

## SEPARATE OPINION OF JUDGE ODA

I concur with the Advisory Opinion of the Court in considering that the transfer of the Regional Office from Alexandria to the new site, if such transfer is inevitable, should be effected in an orderly manner with the minimum of prejudice to the work of the Organization and the interest of Egypt. However, differing as I do from the Advisory Opinion on some of the legal issues which it touches upon, I feel bound to make known my own individual views, as follows.

\* \* \*

1. In my view the 1951 Agreement between Egypt and the WHO does not govern the transfer of the Regional Office for the Eastern Mediterranean from Alexandria, nor can the negotiation and notice provisions of its Section 37 apply to any such transfer. In this connection it is necessary to examine the relation between the 1951 WHO/Egypt Agreement, on the one hand, and, on the other, the establishment and location of the Regional Office in Alexandria.

The Director of the Legal Division of the WHO stated during the oral proceedings :

“The provision which is the subject of the request for advisory opinion merely repeated an analogous provision in the Agreement between Switzerland and WHO of 1948, which Agreement also repeated an identical provision in the Agreement between the ILO and the Swiss Confederation in 1946. Hence the text in question was not the subject of thorough discussion when it was adopted, since it reproduced a clause that was already well known.” (Sitting of 23 October 1980.)

\* \*

2. In fact, Section 37 of the 1951 WHO/Egypt Agreement is practically identical with Article 29 of the 1948 WHO/Swiss Agreement. In this respect it is pertinent to start by examining the establishment in 1948 of the headquarters of the WHO in Geneva and the conclusion of the 1948 WHO/Swiss Agreement.

The International Health Conference called by the United Nations in New York in July 1946 concluded with the signature of the Constitution of the WHO. In Chapter X thereof, Article 43 stated :

“The location of the headquarters of the Organization shall be determined by the Health Assembly after consultation with the United Nations.”

The Interim Commission, established pursuant to the Arrangement concluded at the International Health Conference, was charged, *inter alia*, with making “studies regarding location of Headquarters of the Organization” (2 (b) (ii)). In the deliberations of the Interim Commission, which met five times between July 1946 and February 1949, the establishment and location of the headquarters of the Organization and the Agreement with Switzerland concerning the legal status of the Organization were always dealt with separately, or rather discussions on the Agreement with Switzerland preceded determination of the establishment and location of the headquarters of the Organization.

3. The Executive Secretary of the Interim Commission met with a committee of representatives of the Swiss Confederation and Genevese authorities on 18 and 19 September 1946, and discussed a draft agreement indicating the privileges, immunities, guarantees and facilities of all kinds which the WHO might enjoy if it established itself in Switzerland (WHO, *Official Records*, No. 4, p. 72). Accordingly a proposed agreement between the Swiss Federal Council and the WHO concerning the legal status of the WHO in Switzerland, together with a proposed arrangement for the execution of the Agreement, were drafted: the Agreement was circulated as a WHO document on 16 October 1946 (*ibid.*, p. 81). The Executive Secretary expressed on that occasion the desire that these two texts should *mutatis mutandis* be applied provisionally to the services which were to be administered in Geneva by the Interim Commission until the WHO had chosen a place for its permanent seat. The Swiss Federal Council expressed assent to this proposal at its meeting of 25 October 1946. The letter from the Federal Political Department to the Executive Secretary dated 28 October 1946 clearly indicated that this agreement was proposed for the purpose of determining the legal status of the WHO in Switzerland in the event of its deciding to establish its seat in Geneva (*ibid.*, p. 88). This was nearly two years before Geneva was actually chosen as the site of the WHO headquarters.

4. At its third session (March/April 1947) the Interim Commission, on the basis of the recommendations of the Temporary Panel of Legal Consultants on Privileges and Immunities (i.e., those to be granted to the WHO and its Interim Commission by the Swiss Government), adopted a resolution noting with satisfaction the conclusion of the draft agreement of 19 September 1946 and considered that the draft agreement, the draft arrangement of the same date and the letter of 28 October 1946, together with the resolution itself, would constitute a legal agreement between the Swiss Federal Government and the Interim Commission binding upon both parties during the life of the Interim Commission (WHO, *Official Records*, No. 5, pp. 23 and 139). The Executive Secretary informed the Swiss Federal Council of the resolution in a letter the date of which is not

clear but which was at any rate before August 1947 (WHO, *Official Records*, No. 5, p. 140 ; No. 6, p. 66). At the end of this letter the Executive Secretary stated :

“It is perhaps superfluous for me to add that it will be necessary for the World Health Assembly to give its approval to this *projet d'accord* should it desire to have the provisions of the *projet d'accord* applied to the World Health Organization.” (WHO, *Official Records*, No. 5, p. 141.)

In the final report (1948) of the Interim Commission it was recommended that the World Health Assembly resolve to approve, without modification, the draft Agreement of 19 September 1946, as well as the accompanying draft arrangement for its implementation (WHO, *Official Records*, No. 10, p. 121).

5. At the First World Health Assembly, held in Geneva in June/July 1948, the Secretary explained the proposed agreement and arrangement to the Legal Committee (WHO, *Official Records*, No. 13, p. 278), which then unanimously decided to recommend that the Health Assembly accept them (*ibid.*, p. 279). The World Health Assembly itself, on 17 July 1948, adopted without any objection at its fourteenth plenary meeting the report of the Legal Committee which contained this recommendation, approving the agreement and arrangement with only a minor modification of the latter (*ibid.*, p. 97). This was the final action taken by the World Health Assembly as far as the WHO/Swiss agreement is concerned. The Agreement and the Arrangement for its execution were approved by the Swiss Federal Council on 21 August 1948 and came into force on that date, effective retroactively from 17 July 1948 (*UNTS*, Vol. 26, p. 331). The former carries the title : “Agreement concerning the legal status of the WHO in Switzerland.”

\*

6. Meanwhile, the establishment and location of the headquarters of the WHO was being discussed quite separately from the draft Agreement with the Swiss Government. The Interim Commission, at its second session (Nov. 1946), set up an internal committee of five members for the study of the future seat of the WHO (WHO, *Official Records*, No. 4, p. 15). On 6 March 1947, pursuant to the wish of this five-member internal committee the Secretariat sent a circular letter to all governments invited to the International Health Conference in New York, asking them for their offers or views regarding the establishment of offices of the WHO (WHO, *Official Records*, No. 5, p. 65). At the third session (March/April 1947) of the Interim Commission, the Committee on Headquarters was engaged in making some surveys on the possibilities of the location of headquarters (*ibid.*, p. 136) and in a report of the Executive Secretary submitted in August 1947 to the Interim Commission for its fourth session (Aug./Sep.

1947) several possibilities regarding the headquarters were mentioned on the basis of replies addressed to the Interim Commission in response to its circular letter (WHO, *Official Records*, No. 6, p. 43).

At the fifth session (Jan./Feb. 1948) of the Interim Commission, the Committee on Headquarters prepared a detailed analysis of New York, Geneva, Paris and the United Kingdom for the possible location of the headquarters from various aspects (WHO, *Official Records*, No. 7, p. 217). However, it was agreed on 5 February 1948 that a decision on the location should be left to the World Health Assembly to be held in a few months' time (*ibid.*, p. 56).

7. At the Committee on Headquarters and Regional Organization in the First World Health Assembly (June/July 1948), the Chairman gave a short summary of the question and made special reference to the opinions expressed so far by various countries with regard to the different possible locations for the headquarters. There was general agreement that, although Geneva was not itself a very large medical centre, it was so centrally situated in Europe as to be easily accessible to the various medical centres (WHO, *Official Records*, No. 13, p. 330).

The Committee finally came to the unanimous conclusion that Geneva should be selected as the permanent headquarters of the World Health Organization. The Committee prepared a resolution for the Health Assembly to adopt, and the report of the Committee containing the draft resolution was taken up at the tenth plenary meeting on 2 July 1948. The resolution read as follows :

“The Health Assembly resolves that Geneva be made the permanent headquarters of the World Health Organization.” (WHA1.96 ; *ibid.*, pp. 77 and 330.)

As there were no objections, the President announced that Geneva had been chosen as the permanent seat of the Organization with the reservation that the Assembly had to consult the Secretary-General of the United Nations (*ibid.*, p. 77).

8. After this decision the delegate of Switzerland made the following statement :

“In the name of the Swiss delegation I wish to express my thanks for the great honour shown to our country by the choice of Geneva as the permanent site of the World Health Organization. If, after consultation with the United Nations, your decision should be confirmed – as we sincerely hope will be the case – you may rest assured that the Federal Council, in concert with the authorities of Geneva, will consider and study in the widest and most liberal sense all the steps to be taken for the installation and work of the World Health Organization in this town.” (*Ibid.*)

The Economic and Social Council, in its resolution of 23 July 1948 :

“Consider[ed] that the establishment of the headquarters of the World Health Organization at Geneva [was] in the best interests of the United Nations and of the World Health Organization.” (ECOSOC, res. 168 (VII).)

On 24 July 1948 at the sixteenth plenary meeting of the First World Health Assembly, this resolution of the Economic and Social Council was introduced and the President declared that the resolution as to the permanent headquarters in Geneva should stand (WHO, *Official Records*, No. 13, p. 103).

\*

9. It seems to me that, from the analysis of the process under which the 1948 Swiss/WHO Agreement was prepared on the one hand, and from the fact, on the other hand, that the choice of Geneva as the site of the headquarters was effected through a separate process, it is difficult to conclude that the establishment and location of the headquarters of the WHO in Geneva was governed by the Swiss/WHO Agreement.

\* \*

10. As stated by the Director of the Legal Division of the WHO (para. 1 above), Article 29 of the 1948 WHO/Swiss Agreement also repeated Article 30 of the 1946 ILO/Swiss Agreement. Not only that, these two Agreements are practically identical except that the ILO/Swiss Agreement has one extra provision concerning the transitory régime which might be necessitated by the fact that the International Labour Office had already existed for many years.

The report of the Temporary Panel of Legal Consultants dated 26 April 1947, submitted to the third session of the Interim Commission (which I referred to in para. 4 above), read as follows :

“An Agreement couched in almost identical terms, and serving as model for the draft Agreement negotiated by the Executive Secretary of the Interim Commission and the Swiss Government, had been concluded between this same Government and the International Labour Organisation. This ILO Agreement had met with no objection whatever on the part of the Members of that Organisation.” (WHO, *Official Records*, No. 5, p. 140.)

11. A group of the ILO which met in London from 21 January to 15 February 1946 prepared a Report of the Conference Delegation on Constitutional Questions (International Labour Conference, 29th Session, Report II (1)). According to this report

“The Delegation considers that wherever the seat of the Office may be located there should be an arrangement between the International Labour Organisation and the Government or international authority having jurisdiction over the seat which ensures that the Organisation will enjoy there the full independence necessary for the effective discharge of its international responsibilities until such time as the arrangement is terminated by mutual agreement.” (P. 25.)

The talks in early March between Switzerland and the ILO to negotiate an agreement concerning the legal status of the ILO in Switzerland after the dissolution of the League of Nations, in which Professor Guggenheim and Dr. Jenks participated in their respective roles, are known to the Court. The formal *procès-verbal* which was signed by the negotiators is so simple as to exclude any background to the ILO/Swiss Agreement (*UNTS*, Vol. 15, p. 377). However, according to a communication to the Court by the Legal Adviser of the ILO, there exists an informal *procès-verbal de négociations* which is based on notes taken at the time by the ILO negotiators, but which has never been seen or approved by the other party.

12. We have been told that, on the topic eventually dealt with by Article 30 – which was copied as Article 29 of the WHO/Swiss Agreement – the Swiss draft contained, according to this informal document, the following article :

“*[Translation]* The present Arrangement shall remain in force so long as the seat of the International Labour Organisation is maintained on the territory of Switzerland. It may be denounced on either side, effective at the end of a year, by six months’ previous notice.”

It was certainly not the intention of Switzerland that this agreement should provide for the *removal of the office*, effective at the end of a year, by six months’ previous notice. On the contrary, the fate of the seat of the ILO was not within the scope of this agreement. The meaning of the Swiss delegate was that this agreement providing for the legal status of the Organization in Switzerland would remain in force as long as the seat of the ILO was maintained in Switzerland, but could however be denounced by the procedure suggested.

According to the informal record supplied by the ILO :

“*[Translation]* Mr. Guggenheim emphasized that he would wish to see a denunciation clause included in the Agreement. Mr. Jenks proposed that a form of words be worked out to permit of revision of the agreement between the two parties. If no such form of words could be found, ultimately a provision should be included for each party to have the right to denounce on sufficiently long notice. That proposal was accepted.”

It was thus that the provision now existing as Article 30 was adopted.

13. The ILO did not, apparently, challenge the basic principle as mentioned in the first part of the Swiss suggestion – it only asserted in connection with the second part of the Swiss suggestion that the agreement should be subject to some process of revision before any denunciation. It is quite clear that neither side was engaged in discussing the location or the transfer of the headquarters of the ILO while negotiating the proposed agreement.

The draft which was agreed through these negotiations was submitted to the Governing Body of the International Labour Office at its ninety-eighth session in May 1946. The covering note contained the following passage :

“It was clearly understood . . . that the provisions of the Agreement and Arrangement defining the legal status of the ILO in Switzerland after the dissolution of the League of Nations do not prejudice in any way the question of the seat of the Organization.” (ILO, *Minutes of the 98th Session of the Governing Body*, p. 188.)

The Agreement was signed on 11 March 1946 and came into force on 27 May 1946.

\* \* \*

14. The WHO has established six Regional Offices, including the one in Alexandria. The Regional Office in Washington is very special because of its historical background, which it is unnecessary to go into here. The five other Regional Offices are in India, Egypt, the Philippines, the People's Republic of the Congo and Denmark. Those in India and Egypt started their operations on 1 January and 1 July 1949, respectively, and the other three began operating in the early 1950s. The agreements concerning these five offices (which are similar apart from some minor differences) were approved by the World Health Assembly at its second, fourth, fifth, sixth and ninth sessions (WHA2.81, WHA4.59, WHA5.41, WHA6.39 and WHA9.37).

Since the Regional Office in India started its functions six months ahead of the Regional Office in Alexandria, and the WHO/India Agreement was approved by an earlier session of the World Health Assembly and came into force earlier than the WHO/Egypt Agreement, it is pertinent to make some analysis of the process under which the Regional Office in India was brought into operation, and to compare it with the case of the Regional Office in Egypt.

15. The Constitution of the WHO devotes its Chapter XI, containing Articles 44-54, to Regional Arrangements. Article 44 provides for the establishment of any regional organization, which, according to Article 46, consists of a regional committee and a regional office. Article 54 stipulates in effect that, where any inter-governmental health organization existed prior to the date of signature of the Constitution, it should in due course be

integrated with the WHO. It seems not to be correct to assume that Article 44, read with Article 46, and Article 54 are mutually exclusive or independent of each other in their respective applications. Article 54 was simply supplementary to Articles 44 and 46 for the establishment of a regional office.

In preparing this chapter at the International Health Conference (June/July 1946), the relationship of the Pan American Sanitary Bureau to the WHO carried great weight. This is the reason why Article 54 was drafted. But, the delegates of some countries, such as India, Liberia, Poland, South Africa, the three Soviet Republics and Yugoslavia, urged that all existing regional health agencies should be transformed as quickly as possible into regional committees subordinated to the World Health Organization. The Egyptian delegate intervened in the debate to call attention to the recently created Health Bureau of the Pan Arab League and to request that it be accorded the same consideration as the Pan American Sanitary Bureau (WHO, *Official Records*, No. 2, p. 23).

\* \*

16. The Interim Commission had as its task, among others, to carry out studies regarding the definition of geographical areas with a view to the eventual establishment of regional organizations as contemplated in Chapter XI of the Constitution, due consideration being given to the views of the governments concerned. (Arrangement concluded by the governments present at the International Health Conference, 2 (b) (iii).)

It was only at the third session of the Interim Commission (March/April 1947) that matters concerning regional arrangements began to be given due consideration. Some days prior to this session, the Executive Secretary despatched to all member States a circular dated 6 March 1947, which has been mentioned previously, regarding not only the establishment of the headquarters of the WHO, but also the establishment of its regional offices. In addition, at its third session the Interim Commission instructed the Executive Secretary to undertake further studies on regional areas for consideration at its fourth session and for recommendation to the World Health Assembly (WHO, *Official Records*, No. 5, p. 143). Pursuant to this decision, a circular was despatched on 4 June 1947 with reference to Chapter X, particularly Article 44, of the Constitution of the WHO (WHO, *Official Records*, No. 6, p. 196).

17. By the time of the fourth session (Aug./Sep. 1947) of the Interim Commission a number of replies had been addressed by governments in response to the circulars of 6 March 1947 and 4 June 1947, respectively. In answer to the former circular, India announced that it would soon indicate its views (*ibid.*, p. 43). Neither India nor Egypt had replied to the latter circular by that time.



Prior to the fifth session (Jan./Feb. 1948) further replies had been received from various countries, including Egypt and India. They are not reproduced in their original form and their dates are not known, but it seems that these replies were made in response to the general circular letter of 6 March 1947 concerning the offices of the WHO and that of 4 June 1947 concerning regional arrangements, without making any separate reference to the respective circulars. The replies from Egypt and India are quoted, as follows :

*“Egypt :*

The competent authorities have declared that they are most anxious to see a regional bureau established at Alexandria. This bureau could deal with all questions coming within the scope of the WHO for the entire Middle East.” (WHO, *Official Records*, No. 7, p. 135.)

*“India :*

(3) In the event of India’s proposal regarding the location of headquarters in India not being accepted by the World Health Assembly, the Government of India would press for a regional bureau to be located in India. This bureau might conveniently cover the following territories : Iran, Afghanistan, Pakistan, India, Burma, Ceylon, Siam and possibly Malaya and Singapore.

(4) The Government of India gives an assurance that adequate accommodation and other facilities, as well as necessary amenities and privileges, on similar terms to those provided by other Governments for the United Nations or its Specialized Agencies, will be provided for the headquarters office or the regional bureau, as the case may be.” (*Ibid.*)

In addition, Denmark and Iran indicated their interest in providing the site of regional offices, and there were some replies from other countries which indicated that Alexandria might be the site of one regional office (*ibid.*).

18. At the fifth session (Jan./Feb. 1948) of the Interim Commission a resolution concerning the determination of geographical regions was adopted. Finding that there was not yet sufficient data available for the delimitation of the geographical regions to be administered by the regional offices, referred to in Article 44 of the Constitution of the World Health Organization, the Interim Commission resolved to refer the question to the World Health Assembly with a recommendation that it be assigned as soon as possible for study to a Committee of the Assembly, whose task it would be to make the necessary recommendations, taking due note of the viewpoints expressed by the various governments (WHO, *Official Records*, No. 7, p. 232).

\*

19. Meanwhile, a special question concerning the Alexandria office had been taken up by the Interim Commission. At its third session (March/April 1947) Dr. Shousha Pasha, Under-Secretary of State, Ministry of Public Health of Egypt, who was serving as Vice-President of the Commission, stated on 11 April 1947 that the Pan Arab Bureau was considering the possibility of becoming a Regional Bureau of the WHO for the Mediterranean area. He desired that the Executive Secretary be instructed to make an exploratory approach with regard to that Bureau. (WHO, *Official Records*, No. 5, p. 26.) In response to his statement, the Interim Commission instructed 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 the status of the Organization (*ibid.*, pp. 26 and 142). Hence enquiry was made by the Executive Secretary on 2 May 1947.

On 26 July 1947 the Minister for Public Health of Egypt sent to the Interim Commission a detailed memorandum on "The Pan Arab Regional Health Bureau : its Origin and History" (WHO, *Official Records*, No. 6, p. 173). At the fourth session (Aug./Sep. 1947), the Committee on Relations proposed that a small negotiating subcommittee be appointed to survey the matter and report to the fifth session (*ibid.*, p. 29). No report of this subcommittee is printed in the *Official Records* of the WHO. Apparently there was no discussion on this subject at the fifth session of the Interim Commission.

20. The Interim Commission, at its informal preparatory meeting in Geneva in June 1948, included under the agenda item "Pre-existing Regional Organizations" a report on the Sanitary Bureau at Alexandria by Dr. A. Stampar, Chairman of the Commission. This is a very comprehensive report and its Section 4 was entitled "Arguments in favour of Alexandria as a Regional Health Centre for the Near and Middle East" ; Section 6 (conclusion) thereof read as follows :

"If we have realized how useful the establishment of a regional organization would be and if we remember what a peculiar situation Alexandria has from the point of view of well-established tradition in precisely this kind of international sanitary work, by reason of its geographical situation and the present progress of public health in Egypt, we are bound to admit that the conditions which predestinate Alexandria to be the centre of the future regional health organization for the Near and Middle East are literally unique." (WHO, *Official Records*, No. 12, p. 65.)

\* \*

21. At the First World Health Assembly (June/July 1948), in the Committee on Headquarters and Regional Organization, a subcommittee, appointed to study whether it was advisable actually to establish regional organizations, recommended the establishment of at least three working parties for three different regions, namely, South-East Asia, the Middle East and the Far East (WHO, *Official Records*, No. 13, p. 264). The Committee decided to add two working parties for the regions of Europe and Africa (*ibid.*, pp. 265-266).

For South-East Asia it had been unanimously agreed in the working party that a regional organization should be set up with India as its headquarters and it was also unanimously agreed that, in view of the urgent needs of that part of the world, the setting-up of a regional organization for the South East Asia area should be considered as priority number one. Concerning the Middle East, the Near East and parts of North-East Africa, the working group unanimously agreed to recommend that a regional organization be established immediately to include Egypt and other countries, with headquarters at Alexandria, and it recommended also that the establishment of this regional organization be given the highest priority (*ibid.*, p. 267).

22. The Committee on Headquarters and Regional Organization recommended in its second report as delimitation of geographical areas : (i) Eastern Mediterranean Area ; (ii) Western Pacific Area ; (iii) South-East Asia Area ; (iv) European Area ; (v) African Area ; (vi) American Area (*ibid.*, p. 330).

The Committee discussed at considerable length the necessity for establishing regional organizations in some or all of these areas during the year 1949. On the basis of a report of the Committee the First World Health Assembly, at its eleventh plenary meeting on 10 July 1948, adopted a resolution : this resolution WHA1.72 reads as follows :

“1. In accordance with Article 44 of the WHO Constitution, the Health Assembly

*Resolves* to define the geographical areas as indicated in the second report of the Committee on Headquarters and Regional Organization.

2. The Health Assembly

*Resolves* that the Executive Board be instructed (1) to establish regional organizations in the areas indicated in the second report of the Committee on Headquarters and Regional Organization as soon as the consent of a majority of Members situated within such area is obtained ; where the consent of a majority of the Members has not yet been obtained, a regional organization in the respective area should be established as soon as the necessary consent becomes available ; (2) as regards the Eastern Mediterranean Area, to integrate the regional organization which already exists in that area, viz. the Alexandria

Regional Bureau, with the World Health Organization as soon as possible, through common action, in accordance with Article 54 of the WHO Constitution; (3) as regards Europe, . . .” (WHO, *Official Records*, No. 13, pp. 81 and 331).

23. The sites of the regional offices in India and at Alexandria were mentioned in the report of the respective working groups, which were adopted at committee level, but the World Health Assembly resolution did not specify these names expressly, simply stating that the regional organizations should be established as soon as the consent of a majority of members situated within such areas was obtained. However, in the case of the Eastern Mediterranean Area specifically, integration of the existing regional organization with the WHO was mentioned. It seems quite clear that this integration was supplementary to the establishment of the Regional Office in Alexandria in accordance with Article 44, read with Article 46.

Meanwhile, although the name of India was not mentioned in the resolution itself, Jawaharlal Nehru, Prime Minister of India, sent the following telegram, which was read by the President of the World Health Assembly at the fourteenth plenary meeting on 17 July 1948 :

“On behalf of the Government of India, I wish to thank you and World Health Assembly for unanimously deciding to locate one of the regional bureaux in India. The Government of India will gladly extend every help in promoting the work of the bureau.” (*Ibid.*, p. 96.)

24. Thus, until the time of the First World Health Assembly the process of establishing the Regional Offices in India and Egypt progressed at the same pace, though in the case of Egypt special mention was made, since not only was the Regional Office to be established in accordance with Article 44, read with Article 46, but integration under Article 54 of the Constitution was also made necessary.

\*

25. At its first session (July 1948) the Executive Board noted the letter addressed to the President of the Assembly by the Chief Delegates of Burma, Ceylon, India and Siam, stating that their countries had agreed to join the Regional Organization for South-East Asia with headquarters in India, and also the letter from the delegate of India proposing that this regional organization should be located in the city of Mysore (WHO, *Official Records*, No. 14, p. 12). The Regional Committee for South-East Asia was convened for its first session in New Delhi in October 1948. At its second session (Oct./Nov. 1948) the Executive Board adopted the following resolution :

“The Executive Board

In order to carry out the instructions of the first World Health Assembly

- (1) *Approves* the establishment of the South-East Asia Regional Office on or about 1 January 1949,
- (2) Having considered the recommendation of the Regional Committee . . . *Approves* provisionally the selection of New Delhi as the site of the Regional Office for South-East Asia, this action being subject to consultation with the United Nations by the Director-General . . .” (EB2.R29 ; *ibid.*, p. 27.)

The consultation referred to in the resolution had in fact already taken place in November 1948 in the Administrative Committee on Co-ordination (E/1076, Report of the Administrative Committee on Co-ordination to the ECOSOC, 3 December 1948 ; ECOSOC, *Official Records*, 4th year, 8th Sess., Suppl. 5, p. 9). In fact, the shift of the future site of the Regional Office in India from Mysore to New Delhi seems to have been made as a result of this consultation on the ground that the United Nations, the ILO and the Unesco offices already existed in New Delhi. The Economic and Social Council at its 241st meeting on 17 February 1949 took note of the report (ECOSOC, *Official Records*, 4th year, 8th Sess., p. 148).

26. In the case of the office in Egypt, the Regional Committee for the Eastern Mediterranean was held in Cairo in February 1949. At its first session the location of the Regional Office, date of commencement of operations in the Regional Office, and integration of the Sanitary Bureau were placed, together with other items, on the agenda. On the question of the location of the Regional Office, the following draft resolution, which was read by the delegate of Egypt, was adopted :

“The Regional Committee

Having considered

- (1) the historical role of Alexandria as a centre for epidemiological services to countries in the Eastern Mediterranean Area ; (2) the policy laid down in Article XI (2) of the agreement between the United Nations and the World Health Organization which states that : ‘Any regional or branch offices which the World Health Organization may establish shall, so far as practicable, be closely associated with such regional or branch offices as the United Nations may establish’ ; (3) the importance of establishing the Regional Office in the proximity of Cairo in which are located or expected to be located offices of the United Nations and specialized agencies as follows : FAO, ICAO, ILO, Unesco and UN Information Centre ; (4) the desirability of the excellent site and buildings under favourable conditions generously offered by the Government of Egypt.

*Therefore resolves 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.”* (WHO, *Official Records*, No. 17, p. 46.)

27. With regard to the integration of the Alexandria Sanitary Bureau, the delegate of Egypt stated that in January a Committee of the Arab States had voted in favour of the integration of this Bureau into the WHO. (Regional Committee for Eastern Mediterranean, Summary Minutes, 4th Sess., 8 February 1949.) The Director-General read a draft resolution, the adoption of which was then proposed by the delegate of Egypt, and the Director-General confirmed that all functions would be carried on as in the past. The resolution, which was adopted, read as follows :

“The Regional Committee,

Having regard to : (1) the relevant provisions of Chapter XI of the Constitution of the World Health Organization ; and (2) the resolution of the World Health Assembly of 10 July 1948 ; and (3) the long experience and the services rendered by the Sanitary Bureau at Alexandria in the field of health,

*Resolves 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 within those of the Regional Organization of the World Health Organization.”* (WHO, *Official Records*, No. 17, p. 46.)

The delegate of Egypt presented a statement, which read :

“In accordance with the declaration made by the Delegate of Egypt to the International Sanitary Conference of 1938 at Paris, the Government of Egypt assumed the functions and has carried on the services of the Alexandria Sanitary Bureau. 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.” (*Ibid.*, p. 47.)

The Committee then expressed gratitude to the delegate of Egypt for the transfer of the functions, files and records of the Alexandria Sanitary Bureau to the Organization upon commencement of operations in the Regional Office.

28. On the agenda item “the date of commencement of work in the region”, the Committee requested the Director-General and the Executive

Board to establish the Regional Office and commence work on 1 July 1949.

29. The Executive Board, at its third session (Feb./March 1949) held soon after the Regional Committee for the Eastern Mediterranean, adopted the following resolution :

“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 . . .” (EB3.R30 ; WHO, *Official Records*, No. 17, p. 16.)

The consultation took place in May 1949 in the Administrative Committee on Co-ordination (E/1340, Report of the Administrative Committee on Co-ordination to the ECOSOC, 25 May 1949 ; ECOSOC, *Official Records*, 4th year, 9th Sess., Suppl. 15, p. 11). The Economic and Social Council at its 331st meeting on 9 August 1949 took note of the report of the Co-ordination Committee (E/1470) which contained the report of the Administrative Committee on Co-ordination (ECOSOC, *Official Records*, 4th year, 9th Sess., p. 730).

30. Thus, pursuant to the resolution of the First World Health Assembly, the establishment of the regional office and the selection of its site was approved at the second session (Oct./Nov. 1948) of the Executive Board in the case of India and at the third session (Feb./March 1949) of the Executive Board in the case of Egypt, with an indication, on each occasion, of the date of commencement of operations.

\* \*

31. With regard to the agreement of the WHO with the host governments of its regional offices, the negotiations with India seemed to progress more smoothly than those with Egypt. At its second session (Oct./Nov.

1948), when the regional office in India was approved, the Executive Board resolved that the Director-General be invited to continue negotiations with the Indian Government in order to obtain an agreement extending privileges and immunities to the Regional Organization of the WHO in South-East Asia. Until such agreement came into force, the Indian Government was invited, as a provisional measure, to extend to the regional organization established on its territory the privileges and immunities contained in the General Convention on the Privileges and Immunities of the Specialized Agencies, including Annex VII (EB2.R49 ; WHO, *Official Records*, No. 14, p. 26).

In accordance with the resolution of the second session of the Executive Board, the Director-General of the WHO had initiated negotiations with the Government of India with regard to the draft agreement extending privileges and immunities in India to the Regional Organization for South-East Asia, and by letter of 20 May 1949 the Regional Director was informed of the approval by the Indian Government of the draft agreement (WHO, *Official Records*, No. 21, p. 375). The Second World Health Assembly (June/July 1949) approved the draft and authorized the Director-General or his representative to sign the instrument (WHA2.81 ; *ibid.*, p. 49). The WHO/India Agreement was signed at New Delhi on 9 November 1949 but had come into force earlier on 22 September 1949, upon an exchange of notes (*UNTS*, Vol. 67, p. 43).

\*

32. In contrast, the process of preparation of the WHO/Egypt Agreement proved somewhat complicated. It is not possible to get a clear picture of the early stages of the negotiations between the WHO and Egypt from any of the documents. It seems, however, most probable that negotiations started early in 1949. According to one source, a draft agreement had been prepared by the WHO prior to 8 February 1949 and handed to the Egyptian Government, where it was under study in their legal department. (Regional Committee for Eastern Mediterranean, Summary Minutes, 4th Sess., 8 February 1949.) According to other sources, Dr. Shousha Pasha, Under-Secretary of State for Health, provided the Ministry of Foreign Affairs in April 1949 with a copy of the draft agreement which the WHO intended to conclude with Egypt. There is no proof, but I assume that this draft agreement is the one which has often been referred to as being on the lines of the model host agreement supplied by the WHO.

33. The Regional Committee for the Eastern Mediterranean noted at its first session (Feb. 1949) that the Director-General would negotiate an agreement with the Government of Egypt as an agreement with the host government of the Regional Office (WHO, *Official Records*, No. 17, p. 45).

Since the negotiations were still proceeding, the Second World Health Assembly (June/July 1949) resolved that the Director-General be invited to continue negotiations with the Government of Egypt in order to obtain



an agreement extending privileges and immunities to the Regional Organization of the WHO in the Eastern Mediterranean Area (WHA2.82 ; WHO, *Official Records*, No. 21, p. 49). As in the case of India, the World Health Assembly invited the Government of Egypt, as a provisional measure, to extend to the Regional Organization all privileges and immunities contained in the General Convention on the Privileges and Immunities of the Specialized Agencies.

At the fifth session (Jan./Feb. 1950) the Executive Board asked the Director-General to continue the negotiations and requested the Government of Egypt to expedite them (WHO, *Official Records*, No. 25, p. 15).

34. At the Third World Health Assembly (May 1950) the Secretary reminded the Working Party on Legal Matters, in connection with the agenda item "Agreement with the Government of Egypt", that the WHO had concluded agreements with certain States that were acting as "hosts", either to the Organization or to its regional offices, and referred to agreements such as those which had been concluded with Switzerland and India. He said that the draft agreement with Egypt had become necessary since the Regional Office for the Eastern Mediterranean Area had been established and was functioning in Egypt (WHO, *Official Records*, No. 28, p. 451).

The Third World Health Assembly approved the WHO/Egypt Agreement, and requested the Director-General or his representative to sign the said Agreement after approval by the Government of Egypt in accordance with the respective constitutional procedures (WHA3.83 ; *ibid.*, pp. 52, 451 and 492). However, there still remained some issues to be solved by the WHO and Egypt on matters which are quite irrelevant to this case.

35. Finally agreement was reached and the Executive Board at its seventh session (Jan./Feb. 1951) requested the Director-General to submit a report on these negotiations and the agreement for approval by the Fourth World Health Assembly (EB7.R8 ; WHO, *Official Records*, No. 32, p. 3). The WHO/Egypt Agreement was signed on 25 March 1951 in Cairo by the representative of the WHO and by the representative of Egypt.

It is to be noted with particular interest that at the Fourth World Health Assembly (May 1951) Mr. A. Zarb, Chief of the Legal Office, on 17 May 1951 at the Legal Sub-Committee stressed the fact that :

"The Egyptian Government had so far shown a large measure of understanding and had in fact accorded the Organization most of the facilities necessary for the proper functioning of the Regional Office at Alexandria. However, although the Organization thus enjoyed the most courteous treatment, it would be highly desirable if such treatment be accorded *de jure* and not only *de facto*." (WHO, *Official Records*, No. 35, p. 315.)

The Fourth World Health Assembly (May 1951) took cognizance of the declaration made by the Egyptian declaration under the terms of which

paragraph 5 of the Notes to be exchanged neither extended nor restricted the scope of Section 31 in Article X, invited the Government of Egypt to reconsider point 5 in the text of the Notes to be exchanged, and approved the Agreement together with those Notes. Again, the question of point 5 of the Notes is not relevant here. At any rate, for reasons which are not germane to this case, the finalization of the Agreement had been postponed for a few years before the Agreement, which was approved by the Fourth World Health Assembly on 24 May 1951 (WHA4.59 ; WHO, *Official Records*, No. 35, pp. 41, 136 and 350) and ratified by Egypt on 8 August 1951, came into force on 8 August 1951.

\* \*

36. I have mentioned the example of the Regional Office in India, alongside the case of the Regional Office in Alexandria, mainly for two reasons. First, the Regional Offices in India and Egypt were both set up in accordance with Article 44 of the Constitution, read with Article 46. Certainly in the case of India there was no question of integration of a pre-existing international organization, but the difference between the cases of Egypt and India, relating to the additional application of Article 54 in the case of Egypt, does not mean that the agreements are different in nature. The fact that the pre-existing organization was integrated with the WHO when the Regional Office in Egypt was established does not seem to have any substantial bearing on the interpretation of the 1951 WHO/Egypt Agreement, nor on the determination of any transfer of the Regional Office from the host country.

37. Secondly, as in the case of the WHO/Swiss Agreement on the legal status of the WHO in Switzerland, the negotiations for the establishment and location of the Regional Office, both in India and in Egypt, were dealt with in the WHO separately from the preparation of the agreement with the respective host countries. When the Swiss authorities initiated the negotiations on the agreement concerning the legal status of the WHO with that Organization, they anticipated that the headquarters might eventually be located in Switzerland. In the cases both of India and of Egypt, if the respective regional offices had not been located in these countries there would not have been a special agreement with the WHO concerning privileges, immunities and facilities. However, the process of the preparation of the WHO Agreements with India and Egypt, and also the process of determining the location of the regional offices in these two countries, were carried out separately ; thus neither the WHO Agreement with Egypt, nor that with India, both of which were concluded apparently for the purpose of determining the privileges, immunities and facilities to be granted by the host government to the WHO, may be considered to constitute agreements governing the establishment and location of the Regional Office.

\* \* \*

38. The 1951 WHO/Egypt Agreement carries the title "Agreement for the Purpose 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". Its preamble states that both parties desire to conclude an agreement for the purposes mentioned in the title, and adds :

"in particular with regard to its arrangements in the Eastern Mediterranean Region, and [for the purpose of] regulating other related matters".

The fact that a pre-existing international organization was integrated with the WHO is not mentioned in the preamble or the text, nor is there any mention of an agreement between the parties for the establishment of the Regional Office in Alexandria. The Regional Office in Alexandria is only once referred to by name, in a definition clause of this Agreement.

It is certainly true that the WHO/Egypt Agreement would not have been concluded if the office had not been located in Alexandria. This, however, is very far from justifying an assertion that an agreement for the establishment or location of the Regional Office in Alexandria is contained in the said Agreement. If, in fact, no such agreement is contained in the instrument, it is a matter of course that the negotiation and notice provisions of its Section 37 do not govern the transfer of the Regional Office.

\* \*

39. It is a fact that, as stated in paragraph 12 above, in the process of negotiating Article 30 of the 1946 ILO/Swiss Agreement, which was indirectly copied by the WHO/Egypt Agreement, a clause suggested by Switzerland reading

*"[Translation]* The present Arrangement shall remain in force so long as the seat of the International Labour Organisation is maintained on the territory of Switzerland"

was dropped. The Swiss suggestion seemed to be quite logical as a reflection of the fact that the establishment and location of the headquarters of the ILO had been placed outside the scope of the agreement which was under negotiation. For whatever reason, that clause was withdrawn by the Swiss delegate, but this is not, in my view, to be regarded as signifying that the original intention of Switzerland had been rejected by the ILO.

40. In fact, the equivalent of this clause, which was suggested by Switzerland in its negotiations with the ILO in early 1946, is now to be found in a number of agreements which international organizations later concluded with host countries of their headquarters or regional offices, to some of which I shall now refer.

\*

41. The United Nations Headquarters was established in New York pursuant to the resolution adopted by the United Nations General Assembly on 14 December 1946. The Agreement concluded between the United Nations and the United States (*UNTS*, Vol. 11, p. 12) on 16 June 1947 for the purpose of carrying out the resolution stated that :

“This agreement shall cease to be in force if the seat of the United Nations is removed from the territory of the United States . . .” (Art. IX, Sec. 24.)

42. In the case of the Intergovernmental Maritime Consultative Organization, the headquarters in London was determined in the *IMCO Convention* itself. The Agreement between the United Kingdom and IMCO of 1968 (*UNTS*, Vol. 677, p. 3) indicated the purpose of the Agreement, without leaving any doubt, inasmuch as although the United Kingdom undertook to apply to the Organization the provisions of the Convention on the Privileges and Immunities of the Specialized Agencies, the conclusion of a supplemental agreement had been envisaged “to ensure that the Organization’s legal status in the United Kingdom should be defined and the content of certain privileges, concessions and courtesies as well as the measure for their implementation should be formulated in detail” (preamble). The headquarters may be removed by virtue of a decision of the Assembly in accordance with Article 44 (*b*) of the *IMCO Convention*, and

“In the event of the Headquarters of the Organization being moved from the territory of the United Kingdom . . ., this Agreement shall . . . cease to be in force.” (Art. 18 (2).)

43. For the International Civil Aviation Organization, the seat of the headquarters was to be determined by the Interim Assembly of the Provisional International Civil Aviation Organization. After Montreal was chosen as the site of the headquarters of the ICAO, an agreement was concluded between ICAO and Canada on 14 April 1951 in pursuance of the desire “to conclude an Agreement on privileges, immunities and facilities by reason of the location in the territory of Canada of the Headquarters of the International Civil Aviation Organization”. (*UNTS*, Vol. 96, p. 155.) Article VIII, Section 34, reads :

“This Agreement shall cease to be in force if the seat of the Organization is removed from the territory of Canada.”

44. The case of the International Atomic Energy Agency is slightly different from the examples mentioned above. In this case the Statute does not contain any provision concerning its headquarters. Instead, unlike most other agreements which international organizations have concluded with host countries, the Agreement between Austria and the IAEA of 11 December 1957 (*UNTS*, Vol. 339, p. 152) mentions that this Agreement was concluded “to establish the seat of the International Atomic Energy

Agency in or near the City of Vienna and to regulate questions arising as a result thereof”.

Yet it is provided that

“This Agreement shall cease to be in force . . . if the permanent headquarters of the IAEA is removed from the territory of the Republic of Austria, . . .” (Art. XX, Sec. 52)

thus implying that this kind of termination of the Agreement is different from its revision or denunciation.

45. The analysis of these agreements necessarily leads us to conclude that the transfer of the headquarters does not fall within their scope.

\*

46. Mention may also be made of some agreements of international organizations with host countries of their regional offices, as follows :

The Agreement between the ILO and Ethiopia concerning the establishment of an office in Addis Ababa in 1964 (*UNTS*, Vol. 521, p. 217) states in its preamble that the ILO “has decided to establish an Office of the International Labour Organisation in Addis Ababa and the Government of Ethiopia welcomes the establishment of such an office” but

“This Agreement . . . will remain in force while the ILO office remains established in Addis Ababa.” (Art. 9 (2).)

The Agreement between the ILO and Argentina of 1970 (*UNTS*, Vol. 725, p. 175) is of the same type and states :

“This Agreement shall remain in force for as long as the Office of the ILO remains established in the city of Buenos Aires.” (Art. 4 (2).)

A more recent case of a similar type is seen in the Agreement between the United Nations and Japan regarding the headquarters of the United Nations University (*Japanese Annual of International Law*, No. 21, p. 222). The Agreement of 1976 states that

“The Agreement shall cease to be in force . . . if the permanent headquarters of the University is removed from the territory of Japan . . .” (Art. XV, Sec. 31.)

These examples are not exhaustive at all, but simply chosen at random.

\*

47. The listing of these examples seems to be sufficient to warrant rejection of the contention that the 1951 WHO/Egypt Agreement, being the sole instrument between the parties concerning the Regional Office in

Alexandria, must contain an agreement between them for the establishment and location of the Regional Office.

\* \*

48. It is to be noted that, in these agreements, apart from the ILO/Ethiopia Agreement and the ILO/Argentina Agreement, some transitional period is stipulated in such a way that, in spite of the clause mentioned above, such provisions in the agreements as may be applicable in connection with the orderly termination of the operations of the offices and the disposal of their property there are exempted from the cessation of the agreements. The United Nations/United States Agreement states, after a clause concerning the cessation of the Agreement as a result of the removal of the headquarters from the United States, the following :

“except for such provisions as may be applicable in connection with the orderly termination of the operations of the United Nations at its seat in the United States and the disposition of its property therein” (Art. IX, Sec. 24).

A clause identical in substance is seen in the ICAO/Canada Agreement, in the IAEA/Austria Agreement and in the United Nations/Japan Agreement. The drafting of the IMCO/United Kingdom Agreement is slightly different :

“this Agreement shall, after the period reasonably required for such transfer and for the disposal of the property of the Organization in the United Kingdom, cease to be in force.” (Art. 18.)

The effect, however, is quite similar to that of the examples mentioned above.

49. In these agreements, which were concluded for the purpose of granting privileges and immunities to the organization, there are provisions which indicate that the agreements cease to be in force in the case of removal or transfer of the office from the territory of the host country, apart from revision of the provisions of the agreement and also denunciation by either party in the event of failure of negotiations for revision. However, the provisions necessary for the orderly termination of the functions of the organization and the disposal of its property allow for some reasonable transitional period.

The 1951 WHO/Egypt Agreement which is at issue in this case does not contain such provisions. This seems to indicate that this instrument, which does not contain agreements governing the establishment of the Regional Office, does not automatically cease to be in force even if the Office is transferred from the territory. The privileges, immunities and facilities granted by Egypt to the Organization under the 1951 WHO/Egypt Agreement will remain even after a decision by the WHO to transfer the Office,

and in particular until the time when the transfer is effected. Although it is not denied that most of the provisions of the 1951 WHO/Egypt Agreement will lose their *raison d'être* after the transfer is effected, the Agreement can only be terminated by mutual consent of the parties or by denunciation in accordance with Section 37.

\* \* \*

50. In contrast to an agreement between an international organization and a State concerning the affording of services or co-operation which would bestow definite benefits on the State, the establishment of a headquarters or regional office is made mainly for the effective performance of the functions of the organization.

As Article 51 of the Constitution of the WHO provides, "the regional office shall . . . carry out within the region the decisions of the Health Assembly and of the Board". No doubt the establishment and location of a regional office gives some incidental benefit, social, economic, political, to the host country. Besides, it is not conceivable that a regional office would be established against the wish of a host country, or even without the consent of a host country. In fact, as mentioned previously, it is clear from various documents that the Regional Office in Alexandria was established owing to the strong wish of Egypt to invite it onto its own territory.

There is no doubt that, prior to 1949, the office in Alexandria had most effectively exercised functions of an international nature. It is an undisputed fact that that office was integrated with the WHO. It is also not contested that Egypt, as the host country of the Regional Office, had always loyally and scrupulously carried out its obligations. If the transfer of this Office is decided upon, it will no doubt be tantamount to a blow of some magnitude to Egypt and its people. But if the Organization should deem it unnecessary to keep its Regional Office in that country, there is no reason why it should be obliged to retain the Office on the grounds that it was once established. The fact that a pre-existing office was integrated with the Organization does not have any bearing on this point.

It is not desirable, of course, that the Organization, the functions of which are situated in the field of world health, emphatically not a political but a humanitarian problem, should decide to shift the Office for political motives. Yet once the Organization, in its considered judgment, which the Court is not concerned with, finds it unnecessary or impossible to carry out its functions through the Office at Alexandria, the transfer or removal of the latter certainly falls within the competence of the World Health Assembly. Article 18 of the Constitution of the WHO provides that the determination of the policies of the Organization is one of the main functions of the Health Assembly. There is nothing in the 1951 WHO/Egypt Agreement to affect such a determination.

51. In considering under what conditions, and in accordance with what modalities, such a transfer may be effected, various factors must be taken into due account by the Organization. The function of the Executive Board includes, as provided in Article 28, giving effect to the decisions and policies of the World Health Assembly. In view of the fact that the defining of geographical areas and the establishment of regional organizations were effected by the Health Assembly, and the commencement of the operations of the office was determined by the Executive Board duly considering the convenience of the host country, consultations – rather than a negotiation – based on good faith and a spirit of co-operation concerning the conditions and modalities for the transfer, including the length of the transitional period, should be held between the WHO and the host country before the Executive Board's decision is taken. These consultations are not, however, a matter which falls within the context of the negotiation and notice provisions of Section 37 of the 1951 WHO/Egypt Agreement.

*(Signed)* Shigeru ODA.

---