

INDIVIDUAL OPINION BY JUDGE B. WINIARSKI

[Translation]

The Advisory Opinion indicates that the question submitted to the Court concerns only awards made by the Administrative Tribunal within the limits of its competence and that it contemplates awards made by the Tribunal when properly constituted. "It is true", it is said in the Opinion, "that by this Question the Court is requested to say whether the General Assembly has the right to refuse to give effect to an award 'on any grounds'. But it is difficult to hold that the General Assembly, by inserting these words, intended to modify the meaning which naturally follows from the other terms of the Question and from the considerations contained in its Resolution." The Court accordingly formulates as follows the way in which it understands the Question which the Advisory Opinion must answer: "the Court is requested to consider the general and abstract question whether the General Assembly is legally entitled to refuse to give effect to an award of compensation made by the Administrative Tribunal, properly constituted and acting within the limits of its statutory competence"; farther on in the Opinion it is added that "the previous observations of the Court are based upon that ground".

To this formula it would, in my opinion, be necessary to add a third element to complete it correctly: the Tribunal, properly constituted, acting within the limits of its statutory competence and in accordance with the rules of its procedure. The Opinion states that "in none of these reports or relevant records is to be found any suggestion indicating that the Tribunal, when rendering its awards in those eleven cases, was not legally constituted", but it might with equal reason be added: or that it disregarded any essential rule of its procedure. In any event, I understand the Opinion as contemplating awards which are not nullities, and I was accordingly able to vote with the majority, for, like the majority, I consider that the General Assembly has not the right to refuse to give effect to an award where the ground on which it relies is merely an incorrect application of the law or a mistaken finding or appraisal of the facts.

Having thus construed the question to which the answer is given in its operative part, the Advisory Opinion then refers to the following hypothesis which, in my view, goes beyond the ground upon which the observations of the Court are based: "If, however, the General Assembly, by inserting the words 'on any grounds', intended also to refer to awards made in excess of the Tribunal's competence or to any other defect which might vitiate an award,

there would arise a problem which calls for some general observations."

I regret to be unable to associate myself with these observations: and as they make it necessary for me to clarify my vote, I am compelled to append to the Advisory Opinion certain considerations which briefly summarize my point of view.

It is said in the Opinion that the problem envisaged by this hypothesis would not raise the question of the nullity of arbitral awards made in the ordinary course of arbitration between States, for the present case concerns judgments pronounced by a permanent judicial tribunal established by the General Assembly, functioning under a special statute adopted by the General Assembly and within the organized legal system of the United Nations. If this passage refers to a judgment vitiated by such defects as to be a nullity, I can see no difference between the nullity of an arbitral award and that of an award made by the Administrative Tribunal. An arbitral award, which is always final and without appeal, may be vitiated by defects which make it void; in this event, a party to the arbitration will be justified in refusing to give effect to it. This is not by virtue of any rule peculiar to ordinary arbitration between States; it is a natural and inevitable application of a general principle existing in all law: not only a judgment, but any act is incapable of producing legal effects if it is legally null and void. The Administrative Tribunal, organized as it is, for important practical reasons, is a permanent tribunal made available by the United Nations and accepted by staff members under a contract freely entered into. It does not and cannot constitute an exception to the general rule. Its judgments are final and without appeal; but this provision of the Statute says what it says, and the Opinion quotes the Statement of the rapporteur of the Fifth Committee of the General Assembly when the draft Statute of the Administrative Tribunal was under discussion. Indicating that there would be no appeal from the decisions of the Tribunal, the rapporteur, at the meeting on November 15th, 1946, referred to delay in "the final decision in a case...." if there should be "appeal beyond the Administrative Tribunal". There can be no appellate procedure in the absence of an express provision which must in the first place establish an appellate tribunal. But appeal is one thing, and refusal to give effect to a judgment which is a nullity is another. The view that it is only possible for a party to rely on the rule relating to nullities where some procedure for this purpose is established, finds no support in international law. Such a procedure may be established *ad hoc* between States, as it was in the Orinoco Steamship Company case; it was established in the case of the Administrative Tribunal of the International Labour Organisation; but the absence of an organized procedure does not do away with nullities, and there is no warrant for the idea that there can be no nullity if there is no appropriate court to take cognizance of it. Nor is it necessary that

the principle, in accordance with which a party is entitled to refuse to give effect to a judgment which legally is a nullity, should be enunciated in any express provision.

It is, however, possible that when it considered the hypothesis which has given rise to this Individual Opinion, the Advisory Opinion was contemplating simply an established system of review, review in the sense of a further consideration of the case, and this seems to be so in view of the last lines of the paragraph referred to: "the Court is of opinion that the General Assembly itself could hardly act as a judicial organ—considering the arguments of the parties, appraising the evidence produced by them, establishing the facts and declaring the law applicable to them". Here, the Opinion seems to be contemplating a consideration on appeal and perhaps in proceedings to have a decision quashed, but this is outside the scope of the question referred to the Court by the General Assembly, which is not concerned with a review of this sort but merely with a refusal to give effect to an award.

Having indicated my agreement with the opinion of the Court on the ground defined by it, I can confine myself to these brief observations designed to indicate my disagreement with what I believe to be the purport of the "general observations". As they appear to me to be outside the scope of the factors which determined the attitude of the Court, I shall refrain from going into any detailed argument on this point.

(Signed) B. WINIARSKI.