

## SEPARATE OPINION OF JUDGE RUDA

I have voted in favour of the operative part of the Advisory Opinion. However, I would like to explain how, although I reach somewhat similar conclusions to those of the Court, I do so by way of a different reasoning.

The first question submitted to the Court by the request for advisory opinion is framed by reference to the negotiation and notice provisions of Section 37 of the 1951 Agreement between the WHO and Egypt, and relates to the eventuality of a transfer from Egypt of the WHO Regional Office for the Eastern Mediterranean. Now, this Section 37 begins with the words "The present Agreement may be revised", refers in the second sentence to "the modifications to be made in its provisions" and ends with the phrase "the present Agreement may be denounced by either party giving two years' notice". Therefore, in order to ascertain whether the negotiation and notice provisions of Section 37 are applicable to the eventuality just mentioned, we have to find out whether there is any stipulation in the Agreement determining the site of the Regional Office, or laying down the requirements for its eventual removal, that could be the object of negotiations and, subsequently, lead to modification or revision, or to denunciation in case of failure, as provided for in the Section. It seems to me a logical premise that you cannot "revise" a treaty on a point that is not in it, except perhaps by way of adding a new clause or a new subject, which is not the case here.

Let us begin with the preamble, which is always a very useful part of an instrument for defining its general purpose. This, in the present instance, seems to be clear, i.e., to determine the privileges, immunities and facilities to be granted by Egypt to the WHO, to the representatives of its Members, and to its experts and officials, "in particular with regard to its arrangements in the Eastern Mediterranean Region and . . . regulating other related matters".

The text of the Agreement confirms this general purpose. Most of the articles are devoted to the concession of privileges, immunities and facilities, the exception being the articles dealing with what the preamble calls "other related matters": Article X, on the "Security of the Government of Egypt", and the final provisions in Articles XI and XII. But I can find no clause in the text, including the preamble, agreeing on Alexandria as the site of the Eastern Mediterranean Regional Office, or laying down the requirements for a transfer from that site.

It is true that there are several allusions to the Office in the 1951 Agreement. In the definitions given in Article I, "the Regional Office in

Alexandria” is mentioned by name as one of the “principal” or “subsidiary offices”. Section 6 refers to “the premises of the Organization in Egypt” ; Section 25 provides for additional diplomatic privileges and immunities for “the Regional Director in Egypt and his Deputy” ; Section 30 contains an undertaking to the WHO for the provision of water, electricity, etc., to “the premises placed at its disposal” and police supervision “for the protection of the seat of the Organization”.

I agree with the contention that the 1951 Agreement was mainly devoted to regulating the conditions under which the Office would function in Alexandria, and, even more, that no such agreement would have been signed if the Office had not been located in Alexandria, but this does not mean that Alexandria was chosen and agreed upon in the 1951 Agreement as the site of the Regional Office.

According to my interpretation, the 1951 Agreement *presupposes* the establishment of the Regional Office in Alexandria. The Office is not created or established in this instrument, nor is the choice of site fixed therein. This interpretation is in accordance with the facts as I see them, which I now propose to describe.

At its Third Session, the Interim Commission of the WHO, in 1947, decided to instruct the Executive Secretary

“to get in touch with the authorities of the Pan Arab Sanitary Organization and to submit a report on the activities and status of that organization” (WHO, *Official Records*, No. 5, p. 142).

Later, in September 1947, at its Fourth Session, the Interim Commission decided to appoint a subcommittee

“to study, in consultation with appropriate authorities, the relationship to the WHO of the Sanitary Bureau at Alexandria, in the light of Chapter XI of the WHO Constitution and the International Sanitary Convention of 1938” (WHO, *Official Records*, No. 6, p. 220).

In the course of the discussions, the Interim Commission considered a Report by the Egyptian Minister of Health on the Pan Arab Regional Health Bureau (*ibid.*, pp. 173-177) and the delegation of France pointed out correctly that this Bureau “did not really exist” and that “the negotiations regarding the integration of the Alexandria Epidemiological Intelligence Bureau with the WHO should take place with the Egyptian Government” (*ibid.*, pp. 28 f.).

At the beginning of 1948, the Interim Commission decided, after considering the replies received from Governments and finding that there was not sufficient data available, to defer the question of the determination of the geographical regions to the Health Assembly (WHO, *Official Records*, No. 7, p. 232). During its meetings, the Commission discussed a report by the Executive Secretary, Part 38 of which, entitled “Location of Head-

quarters and Regional Bureaux of the WHO” mentioned a reply received from the Government of Egypt stating that

“the competent authorities have declared that they are most anxious to see a Regional Bureau established at Alexandria. The bureau could deal with all questions coming within the scope of the WHO for the entire Middle East” (*ibid.*, p. 135).

Greece favoured “the maintenance, as heretofore, of a regional organization of the WHO in Alexandria” (*ibid.*).

In the supplementary Report of the Interim Commission to the First World Assembly Dr. Stampar, Chairman of the Interim Commission, in May 1948 recommended in a very comprehensive report, under the item “Pre-existing Regional Organizations”, that the Regional Health Centre for the Near and Middle East be located in Alexandria (WHO, *Official Records*, No. 12, pp. 65-75).

At the First World Health Assembly, the Committee on Headquarters and Regional Organizations appointed a working group, which recommended that “a regional organization be established immediately . . . with headquarters at Alexandria” (WHO, *Official Records*, No. 13, p. 267). A draft resolution was submitted by Egypt, but not adopted, which, *inter alia*, took into consideration

“the fact that the Egyptian Government has offered to place at the disposal of the organization a large and suitable building, formerly occupied by the Sanitary Maritime and Quarantine Board and presently occupied by the Regional Sanitary Bureau of Alexandria”

and recommended that the Regional Bureau be integrated with the WHO as a regional organization (A/HQ/3, 5 July 1948). Finally, on 10 July 1948, the Assembly, on the basis of a second report of the Committee (*ibid.*, p. 80), adopted resolution WHA1.72 on the delineation of geographical regions. This read as follows :

“The First World Health Assembly

*Resolved* on the delineation of the following as geographical areas : (1) Eastern Mediterranean Area, (2) Western Pacific Area, (3) South-East Asia Area, (4) European Area, (5) African Area, (6) American Area.

1. *Eastern Mediterranean Area*, comprising the following countries : Egypt . . . Cyprus . . .

*Resolved* that the Executive Board should be instructed : (1) to establish regional organizations in accordance with the delineation of geographical areas decided upon and as soon as the consent of the majority of Members situated in such areas has been obtained ; (2) as regards the Eastern Mediterranean Area, to integrate the Alexandria Regional Bureau with WHO as soon as possible and (3) as regards Europe . . .” (WHO, *Handbook of Resolutions*, Vol. I, p. 315).

The First Session of the Eastern Mediterranean Regional Committee was held in Cairo, in February 1949. The Director-General of WHO presented a statement (RC/EM/7) on the "Role of the Sanitary Bureau at Alexandria as a Regional Bureau for Epidemiological Notifications and information under the International Sanitary Conventions" which concluded that integration with the WHO should not impair the functions carried out efficiently by the Sanitary Bureau for many years and should facilitate the co-ordination of these functions with the WHO headquarters and the Singapore Epidemiological Information Station.

The Agenda of the Meeting included as item 5 "Location of the Regional Office" (RC/EM/6), as item 9 "Epidemiological Intelligence Service" (RC/EM/7), as item 11 "Integration of the Sanitary Bureau at Alexandria" (RC/EM/3) and as item 12 "Draft Agreement of the Host Government of the Regional Office". Document RC/EM/6, on the location of the Regional Office, is a short report by the WHO Secretariat citing Article XI (2) of the Agreement between the United Nations and the WHO, which states that any regional office of the WHO shall

"so far as practicable be closely associated with such regional or branch offices as the United Nations may establish"

and pointing out the existence of FAO and ILO offices already located in Cairo, and the intention of the United Nations to open an information centre in that city. The report stressed the point that any action taken by the Regional Committee on the location of the Office should be provisional, "until clearance is obtained" in negotiations with the United Nations at the meeting of the Administrative Committee on Co-ordination.

At its Second Session, the Regional Committee dealt with an item on the location of the Regional Office. After a declaration by the Director-General, the contents of which are not given in the minute, the delegate of Egypt made a statement (RC/EM/9)

"to the effect that the Government of Egypt is taking steps to offer the site and building at Alexandria to the WHO for a period of nine years";

and the minute goes on :

"A motion was then made and adopted to recommend to the Director-General and the Executive Board, subject to consultation with the United Nations, the selection of Alexandria as the site of the Regional Office. A resolution on this point will be prepared."

At the next meeting, on the same item, the delegate of Egypt read a draft resolution which was adopted and which I shall describe in detail, together with other resolutions adopted at the same session of the Regional Committee. Two meetings later, item 9, "Epidemiological Intelligence Service" and item 11, "Integration of the Sanitary Bureau at Alexandria", were discussed together and a draft resolution was also adopted on integration, which I shall deal with later. It should be noted that in the course of the debate the Director-General pointed out that provision "for taking over the Bureau had been made" in the 1949 Budget, and that the delegate of Egypt announced that his Government

"was pleased to transfer the functions and all related files and records of the Alexandria Bureau to the World Health Organization"

and also that the

"transfer would be made on the date on which the Organization notifies the Government of Egypt of the beginning of operations in the Regional Office of the Eastern Mediterranean Region".

The Committee then approved a motion to begin the operations of the Regional Office in July, because, according to the Egyptian delegate and the Director-General, such a decision "would be in accord with the draft budget for six months". There was discussed as a separate item, at the same meeting, the "Draft Agreement with the Host Government", the Director-General stating that a draft agreement had been produced and handed to the Egyptian Government, whose legal department was studying it. With respect to the venue for the second session of the Committee, the delegate of Egypt proposed Alexandria "in order that the first [*sic*] meeting should be held at the Regional Bureau"; this motion was supported by the Director-General who said that "it was desirable to have the early meetings at Regional Headquarters".

The Report of the First Meeting of the Regional Committee to the Third Session of the Executive Board (WHO, *Official Records*, No. 17, pp. 45 f.) included a "Summary of resolutions and decisions" and the texts of two resolutions and two statements by the delegate of Egypt. In the summary of resolutions the Committee, under item No. 5, dealt with the "Location of the Regional Office" and mentioned a resolution and a statement which were given as appendices. Appendix 4, "Resolution on Location of the Regional Office", referred in its introduction to (1) the historical role of Alexandria as a centre of epidemiological services, (2) to Article XI of the Agreement between the United Nations and the WHO, (3) to the importance of establishing the Regional Office in the proximity of Cairo because of the location there of several United Nations offices and (4) to

“the desirability of the excellent site and buildings under favourable conditions generously offered by the Government of Egypt”,

and in conclusion resolved

“to recommend to the Director-General and the Executive Board, subject to consultation with the United Nations, the selection of Alexandria as the site of the Regional Office”.

Appendix 3 included a statement by the Egyptian delegate in which he announced that

“at its meeting of 6 February 1949 the Council of Ministers has agreed, subject to approval of the Parliament, to lease to the World Health Organization, for the use of the Regional Office for the Eastern Mediterranean Area, the site of land and the building thereon which are at present occupied by the Quarantine Administration and the Alexandria Health Bureau, for a period of nine years at a nominal annual rent of P.T.10”,

an offer for which the Committee expressed its thanks.

The Report also referred, under item No. 9, to the “Integration of the Alexandria Sanitary Bureau”, mentioning a resolution reproduced as Appendix 2, in which the Committee, having regard to (1) the provisions of Chapter XI of the WHO Constitution, (2) the resolution of the World Health Assembly on the delineation of regions and (3) the services and experience of the Sanitary Bureau at Alexandria, resolved

“to recommend to the Executive Board that in establishing the Regional Organization and the Regional Office for the Eastern Mediterranean the functions of the Alexandria Sanitary Bureau be integrated with those of the Regional Organization of the World Health Organization”.

Appendix 5 reproduced a statement by the Egyptian delegate in which he recalled that the Government of Egypt had assumed the functions and carried on the services of the Alexandria Sanitary Bureau in accordance with a declaration made by his Government at the International Sanitary Conference of 1938. The statement added that :

“In consideration of the resolution on integration of the Alexandria Sanitary Bureau with the World Health Organization, the Government of Egypt is pleased to transfer these functions and all related files and records to the World Health Organization.

This transfer will be made as of the date on which the World Health Organization notifies the Government of Egypt of the commencement of operations in the Regional Office for the Eastern Mediterranean Area.”

This statement was received with thanks by the Committee.

The Summary of Resolutions and Decisions had other points of interest. Under item No. 8, the Committee "requested the Director-General and the Executive Board to establish the regional office and commence work on 1 July 1949", under item No. 10, the Committee "noted that the Director-General would negotiate an agreement with the Government of Egypt", under item No. 12, the Committee "nominated, for consideration of the Executive Board, Dr. Ali Tewfik Shousha Pasha, for the position of Regional Director", and under item No. 13, the Committee "noted the draft budget of the Regional Office" for 1949.

The Third Session of the Executive Board of WHO adopted in March 1949, after having considered the report of the Committee, resolution EB3.R30, which reads as follows :

"The Executive Board

(1) Conditionally approves the selection of Alexandria as the site of the Regional Office for the Eastern Mediterranean Area, this action being subject to consultation with the United Nations ;

(2) Requests the Director-General to thank the Government of Egypt for its generous action in placing the site and buildings at Alexandria at the disposal of the Organization for a period of nine years at a nominal rate of 10 piastres a year ;

(3) Approves the establishment of the Regional Office for the Eastern Mediterranean Area, operations to commence on or about 1 July 1949 ;

(4) Approves the resolution of the Regional Committee that 'the functions of the Alexandria Sanitary Bureau be integrated within those of the Regional Organization of the World Health Organization' ;

(5) Authorizes the Director-General to express appreciation to the Government of Egypt for the transfer of functions, files and records of the Alexandria Sanitary Bureau to the Organization upon commencement of operations in the Regional Office" (WHO, *Handbook of Resolutions*, Vol. I, pp. 331 f.).

At the same session (*ibid.*, p. 332) the Executive Board appointed Sir Ali Tewfik Shousha Pasha as Regional Director for the Eastern Mediterranean, for five years, beginning 1 July 1949. According to Article 52 of the WHO Constitution. "The head of the regional office shall be the Regional Director . . .".

Resolution EB3.R30 appears to me to have been the instrument that decided on the location of the Regional Office, subject to certain conditions. There had been an offer from the Egyptian Government placing the site and buildings at Alexandria of the pre-existing Regional Sanitary Bureau at the disposal of the new organization for nine years ; this offer, according to the statement made by the Egyptian delegate at the First

Meeting of the Regional Committee for the Eastern Mediterranean, was subject to the approval of the Egyptian Parliament. The offer was accepted and the Executive Board decided to select Alexandria as the site of the Regional Office, and approved its establishment subject to consultations with the United Nations, its operations to commence in the near future. This was one of the actions taken in resolution EB3.R30, which dealt with the location of the Office.

The other action taken was the integration of the Alexandria Sanitary Bureau within the Regional Office. It seems to me that the terminology of the resolution is clear : what was integrated were "the functions" of the Bureau. In other words, the previous functions of the Bureau were to be performed in the future by the Regional Office, and for this purpose the Government of Egypt transferred the Bureau's files and records. Although Article 54 of the WHO Constitution is not mentioned in resolution EB3.R30, this seems to have been done in pursuance thereof, even though Article 54 refers to "inter-governmental regional organizations" and the Sanitary Bureau was an office of the Egyptian Government.

I draw a distinction between these two actions, i.e., establishing the location of the Regional Office and the integration of the Alexandria Bureau with the Regional Office, because they have a different purpose. The functions performed by the Alexandria Bureau and its files and records could have been transferred, "integrated", within the Regional Office while at the same time the seat was nevertheless established in another location than Alexandria.

The choice of the site of the Regional Office was subject to consultations with the United Nations, which took place in May 1949, without objection from the Administrative Committee on Co-ordination of the Economic and Social Council (E/1340, pp. 13 f.).

The approval of the Egyptian Parliament was given in Law No. 66 of 29 May 1949, which approved the lease to the WHO of the land in Alexandria occupied by the Quarantine Administration (i.e., the Alexandria Bureau) which was in the public domain, for a nominal rent, to serve as the site of the Regional Office (*Journal officiel du Gouvernement égyptien*, 6<sup>e</sup> année, 16 juin 1949, n<sup>o</sup> 81, p. 1).

The conditions laid down by Egypt and the WHO were thus fulfilled at the end of May 1949.

Here, it is worth while to compare resolution EB3.R30 with the decisions taken in connection with the establishment of other WHO regional organizations and sites of regional offices. There are various types of resolution.

A comparison of the decisions taken by the Executive Board regarding the sites of various regional offices shows that in two cases, Manila and Copenhagen, approval was made subject to the conclusion of a host agreement, which was not the case with respect to Alexandria or the other offices.

My conclusions from these facts are the following :

(1) there was an offer from the Egyptian Government to the WHO of a site and building at Alexandria for the Eastern Mediterranean Regional Office, subject to the approval of the Egyptian Parliament ;

(2) this offer was accepted by the WHO, subject to consultations with the United Nations ;

(3) both conditions were fulfilled in May 1949 ;

(4) the Egyptian Government integrated the functions of the Alexandria Sanitary Bureau with the Eastern Mediterranean Regional Organization and transferred its files and records to the latter ;

(5) the Office commenced operations in July 1949, with a budget, a staff and a Director ; and

(6) the establishment of the seat of the Regional Office in Alexandria was not made subject to the conclusion of a host agreement.

Therefore, the Regional Office had already been factually and juridically established in its site in Alexandria since 1949, two years before the signature of the 1951 Agreement, and its settlement was not linked to the conclusion of the host agreement. Consequently, the facts seem to point to an interpretation of the terms of that treaty to the effect that its text presupposed that the Regional Office was already established in Alexandria.

I find nothing in the text of the 1951 Agreement, in its context, or in its object and purpose to show that it dealt with the establishment of the seat of the Regional Office or its removal. On the contrary, the circumstances previous to its conclusion disclose a prior agreement on this question of the site of the Office. I interpret the 1951 Agreement as a treaty which deals with privileges, immunities and facilities and not with the seat or removal of the Regional Office.

I do not attach legal importance to the description by some of the 1951 Agreement as a "host" or "headquarters" agreement despite the fact that the title under which it was registered<sup>1</sup> with the United Nations was : "Agreement between the World Health Organization and the Government of Egypt for the purposes of determining the privileges, immunities and facilities to be granted in Egypt by the Government to the Organization, to the representatives of its Members and to its experts and officials, signed at Cairo, on 25 March 1951." What is important is the content of the treaty and what rights and obligations were assumed by virtue of that instrument. I cannot deduce from the mere labelling of the 1951 Agreement as a "host" or "headquarters" agreement that the location of the office in Alexandria forms part of its provisions. It is true, as I have said before, that most of the

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<sup>1</sup> According to Article 8, paragraph 1 (b), of the Regulations for Registration of Treaties and International Agreements, approved by General Assembly resolution 97 (I) of 14 December 1946, the Register shall comprise, *inter alia*, a record of : "The title given to the instrument by the parties."

provisions of the 1951 Agreement are based on the maintenance of the Office in Egypt, but this does not mean that the parties agreed in 1951 that the Office was to be located in Alexandria ; that had already been agreed in 1949. It has been contended that the 1951 Agreement integrates and displaces any prior understanding and the proof of this assertion is said to lie in a statement made by Mr. Zarb, a member of the Secretariat, when he stated in the Fourth World Health Assembly that :

“although the Organization thus enjoyed the most courteous treatment, it would be highly desirable for such treatment to be accorded *de jure* and not only *de facto*” (WHO, *Official Records*, No. 35, p. 315).

I interpret this statement, where Mr. Zarb refers to “treatment”, to refer to the privilege of temporary exemption from customs duties already enjoyed by the Office, on the basis of the unilateral decision adopted by Egypt and communicated by the Ministry of Public Health to the Director on 23 June 1949. On the other hand, I cannot see, explicitly or implicitly, in any of the provisions of the 1951 Agreement an intention to integrate or displace any prior understanding.

To my mind, the Regional Office was established at Alexandria by an agreement between Egypt and the WHO, which was reached through a series of successive acts which progressively expressed the will of both parties to locate the Office in Alexandria and which culminated in resolution EB3.R30, the approval of the Egyptian Parliament signified in Law No. 66 and the non-opposition of the United Nations to the choice of Alexandria.

It is well known that international law does not impose any given form for the conclusion of an agreement, provided that there is sufficient evidence of the intention of the parties to create rights and obligations, i.e., to produce legal effects. There is no legal distinction between formal and informal agreements, because the validity of a treaty does not depend on the adoption of any form ; it therefore is up to the parties to choose such form as they think fit for assuming international obligations.

There was, of course, no formal agreement, in 1949, selecting Alexandria as the site of the Regional Office, but the common will of the WHO and Egypt to such effect was very clearly expressed in successive acts of one and the other party, which together constitute an international binding engagement. I see no reason to consider these engagements as *not* producing contractual legal effects ; effects which were not subject to the conclusion of any other agreement.

The problem that the Court faces in Question 1 is simply whether the 1951 Agreement does or does not provide for the location or removal of the Alexandria Office, because Section 37 laid down a procedure for the revision and potential denunciation of the “present Agreement”. Since I

find nothing in the 1951 Agreement that refers to these subjects, which had already been dealt with in a previous agreement in 1949, I am forced to conclude that Section 37 is not applicable "in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt".

But I think that a simple negative answer to Question 1 could lead to misleading legal conclusions, because, as the Court says, a rule of international law "does not operate in a vacuum, it operates in relation to facts and in the context of a wider framework of legal rules of which it forms only a part". Moreover, I see the role of the Court in advisory proceedings as giving the organ or organization that has requested an opinion the maximum possible legal assistance within the margin of the true legal issues before the Court. For these reasons, I believe that it is necessary, after having found that Question 1 should be answered in the negative, to go into other rules provided for in general international law and the agreements in force between the WHO and Egypt, which determine the obligations incumbent upon them should either of them desire a transfer of the Regional Office.

As I have stated several times before, I am of the opinion that there was, in 1949, an *informal agreement*, with full legal effects, on the selection of Alexandria as the site of the Regional Office. This agreement, although it has no outright denunciation clause, is, under the law of treaties, the kind of agreement which is subject to denunciation, because there is no obligation on the part of the Organization to remain in a given place, and, reciprocally, the host State is not obliged to keep an international organization or any of its branches on its territory without its consent.

Therefore, there is no rule that could impede the WHO and Egypt, if either of them so wish, to bring about the removal of the Regional Office from Alexandria through unilateral action.

But this transfer could not be carried out without taking into account the legitimate interests of the other side. For this reason, the WHO and Egypt, as the Court has stated in paragraph 49 and in the operative part of the Advisory Opinion, should consult each other in good faith and negotiate the conditions and modalities of the transfer, bearing in mind that a reasonable period of time should be allowed for the removal, because the orderly termination of the operations of the Regional Office should be the paramount consideration to be taken into account.

(Signed) J. M. RUDA.

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