JUDGMENT CASE NO. 25

OSVALDO S. ROSSELLO vs. IDB

The Administrative Tribunal of the Inter-American Development Bank,

Composed of the honorable Kenneth G. Smith, President, Dr. Alfredo Martínez-Moreno, Vice President, Dr. Ildélio Martins, Dr. Baltasar Cavazos-Flores, the honorable Thomas Buergenthal, the honorable Luzius Wildhaber and Dr. Guillermo López-Guerra considered the case under the procedure prescribed by Articles 20, 21, 22 and 23 of the Rules of the Tribunal.

Counsel for Complainant were the attorneys Julián Arturo de Diego and Susana Carmen Menéndez. Bernadete Buchsbaum, Esq. was counsel for the Bank. In addition to the written pleadings, the Tribunal asked the Executive Secretary to hear the testimony of witnesses and expert witnesses, and on 10 July 1991 the full Tribunal heard oral argument.

WHEREAS:

I. On 6 August 1990 Mr. Osvaldo S. Rosselló, an Argentine citizen and retired staff member of the Inter-American Development Bank brought a complaint before this Administrative Tribunal petitioning for the following:

A. A finding that the following are null and void:

1. The Memorandum of 18 April 1966 advising that benefits under the Retirement Plan applied only to the international staff.

2. The Administrative Instruction dated 1 June 1966 establishing the first definition of local employee, which would later lead to the distinction between local and international staff.

3. The notice of 3 June 1975 under which Family Allowances hitherto paid into the Argentine Retirement Fund would be paid directly to the employees.

4. The termination of service certificate showing his alleged resignation from the Field Office.

5. Resolution FO-601-4 of 17 February 1981 establishing that length of service, leave and benefits accruing under the local personnel system could not be transferred to the international personnel system.

6. The Memorandum of 24 June 1988 setting out financial considerations with a view to the introduction of the Local Staff Retirement Plan, which excludes former local staff members.

7. Recommendation GA-121 and resolution DE-121/88 both of 23 November 1988 establishing that benefits under the Local Staff Retirement Plan do not apply to former local staff members.

8. The Memorandum dated 13 March 1980 from Deputy Manager for Human Resources which rejected his request to include under the Local Staff Retirement Plan his 15 years and four months of service in the IDB Field Office in Argentina.

9. The note of 5 May 1989 confirming that under the provisions of the International Staff Retirement Plan his normal retirement date was 1 June 1989.

10. The decision ordering the settlement of his retirement benefits.

11. Recommendation GA-128-1 of 26 March 1990 made by Management to the Board of Executive Directors, advising it to introduce no changes in the existing Retirement Plan, and the resolution approving that recommendation.

12. The administrative decision to end his service.

B. Compensation for the injury and losses suffered, namely:

1. Loss of salary, benefits and other income occurring from the existence of an employment contract in effect for a period of at least three more years, estimated as follows:

a. US$ 237,046.00 (two hundred thirty-seven thousand forty six dollars) being the salary he would have earned.

b. US$ 4,740.90 (four thousand seven hundred forty dollars and ninety cents) for having forfeited the possibility of being promoted to a higher grade during that period.

c. US$ 40,905.00 (forty thousand nine hundred five dollars) for the loss of a higher amount at retirement as well as a higher monthly retirement pay, which would have been the case if the service and remuneration of the three years left out had in fact been computed.

2. The lower benefit obtained under the IDB International Staff Retirement Plan because of the failure to compute the services rendered at the local Field Office, estimated at US$ 143,311.00 (one hundred forty-three thousand three hundred eleven dollars).

3. The shortfall in his retirement pay under the Argentine social security system (Law 18.037) because he was incorrectly paid the annual leave he had accumulated until 1980, in lieu of taking it and as a result 1980 was not included in the proportional computation of his retirement pay. Provisionally, this sum is estimated at US$ 50,000.00 (fifty thousand dollars).

4. Pain and suffering. This heading is estimated at US$ 100,000.00 (one hundred thousand dollars).

5. Alternatively, in the event that the Tribunal should rule out item 2 above, Complainant petitions for computation of the length of service worked in the Field Office of the IDB, so as to come under the Local Staff Retirement Plan, the

amount of which is estimated at US$ 99,430.00 (ninety nine thousand four hundred thirty dollars).

II. In support of his petitions, Complainant argues as follows:

A. The complaint seeks to redress the legal, professional and financial injuries suffered as a result of the Bank's decision denying him the right to retirement pay consistent with the time and the quality of the services he rendered as a local staff member. In addition, he seeks compensation for all resulting injuries.

He joined the Bank in 1965 and, since that time, worked continuously until he was forced to retire on 31 May 1989.

During that time he acquired the right to a retirement consistent with the work he performed and the time he served the Bank. This acquired right was violated by the Bank in 1981 when it issued a retroactive decision preventing him from including in his retirement computations the years he had worked at the IDB Field Office in Buenos Aires. Furthermore, the Bank rejected his request to include in the Local Staff Retirement Plan approved by the Board of Executive Directors on 23 November 1988 his 15 years and four months of service at the IDB Field Office in Argentina. Complainant objects to the ambiguous application that the Bank makes of its own resolutions, which places him in the strange situation of being unable to include two thirds of his service in either of the two retirement plans and furthermore compels him to retire three years earlier, which amounts to grave discrimination.

B. He was transferred from the IDB Field Office in Buenos Aires to Headquarters in Washington, D.C. and he did not resign his employment contract, neither expressly nor implicitly, when being transferred. A resignation can never be presumed.

It was the Bank that took the initiative and decided to bring Complainant into the international staff in acknowledgement of his professional performance and because there was no prospect of career advancement in the Field Office. There was a reassignment of duties, with a different salary and new benefits, but with no break in his employment relationship with the Bank. It was never even hinted to him that a condition for the transfer was any loss or waiver of any right whatever.

C. Complainant received discriminatory treatment despite his excellent record in the Organization. First, because local staff members at Headquarters can retire with their length of service but he was able to do it only with the years he had accumulated after his transfer.

Second, because the Local Staff Retirement Plan approved on 23 November 1988 is arbitrarily and specifically designed to exclude employees who were transferred from the local to the international staff. Consequently, local staff members with a shorter length of service, fewer responsibilities and lower grade and remuneration receive a retirement pay that is disproportionate when compared with Complainant's, simply because they were allowed to compute the full length of years they actually worked.

Third, because it was only on 17 February 1981, after he had been transferred to Headquarters, that the Field Office Manual established rules according to which the length of service, leave and benefits of the local staff could not be transferred to the

international staff system. This provision is contrary to law and affects acquired rights retroactively.

Thus, with the enactment of the Local Staff Retirement Plan, there arises a paradoxical situation in which no set of rules applies to Complainant, turning him into a sort of outcast without a legal frame of reference. This meant that the 15 years of services rendered by Complainant in the Field Office in Argentina were disregarded, forcing him to retire with only eight and a half years of service, even though he had actually worked for the Organization for more than 24 years.

Furthermore, the discriminatory nature of these actions is made plainer by the specific cases in which authorization is given to raise the retirement age to 65 years when temporary services are validated, whereas Complainant, who was actually a permanent employee for more than 15 years is denied that length of service for the same purpose.

D. Administrative Instructions 601-D of 1 June 1966, which prescribed the rules and procedures for recruiting, selecting, hiring and managing the local staff of the Bank, called for application of the labor laws, regulations and usage applicable in each locality. Management, however, disregarded its own regulations and it was only in August 1974 that some staff were enrolled in the Argentine social security system, in a partial, belated and transitory manner. The losses suffered by Complainant as a result of these irregularities are as follows:

1. At present, he does not receive the family allowance to which he would have been entitled under Argentine law, namely, for spouse, for children, for schooling, etc.

2. He has no access to Argentine health care coverage.

3. He receives retirement pay based only on his 15 years of service in Argentina, with a deduction of the 8 years of service rendered at Headquarters.

4. The system applicable to him (which is a system that the Bank regarded as transitory until the local staff were given benefits similar to the international) became permanent for Complainant.

5. His last year of remuneration was not included in calculating his average remuneration because the Bank, in November 1980, paid him for his accumulated annual leave instead of letting him use it, which would have allowed him to include 1980 in his retirement pay calculations.

E. Neither the Bank's immunity from a jurisdiction nor the doctrine of latches can stand in the way of Complainant's claims. The first because the immunity cannot be used as a defense when injuring the employees, whose rights would be disregarded through the arbitrary application of rules that are totally alien to their employment contracts. The second, the doctrine of latches, because there was no express action by which Complainant waived his benefits, and it cannot be interpreted that he resigned some of his rights simply because he did not claim them, for he could not complain of the existence of an injury that did not become known to him until the moment he was forced to retire.

III. The Bank answered the complaint and asked the Tribunal to reject the claims because Management had acted in accordance with generally applied policies and practices. To uphold the claims of Complainant would amount to preferential treatment *vis-a-vis* other persons who were once local employees and whose service the Board of Executive Directors chose to exclude from the retirement plans of both the local staff and the headquarters staff.

IV. The Bank bases its position on the following:

A. Complainant accepted his status as a local employee and the doctrine of latches prevents him from challenging that status 25 years later. Complainant did not object to his local employee status at the proper time and in the proper manner. Complainant was hired as a local employee on 1 August 1965 when Administrative Instruction No. 5-A of 27 May 1963, which set out the basic features of the local staff system, was already in effect. A series of policies that consolidated the distinction between local and international employees was added to it. For fifteen years Complainant received and accepted salary in local currency and benefits that reflected local labor practices. He contributed to the national social security system and his service was credited under that system.

Complainant was never misled concerning his situation. He knew from the start that he had been hired as a local employee, he knew the rules and regulations in effect at the time. In fact he contributed to the drafting of the Administrative Manual for Field Offices in 1972 and had a chance to look into and express his views on the successive versions of the Local Staff Regulations.

As Assistant to the Representative in Buenos Aires, according to the rules in the manual that he himself helped to draft, Complainant was in charge of processing the employment contracts of the local staff, which clearly indicated the applicable legal system. Although it has not been possible to locate the employment contract of Complainant, there is overwhelming documentary evidence of the existence of a de facto employment relationship between him and the IDB.

B. Complainant does not claim that the rules and regulations of the Bank were applied incorrectly. Instead, he attacks the very existence of those rules and regulations, based on notions of fairness, and asks the Tribunal to either amend them or to find them totally null and void. But Article VI (3) of the Statute of the Tribunal provides that "In interpreting the terms of the employment agreements between the Bank and its staff under terms and conditions of appointment, the Tribunal shall make decisions and pass judgements based on the Agreement Establishing the Bank and the written and approved policies, rules and regulations of the Board of Governors and the Board of Executive Directors, and the personnel and administrative policies in force at the time of the alleged non observance." Although these provisions do not preclude recourse to equity in order to cast light on the terms and conditions of the appointment of a staff member, they do not list that principle as an independent source of law.

C. Complainant contends that no distinction should be drawn between local and international employees and that he is accordingly entitled to certain benefits enjoyed only by the latter (such as participation in the Headquarters Staff Retirement Plan) as well as to benefits that are enjoyed only by the former (such as participation in the Local Staff Retirement Plan) and the severance pay prescribed under Argentine law. In other words, Complainant wants to benefit from both systems.

D. It is the claim of the plaintiff that he never resigned his position as a local employee in the IDB Field Office in Argentina. Although it is true that his letter of resignation has not been located, there was a de facto resignation or at least an extinguishment of the employment relationship by mutual agreement of the parties.

According to the Local Staff Regulations applicable in Argentina in November 1980, regular employees whose service ended at the initiative of the Bank or on account of disability or death were entitled to a special indemnity. Although the Local Staff Regulations did not provide any special compensation in cases of voluntary resignation or severance of employment by mutual agreement, Argentine Federal Law did call for it. It provided for payments reflecting accumulated annual leave and the proportional portion of the year-end bonus in all cases of extinguishment of the employment relationship. Complainant received and accepted these payments, thereby accepting the de facto dissolution of his local employment with the Bank and the bar against transferring benefits from the local to the international system.

As Complainant himself acknowledges in his complaint, accepting an international position at Headquarters was the best way of advancing within his career, because the IDB Field Office in Argentina had no other local positions at a level higher than his own. It is not surprising, then, that when an appropriate vacancy came up in the Operations Department in 1980, the Bank offered Complainant and he accepted an international appointment to that position.

Complainant was not forced to accept an international appointment. Far from it, he voluntarily accepted the employment contract offered to him in November 1980, thus recognizing the distinction between local and international employees. A new contract binding the same parties to new terms supersedes any previous contract inconsistent with it. Complainant accepted the extinguishment of his earlier contract by accepting on 20 November 1980 an employment contract as an international employee, subject to a new probationary period, new employment conditions and a different set of benefits than the one he had been entitled to under the Local Staff Regulations for the Field Office in Argentina.

E. Ever since the Retirement Plan for the international staff at Headquarters was approved on 31 March 1961, authorization has never been given for the retroactive inclusion of the prior service of former local employees. During his fifteen years as a local employee Complainant never participated with participating service in the Headquarters Retirement Plan and never made or offered to make any contributions to it. From the moment he became an international employee, and consequently a participant in the Retirement Plan at Headquarters, Complainant was advised by the Secretary of the Plan, at least once a year, of the length of his participating service, from which he knew that his years as a local employee were not included in that calculation. Complainant tacitly accepted his prior nonparticipation in the Retirement Plan for Headquarters Staff.

F. Long before the Local Staff Retirement Plan was approved, Management made it absolutely clear that the Retirement Plan could not be extended to former employees of Field Offices or to employees transferred from the local to the international staff. On 23 November 1988 the Board of Executive Directors approved the formal text of the Local Staff Retirement Plan which excludes the prior service of former local employees.

Complainant does not contend that his prior local service was eligible service under the present version of the Local Staff Retirement Plan. Instead, he wants the Local

Staff Retirement Plan to be amended in order to allow for the retroactive crediting of his earlier local service.

G. If the past local service of Complainant were allowed to be credited under the Retirement Plan of either the international or the local staff, every employee in the same situation would have the same right. For the Bank, this would mean an extraordinary additional cost.

H. On 8 January 1976 the Board of Executive Directors approved an amendment to the Headquarters Retirement Plan, lowering the normal retirement age from 65 to 62. Exempted from this change were those staff members who were participants in the Plan on 31 December 1975 and had been born on or before 31 December 1930. These employees could choose to retire between ages 62 and 65.

Complainant was born before 31 December 1930 but he was not a participant in the Plan in December 1975 and he was accordingly not entitled to retire at age 65 and may not claim three additional years of salary or any right whatever to a higher retirement based on three more years of active service.

I. The promotion in grade to which Complainant claims he could have been entitled had he continued in the Bank is mere speculation.

J. Complainant alleges that Bank participation as an employer in the Argentine social security system was partial, belated and transitory and further alleges that the payments for annual leave he received and accepted on ceasing to be a local employee affected the computation of his retirement benefits under the Argentine social security system; but he does not indicate whether the Bank was in breach of any of its internal rules or regulations or whether it complied with the relevant provisions in the local staff rules. Instead, Complainant wants the Tribunal to find that the Bank is not entitled to the privileges and immunities stipulated in the Agreement Establishing the IDB. In this sense, this case differs from any other case brought before international organizations. There are several examples of complaints brought before national courts in which the plaintiffs had challenged the immunity of the organization from local law, but there has never been a case in which those immunities had been challenged before international administrative tribunals, perhaps because the very existence of these tribunals is a testimony to the appropriateness of the immunity from local labor laws enjoyed by the organization. Indeed, the national courts of Argentina have confirmed the immunity of the Bank.

K. The request made by Complainant to include his past local service under the retirement plan of either the headquarters staff or the local staff amounts to a request for amendment of a policy adopted by the Board of Executive Directors.

L. Complainant asks for damages in the amount of US$ 100,000.00 for pain and suffering. International administrative tribunals have awarded damages for pain and suffering only in extreme circumstances. The decision by the Board of Executive Directors to bar the crediting of past local service under either Retirement Plan was not flawed by improper motives or by discrimination and accordingly cannot be said to constitute extreme circumstances.

V. The parties produced abundant documentary evidence made up mostly of memoranda, correspondence, resolutions, rules, policies, legal writings and the case law of this and other administrative tribunals. The following witnesses and expert witnesses testified: Gustavo Romero,

Franklin van O'Ordt, Carlos Paz, Tomás Rodrigo, Alberto Rionegro, Enrique García, Luis Sánchez Masi, María Angélica Pérez, Graciela Guzmán, Marbella Alvarez, José Villegas, Jorge Camarena and James Armistead. The body of evidence has served to establish the following facts:

A. The first contacts of Complainant with the IDB date back to the early sixties when, as an employee of the Central Bank of Argentina, he took part in the negotiations on the Privileges and Immunities Agreement between that country and the IDB.

B. On 1 August 1965 the Representative of the Bank in Buenos Aires hired Complainant as "Assistant to the Representative."

C. As Assistant to the Representative Complainant was ultimately responsible for hiring local staff and for supervising the organization and updating of personnel files. Complainant was always fully aware of his terms of employment and of the regulatory system that governed it.

D. While he worked in Argentina Complainant never had a written contract. His remuneration was paid in local currency and was adjusted according to changes in the local labor market. Complainant received and accepted economic benefits similar to those provided under Argentine law, for example, family allowance and a year-end bonus known as "aguinaldo."

E. From the day he was appointed in the Field Office in Argentina and until August 1974 Complainant had no retirement coverage. On the latter date he was retroactively and partially enrolled in a national retirement fund.

F. Complainant performed his duties with acknowledged efficiency. His excellent performance and the broad range of duties he discharged, coupled with the IDB policy of standardizing duties in all Field Offices, led to a situation in which his career prospects not only became limited but there was a danger of regression.

In view of this situation, in November 1980 the Bank transferred Mr. Rosselló to Headquarters without fulfilling the regulatory requirement of asking for his resignation in writing. On 20 November 1980 Complainant signed an employment contract as an international staff member. Although Complainant asked to take up his duties in Washington, D.C. 60 days after signing his new contract he was promptly transferred. On 24 and 25 November 1980, the Bank paid him, in Argentine currency, his regular salary, family allowance, the proportional portion of the year-end bonus and his accumulated annual leave.

G. He was appointed to position #232 in the Support Services Section of the Operations Department at Headquarters. On 28 November 1980, Complainant took up his new duties at Headquarters and received the relevant installation allowances. On 1 December 1980, the Bank gave Complainant copies of the documents describing the rules applicable to international employees, including the Personal Policies Manual, the Insurance Benefits Manual and a brochure on the Staff Retirement Plant that set out the current version of that Plan. Complainant was at all times fully aware of the terms of employment and the regulatory system governing it.

H. 19 December 1981 marked the end of Complainant's probationary period and he was confirmed as a regular international employee. From 28 November 1980, until 1 June 1989, when he reached retirement age under the provisions of the Retirement Plan

for Headquarters Staff, Complainant career within the international staff evolved admirably. Hired at Grade VI, Step 6 of the international salary scale, on 1 September 1984 he was promoted to Grade V as Coordinator of the Field Office Management Unit within the Operations Department, and on 1 June 1988 to Grade IV as Chief of the Administrative Support Unit of that same Department.

I. On 1 September 1988, Complainant was advised that under the Retirement Plan for Headquarters Staff the date of his retirement was growing near. He objected to his retirement and made known his intentions to await final consideration by the Executive Board of a study on the cost of including the past service of former local employees in the recently approved Local Staff Retirement Plan.

J. On 19 June 1989, the Pension Committee of the Headquarters Staff Retirement Plan approved the pension and retirement benefits of Complainant.

CONSIDERING:

I. The principal question to be decided by the Tribunal is whether, in computing his pension rights under the International Staff Retirement Plan, the Complainant is entitled to have his 15 years of service as a local employee of the IDB in Argentina added to his more than eight years as an international employee of the Bank in Washington. In his view, the answer to this question should be in the affirmative.

II. Complainant made no contributions to the International Staff Retirement Plan during the first 15 years of his employment with the Bank. For that period he was covered by an Argentine retirement plan to which he and the Bank contributed. Throughout his employment with the Bank he was aware of the fact that the Bank maintained distinct employment regimes for local and international staff members. Complainant does not deny these facts. He bases his claim on the argument that, unlike other local employees who became international employees, he had one continuous or uninterrupted employment relationship with the Bank. According to him, this was so because he entered the international service without signing a letter of resignation leaving the local employment service as required by the Bank's staff regulations.

III. No letter of resignation by Complainant has been found in the files of the Bank. The Bank has also not been able to refute the testimony before the Tribunal that no such letter was ever executed by him. Complainant does not deny, however, that he signed a contract of employment on 20 November 1980 which is part of the record of this case. This contract, which accords him the status of an international employee, makes no reference to any prior service by Complainant. It contains various provisions, including a probationary term, that cannot, in the opinion of the majority of the members of the Tribunal, be reconciled with the continuous employment theory advanced by the Complainant.

IV. The majority of the members of the Tribunal conclude that the absence of a written letter of resignation, even though required by Bank regulations, did not in this case produce the effect attributed to it by the Complainant. The terms of the contract of 20 November 1980, signed by the Complainant as a condition of assuming his post at Headquarters, made it clear that a new employment relation between the Complainant and the Bank had been entered into. This contract effected a termination of the previous employment relationship and began a new one, taking the place of the missing resignation. Legally, what transpired here was a novation, the termination of one contract by the execution of another.

V. Hence, in the opinion of the majority the Complainant's argument on this issue must be rejected. In reaching this conclusion, the majority took a number of other considerations into account. First, while the Tribunal may or may not approve of the Bank's policy, which created distinct pension plans for local and international staff members, that policy is not open to challenge before this Tribunal, particularly when the dual systems are not being administered in an arbitrary, discriminatory or capricious manner. Second, upon becoming an international employee the Complainant was fully aware that his prior 15 years as a local employee were not being credited to his international pension plan. He was, moreover, not misled by the Bank into believing otherwise; his annual pension statements clearly indicated what rights he was acquiring, and he never made any contributions to the international pension fund to cover the preceding 15 years of local service. Finally, it has not been shown that any local employee in the Complainant's class who became an international staff member, other than consultants and temporary employees who fall into a different category, had his local years of service added to the international pension plan. There was therefore no discrimination in the administration of the pension systems as applied to him.

VI. Unlike the majority opinion, a minority of the members of the Tribunal find that the employment relationship between the same employer, the Bank, and the same employee, the Complainant, was not interrupted when the latter was assigned to Headquarters. In other words, there was no novation of the contract but only an amendment, which affected Complainant's length of service in the Bank. The minority, agrees nevertheless, with the majority that Complainant, when accepting his transfer to Headquarters, was fully aware of the existence of two different systems, one applicable to the local and the other to the international staff, with all their legal consequences, irrespective of whether there were two employment contracts.

VII. Complainant asks to be compensated for the injuries resulting from his forcible early retirement at age 62. He claims he was unlawfully deprived of his right to serve until age 65. The computation upon which his claim for damages is based takes the following items into account: damages for loss of three years' salary; forfeiture of the possibility of obtaining a grade promotion in that period of time; and loss of a higher amount in his retirement account as well as the loss of a higher monthly retirement pay, to which he would have been entitled, if the service and remuneration of the three years between age 62 and age 65 that were left out had been computed.

By resolution DE-2/76 of 8 January 1976, the Executive Board approved an amendment to the Headquarters Staff Retirement Plan, which lowered the normal retirement age from 65 to 62 years. Under Section 1.1 (i) of the Plan, "a participant in participating service on 31 December 1975, who was born on or before 31 December 1930," was, however, allowed to retire at any date between ages 62 and 65.

Complainant argues that since he was born before 31 December 1930, and was an employee in 1975, he had a right to retire at age 65 instead of age 62. His forced retirement was in his view capricious, paradoxical and in breach of his acquired rights.

However, Complainant does not satisfy the requirement that he must have been "a participant in participating service" in or before 1975. Prior to his appointment to the international staff in November 1980, he was a local employee who did not periodically make contributions from his remuneration to the Headquarters Plan. Not having been "in participating service" in or before 1975, he cannot claim a right to retire at age 65, nor can he claim three additional years

of salary or the consequent loss of a higher monthly retirement pay. Again, since Resolution DE-2/76 of 8 January 1976 was already in force when Complainant became an international staff member in November 1980, he could not have acquired any rights to retire at an age later than age 62.

VIII. As regards the claim for a "shortfall in retirement pay obtained under the Argentine social security system" because of the payment of salary in lieu of the annual leave "accumulated" up to 1980, the Tribunal finds it to be established that Complainant was transferred from the status of local employee to that of international employee without being given the option to decide whether he wished to take the 60 days' leave to which he was then entitled instead of being paid salary in lieu of such leave. Indeed, the Tribunal has seen the copy of a telex dated 29 July 1980 sent by Mr. Enrique Garcia, the Bank's Representative in Argentina, to Headquarters conveying, inter alia, a desire by the Complainant to be allowed to take 60 days' leave before taking up his international appointment. However, the documents indicate that he had to assume his duties at Headquarters on 30 November 1980 at the latest. Had he been allowed to take the leave, his employment as a local employee would have continued to the end of 1980 making the annual salary for that year available for computation in the calculation of the retirement pay to which he became entitled under the Argentine social security system, as contributions to the system for the full years' salary would have been made. The Tribunal holds that the denial of the option of choice, which resulted from the manner of his transfer, deprived Complainant of a higher pension. Complainant thus suffered a detriment for which he should be compensated.

The Bank submitted late in the proceedings an Argentinean legal opinion which states, inter alia (a) that by Argentine law there is a ceiling on the maximum amount of retirement pay under the social security system, which on 1 February 1991 was 6,108,775 Australes per month (the equivalent of approximately US$ 617.00); (b) that by the application of the "indexing coefficient" published every year on 31 December by the "Enforcement Authority" and used in the calculation of retirement pay, the "highest updated remuneration received by the Complainant refers to the years 1976 1977 and 1978"; (c) that, consequently, the claim for US$ 50,000.00 made by Complainant has no basis in law or in fact.

In reply to the legal opinion just stated, the Complainant has submitted evidence, which, on investigation, is accepted, that the Argentine statutory provisions fixing a ceiling on retirement pay as well as the application of the "indexing coefficient" have been declared by the appropriate courts of Argentina to be unconstitutional. The Bank's contentions on this subject must therefore be rejected.

An accounting study has also been submitted by the Complainant which establishes that the three best years for purposes of his retirement pay under the social security system would include the year 1980, had contributions been made for the full year. The accounting study also sets out a calculation of the shortfall in the Complainant's retirement pay resulting from the exclusion of 1980 from which it appears that he suffered a diminution of approximately 35 percent in his retirement benefits.

The Tribunal therefore considers that a reasonable sum to compensate the Complainant for this detriment is US$ 53,720.00.

In the opinion of the Tribunal the other issues raised by the parties did not merit consideration.

ACCORDINGLY:

The sum of US$ 53,720.00 is awarded to Complainant.

Washington, D.C., 12 July 1991.

Kenneth G. Smith.

Alfredo Martínez-Moreno.

Ildélio Martins.

Baltasar Cavazos-Flores.

Thomas Buergenthal.

Luzius Wildhaber.

Guillermo López-Guerra.

Hernán Sáenz-Jiménez
Executive Secretary.