

SECOND SESSION OF THE PREPARATORY COMMITTEE
OF THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT

In accordance with the Report of the First Session of the Preparatory Committee (paragraph 6(f) on page 26) the Assistant Secretary General for Economic Affairs referred to the Registrar of the International Court of Justice the question of whether complications would be likely to arise from asking the Court for an advisory opinion on a matter which might subsequently become the subject of a case before it.

The following reply has been received from the Registrar:-

"I have the honour to acknowledge receipt of your letter of February 6, 1947, in which you call my attention to paragraph 6(f) (p.26) of the Report of the First Session of the Preparatory Committee of the International Conference on Trade and Employment. This Committee has decided to refer to me the question whether "complications" would be likely to arise from asking the Court for an advisory opinion on a matter which might subsequently become the subject of a case before it.

"I would in the first place emphasise that my reply is to be regarded as entirely unofficial in character and in no way commits the Court. I am giving you my personal opinion based on an analysis of the texts and of the practice of the Permanent Court of International Justice.

"I would also observe that your question - which I imagine is purely theoretical - is by no means new. It has already formed the subject of study by international jurists in connection with the Permanent Court of International Justice and may today confront any organ or institution of the United Nations empowered to ask the International Court of Justice for an advisory opinion.

"With regard to the expression "complications", I imagine that your Committee means thereby that the Court might find itself debarred from deciding a case by means of a judgment if it had already given an advisory opinion regarding the same matter.

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"In answering this interesting question, one must distinguish between its purely legal aspect and its practical aspect.

"From the point of view of law, the difference between judgments and advisory opinions delivered by the Court ensues first and foremost from the degree of binding force attaching respectively to them. A judgment is binding upon the parties, whereas compliance with the terms of an advisory opinion is, as the name indicates, entirely optional, the interested parties remaining free to take such action upon it as they may see fit. In practice, the experience of the Permanent Court of International Justice shows that such opinions have always exercised great influence. Though they have no binding force, they have always carried great weight. It may even be said that there is no instance in which the conclusions of such an opinion have not in practice been applied.

"Again, a judgment is rendered between two or more parties who are States, whereas an opinion is given in response to a request made by the General Assembly or Security Council, or any other organ or specialized agency which is entitled, under Article 96, paragraph 2, of the Charter to ask for such opinions.

"The conclusion in law to be drawn from the foregoing is - it seems to me - that an advisory opinion does not possess the force of res judicata, in the event of the same question coming before the Court once more, this time as the subject of contentious proceedings.

"In strict law, therefore, there is nothing to prevent a question which has already been submitted to the Court for an advisory opinion from being brought before it for judgment.

"Accordingly, there appears to be no reason to fear any "complications" and it would not seem that the doctrine of res judicata could be invoked in such a case.

"From the point of view of practice, the history of the Permanent Court of International Justice shows that, generally speaking, in advisory proceedings before the Court the same procedural safeguards were provided as in contentious cases. In the eyes of the Permanent Court, both categories of cases were equally important and they were dealt with on strictly analogous lines. At the moment, it is impossible positively to state that the International Court of Justice intends in this respect to follow the practice of the Permanent Court of International Justice, but in view of the terms of Articles 82 to 85 of the Rules of Court, it seems most probable that it will do so.

"If this proves to be the case, it would follow that, in all probability, the International Court of Justice, having passed upon a question by way of an advisory opinion, would find no reason for modifying the solution proposed by it, should the same question subsequently come before it again in the shape of a contentious case. In law, there is nothing to prevent the Court from deciding the question differently, but it is unlikely that it would do so in the absence of imperative reasons for varying its decision, such as new facts brought to light during the contentious proceedings.

"On the other hand, experience also shows that in practice the

authority of an advisory opinion has always been such that no question submitted to the Permanent Court for such an opinion has ever subsequently come before it as the subject of contentious proceedings.

"Accordingly, I believe that for the reasons given above, one may conclude that the "complications" referred to in your report are most unlikely to arise and that neither from the point of view of law nor that of fact should your organization be dissuaded by a fear of such "complications" from consulting the Court whenever it sees fit to do so.

"I hope that I have satisfactorily answered your question, but should you want any further information I am, of course, entirely at your service."