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

EIGHTY-THIRD SESSION

In re Aschenbrenner (No. 2), Tanner-Zwettler, Girod and Hertzschuch

Judgment 1660

THE ADMINISTRATIVE TRIBUNAL,

Considering the second complaint filed by Mr. Gerhard Aschenbrenner and the complaint filed by Mrs. Ingrid Tanner-Zwettler on 18 March 1996 against the European Free Trade Association (EFTA) and corrected on 21 June;

Considering the complaints filed against EFTA by Mr. Rémy Girod and Mr. Pierre Hertzschuch on 21 February 1996 and corrected on 21 June;

Considering EFTA's replies of 7 October 1996, the complainants rejoinders of 16 January 1997 and the Association's surrejoinders of 4 April 1997;

Considering the applications filed to intervene in Mr. Aschenbrenner's and Mrs. Tanner-Zwettler's complaints by:

P.R. Barron
J. Clivaz
C. Delley
L. Dores
C. Evalet-Arsène
R. Fardel
H. Haeberli
R. Hall
A. Hauksdottir
E. Maurer
J. Meaden
C. Moret
R. Portier
H. Reicher
A. Roulin
H. Schindl
E. Steinacker;

Considering the applications filed to intervene in Mr. Girod's and Mr. Hertzschuch's complaints by:

R.M. Artiss
J. Lanner
M. Meylan
D. Monnet
B. Palmer
X. Pintado;

Considering the Association's observations of 13 May 1997 on those applications;

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

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

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

A. Regulation 21(a) of the Staff Regulations of EFTA reads:

"There shall be a Staff Insurance Scheme, the purpose of which shall be to protect the staff members of the Association and their families from the economic consequences of disability, old age and death of the staff member."

Article 4.1(a) of the Regulations of the Staff Insurance Scheme says:

"The States members of the Association or associated with it together guarantee the payments of the benefits to be paid under this Scheme."

By decision No. 10 of 22 September 1977 the Council of EFTA said in paragraph 1:

"The guarantee provided for [in Article 4.1(a)] shall, irrespective of transformation or dissolution of the Association, cover any payment due under the Scheme until the entitlement of the last beneficiary has ceased."

and in paragraph 6:

"The Council shall conclude in due time an agreement with an appropriate institution providing that in the event of transformation or dissolution of the Association the institution shall take over the administration of the Scheme."

As Judgment 1613 (*in re* Evalet-Arsène and others) said under A, the Scheme, known as the SIS, was introduced in 1980 as from 1 July 1977.

At a meeting on 13 and 14 December 1994 the ministers representing the seven States that were then members of the Association adopted what they called a "common understanding". They "took note" of the withdrawal of Austria, Finland and Sweden at 31 December 1994 on their accession to the European Union at 1 January 1995. They agreed, among other things, to decide on the future of the Scheme by 30 June 1995.

On 20 July 1995 the representatives of the seven States that had been members of EFTA at 31 December 1994, sitting as what they called a "Supervisory Body at seven", approved the draft of a contract to be concluded between the Association and a private Swiss mutual insurance scheme, known as "Rentes genevoises", for the transfer thereto of the SIS. On 21 July those seven States and the Association as represented by the Secretary-General signed the contract with *Rentes genevoises*. They thereby undertook to provide the capital to cover current and future benefits and the payment of lump-sum entitlements to participants in the SIS.

Mr. Aschenbrenner, who was born in 1941, held a permanent appointment with the Association until he left on 30 June 1995. Mr. Girod, who was born in 1916 and held a fixed-term appointment, retired in 1981. Mr. Hertzschuch and Mrs. Tanner-Zwettler, who were both born in 1925, held fixed-term appointments. Mr. Hertzschuch retired in 1992 and Mrs. Tanner-Zwettler in 1994. By letters dated 21 July and 23 August 1995 the Secretary-General told them of the transfer of the Scheme to *Rentes genevoises*. On 21 October Mr. Girod and Mr. Hertzschuch each wrote a letter to the Secretary-General giving notice of appeal against that decision and seeking leave to go straight to the Tribunal. In letters of 30 November 1995 the Secretary-General answered that since it had not proved possible to set up the appeal body -- the Advisory Board -- the rules allowed direct appeal to the Tribunal. Those are the decisions that Mr. Girod and Mr. Hertzschuch are impugning. On 14 and 15 December 1995 Mr. Aschenbrenner and Mrs. Tanner-Zwettler wrote in like terms to the Secretary-General and by letters of 19 December, which they are impugning, the Deputy Secretary-General answered in the same terms as had the Secretary-General in his of 30 November 1995.

B. The complainants submit that the "Supervisory Body at seven", so called in the decision of 20 July 1995, was not competent *ratione personae* to make over the SIS, let alone to wind it up. According to the Convention of 4 January 1960 setting up the Association and the Council's decision of 22 September 1977, only the Council was competent to do so.

Secondly, they plead a mistake of law. The Association was free according to the rules to make over the insurance scheme save in the event of the "transformation or dissolution of the Association". The mere withdrawal of three countries from membership did not amount to either of those contingencies. In any event the Supervisory Body was not free to decide, as it did on 20 July 1995, that "The EFTA SIS will be terminated upon the fulfilment of the obligations of the Member States under Council Decision No.10 of 1977." The Association was bound by the terms of decision No. 10, or at least by a decision that the Council took on 20 January 1988 to index staff pensions to any increase in the cost of living as determined by the statistics office of the Canton of Geneva. Paragraph 7(c) of decision No. 10 says that the institution which takes over the Scheme "shall undertake to observe all provisions and implementing rules of the Scheme". There is breach of the rules on the adjustment of pensions in two respects: the maximum limit of 3 per cent a year set on such adjustment in Annex 5 to the contract with *Rentes genevoises*, and the failure to grant any adjustment at all for the period from 1 October 1994 to 30 March 1995.

The complainants' third plea is breach of their acquired rights. There is such breach in the entry into force of the contract with *Rentes genevoises*. There is further breach in the loss of their right to appeal to the Tribunal, which may not hear an appeal against a decision by a third party on a dispute over the application of the Scheme, even though a clause in the contract says that such appeal will lie.

They seek the quashing of the decisions of 30 November 1995 and 19 December 1995 insofar as they constitute "implied rejection" of their appeals of 21 October and 14 and 15 December 1995. They seek costs.

C. The Association replies that the complaints are irreceivable. Insofar as they are challenging the decisions of 30 November and 19 December 1995 they disclose no cause of action. The complainants' letters of 21 October and 14 and 15 December 1995, to which those decisions were the answer, did not amount to internal appeals. Insofar as the complaints are challenging the decisions which the Secretary-General communicated to the complainants in his letters of 21 July and 23 August 1995, they are out of time. Although the Staff Regulations and Staff Rules set no time limit for appeal to the Advisory Board, the complainants took some seven months from the date of notification of their claims to file their complaints. That is not what the case law means by a "reasonable time" and, besides, the Staff Regulations and Staff Rules do not set any time limit that exceeds six months. The Association further contends that the complainants have no cause of action because they are challenging the adoption of rules that cause them no injury. It observes by the way that there is no provision of the Statute of the Tribunal which confers competence on the Tribunal to hear appeals against the adoption of a rule. Moreover, the complainants have for the time being no cause to challenge the 3 per cent a year ceiling on the adjustment of pensions since so far inflation has fallen below that figure.

On the merits the defendant submits that it acted properly and in due compliance with decision No. 10 in making over the Scheme to *Rentes genevoises*. The body that met on 20 July 1995 was none other than the Council as it had existed at 31 December 1994. As the highest authority of the Association it has the widest competence. The wording of decision No. 10 is flexible: it speaks of "transformation", a contingency that falls between the withdrawal of a single member State and dissolution. The Association made proper use of its discretion in taking the view that the withdrawal of three countries from membership brought into play paragraphs 6 to 8 of the decision, which set out the arrangements for transfer to an "appropriate institution". Such transfer was warranted, too, by the size of the three countries and by the uncertainty that clouded the Association's future because of the attitude of some member States towards the European Union. Moreover, had there been no transfer, the SIS would have had no active participants at all since the four member States set up a new pension scheme on 1 January 1995 for the remaining staff: it would have been a "closed" scheme. It would have been difficult too, if not impossible, for the seven member States to guarantee payments had the funds been paid into such a closed scheme.

The adjustment of pensions to the cost of living is not an acquired right. Article 19 of the SIS Regulations indexes pensions to salaries, and a decision is taken on salary scales each year. Moreover, the contract concluded with *Rentes genevoises* provides for a ceiling only on the guarantee of indexing.

The Tribunal does have competence to hear disputes about the Scheme even though the rules are being applied by the institution to which the Scheme has been made over. Should the Tribunal not accept that, however, the Association is willing to consider some other means of appeal.

D. In their rejoinders the complainants challenge the defendant's objections to receivability and to the Tribunal's jurisdiction. They press all their pleas on the merits. In their submission the "Supervisory Body at seven" is *sui generis* and not to be mistaken for the Council itself. They fail to see how countries that are no longer Members can still be represented on the Council. Besides, the mere withdrawal of three countries did not amount to "transformation". Lastly, rules that vest competence in a court of law must be narrowly construed. A staff member may not appeal to the Tribunal against a decision by a third party even though that third party has concluded a contract with the employer. The proposal to replace the Tribunal with some national jurisdiction would not afford the objectivity and effectiveness that the settlement of such disputes calls for.

E. In its surrejoinders the Association presses its objections to receivability. It maintains that the Tribunal may not hear claims to the quashing of rules. It presses in full its pleas on the merits. It contends that the complainants' right to the indexing of pensions was embodied in the Staff Regulations and Staff Rules, which

referred to the pension fund rules and letters of appointment. The Regulations of the Scheme did not apply for the automatic indexing of pensions. In any event the Association was free to prescribe a system of adjustment that set limits on the alleged duty of indexing. The complainants are mistaken in pleading breach of their acquired rights.

Citing Judgment 1451 (*in re* Hamouda and others), the defendant contends that the Tribunal may hear disputes between the pension scheme of an organisation that has accepted its jurisdiction and the participants, even where the scheme has legal personality under Swiss law. The Tribunal derives competence from its own Statute and that competence is to be construed objectively. But the Association is willing to make a further declaration of recognition so as to vest in the Tribunal competence to hear disputes over the management of the SIS by *Rentes genevoises*.

CONSIDERATIONS

1. The European Free Trade Association (EFTA) set up for its staff a pension fund known as the Staff Insurance Scheme (SIS). The Scheme was financed by yearly contributions of 16 per cent of staff salary from the Association and 8 per cent from the staff themselves. Once a participant qualifies he is entitled to the payment of a pension, and the amount of it is the last yearly figure of salary multiplied by 2 per cent for each year of participation up to a maximum of 70 per cent. Article 19 of the Regulations of the Scheme, which is about the "adjustment" of pensions, reads:

"1. Should the Council decide on an adjustment of salaries in relation to the cost of living, it shall grant an identical adjustment of the pensions currently being paid, and of the pensions whose payment is deferred.

2. The Council may consider whether an appropriate adjustment of the pension should be made taking into account increases in the standard of living."

Article 4.1(a) says that "The States members of the Association or associated with it together guarantee the payments of the benefits to be paid under this Scheme".

2. When Austria, Finland and Sweden left to join the European Union the Association terminated the contracts of service of EFTA staff. Since there were to be new arrangements for recruiting staff and for giving them social insurance, contributions to the old Scheme were to stop. Despite some misgivings all seven countries that had been members of the Association at 31 December 1994 decided at a meeting they held on 20 July 1995 to authorise the Secretary-General to conclude a contract with *Rentes genevoises*, an outside scheme. It was to pay any pensions due under the SIS in consideration for a capital transfer of 45,904,432.65 Swiss francs. The contract with *Rentes genevoises* said, among other things, that the pensions would be guaranteed by the State of Geneva and that pensioners would be "free to appeal to the Administrative Tribunal of the International Labour Organization if any dispute arises over the management of the Staff Insurance Scheme by Rentes genevoises".

3. The Secretary-General of EFTA told the staff in letters dated from 21 July to 23 August 1995 about the new pension arrangements. Short of going into the details of the contract, he explained the practical arrangements, describing them as "solid and fair" and "a safe and effective solution for the continuity of the benefits under the EFTA SIS". He said that there would be changes in the indexing of pensions:

"Instead of a yearly decision by the EFTA Council on the indexation of pensions, the new agreement stipulates an automatic yearly indexation of benefits based on inflation in Geneva (as measured on 1 July each year by the Office cantonal genevois de la statistique) up to the level of 3%. Furthermore a stabilisation fund is established drawing on money left over in years when inflation is less than 3% in order to provide for indexation of pensions, to its ability, beyond 3%, whenever inflation exceeds that figure."

4. Four former staff members of the Association are impugning decisions by the Secretary-General which in their view confirm the letters telling them of the change in scheme referred to above. The material dates are as follows:

- The letters telling Mr. Girod and Mr. Hertzschuch of the changes in the pension scheme are dated 21 July 1995. On 21 October 1995 they told the Secretary-General that they wanted to appeal against the decision notified to each of them and sought leave to go straight to the Tribunal. The Secretary-General answered on 30 November 1995 that it had proved impossible to set up the Advisory Board which heard disputes over the

application of the Staff Regulations and Staff Rules in force up to 1 July 1995 and that they might therefore appeal straight to the Tribunal. They did so on 21 February 1996.

- Mr. Aschenbrenner and Mrs. Tanner-Zwettler are in like case, but the dates are not quite the same. The Secretary-General's original letters were dated 23 August 1995, their applications for leave to go straight to the Tribunal were dated 14 and 15 December 1995, and the Deputy Secretary-General answered them on 19 December 1995. They filed their complaints on 18 March 1996.

5. Since the complaints raise the same issues of law they are joined to form the subject of a single ruling.

6. The Association contends that the complaints are irreceivable on several grounds. First, insofar as the complainants challenge letters that merely give them leave to appeal to the Tribunal they disclose no cause of action. Secondly, insofar as they purport to be challenging the decision to make over the SIS to *Rentes genevoises*, their complaints are out of time because the decisions were notified to them in July or August 1995. Thirdly, what they are purporting to challenge is the adoption of rules, and in any event those rules cause them no injury.

7. As to the first plea, it is true that the Secretary-General's and the Deputy Secretary-General's letters giving the complainants leave to come straight to the Tribunal do not formally reject their internal appeals, which did not expressly seek the quashing of the decisions they are now impugning. But the circumstances of the case are peculiar, the Association having failed to provide the internal means of redress that it ought. So it is hard to see any merit in the Association's objection to the complainants' appealing straight to the Tribunal. In answer to their appeals the Association could have told them that in its view no adversarial proceedings had yet taken place. Instead it acknowledged that their internal remedies were not available, "the Advisory Board having failed to report to the Secretary-General or to make proposals for settling the case within the prescribed time limits". So it must be deemed simply to have confirmed the decisions it had already taken in July and August 1995.

8. Although the complainants did not challenge those decisions in their appeals to the Advisory Board, there is nothing objectionable about that: the Advisory Board was never set up, and the rules set no time limit for appeal anyway. As was said in Judgment 1596 (*in re* Leicht and others) of 30 January 1997, on earlier EFTA cases, the ninety-day time limit in Article VII(1) of the Tribunal's Statute started to run at the date of receipt of the letters telling the complainants that the Advisory Board would not be constituted and that they would be unable to exhaust the internal means of appeal laid down in the Regulations. Contrary to what the defendant says in its surrejoinders, it was the official notification of that information, and not the date at which the complainants might have had notice of it, that set off the time limit. Each of the four complainants therefore complied with the ninety-day time limit.

9. The Association's third objection is that the complainants are challenging the adoption of rules and in any event cannot impute any present injury thereto. According to precedent an international civil servant may in exceptional circumstances challenge the lawfulness of a rule that has been applied to him. The notification to the complainants of the changes in the system of reckoning and paying their retirement pensions constituted individual application of rules adopted by the member States of EFTA and set out in the contract with *Rentes genevoises*. Even though, as the defendant says, the complainants cannot yet show any injury, they do have a cause of action and may challenge, howsoever they wish, the lawfulness of the new pension rules.

10. In challenging the individual decisions to apply those new rules to them the complainants put forward three main pleas.

(1) Since the pension scheme forms part of their terms of appointment, the changes ought to have been made by the Council, not by the "Supervisory Body at seven" that decided to wind up the scheme and to empower the Secretary-General to conclude the contract for transfer to *Rentes genevoises*.

(2) The impugned decisions show a mistake of law. According to a decision that the Council took on 22 September 1977 the SIS was to be made over to an outside body only in the event of "transformation or dissolution of the Association". That decision also required the Association to make the SIS over only to a body that would abide by the principles and implementing rules of the Scheme, including the rule on the indexing of pensions to the cost of living. Yet the contract with *Rentes genevoises* sets a maximum on such

indexing.

(3) There was breach of the complainants' acquired rights in the amendment to the rules on indexing and in the loss of the right of appeal to the Tribunal.

11. There is no merit in the plea that the "Supervisory Body at seven" was not competent to take the action that circumstances required. On 20 July 1995, when the decision to end the old scheme was taken, only four countries -- Iceland, Liechtenstein, Norway and Switzerland -- were still member States. True, the body ordinarily competent to run the Association was its Council, representing all the member States in accordance with the Stockholm Convention and reaching decisions unanimously. But here the Council was acting on the "common understanding" that the ministers of the seven countries that were still member States at the time had adopted at their meeting on 13 and 14 December 1994. The Council took the view that the decisions on the future of the SIS "continued to be a common responsibility of the seven current EFTA Member States" and that "the necessary decisions should be finalized as soon as possible". So the delegation of authority was quite proper. What is more, it was quite understandable since the seven countries still owed the serving and the retired staff joint responsibility for safeguarding their entitlements. That is how the three departing countries were associated in the decisions on the future of the SIS. Besides, the decisions were unanimous, and there can have been no procedural flaw in the mere attendance -- which was highly desirable anyway -- of representatives of the former member States as well.

12. The complainants' second plea is that the Council was bound by its decision of 22 September 1977. Paragraph 6 of that decision said:

"The Council shall conclude in due time an agreement with an appropriate institution providing that in the event of transformation or dissolution of the Association the institution shall take over the administration of the Scheme".

The argument is that only such transformation or dissolution warranted transfer and that even then there was no question of doing away with the SIS altogether. Yet it is hardly arguable that the Association did not undergo radical transformation on the loss of the member States. There has been a huge drop in its budget, its secretariat has been wound up, and its staff have gone. Those are indeed the administrative and financial consequences of a fact that the complainants do not deny: the departure of Austria, Finland and Sweden has reduced by 97 per cent the volume of the trade between member States. That being so, one of the contingencies anticipated in 1977 came to pass. So the Council made no mistake of law in relying on the decision then taken and making the SIS over to an "appropriate institution" to manage. Although the transfer meant doing away with the Scheme altogether, a step that the decision taken in 1977 had not contemplated, there was nothing wrong with that so long as pension entitlements were observed and member States were not shirking the duty of guaranteeing them. Member States also made over funds to *Rentes genevoises* to finance the Scheme, and *Rentes genevoises* undertook to pay all the benefits due: a text setting out the indexing of pensions is appended to the contract. The conclusion is that the winding up of the Scheme was merely formal: in fact it survives in a new form.

13. Yet the transfer of management must not allow of breach by *Rentes genevoises* of the rules on the reckoning of pensions, and on that score the complainants put forward their third plea. The defendant made a mistake of law -- they say -- in agreeing that indexing to the cost of living may not yield an increase of over 3 per cent a year. The complainants do not object to the substitution of automatic indexing to the rate of inflation in Geneva for the indexing to salary that is provided for in Article 19(1) of the SIS Regulations. The Association having been overhauled, indexing to salary would make precious little sense and indeed had already been dropped. What they do object to is a breach of Article 19 and of later decisions which, they say, required automatic indexing to the cost of living. If there were such breach -- they argue -- the setting of the 3 per cent a year maximum would not be in line with the guarantees granted to pensioners. All that Article 19(2) of the SIS Regulations said was that the Council would see whether there should be "appropriate adjustment" of pensions to take account of movements in the cost of living. Although until 1994 the practice was to index pensions even where there was no rise in salary, there was no written rule embodying such practice; there were just budgetary decisions. So the practice conferred no rights on the complainants and they may not object to its discontinuance between 1 October 1994 and 30 March 1995. The new arrangements for automatic indexing to inflation in Geneva are not inferior to the old ones. Setting a ceiling is not in itself objectionable since the actual figure is reasonable and there is to be a "stabilisation fund" to allow going above the ceiling in any year in which inflation goes above 3 per cent after being below that

figure.

14. That disposes of the complainants' plea of mistake of law in the new system of indexing. But the same answer holds good for their plea of breach of their acquired rights in the loss of guarantees. There was neither written rule nor practice entitling them to full indexing to the cost of living. So the imposition of the ceiling, which is only a contingency anyway, cannot be regarded as breach of their acquired rights.

15. The complainants' last plea is that the contract with *Rentes genevoises* means that pensioners forfeit their former safeguard of appeal to the Tribunal. That is a more delicate issue. According to Judgment 1330 (*in re* Bangasser and others) of 31 January 1994 and other precedents, the right to appeal to an international administrative tribunal forms part of the essential safeguards that international civil servants must enjoy. The defendant surely realised that access to the Tribunal formed part of its staff's acquired rights; else the contract with *Rentes genevoises* would not have said, in Article 11, that participants and their successors "may appeal to the Administrative Tribunal of the International Labour Organization in the event of dispute over the application of the Staff Insurance Scheme by Rentes genevoises". In other words, the right of appeal to the Tribunal has not been overlooked and there is no breach of any acquired right on that score. Yet actual recognition of the right of appeal will be assured in law only when the Association has addressed to the Director-General of the International Labour Office, in accordance with Article II(5) of the Tribunal's Statute, a declaration extending its jurisdiction to disputes between *Rentes genevoises* and any former EFTA staff who allege breach of their rights under the Scheme. Pending such declaration a dispute may still be referred to the Tribunal in accordance with Article 7(c) of Appendix I to the SIS Regulations, of which the observance is guaranteed by Article 11 of the contract with *Rentes genevoises*. But in that event too only the Association would be the defendant before the Tribunal, and only the Association would be required to give effect to its rulings.

16. The conclusion is that the plea of breach of acquired rights cannot succeed, and that the complaints must therefore fail.

17. Since the complaints are dismissed, so too are the applications to intervene, there being no need to determine whether they are receivable.

DECISION

For the above reasons,

The complaints and the applications to intervene are dismissed.

In witness of this judgment Sir William Douglas, President of the Tribunal, Mr. Michel Gentot, Vice-President, and Miss Mella Carroll, Judge, sign below, as do I, Allan Gardner, Registrar.

Delivered in public in Geneva on 10 July 1997.

(Signed)

William Douglas
Michel Gentot
Mella Carroll
A.B. Gardner

Updated by PFR. Approved by CC. Last update: 7 July 2000.