

SEPARATE OPINION OF JUDGE SCHWEBEL

I have voted in favour of the Court's Advisory Opinion because I think that its essential conclusion — that there is a dispute between the United Nations and the United States over the interpretation or application of the Headquarters Agreement — is tenable. In my view, however, the question put to the Court admits of more than one answer. The answer given by the Court is not the answer which I believe in all respects to be required.

As the Court records in paragraph 1 of its Opinion, the General Assembly, in requesting the Court's advisory opinion as to whether the United States is under an obligation to enter into arbitration in accordance with section 21 of the Headquarters Agreement, affirmed the position of the Secretary-General "that a dispute exists between the United Nations and the host country concerning the interpretation or application of the Agreement . . ." (resolution 42/229 B). In its companion resolution 42/229 A, also adopted on 2 March 1988, the General Assembly considered

"that a dispute exists between the United Nations and the United States . . . concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure set out in section 21 of the Agreement should be set in operation".

That is to say, the General Assembly, after twice answering the question on which it seeks the advice of the Court, the principal judicial organ of the United Nations, requested the Court's opinion on that question. Thereafter, on 23 March 1988, while proceedings in the Court were pending, the General Assembly reaffirmed its answer by holding

"that a dispute exists between the United Nations and the United States . . . concerning the interpretation or application of the Headquarters Agreement, and that the dispute settlement procedure provided for under section 21 of the Agreement . . . should be set in operation . . ." (resolution 42/230).

In responding to the General Assembly's question posed in this fashion, the Court makes holdings of unchallengeable cogency. It is axiomatic that, on the international legal plane, national law cannot derogate from international law, that a State cannot avoid its international responsibility by the enactment of domestic legislation which conflicts with its international obligations. It is evident that a party to an agreement containing an obligation to arbitrate any dispute over its interpretation or application cannot legally avoid that obligation by denying the existence of a dispute or by maintaining that arbitration of it would not serve a useful purpose. It is accepted that a provision of a treaty (or a contract) prescribing

the international arbitration of any dispute arising thereunder does not require, as a prerequisite for its implementation, the exhaustion of local remedies. I agree not only with these restatements of legal principle but also with the findings in this case that the dispute between the United Nations and the United States has not been settled by such negotiation as has taken place, and that the parties have not agreed upon a mode of settlement other than arbitration.

My difference of perspective with the Court turns on whether the dispute between the United Nations and the United States at this juncture concerns "the interpretation or application" of the Headquarters Agreement. The nub of my appreciation of the facts of the case is that there is essential agreement between the United Nations and the United States on the interpretation of the Headquarters Agreement. Whether there currently is a dispute over its application is not so clear.

It can be concluded, as the Court concludes, that, by the course of conduct which the Government of the United States has followed with respect to the continued functioning of the office in New York City of the Observer Mission to the United Nations of the Palestine Liberation Organization, a dispute has arisen between the United Nations and the United States "concerning the . . . application of this Agreement . . .". But, in my view, the facts of the case alternatively allow the conclusion that, since the effective application of the United States Act at issue — the Anti-Terrorism Act — to the PLO's New York office has been deferred pending the outcome of litigation now in progress in the United States District Court for the Southern District of New York, a dispute over the application of the Headquarters Agreement will arise if and when the result of that litigation is effectively to apply that Act to the PLO's office. Explanation of this alternative conclusion, as well as of the parties' coincidence of views on the interpretation of the Headquarters Agreement, requires an exposition of some salient facts of the case.

The Anti-Terrorism Act of 1987, in addition to the central provisions quoted by the Court in paragraph 9 of its Opinion, contains "findings" of the United States Congress about activities of the PLO and "determinations" that the PLO is a "terrorist organization" which "should not benefit from operating in the United States"; directs the Attorney General to take the necessary steps and institute the necessary legal action to "effectuate" the Act; and gives appropriate courts of the United States authority, at the Attorney General's instance, to "enforce" the Act.

When legislation of this substance was initially introduced, Secretary of State Shultz on 29 January 1987 wrote Senator Dole that:

"The PLO Observer Mission in New York was established as a consequence of General Assembly resolution 3237 (XXIX) of

November 22, 1974, which invited the PLO to participate as an observer in the sessions and work at the General Assembly. The PLO Observer Mission represents the PLO in the UN; it is in no sense accredited to the US. The US has made clear that PLO Observer Mission personnel are present in the United States solely in their capacity as 'invitees' of the United Nations within the meaning of the Headquarters Agreement . . . we therefore are under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at UN headquarters . . ." (*Congressional Record*, Vol. 133, No. 78, 14 May 1987, p. S6449).

At the 126th meeting of the United Nations Committee on Relations with the Host Country, on 14 October 1987, the Observer for the PLO drew attention to an amendment to the State Department authorization bill containing provisions later to be reflected in the Anti-Terrorism Act. He quoted the letter of the Secretary of State of 29 January. The representative of the United States responded that, "in the opinion of the Executive Branch, closing of the PLO Mission would not be consistent with the host country's obligations under the Headquarters Agreement". The Legal Counsel of the United Nations then declared that "the Organization shared the legal opinion expressed in the letter of Secretary of State Shultz of 29 January 1987" (A/42/26, pp. 11-12).

Senator Dole did not agree with the position of the Secretary of State, and opinion in the Senate and House was divided. When a conference report on the Foreign Relations Authorization Act was introduced to the Senate, containing the title embodying the Anti-Terrorism Act, the Chairman of the Committee on Foreign Relations, Senator Pell, declared:

"the administration has expressed concern that the language on the PLO might require the closing of the Observer Mission to the United Nations in violation of US obligations under international law. The bill language, as I read it, does not necessarily require the closure of the PLO Observer Mission to the United Nations, since it is an established rule of statutory interpretation that US courts will construe congressional statutes as consistent with US obligations under international law, if such construction is at all plausible.

The proponents of closing the PLO mission argue that the United States is under no legal obligation to host observer missions. If they are right as a matter of international law, then the language in this bill would require the closure of the PLO Observer Mission.

On the other hand, if the United States is under a legal obligation as the host country of the United Nations to allow observer missions recognized by the General Assembly, then the language in this bill cannot be construed, in my opinion, as requiring the closure of the PLO Observer Mission. The bill makes no mention of the PLO Mission to the United Nations and the proponents never indicated an intent to violate US obligations under international law. Rather, they asserted that closure of the New York PLO office was not a violation of international law and that they were proceeding on this basis." (*Congressional Record*, Vol. 133, No. 200, 16 December 1987, pp. S18185-S18186.)

Before developments had reached this stage, the Secretary-General on 13 October 1987 wrote to the Permanent Representative of the United States expressing his serious concern at the adoption by the Senate of an amendment which sought to make unlawful the maintenance within the United States of any office of the PLO. He recalled the terms of the letter of 29 January 1987 of the Secretary of State, and declared that, "I am in agreement with the views expressed by the Secretary of State in this matter . . ."

On 7 December 1987, the Secretary-General wrote to Ambassador Walters in the following terms:

"it is the legal position of the United Nations that the members of the PLO Observer Mission are, by virtue of General Assembly resolution 3237 (XXIX), invitees to the United Nations and that the United States is under an obligation to permit PLO personnel to enter and remain in the United States to carry out their official functions at the United Nations under the Headquarters Agreement. This position . . . coincides with the position taken by the United States Administration in the letter . . . by the Secretary of State on 29 January 1987 . . ."

Even at this late stage, I very much hope that it will be possible for the Administration, in line with its own legal position, to act to prevent the adoption of this legislation. However, I would be grateful if you could confirm that even if this proposed legislation becomes law, the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected. Without such assurance, a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement would exist and I would be obliged to enter into the dispute settlement procedure foreseen under section 21 of the UN Headquarters Agreement . . ."

The legislation nevertheless having been adopted, and, having been

made part of the State Department's authorization to expend funds, signed into law by the President, the Acting Permanent Representative of the United States, Ambassador Okun, wrote to the Secretary-General on 5 January 1988:

"The legislation to which your letters refer is part of the 'Foreign Relations Authorization Act, Fiscal Years 1988 and 1989', signed by President Reagan on December 22. Section 1003 of this law, relating to the Palestine Liberation Organization (PLO), is to take effect ninety days after that date. Because the provisions concerning the PLO Observer Mission may infringe on the President's constitutional authority and, if implemented, would be contrary to our international legal obligations under the United Nations Headquarters Agreement, the Administration intends, during the ninety-day period before this provision is to take effect, to engage in consultations with the Congress in an effort to resolve this matter."

On 14 January 1988, the Secretary-General wrote to Ambassador Walters restating terms of previous exchanges and stating:

"I, of course, welcome the intentions of the US Administration to make use of the 90-day period in the way described by Ambassador Okun, and explained in greater detail by the Legal Adviser of the State Department, Judge Sofaer, in his meeting with the Legal Counsel on 12 January. Nevertheless, neither the letter of Ambassador Okun nor the statements made by Judge Sofaer constitute the assurance I had sought in my letter of 7 December 1987 nor do they ensure that full respect for the Headquarters Agreement can be assumed. Under these circumstances, a dispute exists between the Organization and the United States concerning the interpretation and application of the Headquarters Agreement and I hereby invoke the dispute settlement procedure set out in section 21 of the said Agreement."

On 2 February 1988, the Secretary-General wrote again to Ambassador Walters, in the terms set out in paragraph 19 of the Court's Opinion.

On 11 February 1988, the Legal Counsel of the United Nations, Mr. Fleischhauer, wrote to Judge Sofaer, informing him that the United Nations had chosen Eduardo Jiménez de Aréchaga, former President and Judge of the International Court of Justice, to be its arbitrator "in the event of arbitration under section 21 . . ." and, in view of the governing time constraints, urged that the United States inform the United Nations as soon as possible of its choice of an arbitrator.

Resolution 42/229 B was adopted by a vote of 143 to none. The United States did not participate in the vote. Ambassador Okun gave the explanation which is quoted in paragraph 22 of the Court's Opinion.

On 4 March 1988, following the adoption of resolutions 42/229 A and 42/229 B, the Secretary-General wrote to Ambassador Walters observing that he had not received an official response to his letters in which he had sought

“assurances regarding the non-application or the deferral of the application of the Anti-Terrorism Act of 1987 to the PLO Observer Mission nor . . . a response . . . regarding the choice of an arbitrator by the United States”.

He continued that

“it is my hope that it will still prove possible for the United States to reconcile its domestic legislation with its international obligations. Should this not be the case then I trust that the United States will recognize the existence of a dispute and agree to the utilization of the dispute settlement procedure provided for in section 21 of the Headquarters Agreement, and that in the interim period the status quo will be maintained.”

On 11 March 1988, Ambassador Okun wrote to the Secretary-General in the terms quoted in paragraph 24 of the Court’s Opinion. The Secretary-General protested Ambassador Okun’s letter of 11 March 1988 and by letter of 15 March replied in the following terms:

“in the view of the United Nations the decision taken by the United States Government as outlined in the letter is a clear violation of the Headquarters Agreement between the United Nations and the United States. In particular, I cannot accept the statement contained in the letter that the United States may act irrespective of its obligations under the Headquarters Agreement, and I would ask you to reconsider the serious implications of this statement given the responsibilities of the United States as the host country.

I must also take issue with the conclusion reached in your letter that the United States believes that submission of this matter to arbitration would not serve a useful purpose. The United Nations continues to believe that the machinery provided for in the Headquarters Agreement is the proper framework for the settlement of this dispute and I cannot agree that arbitration would serve no useful purpose. On the contrary, in the present case, it would serve the very purpose for which the provisions of section 21 were included in the Agreement, namely the settlement of a dispute arising from the interpretation or application of the Agreement.”

The Attorney General of the United States wrote the Permanent Observer of the PLO Mission to the United Nations on 11 March 1988 in the terms set out in paragraph 25 of the Court’s Opinion. The PLO Observer

replied on 14 March in the terms contained in paragraph 27 of the Court's Opinion. Attorney General Meese responded by letter of 21 March as quoted in paragraph 27 of the Court's Opinion.

In its written statement submitted to the Court in the current proceedings, the United States repeated the substance of Ambassador Okun's letter of 11 March. It observed that, since the PLO Mission had not complied with the Attorney General's order, a lawsuit had been filed to compel compliance. The statement continued:

"That litigation will afford an opportunity for the PLO and other interested parties to raise legal challenges to enforcement of the Act against the PLO Mission. The United States will take no action to close the Mission pending a decision in that litigation. Since the matter is still pending in our courts, we do not believe arbitration would be appropriate or timely."

In the written statement of the Secretary-General, the Secretary-General, in recounting the factual history of the matter, recalled the terms of his letter of 7 December 1987 and stated that

"a dispute would only exist if the United States Government would fail to provide an assurance that the existing arrangements for the PLO Observer Mission would not be curtailed or otherwise affected . . .".

Once the Act had become law, the written statement continued,

"In the view of the Secretary-General, in the absence of any assurance as to the maintenance of the existing arrangements for the PLO Observer Mission, the incompatibility of this Act with the obligations of the host country under the Headquarters Agreement created a dispute within the meaning of section 21 of the Agreement."

The Secretary-General further argued that:

"The automaticity of the process of bringing the ATA [Anti-Terrorism Act] into force which was initiated with the signing of the ATA into law, objectively constitutes an immediate threat to bring about the closure of the facility from which PLO representation to the United Nations is accomplished, and this immediate threat is itself . . . sufficient to create a dispute in the absence of an assurance from the Executive Branch that the legislation will not be enforced or that the existing arrangements for the PLO Observer Mission in New York will not be affected or otherwise curtailed."

The Secretary-General at the same time concluded:

"the United Nations believes that a dispute has existed between the

United Nations and the United States from the moment of the signing into law of the ATA. Nor can there be any doubt that this dispute concerns the interpretation or application of the Headquarters Agreement. The Secretary of State of the United States and various representatives of the United States in the Host Country Committee and the General Assembly have clearly and consistently recognized that the PLO Observer Mission personnel are present in the United States in their capacity as invitees of the United Nations within the meaning of the Headquarters Agreement, and the Secretary-General has repeatedly taken the position that the ATA is inconsistent with the Headquarters Agreement. Thus, the formal conditions for invoking section 21 of the Headquarters Agreement are clearly established and the procedural obligations of the parties, therefore, have become effective."

On the basis of this record, what conclusions may be drawn as to the current existence of a dispute between the United Nations and the United States over the interpretation or application of the Headquarters Agreement?

As the Court rightly emphasizes in its Opinion, whether there exists an international dispute is a matter for objective determination. The mere assertion or denial of the existence of a dispute by one (or both) sides is not dispositive. The Court also recalls its classic definition of a dispute as "a disagreement on a point of law, a conflict of legal views or interests between two persons". Is there such disagreement or conflict in this case over the interpretation of the Headquarters Agreement?

I do not believe so. On the contrary, throughout there has been and remains a striking concordance of view between the authorized representatives of the United Nations and the United States on the interpretation of the Headquarters Agreement. Thus the Secretary of State at the outset declared that the United States is under "an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations headquarters . . .". The Legal Counsel of the United Nations announced that "The Organization shared" that "legal opinion . . .". The Secretary-General then declared that, "I am in agreement with the views expressed by the Secretary of State in this matter . . .". He subsequently specified that the position of the United Nations "coincides with the position taken by the United States . . .". For its part, the United States, after the signing into law of the Act, reiterated that, "if implemented," the Act "would be contrary to our international legal obligations under the United Nations Headquarters Agreement . . .".

The United States has not retreated from that position nor, of course, has the United Nations. This is not my singular conclusion; it is one which

has been widely and recurrently affirmed in the course of General Assembly debate of the matter, and as recently as 23 March 1988.

Thus on 29 February 1988, the representative of Zimbabwe declared that, "The legal opinion expressed in the letter from Mr. Shultz was shared by the Secretary-General and the United Nations Legal Counsel . . ." (A/42/PV.101, p. 33). The representative of the Federal Republic of Germany, speaking on behalf of the 12 States members of the European Community, stated that

"they fully share the views already expressed by both the Secretary-General of the United Nations and the United States Secretary of State . . . to the effect that the United States is under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters" (*ibid.*, pp. 51-52).

The representative of Czechoslovakia, using virtually identical language, recalled that "those facts were recognized unreservedly . . . by Mr. George Shultz, Secretary of State . . ." (*ibid.*, p. 82). The representative of Denmark, speaking on behalf of the five Nordic countries, declared that "The Nordic countries fully share the views on this question already expressed by both the Secretary-General and the Secretary of State . . ." (*ibid.*, p. 101).

Similarly, on 4 March 1988, the representative of Austria declared:

"It is our understanding from the discussion of the matter during the work of the Sixth Committee that the applicability of the relevant provisions of the Headquarters Agreement to the PLO Observer Mission and its personnel is not being disputed by any delegation, including the delegation of the host country."

The representative of Bangladesh the day before put it in the following terms:

"The Secretary of State of the United States, in a letter to the Senate, stated as early as 29 January 1987 that the host country was 'under an obligation to permit PLO Observer Mission personnel to enter and remain in the United States to carry out their official functions at United Nations Headquarters'.

That view is shared by 145 Members of the United Nations, which voted in favour of General Assembly resolution 43/210 B, which was adopted on 17 December 1987 — with the sole exception of a single Member State. Such unanimity of opinion on the interpretation of a legal provision is truly unprecedented." (A/42/PV.102, p. 68.)

Finally, on 23 March 1988, at the last resumed session of the General Assembly, the representative of Burma concluded that:

“The subject under dispute cannot be seen as relating to the substantive interpretation of this issue in respect of the Headquarters Agreement, for it is evident from what has been expressed by the relevant authorities of the United States Administration that it cannot be said that there is a controversy over such an interpretation between the position taken by them and the views of the Secretary-General and the virtually unanimous views expressed by Member States.” (A/42/PV.107, pp. 28-30.)

In view of the demonstrated consistency of the views of the United Nations and the United States on the interpretation of the Headquarters Agreement, I am unpersuaded by the Court's conclusion that “the opposing attitudes of the parties” give rise to a dispute “concerning the interpretation or application” of the Headquarters Agreement. In so far as that conclusion relates to application, it is not without force; in so far as it relates to interpretation, the above recitation of the facts of the case in my view demonstrates that it is not wholly convincing.

It is of course true that, where the breach by a State of its obligations under a treaty is manifest and undenied, such breach does not escape a jurisdictional clause which affords a court — such as this Court — the authority to decide disputes over that treaty's interpretation or application. Counsel for the United States so argued in the case of *United States Diplomatic and Consular Staff in Tehran (I.C.J. Pleadings, p. 279)*, and that argument, apparently accepted by the Court, remains persuasive. But it does not follow that, in a particular case, the existence or non-existence of a dispute over the interpretation of a treaty is unaffected by the articulated concordance of views of the parties concerning its interpretation. In the case before the Court, if the question of application of the Headquarters Agreement is for purposes of analysis put aside, it does appear that the views of the parties on its interpretation “coincide” (to use the term employed by the Secretary-General).

That being said, I nevertheless recognize that there is logic in and authority for the position that every allegation by a party of a breach of a treaty provision — however manifest and admitted by the other party — necessarily entails elements of interpretation (by the parties and by any court adjudging them), because an application or misapplication of a treaty, however clear, is rooted in an interpretation of it. But when a party actually alleges, if not in form then in substance, only a failure to apply the treaty, and makes clear that there is no dispute over its interpretation, is there, for purposes of dispute settlement, a dispute over the treaty's interpretation? I have my doubts.

The essential question at issue in this case is whether there is a dispute over the application of the Headquarters Agreement. The Court acknow-

ledges that there may be question about whether the Anti-Terrorism Act has been applied or whether the Act will only have received effective application when or if, on completion of current United States judicial proceedings, the PLO Mission is in fact closed. It maintains, however, that this is not decisive as regards section 21 of the Headquarters Agreement, since that Agreement refers to any dispute concerning its interpretation or application and not the application of measures taken in the municipal law of the United States.

The Court is of course correct in pointing out that the issue before the Court is that of the application of the Headquarters Agreement and not that of the application of the Anti-Terrorism Act. But if the Act is not effectively applied to the PLO Observer Mission, what content is there to a dispute over the application of the Headquarters Agreement?

It should be recalled that the Secretary-General did not consistently treat the signing into law of the Act as giving rise of itself to a dispute over the application of the Headquarters Agreement. This is made clear by the terms of his letter of 7 December 1987, in which he requested of the United States confirmation that, even if the then proposed legislation were to become law,

“the present arrangements for the PLO Observer Mission would not be curtailed or otherwise affected. Without such assurance, a dispute between the United Nations and the United States concerning the interpretation or application of the Headquarters Agreement would exist . . .”

Thereafter, finding statements made by the United States not to constitute the assurances which he had sought, on 14 January 1988 he declared a dispute to exist. However, on 2 February, the Secretary-General wrote that:

“since the United States so far has not been in a position to give appropriate assurances regarding the deferral of the application of the law to the PLO Observer Mission, the time is rapidly approaching when I will have no alternative but to proceed either together with the United States within the framework of section 21 of the Headquarters Agreement or by informing the General Assembly of the impasse that has been reached”.

Even after the General Assembly requested an advisory opinion of the Court, the Secretary-General on 4 March 1988 referred to “assurances regarding the non-application or deferral of application” of the Act, and trusted that the United States would recognize the existence of a dispute should it not prove possible for the United States to reconcile its domestic legislation with its international obligations. In his written statement submitted to this Court, the Secretary-General contended that there is a dispute within the meaning of section 21 of the Headquarters Agreement “in the absence of any assurance as to the maintenance of the existing arrangements for the PLO Observer Mission”. The Secretary-General

maintained in his written statement that a threat to close the PLO Mission created a dispute

“in the absence of an assurance from the Executive Branch that the legislation will not be enforced or that existing arrangements for the PLO Observer Mission in New York will not be affected or otherwise curtailed”.

For its part, after the Act became law, the United States initially observed that it had not yet taken action affecting the functioning of the PLO Mission. Once the Attorney General had determined that he was required by the Act to close the New York office of the PLO Observer Mission, and instituted action in the District Court, he declared that: “The United States will take no action to close the Mission pending a decision in that litigation.” This position was reiterated by the United States more than once.

Thus it is clear that the Secretary-General repeatedly indicated that, if the United States were to provide assurances that current arrangements for the PLO Mission would be “maintained” and that application to it of the Act would be “deferred”, a dispute over the interpretation and application of the Headquarters Agreement would not arise. The United States has provided assurances in this vein, though only “Until the United States courts have determined” whether that Act “requires closure of the PLO Observer Mission”.

However important that condition is, it does not vitiate the utility of these assurances. It is not clear why these assurances of the United States may not be treated as sufficient assurances of the maintenance of existing arrangements for the PLO Observer Mission, pending the outcome of litigation in United States courts. Naturally it is for the Secretary-General to decide whether assurances which he seeks are sufficient or insufficient. Nevertheless, the assurances of the United States bear upon an objective determination of whether, now, a dispute exists over the application of the Headquarters Agreement.

The fact is that the PLO Observer Mission to the United Nations functions. It has not been closed; its activities give no sign of having been “affected or otherwise curtailed”. It is true that it has the burden of defending itself in United Nations fora and in the United States District Court against the threat of closure. But an objective appraisal of the matter surely sustains the conclusion that the PLO, in the opinion of the members of the United Nations and in public opinion, has not been adversely affected by the enactment of the Anti-Terrorism Act and action in pursuance of it. On the contrary, it appears to have significantly benefited.

If the PLO had closed down its office in New York City in response to the Attorney General's determination, a dispute over the application of the Headquarters Agreement undoubtedly would have existed from the time of that closure. As it is, the issue of whether the PLO actually will be required to close its New York office has not been definitively determined by the Attorney General; that issue rather is before the District Court for the Southern District of New York.

In oral proceedings before this Court, the Legal Counsel of the United Nations took the position in answer to a question that, if United States courts were to hold that the Anti-Terrorism Act cannot lawfully be enforced against the PLO Observer Mission, that would not mean that the dispute had never existed but would merely put an end to the dispute. That is a reasonable interpretation of the facts and one which leads me to conclude that the Court's Opinion is tenable. But it is not a necessary interpretation, particularly in view of the Secretary-General having repeatedly conditioned the existence of a dispute upon the absence of assurances from the United States of the maintenance of existing arrangements for the functioning of the PLO Observer Mission.

The question in the end comes to whether the United States now is bound to arbitrate the dispute, or whether it will only be so bound in the event that the District Court should order that the Act be enforced against the PLO Observer Mission. Should proceedings before the District Court and any appeals therefrom be maintained, the possibilities of municipal judgment are several. It could be held that the Act applies to the PLO Observer Mission, in which event the United States has inferred that it then will regard arbitration of the resultant dispute as "timely and appropriate". Alternatively, having regard to the reasoning of Senator Pell set out above or on other grounds, it could be held that the Act does not apply to the PLO Observer Mission, in which event, if a dispute requiring arbitration ever existed, it no longer will. Or it could be held that, in view of the Advisory Opinion of this Court, and in view of the fact that the Anti-Terrorism Act does not mention, and accordingly cannot be interpreted as derogating from, arbitral obligations of the United States under the Headquarters Agreement, in any event the United States is bound to arbitrate the dispute. There may be other possibilities as well.

A possible interpretation of section 21 of the Headquarters Agreement which I do not find sustainable is that, because it contains what in arbitration circles is characterized as an imperfect or incomplete clause, that clause permits a party not to appoint an arbitrator if it so chooses. Section 21, paragraph (a), provides:

"Any dispute between the United Nations and the United States concerning the interpretation or application of this agreement . . . which is not settled by negotiation or other agreed mode of settle-

ment, shall be referred for final decision to a tribunal of three arbitrators, one to be named by the Secretary-General, one to be named by the Secretary of State of the United States, and the third to be chosen by the two, or, if they should fail to agree upon a third, then by the President of the International Court of Justice.”

The clause is incomplete in that, while it contains provision for appointment of a third arbitrator by an appointing authority, it contains no provision for an appointing authority to appoint an arbitrator whom a party has failed to appoint. Arbitration clauses which are more prudently crafted characteristically do contain such provision.

The International Law Commission of the United Nations in its early years made a vigorous and searching effort to block loopholes in the process of international arbitration. The absence of provision for appointment by an appointing authority of an arbitrator whom a party has failed to appoint was seen as a large loophole. Despite the progressive character and technical excellence of the draft prepared by the Commission at the instance of its special rapporteur, Professor Georges Scelle, the General Assembly's majority proved in large measure unwilling to accept the Commission's work; it preferred to keep loopholes open, to maintain the diplomatic flexibility of interpretation and action which often has detracted from the judicial character of the processes of international arbitration. Bearing in mind this history, it might be argued that the arbitration provisions of the Headquarters Agreement were deliberately drafted so as to omit provision for third-party appointment of an arbitrator whom a party failed to appoint in order to afford the parties an ultimate exit from an obligation which in a particular case one or the other might find exigent.

I do not believe that such a contention would be correct in the current case, not because the Headquarters Agreement was concluded before the General Assembly reacted as described to the Commission's draft, but because the Court has decisively and soundly rejected it in analogous circumstances.

In its advisory proceedings on the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania*, the arbitration clause before the Court was in pertinent part essentially the same as that of the Headquarters Agreement. That is to say, while it provided for an appointing authority (in that case, the Secretary-General) to appoint the third member should the two parties fail to agree upon him, it contained no provision for the appointment by an appointing authority of an arbitrator who in the first place was to be named by a party.

In disputes between Bulgaria, Hungary and Romania on the one hand, and certain Allied and Associated Powers signatories to the Treaties of

Peace on the other, the Governments of Bulgaria, Hungary and Romania refused to appoint arbitrators in pursuance of the arbitration clause of the Treaties. The Court held that "all the conditions required for the commencement of the stage of the settlement of disputes" by the arbitral commissions "have been fulfilled", and concluded:

"In view of the fact that the Treaties provide that any dispute shall be referred to a Commission 'at the request of either party', it follows that either party is obligated, at the request of the other party, to cooperate in constituting the Commission, in particular by appointing its representative. Otherwise the method of settlement by Commissions provided for in the Treaties would completely fail in its purpose." (*I.C.J. Reports 1950*, p. 77.)

(Signed) Stephen M. SCHWEBEL.