in two different forms; but it appears to the Court that there are here two related but separate questions. The first question is whether the Tribunal failed to deal with the legal question of the existence or otherwise of a legal impediment to further employment, and it is this which is alleged to be a failure to exercise jurisdiction. The second question is whether the Tribunal failed to enquire into the belief of the Secre-

tary-General as to the existence of a legal impediment, and the possible impact of that belief on his ability to give "every reasonable consideration" to a career appointment.

43. The Court would recall that in appropriate cases it is entitled to look behind the strict terms of the question as presented to it. In its Advisory Opinion concerning the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt,* the Court, following the line of its earlier jurisprudence, observed that

> "if it is to remain faithful to the requirements of its judicial character in the exercise of its advisory jurisdiction, it must ascertain what are the legal questions really in issue in questions formulated in a request" (*I.C.J. Reports 1980,* p. 88, para. 35).

The Court in that case, as to some extent also in other cases, found it necessary to reformulate the question submitted for advisory opinion in order to deal with "the questions really in issue". As the Court made clear in a later case, such reformulation must remain within the limits on the powers of the requesting body: the Court cannot, by reformulating the question put, respond to a question which that body could not have submitted, for example because it was not a legal question "arising within the scope of the activities" of the requesting body. In the case concerning the *Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal,* where the Court had occasion to reformulate the question put by the Committee, it observed that its jurisdiction under Article 11 of the Tribunal's Statute is limited to the four specific grounds of objection there specified and recalled its previous dictum that

> "Consequently, the Committee is authorized to request, and the Court to give, an advisory opinion only on legal questions which may properly be considered as falling within the terms of one or more of those four 'grounds'." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* p. 184, para. 41.)

44. In considering what questions are "really in issue", the Court must of course have regard also to the intentions of the requesting body as they emerge from such records as may be available of the discussions leading up to the decision to request an opinion. This was the course which the Court followed in 1980 in its Advisory Opinion on the *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt* (*I.C.J. Reports 1980,* pp. 85 to 88, paras. 28 to 34), in order to define "the true

legal question submitted to the Court" (*ibid.*, p. 89, para. 36). In the present case, as noted above (paragraph 22), application was made to the Committee on all four of the grounds set out in Article 11 of the Statute of the Tribunal; and the Committee took a formal decision on each of those grounds as a separate question. It decided that there was no substantial basis for the Application on the ground either that the Tribunal had exceeded its jurisdiction, or that it had committed a fundamental error in procedure which had occasioned a failure of justice (A/AC.86/XXIV/PV.5, pp. 2-3). The Court accordingly concludes that it is not open to it to enter into these grounds, by reformulating the question put to it or otherwise, because it cannot be said that it was the intention or wish of the Committee to have an opinion of the Court on these points.

45. On the other hand, it was the intention of the Committee to have the opinion of the Court on the question whether the Administrative Tribunal failed to exercise jurisdiction vested in it, one of the four grounds of objection contemplated by Article 11 of the Tribunal's Statute. Without going beyond the limits of this ground, it is open to the Court to redefine the point on which it is asserted that the Tribunal failed to exercise its jurisdiction, if this will enable it to give guidance on "the legal questions really in issue". It thus seems to the Court essential to examine whether the Tribunal addressed its mind to both the questions defined at the end of the paragraph 42 of this Opinion.

46. It is appropriate at this point to examine more closely what is meant by the expression "failed to exercise jurisdiction vested in it". The Court has already given its attention to this point in its advisory opinion on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal* (*I.C.J. Reports 1973*, p. 166). In that opinion the Court defined its role as follows:

> "In the Court's view, therefore, this ground of challenge covers situations where the Tribunal has either consciously or inadvertently omitted to exercise jurisdictional powers vested in it and relevant for its decision of the case or of a particular material issue in the case." (*Loc. cit.*, p. 189, para. 51.)

It also observed that:

> "Clearly, in appreciating whether or not the Tribunal has failed to exercise relevant jurisdictional powers, the Court must have regard to the substance of the matter and not merely to the form. Consequently, the mere fact that the Tribunal has purported to exercise its powers with respect to any particular material issue will not be enough: it must in fact have applied them to the determination of the issue." (*Loc. cit.*, pp. 189-190, para. 51.)

It was however more important for the Court in that case to ascertain

whether the particular plea had to be mentioned expressly, or whether it was sufficient that it had been effectively dealt with, in the course of disposal of another argument or otherwise. The Court said:

> "It can hardly be denied ... that in this particular case the structure adopted [by the Tribunal's Judgement] created the difficulty that some of the applicant's pleas, though covered by the general consideration of the basic questions of non-observance of regulations, of rescission and of damage, were not expressly mentioned or specifically dealt with in the paragraphs in which the Tribunal developed its reasoning and analysed what it deemed to be the pertinent issues.
>
> To find that such a difficulty has arisen in the present case does not signify that, as contended by the applicant, there has been on the part of the Tribunal a failure to exercise its jurisdiction with respect to those pleas which were not expressly mentioned nor specifically dealt with in the substantive part of the Judgement. The test of whether there has been a failure to exercise jurisdiction with respect to a certain submission cannot be the purely formal one of verifying if a particular plea is mentioned *eo nomine* in the substantive part of a judgment: the test must be the real one of whether the Tribunal addressed its mind to the matters on which a plea was based, and drew its own conclusions therefrom as to the obligations violated by the respondent and as to the compensation to be awarded therefor. Such an approach is particularly requisite in a case such as the present one, in which the Tribunal was confronted with a series of claims for compensation or measures of relief which to a considerable extent duplicated or at least substantially overlapped each other and which derived from the same act of the respondent: ..." (*I.C.J. Reports 1973*, p. 193, paras. 55-56.)

47. Similarly in the present case, the Judgement of the Tribunal does not state specifically that it was the view of the Tribunal that, while a fixed-term appointment on secondment cannot be renewed or extended without the consent of the seconding Government, there is no automatic bar to the holder of such appointment being given a career appointment on its expiration. Nor does the Tribunal ever specifically reject or uphold the contention that the Secretary-General, because he was convinced that there was such a bar, could not have given "every reasonable consideration" to the Applicant's application for appointment. If however it can be established with sufficient certainty that "the Tribunal addressed its mind" to the matters on which these contentions were based, "and drew its own conclusions therefrom", then, whatever view be taken of the conclusion reached by the Tribunal on the evidence available, there was no failure to exercise jurisdiction in that respect.

48. Clearly the first step to be taken in order to establish whether the Tribunal addressed its mind to a particular point is to examine the text of its Judgement; but it may also be appropriate to consult separate or dissenting opinions appended to it. So far as the Judgement itself is concerned, the Court has already indicated why, in its view, the Judgement did not take up specifically, and as a preliminary point, the question of the existence of a "legal impediment" (paragraphs 36 and 37 above); the Court does not consider that this signifies that the Tribunal failed to address its mind to that question. Attention should however also be drawn to the passage from paragraph XVIII of the Judgement quoted in paragraph 36 above, in which the Tribunal referred to the Respondent's "sole authority to decide what constituted 'reasonable consideration' and whether the Applicant could be given a probationary appointment", and to the Respondent's proper exercise of his "discretion". A discretion certainly does not authorize, as the Tribunal rightly emphasized in its Judgement No. 54 *(Mauch)*, an "arbitrary or capricious exercise of the power . . ., nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved". The fact remains, however, that in the view of the Tribunal, the Secretary-General was not obliged by binding rules to take a particular action and to take it in a particular way: in other words, the Secretary-General could take the decision to offer the Applicant a career appointment, but was not bound to do so. It follows from this that the Tribunal was clearly deciding, though by implication, that there was no absolute legal impediment, in the sense of an impediment to any further employment, which the Applicant thought had inspired the decision not to give him a career appointment. In doing so the Tribunal therefore responded to the Applicant's plea that it should be adjudged that there was no legal impediment to the continuation of his service.

49. In order to interpret or elucidate a judgement it is both permissible and advisable to take into account any dissenting or other opinions appended to the judgement. Declarations or opinions drafted by members of a tribunal at the time of a decision, and appended thereto, may contribute to the clarification of the decision. Accordingly the wise practice of the Tribunal, following the example of the Court itself, has been not only to permit such expressions of opinion but to publish them appended to the judgement. It is therefore proper in the present case, in order better to grasp the position of the Tribunal on the point now under examination, to refer not only to the Judgement itself, but also to the "Statement" of Mr. Endre Ustor and the dissenting opinion of Mr. Arnold Kean.

50. President Ustor, who voted in favour of the Judgement, considered that the Applicant was "not eligible for consideration for a career appointment" because the fact of secondment "precludes not only the extension of a seconded fixed-term appointment but also its conversion to any other

type of appointment without the consent of the Government concerned". Vice-President Kean took a different view:

> "Far from there being a generally accepted rule that in the absence of the government's consent a seconded staff member must always be refused, *in limine,* a career appointment at the end of his period of secondment, this paragraph [of an International Civil Service Commission Report] makes it quite clear that the government's view was not to be decisive but was to be fully taken into account together with all other relevant factors."

It is evident that if the remaining member of the Tribunal, who did not make any separate statement of his views, had shared the view of Mr. Ustor, the Judgement would have been drafted to convey the view of the two-member majority that the Applicant's secondment was an absolute bar to his obtaining a career appointment, so that the question of "reasonable consideration" would not arise. The Judgement of the Tribunal thus occupied the middle ground between Mr. Ustor and Mr. Kean, differing from the individual view of the former to the extent solely that it held that there was no "legal impediment" barring a career appointment; and differing from the latter in holding that "every reasonable consideration" had in fact been given. Mr. Ustor did not express any disagreement on this second point; he thought that "reasonable consideration" need not have been given, in view of the factor of secondment, but that on the facts it was given.

51. It should however be observed that in any event the reply to be given by the Court to the first question put to it by the Committee does not depend on the correct interpretation of Mr. Ustor's meaning. The Court is asked whether the Tribunal failed to exercise jurisdiction on a particular point; the question is not whether the conclusion of the Tribunal on the point was correct or not, but whether it addressed its mind to it. The Court does not have to choose between the conclusion of the Tribunal and that of an individual member of it, though it may find significance in the extent to which that member shared the conclusion of his colleagues. It may even be said that the greater the measure of revealed disagreement within the Tribunal on the point, the more certain it is that it was considered and debated, not overlooked or passed over.

52. The possibility that the Secretary-General, in considering the Applicant's position, was under a misapprehension as to the effect of secondment as a "legal impediment" to further appointment was dealt with, in slightly different language, in the dissenting opinion of Vice-President Kean. The Tribunal decided that the Applicant had no "legal expec-

tancy" of renewal of his fixed-term appointment. Mr. Kean examined the letter of 21 December 1983, and interpreted it as follows:

> "It was evidently the belief of the writer of the letter that, if the Applicant had no expectancy of renewal, there was no possibility of his receiving a career appointment in pursuance of the General Assembly resolution",

i.e., that the lack of legal "expectancy of renewal", due to his seconded status, constituted a "legal impediment". Since, in Mr. Kean's view,

> "That resolution is, however, not conditional upon the staff member having an expectancy of further employment, which is therefore in no way a prerequisite of a career appointment",

he concluded that "the Respondent's decision was flawed by fundamental mistakes of fact or law and requires to be set aside . . .".

53. The deliberations of the Administrative Tribunal in the case under consideration were held "from 11 May to 8 June 1984". Taking account of the usual practices of judicial bodies composed of several members for the exchange of views during the deliberation process, it seems to the Court impossible to conclude that the Tribunal did not address its mind to the issues which were specifically mentioned by President Ustor and Vice-President Kean as the grounds for their disagreement with parts of the Judgement. Since that disagreement persisted at the moment the Judgement was voted upon, the Tribunal as a body, represented by the majority which voted in favour, must also have drawn its conclusions on these issues, even if those conclusions were not spelled out as clearly in the Judgement as they ought to have been.

54. Before continuing, the Court should however consider what significance, if any, should be attached to the interpretation of the Tribunal's Judgement advanced by the Secretary-General, in his comments on the Applicant's statement to the Committee (A/AC.86/R.118), and in his written statement submitted to the Court in these proceedings. Clearly it is for the Court to form its own view as to the proper interpretation of the Judgement; yet the Secretary-General, both as a party to the case before the Tribunal, and as chief executive officer of the Organization, is well placed to express views on the matter. In his comments on the Applicant's written statement to the Committee, the Secretary-General contended that:

> "it is clear that the Tribunal did consider the Applicant's argument favourably as it held that the Applicant was entitled to reasonable consideration for a career appointment and that he was in fact given such consideration (Judgement, para. XVIII).
>
> . . . . . .
>
> The Respondent submits that it is therefore clear that the Tribunal

> properly exercised its jurisdiction and competence under article 2 of its statute when it heard and passed judgement on the application in the manner which is reflected in its judgement in this case. It did not refuse to exercise its jurisdiction . . ."

However in his written statement submitted to the Court, the Secretary-General argues, first, that the question of the existence of a legal impediment was not in issue between the parties; secondly that the Tribunal does not have jurisdiction to advise on or answer abstract questions; and thirdly that an answer to the question was not required in logic or in law. If these arguments imply an assumption by the Secretary-General that the Tribunal did not in fact deal with the point, this is not the same thing as saying that the Tribunal failed to exercise its jurisdiction in that respect. On the contrary, the view of the Secretary-General is that there was no such failure to exercise jurisdiction, precisely for the three reasons just mentioned. The Court does not however find it possible to endorse the interpretation of the Judgement submitted to it by the Secretary-General: it sees no indication that the Judgement left open the question of "legal impediment" as being "not in issue between the parties". The Court's interpretation of the Judgement in this respect has been explained above in paragraphs 38 to 40 of the present Opinion.

55. The question whether "every reasonable consideration" was in fact given was in any event one for the Tribunal to decide, and one which it did decide, in the affirmative. The Court recalls what it stated in an earlier advisory opinion on an application for review:

> "Under Article 11 of the Statute of the Tribunal, . . . the task of the Court is not to retry the case but to give its opinion on the questions submitted to it concerning the objections lodged against the Judgement. The Court is not therefore entitled to substitute its own opinion for that of the Tribunal on the merits of the case adjudicated by the Tribunal. Its role is to determine if the circumstances of the case, whether they relate to merits or procedure, show that any objection made to the Judgement on one of the grounds mentioned in Article 11 is well founded.
>
> . . . . . .
>
> under Article 11 of the Statute of the United Nations Administrative Tribunal a challenge to a decision for alleged failure to exercise jurisdiction or fundamental error in procedure cannot properly be transformed into a proceeding against the substance of the decision." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973,* pp. 187-188, paras. 47-48.)

The Court's conclusion on the contention that the Secretary-General did not give "reasonable consideration" under resolution 37/126 because he

believed there existed a "legal impediment" must therefore be, in the words used in respect of one of the contentions advanced in 1973:

> "In the circumstances the Court does not think that the contention that the Tribunal failed to exercise jurisdiction vested in it . . . is capable of being sustained. The Tribunal manifestly addressed its mind to the question and exercised its jurisdiction by deciding against the applicant's claim. Therefore this contention turns out to concern not a failure by the Tribunal to exercise its jurisdiction but an appeal against its decision on the merits." (*Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal, I.C.J. Reports 1973*, p. 201, para. 70.)

*

56. The Applicant, in his statement of views transmitted to the Court by the Secretary-General, has gone beyond the terms of the question submitted to the Court, which is whether the Tribunal failed to exercise its jurisdiction on one specific point, and has contended that "the Tribunal failed to 'apply its mind' to the determination of his rights and contractual status, and the Secretary-General's obligations towards him". It has also been suggested, in a legal opinion annexed to the Applicant's comments on the written statements before the Court, that the Court may "address itself to the much more general question as to whether the Tribunal has not also omitted to exercise jurisdiction vested in it for reasons other than those adduced by the Committee". As the Court has observed, it is necessary to ascertain "the legal questions really in issue in questions formulated in a request" (paragraphs 43 and 45 above); that is to say the questions "in issue" for the body requesting the opinion. It is not open to the Court to examine every question which was "in issue" before the Tribunal, to see whether the Tribunal exercised its jurisdiction in that respect. The matters referred to in the Applicant's arguments, and in the legal opinion mentioned above, do not appear to have been "in issue" before the Committee: they are much wider than the question defined in the application made to the Committee (A/AC.86/R.117, paras. 6-16). Furthermore, they prove to be directed to showing that the Judgement of the Tribunal was inconsistent or simply wrong. The Applicant asserts repeatedly that "consideration for a career appointment could not have been reasonable" if this or that circumstance was present, as he contends it was. The fact of the matter is however that the Tribunal found that the consideration given was reasonable, and to accuse the Tribunal of being wrong in that decision is not to convict it of failure to exercise its jurisdiction, but rather to complain of the way in which it did exercise it.

*

57. It has been contended by the United States that the Tribunal's finding that "reasonable consideration" had been given to the Applicant's case was no more than an inference from an unsupported assertion made by the Secretary-General in the letter of 21 December 1983. The conclusion which the United States draws from this is however not that there was a failure by the Tribunal to exercise jurisdiction vested in it: it is that the Tribunal's alleged failure "could be construed to be, in the words of Article 11 of the Tribunal's Statute, '. . . a fundamental error in procedure which has occasioned a failure of justice . . .'". The opinion of the Court has however not been requested on the question whether the Judgement of the Tribunal may be defective on this ground.

* *

58. To sum up, the Court, after due analysis of the text of Judgement No. 333 of the Administrative Tribunal considers that the Tribunal did not fail to exercise jurisdiction vested in it "by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his contract on 26 December 1983". Accordingly, the answer to the first question put to it in this case by the Committee must be in the negative.

* * *

59. The Court now turns to the second of the two questions which have been submitted to it for advisory opinion by the Committee, namely:

> "Did the United Nations Administrative Tribunal, in the same Judgement No. 333, err on questions of law relating to provisions of the Charter of the United Nations?"

In paragraph 27 above the Court has recalled the extent of its powers when an opinion of the Court is requested on the basis of an objection that the Tribunal had "erred on a question of law relating to the provisions of the Charter of the United Nations". With regard however to the scope of the enquiry to be conducted by the Court in order to decide upon an objection made on the ground now under examination it may be recalled that in its 1982 Advisory Opinion the Court came to the following conclusion:

> "In any event, the Court clearly could not decide whether a judgement about the interpretation of Staff Regulations or Staff Rules has erred on a question of law relating to the provisions of the Charter, without looking at that judgement to see what the Tribunal did decide. While to that extent the Court has therefore to examine the Tribunal's decision on the merits, it is not the business of the Court, after making that examination, itself to get involved in the question of the proper interpretation of the Staff Regulations and Staff Rules, as

such, further than is strictly necessary in order to judge whether the interpretation adopted by the Tribunal is in contradiction with the requirements of the provisions of the Charter of the United Nations." (*Application for Review of Judgement No. 273 of the United Nations Administrative Tribunal, I.C.J. Reports 1982,* p. 358, para. 64.)

60. The Court also emphasized that:

"it would be quite mistaken to suppose that, because the law applied by the Tribunal, or indeed the law applied by any organ of the United Nations, derives its ultimate validity from the Charter, the ground of Article 11 now under examination means that an objection to any interpretation by the Tribunal of staff rules and regulations is a matter for an advisory opinion of the Court" (*ibid.*, p. 358, para. 65).

It declined, in short, to interpret the words "error on a question of law relating to the provisions of the Charter" as meaning the same as "error of law" (*ibid.*, pp. 358-359) and continued:

"But if the interpretation, in general, of Staff Regulations and Rules is not the business of the Court, it is, as already noted, very much the business of this Court to judge whether there is a contradiction between a particular interpretation or application of Staff Regulations and Rules by the Tribunal and any of the provisions of the Charter . . ." (*Ibid.*, p. 359, para. 66.)

61. The Court would only add to this statement that it is also open to the Court to judge whether there is any contradiction between the Tribunal's interpretation of any other relevant texts, such as, in this case, the provisions of General Assembly resolution 37/126, and any of the provisions of the Charter. It would also note that, according to the Tribunal's own jurisprudence on the subject of its own competence,

"Article 2.1 of the Statute of the Tribunal refers, in defining the competence of the Tribunal, to applications alleging non-observance of contracts of employment of staff members of the Secretariat of the United Nations, or of their terms of appointment. The words 'contracts' and 'terms of appointment' are stated to include all pertinent regulations and rules in force at the time, but this phraseology cannot be assumed to exclude the possible application of any other sources of law, particularly the Charter, which is indeed the constitution of the United Nations and contains certain provisions relating to staff members . . ." (Judgement No. 162 *(Mullan).*)

* *

62. In the statement of his views transmitted to the Court the Applicant has expressed his objections to the Judgement of the Tribunal in terms of "principles" of the Charter rather than as breaches of specific provisions; he contends that "a failure [by the Tribunal] to reconcile its conclusions with principles of the Charter constitutes no less of an error of law than an erroneous interpretation of a Charter provision". In the view of the Court, however, there was good reason for the wording chosen for the relevant passage in Article 11 of the Tribunal's Statute, referring to an error on "a question of law relating to *the provisions of* the Charter". A claim of error of law in a Judgement of the Tribunal based on alleged lack of respect for principles, without reference to any specific texts, might well serve as a cover for a generalized attack on the merits of the Tribunal's decision, and an invitation to the Court to "retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal" (*I.C.J. Reports 1982*, p. 356, para. 58), which the Court has declared is not its proper role. At all events, in his Application to the Committee (A/AC.86/R.117) and in his comments on the written statements, the Applicant has expressed his objections more precisely in terms of specified articles of the Charter, and it is by reference to these texts that the Court will examine whether the objection of error of law relating to the provisions of the Charter is or is not well founded.

63. As noted above, the Court considers that it is clear from the Judgement that for the Tribunal the Secretary-General did give "every reasonable consideration" to the possibility of a career appointment for the Applicant, and thus complied with the requirements of General Assembly resolution 37/126. In his comments on the written statements submitted to the Court, the Applicant "submits that no such finding of fact was made . . . Even if it were, whether or not such consideration was 'reasonable' is a legal determination and therefore reviewable." The Secretary-General, on the other hand, argued in his written statement that the question whether or not "reasonable consideration" had been given was "not a question of law relating to Article 101, paragraph 3, of the Charter".

64. It is essential to keep clearly in mind the distinction between the Secretary-General's discharge of his duties and the performance by the Tribunal of its judicial functions, even though the same considerations may have had to be taken into account for both. It was the duty of the Secretary-General to give "every reasonable consideration" to the Applicant as a candidate for a career appointment; if he failed to do so, he failed to comply with General Assembly resolution 37/126. In order to do so, or in the course of doing so, he had to weigh up all relevant considerations, including the fact of the Applicant's secondment, in a reasonable manner in order to arrive at a conclusion. The Tribunal, when seised of the question, did not have to follow the Secretary-General through this process,

checking every step of the sequence. It had to decide whether there had been "non-observance" of any of the relevant texts, including General Assembly resolution 37/126; it had therefore to determine whether "every reasonable consideration" had been given. It clearly had the power and the duty to re-examine the question of secondment as a legal impediment, to satisfy itself that the Secretary-General had not committed an error of law on the point, and this it did. It had then to assess the question of reasonableness; but this did not, in the Court's view, involve the Tribunal in an attempt to make its own decision as to whether the Applicant should be given a career appointment.

65. Once the Tribunal had found that the Applicant did not possess a "legal expectancy" of further employment, involving a corresponding obligation on the United Nations to "provide continuing employment" (see paragraphs 33 and 34 above), his entitlement was only to receive "every reasonable consideration". Such consideration must by definition involve latitude for the exercise of the Secretary-General's discretion; and the Tribunal in fact found that "the Respondent had the sole authority to decide . . . whether the Applicant could be given a probationary appointment" and that he "exercised his discretion properly" (para. XVIII). The consistent jurisprudence of the Tribunal itself is to the effect that where the Secretary-General has been invested with discretionary powers, the Tribunal will in principle not enquire into their exercise, provided however that "Such discretionary powers must be exercised without improper motive so that there shall be no misuse of power, since any such misuse of power would call for the rescinding of the decision" (Judgement No. 50 *(Brown)*). Similarly, the Tribunal recalled in the Judgement now under examination its finding in an earlier case that

> "While the measure of power here was intended to be left completely within the discretion of the Secretary-General, this would not authorize an arbitrary or capricious exercise of the power of termination, nor the assignment of specious or untruthful reasons for the action taken, such as would connote a lack of good faith or due consideration for the rights of the staff member involved." (Judgement No. 54 *(Mauch)*.)

66. Essentially the complaint which the Applicant makes of the Tribunal's Judgement is not so much that the Tribunal itself made errors of law relating to the provisions of the Charter as that the Secretary-General, in taking his decision as to continued employment for the Applicant, did not respect certain provisions of the Charter, and the Administrative Tribunal failed so to find. Furthermore, if an objection to a judgement of the Tribunal is to be sustained on the grounds of error of law relating to the provi-

sions of the Charter, the Tribunal must have been presented with an issue for decision on which such an error could be made. It is therefore appropriate to keep in mind what was the case as presented to the Tribunal, in order to appreciate what it was that the Tribunal was asked to decide.

* *

67. The first provision of the Charter in respect of which the Applicant contends that the Tribunal made an error of law is Article 101, paragraph 1, thereof, which provides that "The staff [of the Secretariat] shall be appointed by the Secretary-General under regulations established by the General Assembly". The passage criticized in the Judgement in this respect arises out of the question whether any role ought to have been played by the Appointment and Promotion Board. In his "Observations on the Answer of the Respondent" submitted to the Tribunal, the Applicant, under the heading "Reasonable consideration for a career appointment was erroneously denied", devotes three paragraphs to the contention that "The Respondent prevented consideration by the Appointment and Promotion Board". According to the material before the Tribunal, even though the Applicant had been in the service of the United Nations for a number of years, his first career appointment would, in accordance with established rules and practices, have been a probationary appointment (see United Nations Staff Rule 104.12 *(a)* and 104.13 *(a)* (i)). By resolution 38/232 (VI, para. 5) the General Assembly had on 20 December 1983 recommended that following five years' satisfactory service on fixed-term contracts, the requirement for a probationary appointment should be dispensed with; but the Tribunal held that "until the Respondent had accepted" that recommendation, "the existing procedure of offering a probationary appointment to a candidate remains applicable" (para. XVIII). The customary procedure leading to the offer of a probationary appointment was that a recommendation would be made by the substantive department where the appointment was to be held, and this would be considered by the administrative service, the Office of Personnel Services. The resulting proposal would be then considered by the Appointment and Promotion Board. It may also be noted in passing that the Applicant in his letter to the Secretary-General of 13 December 1983, relied on United Nations Staff Rule 104.14 *(a)* (ii), which requires the Appointment and Promotion Board, in filling vacancies, normally to "give preference, where qualifications are equal, to staff members already in the Secretariat". However, the Applicant complained that while the substantive department in which he had worked clearly had the intention of proposing his "continued appointment", the administrative service never gave consideration to a proposal to that effect because "upon instruction by the Office of the Secretary-General" it informed the Applicant on 23 November 1983 that "it is not the intention of the

Organization to extend your fixed-term appointment beyond its expiration date".

68. It was contended by the Applicant before the Tribunal that the possibility of his being given a career appointment was never considered by the Appointment and Promotion Board because, as a result of the action taken by the Office of the Secretary-General, no proposal ever reached that Board. He presented this as an element of the denial of "reasonable consideration" which he was alleging. The Tribunal's conclusions on this appear in paragraphs XVI to XVIII of the Judgement: in effect, it rejected the argument that a right to receive "reasonable consideration" entailed a right to be considered by the Appointment and Promotion Board: General Assembly resolution 37/126, while binding on the Secretary-General, laid down no special procedure, and, as noted above, the procedure recommended by General Assembly resolution 38/232 had not yet been implemented. Accordingly, in the Tribunal's view,

> "the existing procedure of offering a probationary appointment to a candidate remains applicable, and . . . in the absence of such an appointment it is left to the Respondent to decide how 'every reasonable consideration' for a career appointment should be given to a staff member under General Assembly resolution 37/126, IV, paragraph 5. In the present case, the Respondent had the sole authority to decide what constituted 'reasonable consideration' and whether the Applicant could be given a probationary appointment." (Para. XVIII.)

69. On the basis of this part of the Judgement, the Applicant claims that "a question of law relating to Article 101, paragraph 1, of the Charter" arises. He observes that "The Secretary-General's powers of appointment are limited, under Article 101 (1) of the Charter, by the obligation to carry out the 'regulations established by the General Assembly'", and complains that

> "The Tribunal made no attempt to apply its own or any other legal standard of reasonableness, nor to set any limits on the Secretary-General's discretion, limits which it had itself articulated in the past (e.g., Judgement No. 54, *Mauch*) and which the Court recognized in *Fasla* as a fundamental part of the Tribunal's role (*I.C.J. Reports 1973*, at p. 205). The Tribunal's judgement, if allowed to stand, permits the Respondent to act as though General Assembly Resolution

> 37/126, Section IV, paragraph 5, had never been passed. Indeed it endows him with even greater discretionary powers than he had before the Resolution, when the normal mechanisms and procedures for appointment applied."

70. It does not however appear to the Court that the Judgement of the Tribunal, properly understood, raises any question of law relating to Article 101, paragraph 1. In the passage in paragraph XVIII of its Judgement quoted at the end of paragraph 68 above, the Tribunal was not examining the measure of substantive discretion left to the Secretary-General by resolution 37/126, in the sense of the limits on that discretion set by the jurisprudence of such Administrative Tribunal Judgements as No. 50 *(Brown)* and No. 54 *(Mauch).* It was considering whether any specified *procedure* had to be followed to ensure "reasonable consideration", and concluded that that was not so. The Court does not, in this context, read the phrase "In the present case, the Respondent had the sole authority to decide what constituted 'reasonable consideration'" as meaning that the only test of reasonableness was whether the Secretary-General thought his conclusion was reasonable, but as meaning that it was for the Secretary-General to decide what *process* constituted "reasonable consideration" — whether it be consideration by the Secretary-General himself with the advice of his senior officials, or by the Appointment and Promotion Board, or by whatever other system might commend itself. This interpretation was in fact presented by the Applicant himself in his statement of views:

> "What the Judgement appears to be saying is that only in the case of a probationary appointment need a candidate be referred to the Appointment and Promotion machinery for consideration. For any other type of appointment the Secretary-General has sole authority to employ whatever method of consideration he chooses."

This procedural question was one of the issues placed before the Tribunal by the Applicant, through his complaint that the Appointment and Promotion Board had not been consulted; whereas the Secretary-General had never claimed before the Tribunal that he possessed an unlimited and unverifiable discretion to refuse an appointment on whatever ground he chose to classify as "reasonable". On the contrary, in his Answer before the Tribunal, he stated that

> "Applicant's re-appointment was a matter to be decided upon by the Secretary-General in the exercise of his authority and respon-

> sibility under the Charter and the Staff Regulations after consideration of all the circumstances in the case",

and in effect invited the Tribunal to say that he had properly exercised this responsibility. He did not assert that the Tribunal had no power to examine his actions on the ground that he had "sole authority" to decide what was "reasonable". Nor can the Court conclude, in the light of the Tribunal's quotation of its own jurisprudence, that the Tribunal went beyond the confines of the case before it to assert the existence of such an unfettered discretion.

71. Furthermore, it is difficult to follow the Applicant's contention that "The Tribunal made no attempt to apply its own or any other legal standard of reasonableness, nor to set any limits on the Secretary-General's discretion . . .", when the Tribunal in fact quoted the passage from its own Judgement No. 54 *(Mauch)* referring to the limitation of the exercise of the Secretary-General's discretion, and made a specific finding that "the Respondent's action in the exercise of his discretion cannot be impugned on any of the grounds" stated in that Judgement (para. XIX).

72. However while it is true that the Secretary-General made no claim to an unfettered discretion, and the Tribunal nowhere stated that he possessed one, the Tribunal did in effect accept as sufficient a statement by the Secretary-General that the "reasonable consideration" required by resolution 37/126 had been given, and did not require him to furnish any details of when and how it was given, let alone calling for evidence to that effect. The view might therefore be advanced that the Tribunal did not properly discharge its function of judicial review of administrative action, since the practical effect of an unquestioning acceptance of the Secretary-General's assertion that he had given "every reasonable consideration" would, it is suggested, be that he would enjoy such an unfettered discretion. It is however necessary to recall once again that the question before the Court is a different one: whether the Tribunal erred on a question of law relating to the provisions of the Charter of the United Nations. It is only if the Tribunal can be said, by the course of action it is alleged to have adopted, to have erred on a question of law of that kind, that it becomes the duty of the Court to examine the matter. The Court has therefore to ask, first, what was the error of law which, it is asserted, was committed by the Tribunal; and secondly, what was the source of the rule of law it is said to have failed properly to respect, in order to establish whether the error was one which related to the provisions of the Charter.

73. The Tribunal was seised of an application "alleging non-observance" of the "terms of appointment" of the Applicant, such "terms of appointment" including "all pertinent regulations and rules in force at the time", and including also General Assembly resolution 37/126. As

emphasized in the Court's 1982 Opinion (see paragraph 60 above) it is the business of the Court to judge whether there is a contradiction between an interpretation by the Tribunal of a text such as resolution 37/126 and any of the provisions of the Charter. Nothing in the resolution itself, or in the Staff Rules and Regulations, laid down how the Tribunal was to handle a claim of breach by the Secretary-General of a provision requiring him to give "every reasonable consideration" to a staff member's employment, or what evidence it was to require, nor do the Statute and Rules of the Tribunal throw light on the matter. The Tribunal did not interpret the resolution as requiring the Secretary-General to demonstrate to the Tribunal the manner in which "reasonable consideration" had been given; and the Court is unable to regard this interpretation as in contradiction with Article 101, paragraph 1, of the Charter. It is therefore not called upon to consider whether the Tribunal could or should have proceeded differently. The question whether, for example, the Tribunal made a correct application of the principle of the burden of proof (cf. *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984,* p. 437, para. 101) does not appear to the Court to be one of law "relating to the provisions of the Charter of the United Nations", and does not therefore require examination in the present Opinion.

74. The Tribunal also found, distinguishing in this respect the ILO Administrative Tribunal Judgment No. 431 *(Rosescu),* that

> "there has been no allegation, and far less any evidence, that the Respondent sought instructions from any Member States, or that he had in any manner let the wishes of a Member State prevail over the interests of the United Nations . . ." (para. XIX).

While it is correct that there had been no allegation by the Applicant that the Secretary-General had sought instructions from any member State — and indeed the Applicant has not alleged this in his communications to the Court (see paragraph 76 below) —, the Applicant had, in his pleadings, referred to the *dictum* in the *Mauch* case as to the significance of "assignment of specious or untruthful reasons for the action taken", and suggested that it was applicable. The impropriety alleged by him lay in the making of statements by senior Secretariat officials, quoted in paragraph 16 above, which he interpreted as revealing a belief that his secondment acted as a bar to all further employment. According to the Applicant, if the Secretary-General did not hold that belief, "then the reasons given by the officials quoted . . . were specious".

75. These various statements were before the Tribunal, as annexes to the Applicant's Statement of Facts and Arguments and Observations on the Answer, but the Tribunal did not refer to them, except for the letter of 21 December 1983, of which, as the Court has noted, the Tribunal gave an interpretation different from that of the Applicant. It had before it also,

however, the Respondent's Answer, in which he maintained the position that "there was no contractual or otherwise legally based prohibition on the Secretary-General, either to grant or withhold another appointment", and that "The decision in this case was legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing interests". The Tribunal need not have accepted this; it might have regarded the statements quoted by the Applicant as evidence that the problem of secondment and the lack of government consent had been allowed to predominate more than the Secretary-General was ready to admit. That was not however the view it took: it found that the Secretary-General "exercised his discretion properly". Whether or not this was an error of judgment on the Tribunal's part is not to the purpose; what is certain is that it was not an error on a question of law relating to Article 101, paragraph 1, of the Charter. It could perhaps be contended that the Tribunal might have committed an error in not finding that the Secretary-General had failed to apply correctly the applicable texts. It has however to be recalled that while, as the Court observed in 1982 "all valid regulations and rules adopted by a United Nations organ cannot be other than based on the provisions of the Charter", the Court went on to point out that

> "It does not follow, however, that every question of the interpretation or application of those regulations and rules is a question of law relating to the provisions of the Charter" (*I.C.J. Reports 1982*, p. 358, para. 65).

Whatever view be taken as to the way in which the Tribunal examined the exercise by the Secretary-General of his discretion, taking into account the apparent inconsistency between the Secretary-General's pleading and the reported statements of his senior officials, the essential point is that the Tribunal did not abandon all claim to test such exercise against the requirements of the Charter. On the contrary, it re-affirmed the need to check any "arbitrary or capricious exercise" of a discretionary power.

* *

76. The next provision of the Charter which the Applicant claims has to be considered inasmuch as he contends that the Tribunal committed an error of law relating to it is Article 100, paragraph 1, which provides:

> "In the performance of their duties the Secretary-General and the staff shall not seek or receive instructions from any government or from any other authority external to the Organization. They shall re-

> frain from any action which might reflect on their position as international officials responsible only to the Organization."

The Applicant has emphasized that he does not allege that in refusing him further employment the Secretary-General was merely carrying out the instructions of a government, or that the Secretary-General is precluded from taking into consideration formal representations made to him by member States. He refers however to "public statements by high officials of the Secretary-General" — those described in paragraph 16 above — as

> "indicating that *he believed* that further employment of the Applicant was impossible without the consent of the USSR Government, a belief which the Respondent himself has subsequently admitted to be erroneous. It was that belief, and the Tribunal's failure to fault it, that the Applicant alleged to be a dereliction from Article 100.1." (Emphasis original.)

77. It will be apparent from the Court's analysis of the Tribunal's Judgement in paragraphs 27 to 37 above that the Court is unable to uphold the Applicant's contention. His argument rests on the following premises: that the Secretary-General believed that he could not give the Applicant any further employment whatever without the consent of his former national Government; that the Tribunal found that this was the Secretary-General's belief; that that belief was wrong as a matter of law; and that the Tribunal failed to find that it was wrong in law. The Court however does not consider either that the Tribunal found the existence of the belief attributed to the Secretary-General, or that the Tribunal found that such a belief was or would have been correct. In view of the nature of the decision actually taken by the Tribunal on the facts of the case, it does not appear necessary to consider the matter further.

78. The Applicant also suggests that the Judgement contains an error of law relating to the provisions of Article 100 of the Charter in certain other respects. In the statement of his views transmitted to the Court he argues as follows:

> "The necessity to construe strictly the limits of a government involvement arises not only from the interests of the Organization, not only from the legally protected rights of officials, but also from Article 100 of the Charter. An official who comes in with the consent of a government may not expect, nor may the Organization bestow, special treatment. Still less may the Tribunal suggest that special treatment would be proper . . . Tribunal Judgement 333 failed to find impropriety in a staff member being barred from entering Headquarters in order to avoid offense to a Member State."

Alluding to the finding by the Tribunal that

> "evidence was available that the USSR authorities were contemplating replacing the Applicant by another person whom they had already selected and whom they wished to be trained further by the Applicant" (para. XI),

and that

> "It was suggested to him that he should leave for Moscow early in 1983 for this purpose, but his application for leave was refused by the United Nations" *(ibid.)*,

the Applicant also complained that

> "The Judgement finds no impropriety in a Member State 'contemplating replacing the Applicant by another person whom they had already selected', or 'suggesting to him that he should leave for Moscow' soon after he had undertaken programme duties under a new contract, thus sanctioning a higher allegiance to his country than to the United Nations."

In regard to these contentions, it suffices, first, to say that the Tribunal was not called upon to say that the ban on entering Headquarters was a "non-observance" of the Applicant's "contract of employment" or of his "terms of appointment" in the exercise of its competence under Article 2 of its Statute, since the Applicant made no such claim in the pleas he presented to the Tribunal. The Tribunal therefore made no finding in that respect. Secondly it had no competence, under its Statute, to rule on the legality or propriety of the actions of a member State, and it did not do so. The Court is therefore unable to see any possibility that the Tribunal's Judgement contained an error of law concerning the provisions of the Charter in connection with these aspects of the case.

* *

79. The Applicant next refers to Article 101, paragraph 3, of the Charter, which provides:

> "The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence, and integrity. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible."

In his application to the Committee, the Applicant deduces from this that

> "a staff member whose service record has amply demonstrated the qualities of efficiency, competence and integrity, and who has received the unqualified endorsement of his superiors, should not be excluded from consideration by extraneous, secondary or illegitimate factors . . .".

He complains that

> "Neither the Majority Judgement [of the Tribunal] nor the Concurring Statement [of President Ustor] give any indication that they have weighed the mandate of Article 101.3 against other factors of lesser paramountcy."

In his comments on the written statements he claims that "The Judgement itself, by omitting any consideration of Article 101.3, makes merit subservient to other considerations".

80. It appears to the Court that these objections must be interpreted as a contention by the Applicant that the Tribunal should have found that "reasonable consideration" had not been given either because the Secretary-General was (wrongly) convinced that secondment constituted a bar to all further employment, or because he allowed the wishes of a member State to prevail over the "necessity of securing the highest standards of efficiency, competence and integrity". As the Court has already indicated, the Tribunal, so far from finding that the Secretary-General acted from mistaken conviction of the existence of a legal impediment, held that he had given the Applicant's case reasonable consideration but had decided, in the exercise of his discretion, not to give him further employment. The Secretary-General stated before the Tribunal that

> "The decision now contested was taken by the Secretary-General after consideration of all the circumstances in the case, including Applicant's service record, together with the estimation of his supervisors and representations on his behalf by counsel, and the events of 10 February 1983 and thereafter, together with representations to diverse effect by the permanent missions of two member States",

and that

> "The decision in this case was legitimately motivated by the Secretary-General's perception of the interests of the Organization to which he properly gave precedence over competing interests."

The Secretary-General submitted that the consideration he gave to the matter constituted "reasonable consideration" within the meaning of

General Assembly resolution 37/126; and as already noted, the Tribunal upheld that view.

81. It is clear that the expression "the paramount consideration" (in French, *la considération dominante*) in Article 101 of the Charter is not synonymous with "the sole consideration"; it is simply a consideration to which greater weight is normally to be given than to any other. Nor does it mean that "efficiency, competence and integrity" together constitute a sufficient consideration, in the sense that a high enough standard of each gives rise to an entitlement to appointment. It is also clear, since paragraph 1 of the Article provides that "The staff shall be appointed by the Secretary-General under regulations established by the General Assembly", that the task of balancing the various considerations, in cases where they incline in different directions, is for the Secretary-General, subject to any general directions which might be given to him by the General Assembly. Resolution 37/126 itself constitutes such a direction, and one which operated in favour of the Applicant as compared with any outside candidate, or one without his record of more than "five years' continuing good service". Both on this basis, and on the basis of Article 101, paragraph 3, of the Charter, it is material to observe that the Applicant's efficiency and competence were highly spoken of by his superiors. The Tribunal did not make any finding reflecting on his integrity; it did however discuss the consequences of a change of nationality by a staff member in another connection — to be considered below.

82. The decision was that of the Secretary-General; and it was not for the Tribunal, nor indeed for the Court, to substitute its own appreciation of the problem for that of the Secretary-General. The Court could only find that the Tribunal had in this respect "erred on a question of law relating to the provisions of the Charter" if it found that the Tribunal had upheld a decision of the Secretary-General which could not be reconciled with the relevant article of the Charter. That does not appear to the Court to be the case. The decision of the Secretary-General cannot be said to have failed to respect the "paramount" character of the considerations mentioned in Article 101, paragraph 3, simply because he took into account "all the circumstances" enumerated in his Answer (paragraph 80 above) in order to give effect to "the interests of the Organization".

83. Something should however be said of the reference made by the Secretary-General to "the events of 10 February 1983 and thereafter". That date was of course that of the Applicant's communication to the Government of the USSR. In this connection, the Tribunal did comment on the significance and consequences of the Applicant's actions in a passage of its Judgement which has not yet been examined (see paragraph 34 above). The Tribunal was dealing with an argument submitted by the Applicant to the effect that

"even if secondment existed or was implied for his service in the

United Nations, a change in his status took place from 10 February 1983 onwards when he resigned from the service of the USSR Government, and that in fact a new contractual relationship could be assumed to have been created between him and the Respondent. He argues that the Respondent, by not taking disciplinary action against him, by promoting him, by allowing him to serve out his contract until the date of its expiry (26 December 1983), and by letting him continue as Vice-Chairman of the Appointment and Promotion Committee, created a new, although tacit, agreement in which the Soviet Government was not in any way involved." (Para. VIII.)

The Respondent had argued in reply that

"Certainly, Respondent does not consider that a continuing relationship with a national government is a contractual obligation of any fixed-term staff member — seconded or not —, nor would a break between a staff member and his government constitute in itself grounds for terminating the fixed-term contract of a fixed-term staff member seconded or not. It is not for Respondent to approve or disapprove Applicant's transfer of allegiance."

84. The Tribunal examined "the events leading to and following from the Applicant's resignation from the service of the USSR Government", since it considered that they threw "much light for the resolution of this controversy" (para. IX), i.e., the controversy as to the alleged "new contractual relationship". It observed that "The Applicant was entitled to act in any way he considered best in his interest, but he must necessarily face the consequences of his actions" (para. XII). After noting that he could not "bring about any legal expectancy of renewal of his appointment", the Tribunal continued:

"Another consequence of his actions raised the question of his suitability as an international civil servant. In Judgement No. 326 *(Fischman)*, the Tribunal referred to the widely held belief mentioned in a report of the Fifth Committee of the General Assembly that

'International officials should be true representatives of the cultures and personality of the country of which they were nationals, and that those who elected to break their ties with that country could no longer claim to fulfil the conditions governing employment in the United Nations',

and held that this 'must continue to provide an essential guidance in this matter'."

The Court notes in this respect that the "widely held belief" amounts to

the views expressed by some delegates to the Fifth Committee in 1953 at the Eighth Session of the General Assembly, which never materialized in an Assembly resolution. The Tribunal's Judgement No. 333 continues:

> "In the same judgement [No. 326], the Tribunal also recalled a part of Information Circular ST/AFS/SER.A/238 of 19 January 1954 which stated *inter alia* that
>
> > 'The decision of a staff member to remain on or acquire permanent residence status in . . . [the] country [of his duty station] in no way represents an interest of the United Nations. On the contrary, this decision may adversely affect the interests of the United Nations in the case of internationally recruited staff members in the Professional category . . .'
>
> The Applicant had been granted asylum in the United States of America and there arose the problem of his having to waive privileges and immunities with the permission of the Respondent. Such a waiver was necessary for changing his visa category under the United States laws. However there was apparently no immediate problem and it seems that no request was made to the Respondent for agreeing to the Applicant waiving his privileges and immunities. Besides, a private bill was later introduced on the Applicant's behalf in the United States House and Senate." (Para. XII.)

85. The Secretary-General's Answer before the Tribunal, in which he commented on the question of the change of nationality in the terms quoted in paragraph 83 above, is dated 14 March 1984. However, on 17 May 1984 the Tribunal gave its Judgement (No. 326) in the case of *Fischman*, in which it refused to order rescission of a decision of the Secretary-General whereby Mr. Fischman was not permitted to take steps to acquire permanent resident status in the United States, with a view to obtaining United States nationality, and in this connection the Tribunal made the observations on the significance of national ties quoted in paragraph XII of Judgement No. 333. It appears therefore that in considering the Secretary-General's submissions, the Tribunal took the view that on this point they were not consistent with the ideas found in the *Fischman* decision, and thought it appropriate to enter a caveat, even though it was not essential to the argument of Judgement No. 333.

86. In this passage of its Judgement, therefore, the Tribunal was not endorsing or reversing a decision of the Secretary-General, but disapproving one argument which the Secretary-General had put forward in support of his position. Since the Tribunal nonetheless upheld the Secretary-General's position, the passage in question in the Judgement is an

obiter dictum. This circumstance does not however affect the duty of the Court to consider whether this ground of objection is or is not well founded. It is the Judgement of the Tribunal, not the action of the Secretary-General giving rise to the application to the Tribunal, which has to be reviewed by the Court; and it is the Court's duty to point out any error "on a question of law relating to the provisions of the Charter" in a judgement of the Tribunal referred to it on that ground, whether or not such error affected the disposal of the case. This is clear from the wording of Article 11 of the Tribunal's Statute: it is only where what is alleged is "a fundamental error in procedure" — the fourth ground specified in that Article — that there exists the additional requirement that that error should have "occasioned a failure of justice". The other errors mentioned therefore constitute grounds of objection in themselves, regardless of their impact on the operative part of the Tribunal's decision.

87. Having considered the passage in question carefully, the Court is however unable to find that the Tribunal there committed an error of law "relating to the provisions of the Charter". The question is of course not whether the Judgement in the *Fischman* case contained such an error, but whether the reasoning of the Tribunal in Judgement No. 333, in support of which it quoted its decision in the earlier case, erred on such a question of law. The Secretary-General had in effect argued that the retention of the Applicant in service notwithstanding his severance of his ties with his own government did not imply that a "new contractual relationship" had come into existence. For the Secretary-General, the change of nationality was an act having no specific legal or administrative consequences. The Tribunal upheld the Secretary-General's main contention, but at the same time pointed out that, according to one view, the change of nationality was not necessarily such an act, but one which in some circumstances "may adversely affect the interests of the United Nations" (ST/AFS/SER.A/238 quoted in the Judgement in the *Fischman* case). This is very far from saying that a change or attempted change of nationality may be treated as a factor outweighing the "paramount" consideration defined by Article 101, paragraph 3, of the Charter, which is what the Applicant accuses the Secretary-General of having done.

88. It is illuminating to consider an earlier Judgement of the Tribunal in which it had occasion to find that the Secretary-General had contravened Article 101, paragraph 3, of the Charter. In Judgement No. 310 *(Estabial)*, recruitment to a particular post had been limited to candidates from French-speaking African countries. This was done in the belief, which the Tribunal found to be mistaken, that this was a correct application of the last sentence of Article 101, paragraph 3, providing that "Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible" (Judgement No. 310, para. XIV). The Tribunal ruled that

> "It was not for the Secretary-General to alter these conditions laid down by the Charter and the Staff Regulations by establishing as a 'paramount' condition the search, however legitimate, for 'as wide a geographical basis as possible', thereby eliminating the paramount condition set by the Charter in the interests of the service." (Judgement No. 310, para. XIV, *in fine.*)

In effect the contention of the Applicant in the present case is that the only possible explanation of the Secretary-General's decision, in view of all the factors militating in his favour (more than five years' service, glowing reports from his superiors, his experience in a post requiring lengthy training), is that the Secretary-General established as a "paramount" consideration the possibility of Government objection to the recruitment of a previously seconded staff member and that this would be contrary to the requirements set by the first sentence of Article 101, paragraph 3, of the Charter.

89. The Tribunal however found that the Secretary-General did not believe that the secondment factor was a legal impediment to the Applicant's further employment, and that "reasonable consideration" had been given. It therefore did not find that the secondment factor had been established as a rival "paramount consideration". The Applicant has contended that the fact that the other considerations referred to by the Secretary-General were able to outweigh the considerations militating in favour of his re-appointment casts grave doubt on whether the "paramount consideration" of the Charter was allowed to operate as it should. However, as recalled above, "the Court's proper role is not to retry the case and to attempt to substitute its own opinion on the merits for that of the Tribunal" (*I.C.J. Reports 1982,* p. 356, para. 58). The Court is, on balance, unable to conclude that the Judgement of the Tribunal on this point has been shown to be in contradiction with the Charter. It found as a fact that there had been "reasonable consideration" of the Applicant's case, and by implication that the Secretary-General had not been under a misapprehension as to the effect of secondment. The provision of Article 101, paragraph 3, of the Charter must have been present to the mind of the Tribunal when it considered the question. In the view of the Court, these findings cannot be disturbed on the ground of error on a question of law relating to the provisions of the Charter.

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90. It has been suggested that the passage of the Tribunal's Judgement quoting the *Fischman* decision amounts to a finding that the Applicant's actions on and after 10 February 1983 were such as to "adversely affect the interests of the United Nations" and that they cast such doubt on "his suitability as an international civil servant" that no "reasonable consideration" could possibly lead to a further appointment. This, it is argued, is in contradiction with the "paramount consideration" defined by Article 101,

paragraph 3, of the Charter. The Court does not however think that this is a correct analysis of the Tribunal's reasoning. The passages quoted in paragraph 84 were, as already noted, part of a section of the Tribunal's Judgement (paras. VIII-XIII) dealing with the Applicant's argument that "a new contractual relationship could have been assumed to have been created between him and the Respondent" subsequently to the events of 10 February 1983. The Tribunal was being asked to interpret the action taken or not taken by the administration at this time as indicating the existence of such a new tacit agreement. It was not at this stage of its Judgement contemplating the question of "reasonable consideration": this is perfectly clear from the two paragraphs (paras. XIII and XIV) immediately following that in which reference is made to the *Fischman* case. Paragraph XIII contains the following conclusion:

> "In view of the foregoing, the Tribunal concludes that . . . no tacit agreement existed between the Applicant and the Respondent between 10 February 1983 and 26 December 1983 changing the character of their relationship",

and paragraph XIV reads as follows:

> "With these conclusions in mind the Tribunal considered the Applicant's plea that he was entitled to, but was denied, the right to receive 'every reasonable consideration' in terms of paragraph 5 of General Assembly resolution 37/126, IV, of 17 December 1982."

The latter plea is the subject of paragraphs XIV to XIX of the Judgement. The Court considers that the words "With these conclusions in mind" cannot be read as importing into the discussion of the question of reasonable consideration the whole argument of the impact of change of nationality on "suitability". If it had been the view of the Tribunal that the "essential guidance" referred to in the *Fischman* decision was determinative of the question of reasonable consideration, it would merely have had to say so in paragraph XIV of its Judgement, and proceed no further.

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91. There remains one further argument to be examined in connection with the suggestion that the Tribunal committed an error of law relating to the provisions of Article 101, paragraph 3, of the Charter. The Tribunal itself in its Judgement saw no need to refer to that Article, but it was referred to by Vice-President Kean in his dissenting opinion. He was discussing the statement in the letter of 21 December 1983 addressed to the Applicant (quoted in paragraph 14 above) that

> "At the time your present appointment was made your Government agreed to release you for service under a one-year contract, the Organization agreed so to limit the duration of your United Nations service, and you yourself were aware of that arrangement which, therefore, cannot give you any expectancy of renewal without the involvement of all the parties originally concerned."

Mr. Kean's comment on this aspect of the case was as follows:

> "In the Applicant's case, there was in the circumstances no possibility, and no desire on the part of the Government or of the Applicant, that he should rejoin the service of that Government, from which he had recently resigned. The only effect, therefore, of a supposed preclusive agreement (expressed or implied) would have been to prevent the Applicant from being employed, then or at any future time, by the United Nations, however valuable or necessary his services might be. It cannot be believed that the Respondent would ever have been a party to so unreasonable an agreement, bearing in mind the provision of Article 101.3 of the Charter of the United Nations that 'the *paramount consideration* in the employment of the staff . . . shall be the necessity of securing the highest standards of efficiency, competence, and integrity'. (Emphasis added.)"

Thus Mr. Kean's finding was that such an agreement did not exist; but it appears that if such an agreement had existed it would, in his view at least, have been contrary to Article 101, paragraph 3, of the Charter.

92. If therefore the Tribunal relied on the agreement of the Organization "to limit the duration of [the] United Nations service" of the Applicant, as a basis for finding that he was ineligible for a career appointment, and not entitled to "every reasonable consideration" with such appointment in view, then it would be necessary to consider whether this constituted an error on a question of law relating to the provisions of Article 101, paragraph 3, of the Charter. It does not however appear to the Court that such was the reasoning of the Tribunal. It noted that

> "In his letter of 21 December 1983 addressed to the Applicant, the Respondent concluded that, since the involvement of all parties concerned was necessary for the renewal of the Applicant's appointment, such renewal was impossible in the circumstances" (para. IV),

and observed that this accorded with the Tribunal's own jurisprudence on secondment. The conclusion it based on this was however merely that the Applicant had not established "that he had a legal expectancy of any type of further appointment" (para. VI). It did not find that secondment barred him from "reasonable consideration" under resolution 37/126; on the

contrary, as emphasized earlier in this opinion, it found that such consideration was given. Accordingly, whether Mr. Kean's assessment of the effect of Article 101, paragraph 3, of the Charter be correct or not, there was no need for the Tribunal to express a view on the matter, and it did not do so. Therefore, in this respect the Tribunal cannot have committed an error of law relating to that provision of the Charter.

* *

93. The Applicant next invokes Article 8 of the Charter as being a provision by reference to which the Tribunal committed an error on a question of law. That Article provides:

> "The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs."

The Article is generally understood to prohibit any discrimination on the basis of sex, a question of no relevance whatever in the present proceedings. The Applicant however propounds the novel view that "the Article is framed so as to have broader application" and that it prohibits "any restriction on the eligibility of any person to participate in any organ of the United Nations under conditions of equality". Whatever merit, if any, this contention may have, the Court is not called upon to deal with it, for two reasons. In the first place, the point was not taken before the Tribunal. While the Tribunal might be guilty of an error of law in relation to the plain meaning of a provision of the Charter, even if that provision were not pleaded before it, it cannot be criticized for failing to foresee and deal with a novel interpretation of the Charter which was never brought to its attention. Secondly, in any event, the Applicant's contention proves to be based, once again, on the view that the Secretary-General had classified him as ineligible for any further employment, and thus did not give reasonable consideration to his case. He argues that "What Article 8 prohibits is any restriction on eligibility to serve. This does not prohibit the consideration of other factors in any particular employment decision". Nor does the Applicant "challenge the Secretary-General's discretionary powers of appointment". Since the Tribunal found that there had been no exclusion of eligibility, but simply a decision, after reasonable consideration, not to offer appointment, Article 8, even in the wide interpretation contended for by the Applicant, has no relevance whatever.

* *

94. Finally, the Applicant asserts that the Tribunal erred on a question of law relating to Article 2, paragraph 1, of the Charter, namely: "The Organization is based on the principle of the sovereign equality of all its Members", coupled with Article 100, paragraph 2:

> "Each Member of the United Nations undertakes to respect the exclusively international character of the responsibilities of the Secretary-General and the staff and not to seek to influence them in the discharge of their responsibilities."

The Applicant concedes that the Tribunal was not asked to adjudicate the policies of any individual government, and had no competence to do so, but contends that it was asked to adjudicate the obligations of the Secretary-General under the Charter and the Staff Rules. However he argues that

> "If the policies of an individual government conflict with the obligations of the Secretary-General to treat all staff members equally, to give paramount consideration to the principle of merit, to neither seek nor receive instructions from any outside authority, the Secretary-General must, in the words of [the ILO Administrative Tribunal in the case of] *Rosescu*, safeguard the interests of the organization and give them priority over others."

95. It is however by no means clear what the decision of the Tribunal ought, according to the Applicant, to have been in order to respect these provisions of the Charter. As noted in paragraph 76 above, the Applicant does not allege that in refusing him further employment, the Secretary-General was merely carrying out the instructions of a government, or that the Secretary-General is precluded from taking into consideration formal representations made to him by member States. The complaint here examined thus appears to be that a certain government brought pressure to bear on the Secretary-General of a kind which contravened Article 100, paragraph 2, of the Charter. If the Tribunal had considered that this was the case, it could either have found that the Secretary-General bowed to that pressure, or that he did not. If it found that he did not, there was no non-observance of the Applicant's contract of employment or his terms of appointment, within the meaning of Article 2 of the Tribunal's Statute. In that event, even if there had been evidence (which there was not) that a member State had behaved in violation of Article 100, paragraph 2, of the Charter, the Tribunal would not have been justified in making any finding in that respect, and could not therefore be criticized for not doing so. If it had found that the Secretary-General did bow to pressure, he could have been in breach of Article 100, paragraph 1, of the Charter, already discussed above. In fact, however, the Tribunal expressly found that

> "there has been no allegation, and far less any evidence, that the Re-

spondent . . . had in any manner let the wishes of a Member State prevail over the interests of the United Nations and thus disregarded his duties under Article 100, paragraph 1, of the Charter" (para. XIX).

The Court can therefore see no possibility of an error of law by the Tribunal relating to Articles 2 and 100, paragraph 2, of the Charter.

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96. In respect of the second question addressed to it by the Committee in this case, the Court concludes that the Tribunal, in its Judgement No. 333, did not err on a question of law relating to the provisions of the Charter. The reply to that question also must therefore be in the negative.

* * *

97. For these reasons,

THE COURT,

A. Unanimously,

Decides to comply with the request for an advisory opinion;

B. *Is of the opinion:*

(1) with regard to Question 1,

unanimously,

That the United Nations Administrative Tribunal, in its Judgement No. 333 of 8 June 1984 (AT/DEC/333), did not fail to exercise jurisdiction vested in it by not responding to the question whether a legal impediment existed to the further employment in the United Nations of the Applicant after the expiry of his fixed-term contract on 26 December 1983;

(2) with regard to Question 2,

by eleven votes to three,

That the United Nations Administrative Tribunal, in the same Judgement No. 333, did not err on any question of law relating to the provisions of the Charter of the United Nations.

IN FAVOUR: *President* Nagendra Singh; *Vice-President* Mbaye; *Judges* Lachs, Ruda, Elias, Oda, Ago, Sette-Camara, Bedjaoui, Ni and Tarassov;

AGAINST: *Judges* Schwebel, Sir Robert Jennings and Evensen.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of May, one thousand nine hundred and eighty-seven, in two copies, one of which will be placed in the archives of the Court and the other transmitted to the Secretary-General of the United Nations.

(Signed) NAGENDRA SINGH,
President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judge LACHS appends a declaration to the Advisory Opinion of the Court.

Judges ELIAS, ODA and AGO append separate opinions to the Advisory Opinion of the Court.

Judges SCHWEBEL, Sir Robert JENNINGS and EVENSEN append dissenting opinions to the Advisory Opinion of the Court.

(Initialled) N.S.
(Initialled) E.V.O.