The Administrative Tribunal,

Considering the complaint filed by Mrs C. H.-P. against the World Trade Organization (WTO) on 19 June 2006, the WTO's reply of 6 September, the complainant's rejoinder of 21 November 2006 and the Organization's surrejoinder of 23 January 2007;

Considering Article II, paragraph 5, of the Statute of the Tribunal;

Having examined the written submissions and decided not to order hearings, for which neither party has applied;

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

A. The complainant, who was born in 1961, joined the Interim Commission for the International Trade Organization/General Agreement on Tariffs and Trade (ICITO/GATT) – the WTO's predecessor – in November 1991 under a short-term contract as an Economic Affairs Officer at grade P.3. At that time, she was designated as a local recruit, as a result of which she was not eligible for the benefits granted, subject to certain conditions, to internationally recruited staff, including home leave and the education grant. As from 21 December 1991 she held a fixed-term contract. In January 1992 she submitted a Personal History Form indicating that, at birth, she held French nationality and that she currently held both Swiss and French nationality. She also indicated an address in Geneva as both her present and permanent address.

The complainant applied for an education grant in August 2001 but received no response. She wrote to the Director of the Human Resources Division (HRD) on 2 September 2004 stating that, as a French and Swiss national she was not entitled to an education grant, but asking him to examine her situation in the light of the applicable rules, so as to ascertain whether staff members in a similar situation to her had benefited from a more favourable treatment, which could also apply to her. The Director of HRD replied on 16 September 2004 that the statutory provisions governing local and international recruitment were under review.

In a Notice to the Staff issued on 19 January 2005, the Administration announced that it had decided to review the recruitment status of fixed-term and regular staff members who believed that their status had been erroneously determined at the time of their first appointment. A Panel on Local and International Recruitment Status was established to review the requests submitted by 53 staff members, including the complainant, and in particular to examine whether or not the relevant United Nations (UN) or WTO Staff Rules had been correctly applied to them*. The complainant was informed by a memorandum of 29 July that the Director-General had decided to endorse the Panel's recommendation in her case, namely that she should have been designated as an "international recruit", and indicated that her recruitment status would be changed with effect from 1 August 2005.

By a letter of 8 August the complainant asked the Director of HRD to determine, in the light of the Director-General's decision, whether she was eligible for an education grant. The Director of HRD replied that same day that, in accordance with the staff rules, an education grant was paid to staff members who were internationally recruited and whose duty station was outside their home country. Since the complainant held Swiss nationality and resided in Switzerland within commuting distance of her duty station, the Director of HRD considered that she was not eligible for an education grant. On 12 August the complainant asked the Director-General to review that decision. She was informed on 12 September that the Director-General had decided to uphold the decision of 8 August 2005.

On 5 October 2005 the complainant filed an appeal with the Joint Appeals Board challenging the refusal to pay her an education grant and requesting that she be granted all other allowances and benefits available to internationally recruited staff members. In its report of 20 December 2005 the Board recommended that the Administration ascertain, in good faith and objectively, all the facts that existed at the time of the complainant's recruitment, taking into account the new information given by the complainant during the internal appeal proceedings. The Administration should then decide anew what the complainant's "home country" was and whether or not she was

entitled to an education grant and to home leave. On 26 January 2006the Director of HRD informed the complainant that the Director-General had decided to endorse the Board's recommendation. She was consequently asked to provide additional information, which she did in February.

By a letter of 22 March 2006 the Director of HRD notified the complainant that, having examined the additional information she had provided, the Director-General had decided that, for the purposes of the Staff Regulations and Staff Rules, she was a Swiss national and that her "recognized home country" was Switzerland. That is the impugned decision.

B. The complainant contends that the Organization has chosen to ignore, without justification, some of the information contained in her personal file as well as some of the information she had produced following the Joint Appeals Board's recommendation.

With regard to the nationality to be taken into consideration by the WTO, the complainant refers to UN Staff Rule 104.8(b), which reads as follows:

"When a staff member has been legally accorded nationality status by more than one State, the staff member's nationality for the purposes of the Staff Regulations and these Rules shall be the nationality of the State with which the staff member is, in the opinion of the Secretary-General, most closely associated."

She points out that, despite the fact she held only French nationality at birth, the Organization has refused to consider her as a French national, without giving any explanation. Neither has it provided reasons for giving more weight to the steps taken by the complainant to acquire Swiss nationality at the age of 25 than to those taken to reacquire her "nationality of origin", that is to say French nationality, which she had renounced when she became a Swiss national. Moreover, the French and British nationalities of her parents were not taken into consideration to determine the country with which she was most closely associated. She adds that she has no family living in Switzerland, except for her mother who spends only part of the year in that country, and that all her "family connections and all [her] residential ties at the time of recruitment" were in France. She asserts that consequently she should be treated as a French national.

With regard to her request for home leave and education grant, she contends that the Organization's decision to reject the United Kingdom as her home country was arbitrary as it was not based on a transparent and consistent interpretation of the UN Staff Regulations and Staff Rules. UN Staff Rule 105.3(d) provides that the country of home leave shall be the country of the staff member's nationality. However, according to UN Staff Rule 105.3(d)(iii) the Director-General may, in exceptional and compelling circumstances, authorise a country other than the country of nationality as the home country. She also points out that since 1998 six of her colleagues have been authorised to take home leave in a country other than their country of nationality. Furthermore, she submits that, contrary to the Organization's statement in the letter of 22 March 2006, she maintained normal residence in London for a "prolonged period" of time before joining ICITO/GATT in 1991. Indeed, she spent five years in England and still has close family and personal ties in that country since her brother, whom she visits on a regular basis, lives there. She asserts that, as an internationally recruited staff member whose duty station is not situated in her home country, she is entitled to certain benefits, including home leave and education grant.

The complainant alleges that she was treated differently to a number of colleagues whose situation in fact and in law was similar to hers; this amounts to discrimination in her view. She explains in particular that five of her colleagues who held dual nationality, including Swiss nationality, at the time of recruitment were allowed to "put forward their foreign roots" in the determination of their nationality for WTO purposes and were all designated as non-Swiss. Considering that her situation is similar to theirs, she contends that she was discriminated against because the Administration refused to consider her as a French national. Also she was discriminated against with regard to the determination of her home country. Indeed, the Administration held in the impugned decision that, at the time of recruitment, her "links with Switzerland were stronger than with France, where, apparently, [she] never lived on a regular basis, worked or studied".

Referring to the memorandum of 29 July 2005 informing her that her recruitment status would be changed with effect from 1 August 2005, she contends that, since the Director-General endorsed the Panel's recommendation that she "should have been designated as an international recruit", her status should be modified with retroactive effect from the date of her entry into service. She points out that, according to the Tribunal's case law, a retroactive decision will be admissible in law where its effect is favourable to the staff member to whom it applies.

The complainant asks the Tribunal to change the “date of effect of the decision of the administration giving [her] international status from 1 August 2005 back to December 1991”, to quash the decision of 22 March 2006 and to find that she should have been designated as a French national with England or, failing that, France as her home country as from the date of recruitment. She claims 300,000 Swiss francs in compensation for the various benefits that she has been denied, including 20,272 francs in interest, as well as 60,000 francs in moral damages and 6,000 francs in costs.

C. In its reply the WTO indicates that all the evidence available in the complainant’s personal file was duly taken into account to determine her home country and subsequently her eligibility for an education grant and other entitlements. In accordance with the Tribunal’s case law, the burden of proof is on the complainant to show that the Organization did not consider all available information;in its view, she has failed to do so.

The Organization asserts that the Administration has correctly applied the relevant UN Staff Rules to determine the complainant’s nationality. It maintains that it was correct to hold that at the time of recruitment the complainant had closer links with Switzerland than with France because she was brought up and spent most of her life in Switzerland, chose to acquire Swiss citizenship despite the legal requirement to abandon any other nationality and had her closest family, i.e. her parents, in that country. It adds that the Director-General has discretionary authority to determine, based on the evidence before him, a staff member’s status for the purpose of implementing the staff rules.

In its view, there were no exceptional and compelling circumstances justifying the choice of a country other than Switzerland as the complainant’s home country. In accordance with UN Staff Rule 105.3(d), the complainant’s home country was Switzerland as it was her country of nationality. In any case, the decision to make an exception under Staff Rule 105.3(d) lay at the discretion of the Director-General. The WTO also indicates that the complainant did not maintain normal residence in London for a prolonged period preceding her appointment within the meaning of the relevant provisions; in its view, three years of working and one year of studying in England cannot be considered as a considerable duration of time, especially compared to the 25 years spent in Switzerland. Moreover, the fact that she visited, on a regular basis, her brother who was living in England, does not constitute a “compelling” circumstance either, particularly because her mother was livingin Switzerland.

The Organization points out that the complainant’s home country has already been determined to be that of her nationality, i.e. Switzerland, which is her only duty station as well as her normal place of residence. Considering the United Kingdom to be the complainant’s home country would therefore be inconsistent with the purpose and intent of UN Staff Regulation 5.3, according to which home leave should be granted only to staff members who reside and work away from the country of their nationality.

The defendant asserts that since the complainant resides and works in the country of her nationality, she is not entitled to the allowances and benefits available to internationally recruited staff members. Indeed, the fact that a staff member is an international recruit does not mean that he or she will *ipso facto* obtain all the benefits available to internationally recruited staff members; due consideration is given to the nationality and home country of the staff member concerned. Referring to the Tribunal’s case law, it explains that the rationale behind the benefits granted to internationally recruited staff members is to take account of certain disadvantages arising from being a foreigner newly installed in a country.

The WTO denies that it breached the principle of equal treatment in determining the complainant’s nationality and home country, in particular since the staff members to whom she refers are in a different situation in fact and in law. Indeed, one of these staff members had his nationality and home country determined by another international organisation before joining the WTOand two others acquired Swiss nationality by marriage, unlike the complainant, who acquired it by naturalisation. In addition, it points out that other staff members had a single nationality and had stronger links with their country of origin than the complainant.

The Organization contends that, should it be determined that the complainant’s home country is the United Kingdom or France, she should not be paid the benefits available to internationally recruited staff members retroactively from 1991, because she agreed to her terms of appointment and did not challenge them within the prescribed time limit. In addition, it denies that there was a pattern of discrimination and arbitrariness directed against the complainant and consequently considers that there are no grounds for an award of moral damages.

D. In her rejoinder the complainant reiterates her pleas. She stresses that she maintained normal residence in

London for a prolonged period before joining the WTO, adding that for the first 20 years of her life she had no choice over her place of residence, as she had to stay where her parents had decided to live. She also explains that since she has requested that the United Kingdom be considered as her home country and the WTO is not located in that country, her request is not inconsistent with the purposes and intent of UN Staff Regulation 5.3. In addition, she alleges that she has been denied due process since the Organization has refused to disclose information regarding its usual practice in cases similar to hers.

E. In its surrejoinder the Organization maintains its position. It emphasises that the Notice to the Staff of 19 January 2005 clearly states that the new definition of local and non-local status will apply prospectively. With regard to the complainant's claim for disclosure of information, it explains that the personal file of its staff members is confidential.

CONSIDERATIONS

1. The complainant holds dual citizenship in Switzerland and in France. She joined ICITO/GATT in November 1991 on a short-term contract. She was appointed to the professional staff, at grade P.3, on a fixed-term contract in December of the same year. The Staff Regulations of the United Nations and Staff Rules were applicable until 1 January 1999 when the WTO Staff Regulations and Staff Rules came into force. When she joined ICITO/GATT, the complainant was designated as a local recruit on the basis that Swiss nationals had to be so classified.

2. In 2004 the WTO undertook a reassessment of the recruitment status of the complainant and certain other members of staff. On 29 July 2005 the complainant and some other staff members were notified that their status had been redetermined as international with effect from 1 August 2005, but expressly not retroactively. Subject to conditions, international staff members are entitled to a number of benefits that are not available to local staff, including home leave and education grants for their children. Briefly, these benefits are available only if a staff member is serving at a duty station outside his or her home country.

3. The complainant contested the decision to grant her international status with effect only from 1 August 2005 and also sought a determination that she was eligible for an education grant for her children. She later claimed that she was also eligible for home leave. These issues became the subject of proceedings before the WTO Joint Appeals Board in which the complainant argued that she should be designated a French citizen with England as her recognised home country, or, in the alternative, France. In consequence, she argued, she should be granted all the benefits associated with international status, including home leave and education grant.

4. The Joint Appeals Board recommended that the questions relating to the complainant's citizenship and home country be re-examined in the light of the facts disclosed before it. The recommendation was accepted and the matter re-examined. However, the Director-General maintained his decision that the complainant was properly designated as a Swiss national with Switzerland as her home country and, accordingly, was entitled to neither home leave nor an education grant. That decision is the subject of the complaint by which the complainant seeks a determination that she should be designated a French citizen with England or, alternatively, France as her home country with effect from 1991. She also seeks compensation and moral damages for the benefits that, according to her argument, have been denied to her since 1991.

5. The questions raised by the complainant are to be determined by reference to the rules in force in December 1991 when the complainant was granted a fixed-term contract. It is common ground that, because of the practice applied when the complainant was designated as a local recruit, not all relevant facts were made known to the Organization in 1991 and that, in consequence, the issues are to be determined by reference to the facts as they are now known.

6. As earlier indicated, the benefits at issue in this case depend on the identification of the complainant's home country. "Home country" is defined in UN Staff Rule 105.3 which, *mutatis mutandis,* was applicable in December 1991, as "the country of home leave" which, in turn, is relevantly defined as "the country of the staff member's nationality". The latter definition is subject to the following exception upon which the complainant relies:

"The [Director-General], in exceptional and compelling circumstances, may authorize:

a. A country other than the country of nationality as the home country, for the purposes of this rule. A staff member requesting such authorization will be required to satisfy the [Director-General] that the staff member maintained normal residence in such other country for a prolonged period preceding his or her appointment, that the staff member continues to have close family and personal ties in that country and that the staff member's taking home leave there would not be inconsistent with the purposes and intent of staff regulation 5.3."

UN Staff Regulation 5.3 relevantly states that "[a] staff member whose home country is the country of his or her official duty station or who continues to reside in his or her home country […] shall not be eligible for home leave".

7. UN Staff Rule 104.8 provides:

"(a) In the application of Staff Regulations and Staff Rules, the United Nations shall not recognize more than one nationality for each staff member.

(b) When a staff member has been legally accorded nationality status by more than one State, the staff member's nationality for the purposes of the Staff Regulations and these Rules shall be the nationality of the State with which the staff member is, in the opinion of the [Director-General], most closely associated."

8. Before considering the complainant's arguments, it is convenient to note some of the more important aspects of her life history. She was born in Switzerland, in 1961, to parents who were both international civil servants, her mother being a French citizen and her father a British subject. She obtained French citizenship at birth. She did not at any stage become a British subject. Until 1981 she resided with her parents in Switzerland where she attended an international bilingual school and, later, university. During this period she visited the United Kingdom, on average, every year, including when her father took home leave every second year. She also regularly visited France where her parents maintained a second home and engaged in vacation employment in that country. In 1981 the complainant formed a relationship with a person living in London and between 1981 and 1984 commuted between there and Geneva to complete her university studies. During this period, she also undertook part-time employment as a teaching assistant at GenevaUniversity. In 1984 she commenced employment in London and established a residence in that city. Additionally, she undertook further studies at the London School of Economics. Between 1988 and 1989 the complainant worked on short-term contracts in Luxemburg or Geneva, and, again, commuted between those places and London. She did not establish a residence in Luxemburg. In Geneva she stayed with her parents.

9. In 1985, while working in London, the complainant applied for Swiss citizenship in order to facilitate her travel to and from Switzerland and to improve her employment prospects. To obtain Swiss citizenship she had to relinquish her French citizenship which she regained in 1991. The complainant returned to Switzerland in 1989 because of her father's illness and was employed in Geneva on a series of short-term contracts, including one with ICITO/GATT, until she obtained a fixed-term contract in December 1991.

10. In December 1991 the complainant had family members in Switzerland, France and the United Kingdom. She had several cousins in France, a brother and aunt in the United Kingdom, and her mother lived for half of the year in Switzerland and the other half in France.

11. The complainant makes various criticisms of the decision not to designate her as a French national. For example, she points out that there is no explanation for more weight being given to her acquisition of Swiss citizenship than her reacquisition of French citizenship, and contends that this indicates that the decision was arbitrary. So long as the Director-General considered all material facts and did not have regard to irrelevant considerations – and there is nothing to suggest that he erred in either respect – it was for him to assess what weight should be given to particular factors. There being nothing else to suggest that the Director-General exceeded his discretion, the argument that the decision was arbitrary must be rejected.

12. The complainant further contends that the decision not to recognise the United Kingdom as her home country was also arbitrary. In this regard, she argues that there is "no indication […] of what a 'prolonged period of time' should be, and we are once again faced with an arbitrary decision". However, the relevant exception expressly states that a staff member is "required to satisfy the [Director-General] that [he/she] maintained normal residence in [another] country for a prolonged period preceding his or her appointment". The Director-General's decision clearly indicated that he was not satisfied that the complainant had maintained "normal residence" in

London while studying and working part-time in Geneva between 1981 and 1984 and, again, while working in Luxemburg or Geneva between 1988 and 1991. That left a period of approximately four years which expired three years before the complainant's appointment on a fixed-term contract in December 1991. It was open to the Director-General to decide that that period did not constitute a prolonged period preceding the complainant's appointment. Equally, it was open to him to come to the conclusion that, even taking into account all the complainant's links with England, there were not exceptional and compelling circumstances justifying recognition of the United Kingdom as her home country.

13. The principal argument made by the complainant in relation to the decision not to recognise her as a French national having her home in the United Kingdom is that it was discriminatory. In this respect, she argues that the rules, as applied, discriminate against staff members who are the children of international civil servants and, more specifically, against the children of international civil servants whose parents each have a different nationality. Further, she points to a number of other WTO staff members who are nationals of Switzerland and another country and who, she claims, are in the same position in fact and law but have been treated more favourably either in relation to their nationality or their home country.

14. Before turning to the complainant's claim of discrimination, it is convenient to note the different but related purposes of home leave and education grant. The purpose of home leave is not to confer a financial benefit or to make a monetary concession (see Judgment 937). Rather, as pointed out in Judgment 2389, it is "to enable staff members who, owing to their work, spend a number of years away from the country with which they have the closest personal or material ties to return there in order to maintain those connections". Similarly, the purpose of the education grant is made explicit by UN Staff Regulation 3.2(c), namely, to provide for a staff member "serving in a country whose language is different from his or her own and who is obliged to pay tuition for the teaching of the mother tongue to a dependent child attending a local school in which the instruction is given in a language other than his or her own".

15. It may well be that, in some circumstances, the child of international civil servants will develop closer ties with the country in which his or her parents work and in which he or she is brought up than the parents' country of origin. So, too, it may well be more likely that the child will establish closer ties with the country in which he or she is brought up if his or her parents have different countries of origin. Were the purpose of home leave to provide a financial benefit, then it might be possible to argue that the provisions with respect to nationality and home country have a discriminatory impact upon staff members who are the children of international civil servants. However, given that the purpose of home leave is to enable the maintenance of social and material ties in the country with which a person is most closely associated, the argument that the application of the relevant provisions results in discrimination against staff members whose parents were international civil servants must be rejected.

16. So far as concerns the education grant, the argument of discrimination against persons who are the children of international civil servants must also be rejected. Again, the purpose of the grant is not to confer a financial benefit but to enable a child of a staff member to be educated in the mother tongue of his or her parent and, ordinarily, that will be the language of the country with which the staff member has the closest connection.

17. The complainant notes that, in an effort to obtain relevant information, she asked the Director of HRD to write to various staff members, including all "Swiss [binationals] recruited to the WTO under their non-Swiss nationality" and "staff members authorized […] to have a country other than the country of nationality as their home country" asking them to authorise access to their Personal History Forms, their home determination forms and their contracts. That request was not granted. Rather, the complainant was informed that the Tribunal could request relevant information. In general terms, the Tribunal will only request additional information if a complainant establishes an arguable case and there is doubt as to the facts. In the present case, the complainant has failed to establish an arguable case of discrimination.

18. The complainant has identified five staff members who, although being nationals of Switzerland and of another country, were recruited as nationals of that other country. Of these, two were recruited after the WTO Staff Regulations and Staff Rules came into force. WTO Staff Rule 103.1 relevantly provides, in part, that:

"Staff members will be considered as locally recruited if at the time of recruitment they are resident within a radius of 75 km from the Pont du Mont-Blanc in Geneva regardless of the duration of that residence, except that staff members who are transferred, seconded or loaned from an intergovernmental organization in Geneva and who had been internationally recruited to that organization shall retain that status."

Of the two staff members recruited after the WTO Staff Rules came into force, one did not have a residence in Switzerland and the other was recruited from another organisation where he/she had international status.

19. Of the other three staff members to whom the complainant refers, two had acquired Swiss citizenship when they married by automatic operation of the then applicable law and not by application for naturalisation, as was the case with the complainant. The Director-General was entitled to conclude that the acquisition of citizenship in those circumstances indicated a more tenuous connection with Switzerland than did the process of naturalisation. Additionally, one of these staff members was seconded and later permanently transferred from another international organisation which had already designated another country as that person's country of nationality. The third person whose nationality was determined under the UN Staff Rules was also transferred from another international organisation which had already determined his/her nationality as other than Swiss.

20. Discrimination occurs when persons in the same position in fact and in law are treated differently, not when there is a relevant difference warranting different treatment that is appropriate and adapted to that difference (see Judgments 1194 and 2313). In the present case, the complainant has failed to establish that she was in the same position in fact and in law as those with whom she compares herself. Moreover, given her different circumstances, the complainant has failed to demonstrate that her different treatment was not appropriate and adapted to her different situation.

21. The complainant's argument with respect to discrimination in the failure to recognise the United Kingdom as her home country is made by reference to persons who were nationals of a country other than Switzerland and who had that other country recognised as their home country and, also, by reference to one person whose home country was recognised as other than that of her nationality. In the latter case, the country so recognised was the country of her husband and children. There being a relevant factual difference in that latter case and a relevant legal difference in the other cases, the complainant has failed to demonstrate that the designation of Switzerland as her home country was discriminatory.

22. The remaining issue is whether the complainant's international status should be recognised retroactively to December 1991. In this regard, it may be noted that, exceptionally, retroactive effect may be granted to a decision where the effect is favourable to a staff member (see Judgment 1130). In the present case, however, a grant of retroactivity would confer no benefit on the complainant either in relation to home leave or education grant. In the circumstances, the rule against retroactivity should be applied.

DECISION

For the above reasons,

The complaint is dismissed.

In witness of this judgment, adopted on 10 May 2007, Mr Michel Gentot, President of the Tribunal, Ms Mary G. Gaudron, Judge, and Mr Agustín Gordillo, Judge, sign below, as do I, Catherine Comtet, Registrar.

Delivered in public in Geneva on 11 July 2007.

Michel Gentot

Mary G. Gaudron

Agustín Gordillo

Catherine Comtet

*The Staff Regulations of the United Nations and Staff Rules (hereinafter UN Staff Regulations and Staff Rules) applied to staff members of ICITO/GATT. The WTO Staff Regulations and Staff Rules entered into force on 1 January 1999.

Updated by PFR. Approved by CC. Last update: 19 July 2007.