SEPARATE OPINION OF JUDGE SHAHABUDDEEN

I agree with the Court's decision but propose to record some additional views directed to matters of approach and perspective in respect of two points. The first relates to the stage at which the dispute materialized. The second relates to the question whether the dispute was one concerning the interpretation or application of the Headquarters Agreement.

As to the first point, the decision of the Court has limited itself to finding that "the opposing attitudes of the United Nations and the United States show the existence of a dispute between the two parties to the Headquarters Agreement". The Court has not made any explicit findings as to when the dispute materialized. Recognizing that various dates may be eligible for consideration over a period of shifts and changes in an evolving situation, I nevertheless have difficulty in resisting the impression that it is excessive judicial economy to leave in obscurity which of these possible dates is the material one. A determination that a dispute is in existence is not made *in vacuo;* it is necessarily made after reviewing a dynamic course of events flowing over a period of time and determining that it ultimately eventuated in a dispute at a certain stage, however roughly this may be computed. It seems to me that the identification of this stage is an integral and inescapable part of the declarable reasoning process of the Court relating to what I regard as the central (though not sole) issue in the case, namely, whether or not a dispute existed as at the date of the General Assembly's request for an advisory opinion. Additionally, the identification of that stage supplies a useful and perhaps necessary analytical benchmark to differentiate between communications and discussions forming part of the process leading up to the birth of the dispute, and those directed to the resolution of the dispute after it had come into being.

The bill in question had been introduced in the United States House of Representatives on 29 April 1987 and in the Senate on 14 May 1987. The United States Administration was opposed to the purpose of the bill but recognized that that purpose was in fact to close the PLO Observer Mission. The President being charged with responsibility to enforce the laws of the State, the assent given by him to the bill on 22 December 1987 was reasonably capable of being interpreted as a commitment by the Administration to enforce a closure of the Mission in obedience to the command of the Act.

Against these unfolding events, the Secretary-General is on record as objecting as from 13 October 1987 on the ground that such a law would

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lead to a breach by the United States of its international legal obligations under the Headquarters Agreement. In his letter of 7 December 1987 to Ambassador Walters, United States Permanent Representative to the United Nations, he made it clear that in his view the enactment of the legislation would give rise to a dispute unless certain assurances were given. The fair interpretation was that this looked to assurances to be given on or before the enactment of the legislation, if only because of the need to avoid any period of risk or uncertainty. No such assurances having been given, the giving of assent to the Act on 22 December 1987 automatically operated to bring the competing interests into collision and to precipitate a dispute.

The Secretary-General's formal declaration on 14 January 1988 of the existence of a dispute was not necessary for its crystallization (see the *Chorzów Factory* case, *P.C.I.J., Series A, No. 13,* pp. 10-11, and the *Certain German Interests in Polish Upper Silesia* case, *P.C.I.J., Series A, No. 6,* p. 14). Save for Ambassador Okun's letter of 5 January 1988, advising that the assent had been given to the Act on 22 December 1987 and therefore associated in substance with that fact, there were no new developments between the date of assent and 14 January 1988 when the Secretary-General replied stating that a dispute existed and invoking the disputes settlement procedure set out in section 21 of the Agreement. The Secretary-General did not say as from when he considered that a dispute existed. His letter is not necessarily inconsistent with a dispute having automatically crystallized on 22 December 1987 in terms of the previous developments. But, if this is wrong, it is clear that a dispute did at any rate come into being on 14 January 1988. The record leaves no room for doubt that the dispute which so arose on one or the other of those two dates has continued in existence to this day.

On the second point, as to whether the dispute was one "concerning the interpretation or application" of the Headquarters Agreement within the meaning of section 21 of it, there seems to be an argument that, even though there was a dispute, the dispute did not concern the "interpretation" of the Headquarters Agreement for the reason that the Secretary of State shared the views of the Secretary-General as to the status of the PLO Observer Mission under the Agreement; and that, further, the dispute did not concern the "application" of the Agreement for the reason that a closure of the PLO Observer Mission has not as yet been effected.

As to whether the dispute in this case related to a question of interpretation of the Agreement, it was indeed the case that the views of the State Department coincided with those of the Secretary-General on the question of the status of the PLO Observer Mission under the Agreement (see the Secretary-General's letter of 13 October 1987 to United States Permanent Representative Ambassador Walters). But then different views on the subject seemingly prevailed with the United States legislature, and

these would seem to have been upheld by the President when he assented to the Act adopted by it.

I have, however, considered an argument that, even so, there is still no conflict of views between the United States and the United Nations as to the interpretation of the Agreement for the reason that the United States has taken a position which may be interpreted to mean that, although the Administration is obliged by domestic law to enforce the Act by closing the PLO Observer Mission, it at the same time recognizes that it has no right to do so under international law and will engage international responsibility accordingly if it proceeds to a closure.

The argument is interesting, as much for its refinement as for its consequences, for, if sound, it means that, provided a State is prepared to go on record as admitting that it is consciously embarking on the violation of its accepted treaty obligation — something few States are prepared to do (see S. Rosenne, *Breach of Treaty,* 1984, p. 11) — it can escape its obligation to submit to an agreed procedure for the settlement of disputes concerning the interpretation of the treaty on the ground that it is in fact in agreement with the other party as to the meaning of the treaty, with the consequence that there is no dispute as to its interpretation.

A proposition productive of such strange results may not unreasonably be suspected of supplying its own refutation. I would suspect that, to begin with, the superstructure of the argument bases itself too narrowly on a possibly disjointed reading of the disputes settlement formula prescribed by section 21 of the Agreement.

The phrase "interpretation and application" has occurred in one version or another in a multitude of disputes settlement provisions extending over many decades into the past. In the *Certain German Interests in Polish Upper Silesia* case (*P.C.I.J., Series A, No. 6,* p. 14), it was held that it was not necessary to satisfy both elements of the phrase taken cumulatively, the word "and" falling to be read disjunctively. The phrase in this case happens to be "interpretation or application". Satisfaction of either element will therefore suffice. But, further, since it is not possible to interpret a treaty save with reference to some factual field (even if taken hypothetically) and since it is not possible to apply a treaty except on the basis of some interpretation of it, there is a detectable view that there is little practical, or even theoretical, distinction between the two elements of the formula (see L. B. Sohn, "Settlement of Disputes relating to the Interpretation and Application of Treaties", *Recueil des cours de l'Académie de droit international de La Haye,* Vol. 150, 1976, p. 271). It seems arguable that the two elements constitute a compendious term of art generally covering all disputes as to rights and duties having their source in the controlling treaty (see the language used in the *Chorzów Factory* case, *P.C.I.J., Series A, No. 9,* p. 24). It is, with much respect to the opposite view, not right to adopt an approach which would seek to avoid this conclusion by dissect-

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ing the phrase in question, focusing separately on its individual elements, and then reading them as if they did not belong together in a single formula whose force indeed derives from its constituent parts but is not coextensive with their sum[1].

Expansiveness is alien to the circumspect and cautious approach which considerations of weight and solidity have long pointed out as appropriate to a court circumstanced as this is. The construction proposed above does not, I believe, surpass the bounds of a reasonably careful contextual appreciation of the intendment of the clause in question. But, even if it should for any reason be judged unacceptably in advance of the text on which it is based, still it does appear to me that the aim of the opposite contention distinctly exceeds its reach, falling short, as the latter does, of all the ground that needs to be covered if the contention, assuming it to be right, is to furnish a complete justification for returning a negative answer to the General Assembly's question.

This is because the contention is directed only to the situation which will be created if and when the office of the PLO Observer Mission is ultimately closed. It is only with respect to that situation that it may be said that there is no dispute between the United Nations and the United States concerning the interpretation of the Agreement, it being agreed by both of them that it will be breached in that event. But the Secretary-General's claim covers an additional matter with respect to which it is clear that the two sides are in disagreement over the interpretation of the Agreement.

The additional matter concerns the question whether, even if there is no ultimate closure, the Agreement is currently being breached by reason of a threat extended by the very enactment of the Act on 22 December 1987, taken either separately from, or cumulatively with, its subsequent entry into force on 21 March 1988, with the Attorney General's closure directive of 11 March 1988 (issued even before the Act entered into force and described in the United States written statement to the Court as an "order"), and with the consequential institution on 22 March 1988 of an action to enforce a closure and its continuing pendency since then. It may reasonably be inferred from the material before the Court (oral proceedings included) that the Secretary-General considers that there is a question as to whether these matters are themselves currently at variance with the Agree-

[1] The problem involved is probably a familiar one in all jurisdictions. J. Stamp considered it in *Bourne* v. *Norwich Crematorium* (1967) 2 All E.R. 576.

ment, in the sense of whether they are in violation of any right impliedly conferred by the Agreement on the United Nations to ensure that its permanent invitees can function from their established offices without harassment or unnecessary interference. It is equally clear from the material that the United States does not accept that there is any current violation of the Agreement, having consistently maintained that no question of a violation can arise unless and until the Act is in fact enforced by effecting an actual closure of the PLO Observer Mission's office. It seems obvious that this marked divergence of views ineluctably involves a dispute concerning the interpretation of the Agreement.

So far for the question whether the dispute concerns the "interpretation" of the Agreement. Now for a brief word on the question whether the dispute concerns the "application" of the Agreement.

There could not be any doubt that a closure of the PLO Observer Mission's office will in fact involve a question of the application of the Agreement. As to whether the existing circumstances give rise to such a question, the present position is that the office is in fact being allowed to remain open but, according to the Secretary-General, this is subject to an existing threat of interference arising from the enactment and operation of the Act. It seems obvious that the position thus taken by the Secretary-General does raise a question as to whether the application of the Agreement is currently being affected by the suggested existence of such a present threat of interference.

There is much in the United States position which is preoccupied with the question whether any actual breach of its obligations under the Agreement has as yet occurred and as to whether, in the absence of any such breach, there could be any dispute concerning the interpretation or application of the Agreement. As the Court has pointed out, it would be exceeding its jurisdiction were it to enter into the question whether an actual breach has occurred, that being a question to be reserved for the arbitral tribunal in the event of the Court giving an affirmative answer to the preliminary question as to whether there is a dispute. Moreover, if it is correct to say that in the absence of an actual breach there can be no dispute, this inevitably involves the Court in determining whether there has been an actual breach before it can conclude whether a dispute exists as to whether there has been such a breach. So the substantive matter would be determined before the preliminary issues.

The disputes settlement procedure of section 21 of the Agreement clearly applies to disputes arising out of complaints about an actual breach of the Agreement, but equally clearly it is not limited to such cases only. It extends to disputes arising out of opposition by one party to a course of conduct pursued by the other party, or a threat by it to act, with a view to producing what the complainant considers would be a breach of the Agreement. In the view of the Secretary-General, as I interpret it, such a course of conduct or threat was represented by the enactment of the

Anti-Terrorism Act of 1987, this having in fact been assented to by the host country's Head of State whose recognized duty it was to carry out the laws of the State. Failing assurances to the contrary (which were sought but never given) the Secretary-General was entitled to assume that the President, through his appropriate officers, would carry out that duty with consequences which the Secretary-General considered would be at variance with the Agreement. This conflict of both views and interests would give rise to a dispute within the established jurisprudence on the subject, whether or not any actual breach of the Agreement had as yet occurred through the enforced closure of the Mission.

The framework of the Agreement does not link the concept of a dispute to the concept of an actual breach. A claim by one party that the other party is in actual breach of an obligation under the Agreement is not a precondition to the existence of a dispute. And disputes as to the application of the Agreement comprehend disputes as to its applicability (see the *Chorzów Factory* case, *P.C.I.J., Series A, No. 9*, p. 20).

However, if this is wrong, with the consequence that a claim that there has been an actual breach is required, then it is to be noted that, from the record, it is a reasonably clear interpretation of the Secretary-General's position that it does include a claim that the host State is in current breach of its obligations under the Headquarters Agreement by reason of the enactment of the Act considered either separately from, or cumulatively with, the subsequent actions taken pursuant to it. Such a claim may be contested but cannot be considered so wholly unarguable as to be incapable of giving rise to a real dispute (see the *Nuclear Tests* case, *I.C.J. Reports 1974*, p. 430, per Judge Barwick, dissenting).

The general approach taken above would seem to be reinforced by three considerations. First, there seems to be no disposition in the jurisprudence of the Court and of its predecessor to impose too narrow a construction on the scope of disputes settlement provisions (see *inter alia* the *Mavrommatis Jerusalem Concessions* case, *P.C.I.J., Series A, No. 5*, pp. 47-48; the *Chorzów Factory* case, *P.C.I.J., Series A, No. 9*, pp. 20-25; the *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* case, *I.C.J. Reports 1950*, p. 75; and the *Appeal Relating to the Jurisdiction of the ICAO Council* case, *I.C.J. Reports 1972*, pp. 106-107, 125-126, and 147). Arbitral jurisprudence likewise rejects the proposition that "insofar as treaties of arbitration constitute conferrals of jurisdiction upon international authority, they are to be restrictively construed" (Stephen M. Schwebel, *International Arbitration: Three Salient Problems*, Cambridge, 1987, p. 149, note 12, citing *Interpretation of Article 181 of the Treaty of Neuilly (The Forests of Central Rhodope), Preliminary Question* (1931) *UNRIAA*, 1391, 1403).

Second, there is the amplitude and elasticity of the word "concerning"

as it occurs in the phrase "concerning the interpretation or application" of the Headquarters Agreement. The word "concern" is defined in *West's Law and Commercial Dictionary in Five Languages,* 1985, Volume 1, page 300, as meaning: "To pertain, relate, or belong to; to be of interest or importance to; to involve; to affect the interest of". Cited in support is the case of *People* v. *Photocolor Corporation,* 156 Misc. 47, 281, N.Y.S. 130. Referring to the same case, *Black's Law Dictionary,* 5th edition, 1979, page 262, gives substantially the same definition but adds: "have connection with; to have reference to . . .". See too the *Shorter Oxford English Dictionary,* 3rd edition, Volume 1, page 389, and *Webster's Third New International Dictionary,* 1986, page 470. And compare the somewhat similar approach taken by Judge Schwebel to the interpretation of the words "relating to" in the *Yakimetz* case (*I.C.J. Reports 1987,* pp. 113-114), where he said:

> "The terms of Article 11 of the Statute of the [United Nations Administrative] Tribunal, as well as its *travaux préparatoires,* make clear that an error of law 'relating to' provisions of the United Nations Charter need not squarely and directly engage a provision of the Charter. It is sufficient if such an error is 'in relationship to' the Charter, 'has reference to' the Charter, or 'is connected with' the Charter."

I consider that there are elements in that approach which are serviceable here.

A third supporting consideration derives from the principle of interpretation prescribed by section 27 of the Agreement which requires that the

> "agreement shall be construed in the light of its primary purpose to enable the United Nations at its headquarters in the United States, fully and efficiently, to discharge its responsibilities and fulfil its purposes".

An interpretation which effectively leaves the United Nations without any legal recourse in the circumstances presented can hardly be reconciled with that covenanted principle of interpretation (see the analogous situation in the *Chorzów Factory* case, *P.C.I.J., Series A, No. 9,* pp. 24-25). Arguments based on cases in which parties deliberately decided to leave loopholes as expedient escape hatches in their treaty arrangements would seem misplaced in the particular context under consideration.

Certainly, then, the Court should always take care to satisfy itself of its authority to act. It is equally appropriate, however, for the Court to be mindful of the risk of wishing to be so very certain of its powers as to be astute to discover overly refined reasons for not exercising those which it

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may fairly be thought to have. The Court has rightly avoided that risk in this case.

Having given my best consideration to what, in the absence of assistance from the host State, I have endeavoured to discern from the material to be or may be its position, as well as to the position of the United Nations, I can only conclude by agreeing with the decision reached.

(Signed) Mohamed SHAHABUDDEEN.