

DISSENTING OPINION OF JUDGE AZEVEDO

[*Translation.*]

Whilst regretting that my opinion differs from that of the Court, I give an affirmative answer to both questions for the following reasons :

1.—It is useless to recall here in detail the evolution of law which tends to carry to its ultimate consequence the execution of any sort of obligation ; the nature of the undertakings must be examined in order to accept incomplete or imperfect solutions such as that of damages, in the sole case of *de facto* or *de jure* impossibility.

Once the respect of the human person has been reserved—*nemo ad factum præcise cogi potest*—the execution of the obligations to “perform” is therefore pursued until a remedy is found for a mere declaration of will which the debtor persists in refusing to make without reason. As regards the *pactum de compromittendo*, international law has made certain progress in developing the formulas regulating passage from arbitration *in potentia* to arbitration *in actu*, particularly in respect of the appointment of arbitrators by the act of a third party.

This is to be explained by the absence of a complete judicial organization which, in domestic law, prevents too frequent reference to private judges. But for the same reason, viewed from a different angle, the task of filling the gaps in a treaty is in general rendered very difficult, in the international field, in the absence of a person who can assume this delicate rôle of appointing substitute arbitrators.

At any rate, the means permitting international engagements to be *rite adimpleti* may more easily be found if a clear distinction is made between the question of the legitimacy of a substitution of the will and that of the organ entrusted with such action.

2.—Confronted with the fact that it is almost impossible to provide adequate rules covering an almost infinite number of concrete cases, it is sufficient that the author of a law or treaty should set up machinery which can function normally, and the juridical system will provide for the adaptation required in each case, without requiring a revision of the acts. On the contrary, conventions will often be shown to be useless if, by excessive attachment to the letter of the texts and by resorting to vague penalties especially when it is known that there is an intention to evade the agreements, the defects attributed to the undertakings are allowed to prevail.

The specific performance of preliminary contracts does not affect the sovereignty even of the State which rightfully alienated it to the extent necessary to permit a replacement of its own choice—*quæ ab initio erant voluntatis ex post facto sunt necessitatis*.

It is also of little importance that international obligations cannot in general be the object of direct penalties, if the execution of some of them can be pursued up to a certain point ; there should thus be no hesitation about pursuing the useful results of an arbitration clause, by abandoning the problems raised by the execution of the decisions at the moment when these are handed down by the arbitrators. This will be a subsequent stage which is easier to regulate, for the law would already be declared.

3.—In the present case, the careful and prolonged negotiations which preceded the drafting of the treaties concerned rule out the possibility of faults and errors having been committed by the parties themselves; on the other hand, they derive therefrom a certain character of compromise often leading to formulas which are not completely satisfactory to the two parties.

These considerations, however, could not justify the conclusion that a renunciation for resistance in respect of the appointment of a third member, a more serious question than the replacement of the representative of one party, was successfully overcome. Indeed, the choice of a third member, failing previous agreement, will no longer be subject to control by the parties, and this affects both the party which in good faith tried to find an impartial arbitrator and the party which frustrated such appointment ; whereas, in the nomination of a national commissioner, where each party enjoys complete liberty to make the designation, the intervention which is exercised as a penalty from the outside would affect only the guilty party. The normal interest in having a member freely chosen may yield to the design of frustrating the constitution of the arbitral organ.

4.—It must therefore be admitted that instead of accepting risks, the parties, whilst providing for disputes, did not contemplate such unusual eventualities as the denial that the disputes themselves existed, or the radical refusal to appoint national commissioners. There is nothing in the preparatory work of the treaties to show that the parties contemplated the eventuality of all disputes remaining without a solution, practically facilitating the non-performance of the treaties themselves.

At any rate, this failure to provide for every case would not be irreparable, in view of the juridical principles recalled above which can overcome undue resistance, as was shown in the Opinion of the Court which removed the first of the said obstacles. Even the absence of a clause providing for the substitution of a national member, as may be found in some treaties, would not lead to such an irreparable result.

5.—It may be observed that a high authority of the United Nations has been exceptionally invested with broad powers, which go beyond the functions attributed to him by the Charter. Indeed, the Secretary-General has been entrusted with a number of very delicate tasks which all tend to one main end—to ensure the peaceful settlement of any dispute which may arise between the parties.

In this way a strict interpretation limited to an examination of one text only and which takes as its data a partial intention of the parties, cannot, in my view, prevail, especially if it confirms the complete breakdown of the whole machinery for solving the disputes, although it be recognized in theory that a responsibility arises from the fact that an international obligation has been violated.

On the contrary, I believe that the treaties should be interpreted as a whole, having regard to the purposes embodied therein. No effort must be spared to ensure the most perfect execution of obligations, in spite of imperfections and disadvantages exclusively due to the obstruction of the party which was under the obligation to carry out the undertaking.

6.—But the request for an opinion does not contemplate the *maximum* result in the application of these principles, as would be the case, for example, if it attempted to provide for the appointment of the national commissioners themselves on the basis of an argument derived *a fortiori* from the nature and extent of the powers conferred upon the Secretary-General.

Question III hardly refers to the nomination of the representative of a recalcitrant State in conjunction with that of the third member, and the Court must simply confine itself to the problem of the nomination of a third member independently of the nomination of the other arbitrators.

In order to determine whether the nomination of the third member must necessarily follow the designation of the other members, it must first be admitted that the texts of the relevant clauses are completely neutral and provide for several solutions. They are therefore not sufficiently clear to justify the rejection of any process of interpretation other than the one which confines itself to the letter of the texts.

To be sure, the current practice is to appoint the third member after the other members have been appointed, or at the same time, but this empirical observation by no means justifies our reading into these texts a condition which does not exist.

7.—What is most interesting, however, is the nature of the functions attributed to the third arbitrator in each particular case.

International practice makes a clear distinction between two principal categories of such functions.

In a certain number of cases the third member appears on the scene only when a divergence of views arises between the other commissioners, and his function in principle is to give the casting vote ; he may in exceptional circumstances be authorized to adopt an intermediary solution or even an entirely new one. This position is exclusively subsidiary and conditional.

In other cases the nomination of a third member takes place beforehand, and he is even entrusted with the task of presiding over the work of the commission. He plays a principal rôle which, however, decreases when the other members agree, even though he be permitted to give his personal views in any case.

8.—There happens to be a decisive element in the three treaties which points clearly to the system which has been preferred.

Indeed, these instruments provide for the constitution of two commissions : one a so-called "conciliation" commission for economic questions, and the other, which has no name, for disputes in general.

The first of these is composed of an equal number of representatives of the parties concerned, although the precise number of the members is not laid down ; nevertheless, if agreement has not been reached within three months of the dispute having been referred to the commission, the addition of a third member, appointed by the Secretary-General, may be required. This is a perfect model for the rôle of the third arbitrator who can only intervene after the efforts of the other members have failed (Treaties with Hungary, Bulgaria and Romania, Articles 35, 31 and 32 respectively).

In the other commission the régime of the coincidence of two opinions is also preferred ; but, in this case, the very designation of the third member by the Secretary-General depends not upon a time-limit extending from the date when a certain case was referred, but merely upon disagreement between the parties upon the appointment of a national of a third State, after a lapse of one month (the above cited treaties, Articles 40, 36 and 38).

This comparison, within the same treaty, brings out a distinction which is further emphasized by the creation of a third commission, provided for only in the treaty with Romania (Article 33). For instance, for the determination of the prices of goods delivered as reparations, a third system has been adopted submitting the controversy to the Heads of Diplomatic Missions at Bucharest. In case of disagreement, the Secretary-General shall appoint a single "arbitrator" whose decision shall be binding on the parties. Obviously, this arbitrator is not bound by any of the solutions previously put forward.

9.—In the present case, it seems therefore arbitrary again to call upon the Secretary-General to intervene in another circumstance which the text has not indicated as a condition : the appointment

and also perhaps the acceptance of other members. Nor has the sequence of voting at the time of the decision any relation to that of the appointment of the members of the organ, as they must all perform their functions simultaneously.

In the desire to meet a hypothetical intention of the parties, one runs the risk of losing sight of the main aspect of the question, that of the rôle of the third arbitrator considered from the angle of a familiar distinction in international law. Even this preoccupation does not give assurance of a perfect interpretation and, at the same time, by an inversion of the order followed in the Request for Opinion, may compel an answer to a question which in the end must be set aside: Question IV.

10.—Undoubtedly the appointment of this third member would be useless if ultimately the commission were unable to function. For that reason, the General Assembly has put Question IV.

Before answering this question, one must, however, underline another aspect of the function of the commissioners: those that are to be appointed by the parties have quite openly been considered as their "representatives". This will make it easier for the States having designated them to replace them.

On the other hand, the position of the third member becomes more important, as he will in fact become the only true arbitrator, with the single reservation that he will not be in a position to adopt another solution than those proposed by the other members. He will crystallize the majority responsible for the decisions. He will be the one to define it so that this majority will coincide with the simple juxtaposition of two votes on the same side.

Obviously, if the two representatives of the parties agree, it is useless for the third member to give a verdict. But in this case there would be no dispute, the latter having been settled by the agreement of those who would then be really agents for the Governments reaching a compromise.

On the other hand, it is equally certain that the concept of minority ceases to have any value by eradicating the relative character which may be attributed to it and to the corresponding concept of majority, the latter being transformed into unanimity.

11.—One finds in the records of international law a series of cases in which an arbitration organ saw its initial composition disturbed by the disappearance of one member, either by accidental circumstances or because of the action of that member or of the State which had appointed him, action taken either openly or indirectly.

The practice of keeping in function such a tribunal is justified by the desire not to put wrongful conduct at an advantage. The same solution must prevail, therefore, in the case of absence of a member *ab initio*, particularly if his absence is not due to circumstances

beyond the control of the party which should have appointed him.

In the first case, the majority is also formed by the remaining members. There is no opposition left, as the organ comprises three members. One is not confronted either by a situation different from the one envisaged by the parties, or even by a revision of the treaty with a view to obtain an abstention from the remaining judges and thereby the closure of the tribunal. In fact, it is only the natural consequence of a specific sanction required by the nature of the obligation disregarded by one of the parties.

There is no essential difference between the two cases. If one does not wish to see form overrule substance, one is compelled to adopt the same solution *ubi eadem ratio, ibi idem jus*.

An excessive respect for mere formulæ should not result in the extension of a mere concept such as, for instance, the one of the "fundamental procedural order" which has sometimes been put forward to give exceptional importance to the time of the constitution of an organ, to the detriment of social exigencies and for the exclusive benefit of those who are forgetful of their promises, whether they be individuals or States.

12.—The most critical moment for a deliberative organ is not the time of its organization, but the time when, fulfilling its purpose, it makes a decision which alone will carry legal effect *in casu*.

The organ which loses a member without being able to replace him remains, from another angle, in a more serious position than the one which started its work with an incomplete bench, but in the hope or, at least, with the possibility that a change in the attitude of the defaulting State before the end of its work would permit its completion. It is impossible ever to foresee with certainty the maintenance or the abandonment of a diplomatic position.

Excessive liking for abstractions should therefore not lead to the rejection of the extension of a reasonable solution accepted without reservations in international law, such as that of the functioning of an incomplete tribunal, not only in an analogous case, but also in a case where this application would be justified for major reasons.

It is true that the work of these commissions might not bring complete results because decisions will not be made in case of disagreement between the two members. But the same result would occur if one member had disappeared during the term of office of the tribunal.

The commission would at least fulfil part of its purpose in deciding cases where agreement was complete. This would give some satisfaction to the principle of effectivity.

13.—It is also necessary to remember the distinction between the notion of composition of an organ and of *quorum* permitting its operation.

Although consisting of fifteen members, the International Court of Justice could not, for instance, start functioning before some of the judges have been elected (Statute, Article 12, paragraph 3), or before all have accepted their election?

14.—It may be observed that the member most qualified to express the views of the recalcitrant State might, in voting, modify the opinion of the third member. That is an indisputable disadvantage, but it is quite as serious as some others which continually occur in cases of wrongful admission by a party and which, for example, lead to the absence of any definite expression of the questions to be decided, to the absence of rules of procedure and of substance, and even to the insufficiency of evidence.

All this, however, constitutes a large part, if not the main part, of the sanction imposed upon the defaulting State. It acts as an injunction to bring about its consent. The same can be said of the kind of "veto" which the party represented on the commission will have in practice. This "veto" results exclusively from the default of the other party which has an easy means of suppressing it at any time by filling the empty seat.

15.—None of these obstacles has been sufficient to set aside procedure by default in similar circumstances in international law.

Absence of means of defence and absence of counsel is far more serious than the absence of participation in the judgment of a national member, to whom even the Statute of the International Court of Justice has attributed a purely optional character. All these consequences, however, are also accepted as a new sanction against the party which does not appear in Court.

In my opinion, the absence of the "representative" of one of the parties is no reason for suspecting the third member, whose function is not in any way changed thereby. Whether he acts with one or two members, he remains free to have the last word.

In case of default, Article 53 of the Statute contents itself with a recommendation to the International Court to exercise a certain *ex officio* control, which it has already had occasion to exert. There is nothing to prevent organs functioning in an incomplete way from taking their guidance from the same principle when they are about to make their decisions. They have every reason to do so.

(Signed) PH. AZEVEDO.