Registry's translation,
the French text alone being authoritative.

104th Session **Judgment No. 2682**

The Administrative Tribunal,

Considering the second complaints filed by Mrs R.M. C. S., Mrs M.-F. F., Mrs M. G. B. and Mr J.L. T. M. against the International Olive Oil Council (IOOC) on 27 November 2006, the IOOC's reply of 14 February 2007, the complainants' rejoinder of 22 May and the Council's surrejoinder of 3 September 2007;

Considering Articles II, paragraph 5, and VII of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which none of the parties has applied;

Considering that the facts of the case and the pleadings may be summed up as follows:

A. The relevant facts of this dispute are given under A in Judgment 2681, also delivered this day.

These complaints are directed against the Executive Director's express decisions of 15 September 2006 by which he dismissed the internal appeals.

B. The complainants' pleas and claims are identical to those set out under B in the above-mentioned Judgment 2681.

C. In its reply the IOOC requests the joinder of the complaints by which the complainants challenge the decision of 18 November 2005 amending the retirement age as from 1 January 2007. It explains with reference to the alleged breach of the duty of consultation that the Executive Director had closely examined the issue of consulting the Joint Committee, but that he had realised that interpreting the relevant provisions as meaning that the Committee had to be consulted "led to an absurd situation". Indeed, this would imply that the Executive Director has to consult the Joint Committee with regard to the draft decision containing the amendment and also consult the Staff Committee with regard to the draft amendment itself. However, this interpretation raises a question as to why the duty to consult the Staff Committee "on draft amendments of the Staff Regulations" should be laid down in Article 49 of the Staff Regulations if, with respect to the same question, the Executive Director must in any case consult the Joint Committee, which is made up of persons appointed by the Executive Director and by the Staff Committee. The IOOC endeavours to show that in this connection the only pertinent provisions are those of Article 49, which expressly provides for prior consultation of the Staff Committee. Article 50, which states that the Joint Committee must be consulted "on any decision or draft decision which has or could have implications for the statutory situation of the staff" could not, in the IOOC's opinion, apply to a decision to amend the Staff Regulations, which lies within the authority of the Council of Members alone. Noting that various talks had been held with staff representatives and that a survey had been carried out among the staff, the IOOC asserts that the Staff Committee "was in fact adequately consulted". It explains that, although the minutes of the Staff Committee do not disclose the contents of a specific consultation, it may be inferred from them, on the one hand, that the Executive Director had already consulted the Staff Committee on the actual principle of the envisaged amendment before sending the draft to the Members of the IOOC and, on the other, that he had then as a matter of course consulted the Committee on the draft amendment itself. The IOOC adds that the fact that the minutes do not record the contents of the consultation is understandable given that there had been a long consultative process and not just a single consultative meeting. To prove that consultations really did take place, it produces a statement signed by members of the 2005 Staff Committee who are still serving.

The IOOC denies any breach of acquired rights. Relying on Judgment 61, in which the Tribunal held that provisions which appertain to the individual terms and conditions of appointment of an official may be modified only insofar as modification does not adversely affect the balance of contractual obligations or infringe the essential terms in consideration of which the official accepted appointment, it argues that it is difficult in the present case to consider a provision concerning the date of compulsory retirement to be "decisive or even pertinent": that date is still distant when the official decides to join or remain with the organisation, and it is also

hypothetical, because the official might decide to leave the organisation long before he or she reaches retirement age.

The IOOC then reviews each of the criteria defined in Judgment 832. It emphasises with respect to the nature of the altered term of appointment that the provision of the Staff Regulations in question may be modified "if the efficient functioning of the organisation in the general interest of the international community" so requires and also in the interests of most of the organisation's officials. The IOOC states that, far from being based on purely budgetary considerations, the real reasons for the alteration of the retirement age lay in the 2001 amendment which had raised it to 65. In this connection it puts forward several explanations, including the ill-conceived nature of the above-mentioned amendment or the fact that no heed had been paid to recent developments in the United Nations (UN) or in other major international organisations belonging to the common system. Lastly, according to the IOOC, one of the consequences of recognising an acquired right in this case would be that it would have to retain an obligation to all serving officials which it is not prepared to assume and which is likely to hamper its efficient functioning – especially in the event of having to make staff cuts – it being understood that such efficient functioning is in the interests not only of the organisation but also of its officials. The IOOC adds that "no complaints have been received about the Provident Fund system, which must therefore be considered to guarantee officials at least a substantial capital sum".

The IOOC considers that it need not respond to the contention that the principle of legitimate expectations has been breached, because the allegedly unstable or precarious nature of the old-age insurance scheme has no "causal link" with the decision to make 60 the retirement age again.

Lastly, the IOOC submits that the claim for compensation for moral injury is irreceivable as far as Mrs C. S. and Mrs G. B. are concerned, since they did not present this claim during the internal appeal procedure.

D. In their rejoinder the complainants agree to the joinder of their complaints. On the subject of the duty of consultation, they state that they do not see why the IOOC's reasoning, by which it arrives at the conclusion that in this case it was unnecessary to consult the Joint Committee, would not also support the conclusion that there was no duty to consult the Staff Committee. They add that consultation is not, as the IOOC would have it, a completely informal procedure which can be "hurried through".

As to the breach of acquired rights, the complainants "utterly disagree" with the IOOC's assertion that, because it is not decisive, a provision concerning the date of compulsory retirement is not pertinent. In their opinion, the nub of the problem lies in the weak old-age insurance scheme offered by the IOOC to its officials, and the option of working until 65, rather than 60, is an issue of fundamental importance.

With regard to the nature of the terms of appointment, the complainants state that they rely on the precedent established by Judgment 986 in which it was held that a breach of an acquired right, even when there has been an amendment of staff regulations, may warrant the setting aside of a decision. They endeavour to refute each of the explanations put forward by the IOOC with respect to the reasons for the decision of 18 November 2005. They point out for example that the UN set the normal retirement age at 60 only for officials appointed before 1990, but that for officials appointed thereafter it is 62. They contend that the decision to raise the retirement age in 2001 was perfectly lawful. As for the consequences of recognising or not recognising an acquired right, they consider that the IOOC appears to belittle the Tribunal's particular concern about an amendment's repercussions on the complainants' overall remuneration. In this connection, they express scepticism about the IOOC's assertion that the decision to lower the retirement age was taken in the interests not only of the IOOC but also of its officials.

Lastly, they submit with regard to the breach of the principle of legitimate expectations that there is indeed a causal link between the lowering of the retirement age by the decision of 18 November 2005 – which constitutes the "umpteenth" alteration of the old-age insurance scheme – and the unstable, precarious nature of that scheme.

E. In its surrejoinder the IOOC reiterates its arguments and states that the retirement age was set at 62 within the UN system because it was necessary to bring the staff regulations of the organisations concerned into line with the recent amendment (for financial reasons) of the Regulations of the United Nations Joint Staff Pension Fund, which had made 62 the "normal retirement age".

CONSIDERATIONS

1. By a decision of 18 November 2005 amending Article 61 of its Staff Regulations, the IOOC lowered the retirement age of the permanent staff members of its Executive Secretariat from 65 to 60 as from 1 January 2007. This decision was accompanied by a transitional provision incorporated into the Staff Regulations as Article 69a,which stipulated that permanent staff members of the Executive Secretariat who had already reached the age of 60 on 1 January 2007 would retire on that date.

The retirement age of the organisation's officials had been set at 60 by Rule 30 of the Staff Regulations of 7 March 1961. This age limit was retained in successive revisions in 1971, 1980, 1983 and 1989 and remained unchanged until 2001. The automatic application of this provision could be waived only by a decision of the Executive Director allowing staff members to postpone retirement to 65 or, as from 1980, only to 62, subject to restrictions which varied over the years according to the provisions adopted during these various revisions of the Staff Regulations.

By a decision of 8 November 2001, the IOOC had decided to raise the retirement age of the organisation's officials to 65. This amendment of the Staff Regulations, which also made provision for postponing retirement to 67 in exceptional cases by decision of the Executive Director, did not, however, entail any corresponding extension of the period of contribution to the Provident Fund to which the organisation's officials are affiliated, and the amount accrued continued to be payable at the age of 60.

A first check was put on this reform in June 2003 when, as part of a far-reaching change of management policy at the organisation – which was also reflected a few months later in the appointment of a new Executive Director – the IOOC took a new decision removing any possibility of deferring retirement beyond 65 and specifying that officials could opt for retirement at 60.

Having adopted a new organisation chart for its Executive Secretariat which entailed a reduction in its staff complement, the IOOC then decided on 1 July 2005 to postpone until its following session the consideration of a plan to make 60 the age for retirement as one of the means of achieving this reduction.

It was against this background that the IOOC took the above-mentioned decision of 18 November 2005 to revert, as from 1 January 2007, to the previous retirement age which had been in force until 2001. According to the reasons given for this decision, it was based partly on the need to pursue the programme for the reorganisation of the Executive Secretariat which had been adopted in July 2005, partly on the fact that the disadvantages of having dissociated the respective age limits for retirement and for cover by the Provident Fund in 2001 were now apparent, and partly on the wish to have rules on the matter which were similar to those applied in other international organisations such as the UN.

2. By appeals submitted to the Administrative and Financial Division on either 17 or 18 January 2006 the complainants challenged the lawfulness of that decision and requested that the retirement age of 65 in force on 18 November 2005 be applied to them or, failing that, that they be awarded compensation equivalent to the emoluments they would have received had they continued to serve until they reached that age, as well as compensation for various other related injuries.

These appeals, the purpose of which was to refer the matter to the Joint Committee for an opinion, were not, however, forwarded to the Chairperson of the Committee until 9 May 2006. Having received no reply to their appeals within two months, the complainants considered that they had met with an implied decision rejecting them, and they referred that decision to the Tribunal in four complaints filed on 12 June 2006.

After the Joint Committee had adopted a report on each of the appeals on 6 July, the Executive Director dismissed them by express decisions dated 15 September 2006, which the complainants also challenged before the Tribunal in four new complaints filed on 27 November 2006.

By a judgment also delivered this day the Tribunal found that the four initial complaints therefore no longer showed a cause of action and that there was thus no longer any need to rule thereupon.

It will, however, rule in the present judgment on the four complaints directed against the above-mentioned decisions of the Executive Director dated 15 September 2006.

The joinder of the complaints

3. The joinder of the four complaints in question is requested by the IOOC and accepted by the complainants. These complaints raise identical issues of fact and law and seek the same redress. The Tribunal will therefore join them so as to rule on them by a single judgment.

The lawfulness of the procedure whereby the IOOC's decision of 18 November 2005 was adopted

4. The complainants first assert that the IOOC's decision of 18 November 2005 had not been submitted for an opinion of the Joint Committee.

It has been established that the Committee was not in fact consulted when this decision was formulated, as it notes itself in some of the reports it issued on 6 July 2006, on the complainants' appeals. Yet according to Article 50(2), point two, of the Staff Regulations, the Executive Director must consult the Joint Committee "on any decision or draft decision which has or could have implications for the statutory situation of the staff". The IOOC's decision being to amend the Staff Regulations so as to lower the age of retirement, it plainly fell within the ambit of this provision and should therefore have been submitted to the Joint Committee for an opinion. The fact that, under Article 49 of these Regulations, the Staff Committee should also have been consulted about this decision could not exonerate the organisation, as it submits, from having to obtain the requisite opinion from the Joint Committee as well.

Moreover, the Tribunal notes that the evidence on file shows that the organisation was in fact fully aware of its duty in this respect. Indeed, the minutes of the meeting between the Executive Director and the Staff Committee on 7 September 2005 mention that, when questioned by members of that Committee about compliance with this duty, the Executive Director replied: "the Joint Committee will be consulted on the decision as provided for in the rules".

If, as it now submits, the organisation considers that the requirement to consult both the Joint Committee and the Staff Committee makes little sense as these bodies are relatively similar in composition, it is incumbent upon it to refer the matter to its governing bodies in order that the provisions of the Staff Regulations may be amended accordingly. But it should under no circumstances ignore the existing rules on these grounds, and the irregularity thus committed is all the greater in this case because the duty to consult the Joint Committee is a safeguard given to its officials.

The IOOC's decision of 18 November 2005 was therefore unlawful on this ground alone.

5. The complainants also contend that the consultation of the Staff Committee prior to that same decision was procedurally flawed.

This consultation is provided for in the above-mentioned Article 49 of the Staff Regulations, which states that the Committee shall be consulted by the Executive Director "on draft amendments of the Staff Regulations". Thus, the draft amendment of the Staff Regulations, which was adopted by the IOOC on 18 November 2005, did have to be submitted to the Staff Committee as well for an opinion.

The evidence on file shows that, unlike the Joint Committee, this body was not sidelined during the run-up to this amendment to the Staff Regulations. The planned amendment of the retirement age was indeed discussed at several meetings on 20 July, 7 September, 11 November and 22 November 2005, as the minutes of those meetings testify. But these minutes also indicate – as the Joint Committee rightly notes in some of its reports of 6 July 2006 – that the Staff Committee was nevertheless not formally consulted on this amendment. While at the four meetings in question the Executive Director did supply some information about the content of the measure being contemplated, it is not established that the Staff Committee was asked to issue an opinion on a specific text which had been submitted to it. On the contrary, the above-mentioned minutes record that the Staff Committee considered that, in this case, it could not be deemed to have been validly asked to give an opinion on this measure.

It is true that the organisation has produced before the Tribunal a statement signed by some of the members of the Staff Committee at the material time, to the effect that the latter was consulted on the envisaged decision during the 92nd and 93rd sessions of the IOOC, which were held from 27 June to 1 July 2005 and from 14 to 18 November of that same year respectively.

However, as far as the alleged consultation during the 92nd session of the IOOC is concerned, the terms of that statement directly contradict those of the minutes of the Committee meetings held on 20 July and 7 September 2005, in other words after that session. Indeed the minutes of the meeting on 20 July 2005 mention that the

Committee felt that it had to draw the Executive Director's attention at that point in time to the need "to have the decision in writing in order to be able to analyse it with a specialised legal expert", while those of the meeting on 7 September indicate that the Staff Committee had "told the Executive Director that they had not received a copy of the draft decision for analysis". Moreover, according to these minutes, in his reply to the members of the Committee the Executive Director had then informed them that "the Staff Committee […] w[ould] be consulted, as required in the rules, when the Staff Regulations are amended", which is a clear indication that it had not yet been consulted.

Any consultation of the Committee during the 93rd session of the IOOC is merely referred to in the above-mentioned statement in very general terms; the minutes of the meeting on 11 November 2005 show indeed that this matter had been dealt with only in a rundown of information. Furthermore, the discussions held at the meeting on 22 November, i.e. after the adoption of the decision they challenge, clearly cannot be taken into consideration.

According to the Tribunal's case law, particularly as established in Judgments 2354 and 2615, the consultation of such an advisory body may not be deemed valid unless it is established that it has been formally asked to issue an opinion on the basis of precise information and documentation.

In the present case the Tribunal considers that it has not been proved that such valid consultation took place. The IOOC's decision of 18 November 2005 was therefore unlawful on this ground as well.

Breach of acquired rights

6. Pursuant to a general principle of law, the amendment to an official's detriment of a provision governing his or her status may not lawfully be decided without the official's consent if it breaches his or her acquired rights. In this case, express reference was in fact made to this principle in Article 70 of the Staff Regulations in force at the time of the disputed discussion, which states that these Regulations "may be amended by the Council, without prejudice to the acquired rights of the members of the Executive Secretariat".

However, according to the case law as established in Judgment 61, clarified in Judgment 832 and confirmed in Judgment 986, an acquired right is breached only when such an amendment adversely affects the balance of contractual obligations by altering fundamental terms of employment in consideration of which the official accepted an appointment, or which subsequently induced him or her to stay on. In order to determine whether there has been a breach of acquired rights, it is therefore necessary to ascertain whether the altered terms of employment are fundamental and essential within the meaning of Judgment 832.

In the present case the decision to amend the Staff Regulations, which lowered the retirement age from 65 to 60, was naturally of great importance for the officials concerned. But it must be emphasised that, as the above-mentioned sequence of amendments to the Regulations shows, the normal retirement age applicable to the staff members of the organisation's Executive Secretariat had in fact already been set at 60 since 1961 and had been raised to 65 only during the period between November 2001 and January 2007 – in other words for a fairly short spell compared with the 40 years in which the earlier provisions had applied.

The complainants, who had been appointed under the Staff Regulations which already set the retirement age at 60, cannot therefore legitimately argue that the amendment made in 2005 altered fundamental terms of appointment in consideration of which they joined the organisation.

Of course, as Judgment 832 makes clear, it is also necessary to examine whether the amendment of the Staff Regulations which had occurred in the meantime, in other words the decision in 2001 to raise the retirement age to 65, was not such as to induce them to remain in the organisation's service. However, as it happens, in view of the very nature of this measure and the complainants' age when it was adopted, it is hardly likely that they would have tried to change employer after 2001, irrespective of the age limit the organisation intended to apply to them.

In addition, it should be underlined that the impact of this measure was substantially cushioned by the fact that the decision adopted in 2001 was not accompanied by a corresponding extension to 65 of the age limit for coverage by the Provident Fund. Indeed, given that contributions to the Fund still ceased when the official reached 60 and his or her rights crystallised at that date, that decision could not really be regarded as merely deferring the age of retirement. Moreover, from a financial point of view, as the IOOC indeed noted in its decision of 18 November 2005, that measure was after all somewhat inconsistent and hence in itself inevitably precarious.

Lastly, the application to the present case of the three criteria identified by the Tribunal in Judgment 832 as a means of determining whether a breach of acquired rights has occurred, namely the nature of the altered terms of appointment, the reason for the change and the consequence of recognising or not recognising an acquired right, confirms that no breach is to be found here.

As far as the nature of the altered terms of appointment is concerned, these terms were established not by a clause in the complainants' employment contract or by an individual decision, but by a provision of the Staff Regulations. While the terms of a contract and some decisions will in principle give rise to acquired rights, this is not necessarily true in all circumstances of provisions of staff regulations and rules.

With regard to the reasons for the disputed measure, the grounds for the decision of 18 November 2005, which are listed above, indicate that it rested on considerations warranting an amendment of the terms of appointment of IOOC officials. In this regard, the fact that one of these considerations was related to the need to make staff cuts, partly for budgetary reasons, does not in itself call into question the validity of the measure. As the Tribunal has already indicated in its above-mentioned Judgment 832, when weighing up the consequences of a breach of an acquired right, the financial situation of the organisation applying the terms of appointment in question cannot be discounted.

As for the consequences of the disputed measure there is no doubt that it greatly prejudiced the complainants' interests because, as it happens, they would have preferred to continue serving until the age of 65. Firstly, however, it must be stressed that the effect of lowering the retirement age by the decision of 18 November 2005 was nevertheless mitigated in this case by deferring the entry into force of this measure until 1 January 2007. This step was deliberately taken precisely in order to limit the adverse impact on the interests of officials in the complainants' situation. Secondly, the disputed decision did not create any discrimination between the staff members of the organisation other than that which was justified in the light of the purpose of the measure in question by objective differences in situation.

The Tribunal therefore considers that the alterations to the complainants' terms of appointment resulting from the disputed decision do not constitute a breach of their acquired rights.

Breach of the principle of legitimate expectations

7. The Tribunal has consistently held that international organisations must take care not to undermine the mutual trust which must prevail in their relations with their staff. The case law refers to the principles of good faith, legitimate expectations and trust, which these organisations must observe (see for example Judgment 2008).

In the present case, however, the Tribunal considers, for reasons similar to those which lead it to rule out a breach of acquired rights, that the principle of legitimate expectations has not been disregarded.

Since the retirement age was already set at 60 when the complainants were appointed, the organisation could choose to apply this age limit to them and thus reverse the amendment introduced in 2001 without unduly undermining the trust which it must foster with its staff, *a fortiori* given that the retirement age had been set at 60 since 1961 and the fairly short period during which it was raised to 65 – without any corresponding change being made in the age limit for cover by the Provident Fund – therefore represented a departure from a well-established rule.

Moreover, since the IOOC postponed the date on which the new retirement age would enter into force until 1 January 2007, as noted above, the effects of this amendment of the Staff Regulations were to some extent cushioned for the complainants.

For this reason, even if, as the complainants contend, the benefits available from its Provident Fund compared rather unfavourably with those of similar schemes, the organisation could lower the retirement age applicable to the complainants without breaching its duties towards them.

8. It may be concluded from the above that the individual impugned decisions, which are based on a decision regarding the Staff Regulations which is tainted with two procedural flaws, are themselves unlawful and that the complainants therefore have reason to request that they be set aside.

The case must be sent back to the organisation for it to take a new decision, in compliance with the requirements

regarding consultation, in order to set the retirement age of the permanent members of its Executive Secretariat.

9. The complainants are also entitled to compensation for the moral injury arising from the unlawfulness of the impugned decisions, provided they have submitted receivable claims to this end.

Thus, Mrs F. and Mr T. M. shall be awarded such compensation. As they have not put a figure to their claims, the Tribunal considers that it would be fair, in the light of the facts of the case, to set the sum due to each of them in this respect at 3,000 euros.

However, the Tribunal is bound to observe that, as the organisation asserts, since Mrs C. S. and Mrs G. B. did not previously present their claims to this effect to the Joint Committee, these claims are irreceivable pursuant to Article VII, paragraph 1, of the Statute of the Tribunal.

10. Lastly, although the decision of 18 November 2005 is flawed on two accounts, it did not in substance breach any legal principle or rule which would otherwise have justified calling into question the complainants' retirement at the age of 60. The complainants' various claims for compensation for the financial consequences of this measure must therefore be dismissed.

11. Since their claims are partly well founded, the complainants are entitled to an award of costs, which the Tribunal sets at 1,000 euros for each of them.

DECISION

For the above reasons,

1. The four decisions of the Executive Director of the IOOC dated 15 September 2006 are set aside.

2. The case is sent back to the organisation for it to take a new decision, in compliance with the requirements regarding consultation, in order to set the retirement age of the permanent members of its Executive Secretariat.

3. The organisation shall pay Mrs F. and Mr T. M. compensation for the moral injury suffered in the amount of 3,000 euros for each of them.

4. It shall pay each of the four complainants 1,000 euros in costs.

5. The four complaints are otherwise dismissed.

In witness of this judgment, adopted on 15 November 2007, Mr Seydou Ba, President of the Tribunal, Mr Claude Rouiller, Judge, and Mr Patrick Frydman, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 6 February 2008.

Seydou Ba

Claude Rouiller

Patrick Frydman

Catherine Comtet

Updated by SD. Approved by CC. Last update: 27 February 2008.