Denver Journal of International Law & Policy

Volume 10
Number 3 *Spring*

Article 10

May 2020

ICJ Advisory Opinion: 1951 WHO-Egypt Treaty

Charles A. Wintermeyer Jr.

DEVELOPMENTS

ICJ Advisory Opinion: 1951 WHO-Egypt Treaty

This Advisory Opinion of the International Court of Justice[1] is only the third one ever requested by a United Nations specialized agency, and the only one ever requested by the World Health Organization.[2] The Opinion is also notable due to its subject matter: it dealt with a novel attempt to use the transfer of a specialized agency office as a means of political retaliation. The underlying political differences had no connection with the objectives and goals of the agency. Members of the Eastern Mediterranean Region of the World Health Organization (WHO) sought to transfer the site of the Eastern Mediterranean Regional Office (EMRO) from Alexandria, Egypt, to Amman, Jordan, as a consequence of their dissatisfaction over the Camp David Accords that Egypt had signed with Israel. The Court held that regardless of any particular treaty provision, EMRO could be transferred, but that the WHO was required to give Egypt reasonable notice of the transfer, and to negotiate in good faith so that the transfer would be effected with minimal damage to Egypt's interests.[3]

---

1. Advisory Opinion on the Interpretation of the Agreement of 25 March 1951 Between the World Health Organization and Egypt, [1980] I.C.J. ____ *reprinted in* 20 INT'L LEGAL MAT. 88 (1980).

2. The other two specialized agencies requesting advisory opinions were the United Nations Educational, Scientific and Cultural Organization and the Inter-Governmental Maritime Consultative Organization. *See* [1979-1980] I.C.J.Y.B. 42-3, 46-50, 116.

3. The substantive part of the opinion read as follows:

> a. their mutual obligations under those legal principles and rules place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected;
>
> b. in the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of cooperation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum of prejudice to the work of the Organization and the interests of Egypt;
>
> c. their mutual obligations under those legal principles and rules place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect an orderly and equitable transfer of the Office

This development examines the background of the Opinion as well as the Opinion itself. The analysis will center on the Opinion's relationship to current international legal jurisprudence, and its possible precedential value with respect to future requests for advisory opinions and future political retaliaton by specialized agencies. The conclusion will discuss the Opinion's impact on international law and the Court's jurisprudence.

The background of the Opinion dates really to the time of the founding of the United Nations itself. The Constitution of the WHO was approved in 1946.[4] Under Chapter XI, the WHO sought to integrate existing regional health organizations as it was establishing its own regions and regonal offices. The Alexandria Sanitary Bureau had already acquired a regional role,[5] and neighboring states agreed that Alexandria should be kept as the WHO's regional office.[6] After substantial preliminary negotiations between the WHO and the government of Egypt,[7] EMRO started functioning at Alexandria on 1 May 1949.[8] As of that date, however, Egypt had not yet signed the Convention on the Privileges and Immunities of the Specialized Agencies, nor had it concluded the treaty with the WHO concerning its operations in Egypt.[9] Egypt granted temporary exemption from customs duties, and the treaty was finally concluded on 25 March 1951.[10]

The next significant development occured in 1954. Due to the hostility between Israel and its neighbors in the Eastern Mediterranean Region, EMRO formed two subcommittees, one of which—Subcommittee A—excluded Israel from its membership.[11]

The EMRO status quo remained fairly constant until the Camp David Accords involving Egypt, Israel, and the United States. The other regional members reacted with hostility to the Accords.[12] On 7 May 1979,

---

to its new site.
20 INT'L LEGAL MAT. at 100.

4. CONSTITUTION OF THE WORLD HEALTH ORGANIZATION, *opened for signature* July 22, 1946, 62 Stat. 2679, T.I.A.S. No. 1808, 14 U.N.T.S. 185.

5. A Board of Health was established in 1831 to prevent the spread of disease by pilgrims going to or returning from Mecca. It became more international in character after that. The Egyptian government became more active in the Sanitary Bureau starting in 1938, but it remained internationally oriented. 20 INT'L LEGAL MAT. at 90-91.

6. A number of resolutions were passed by Arab quarantine experts calling for a regional organization of the WHO, with the regional office at Alexandria. *Id.* at 91.

7. The government of Egypt was involved, as was WHO and various of its divisions, and the United Nations itself. *Id.* at 91-92.

8. *Id.* at 93.

9. *Id.*

10. *Id.* This temporary exemption was the only WHO-Egypt understanding governing the EMRO until the 1951 Treaty was signed.

11. *Id.* at 94. Hostility had existed prior to 1954, of course, but prior to that time it had not been deemed necessary to form two separate subcommittees.

12. Judge Morozov, in his dissent, argued that the Camp David Accords were the root cause of the hostility. The case involved a much larger political issue than WHO internal politics, he said, and the Court should have declined to give an opinion. *Id.* at 147.

five EMRO members asked the Regional Director for a meeting to discuss the transfer of EMRO from Egypt to another state.[13] Subcommittee A passed a resolution to transfer the EMRO on 12 May 1979.[14]

On 28 May 1979, the Thirty-Second World Health Assembly convened. The Assembly also adopted a resolution to transfer EMRO.[15] The Executive Board of WHO then established a working group to study the matter. In its report, submitted on 16 January 1980, this group declared that it could not ascertain whether section 37 of the 1951 Treaty was applicable.[16] The report mentioned the possibility of requesting the International Court of Justice for an advisory opinion on the matter.[17]

In May 1980, Subcommittee A voted nineteen to one to transfer EMRO to Amman as soon as possible.[18] During subsequent World Health Assembly discussions, two significant views arose. One was that transfers of regional offices should not be used as a political weapon.[19] The other, raised by the members of Subcommittee A, was that the members of a region should be allowed to transfer their regonal office if they so desired.[20]

The Assembly asked the Legal Division of the WHO whether section 37 of the 1951 Treaty applied.[21] Like the working group, the Legal Division could not decide. Finally, on 21 May 1980, the Thirty-Third World Health Assembly requested an advisory opinion of the Court.[22]

---

13. *Id.* at 94.

14. *Id.* Egypt was not represented at the meeting during which the resolution was approved, and had tried to have the meeting postponed.

15. Due to allegations by Egypt, the Assembly established a committee to study the matter. This committee felt that more study was needed and recommended that the Executive Board undertake such a study. *Id.*

16. *Id.* For the text of section 37 of the Treaty, see note 25 *infra.*

17. 20 INT'L LEGAL MAT. at 95.

18. *Id.* Egypt cast the opposing vote.

19. In his separate opinion, Judge Gros maintained that since the WHO Constitution contained only health-oriented objectives, such a transfer for political reasons was essentially an ultra vires act. He would have preferred that the Court address that point. *Id.* at 102-03.

20. These members also argued that retaining EMRO in Alexandria would be harmful to the WHO's work. Perhaps to fulfill that prediction, the majority of the members notified the WHO's District-General three days later that they would "boycott" EMRO as long as it remained in Alexandria. *Id.* at 95.

21. *Id.*

22. The Assembly posed two questions to the Court:

> 1. Are the negotiations and notice provisions of section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?
>
> 2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two year period between notice and termination of the Agreement?

Id. at 89.

The Court delivered its opinion on 20 December 1980.[23] After describing the historical and procedural background of the case, the Court briefly discussed its discretion in deciding to issue an advisory opinion on the matter.[24]

The arguments before the Court dealt with the applicability of the 1951 Treaty in general, and with section 37 in particular.[25] Nevertheless, in order to address the true legal problems at issue, the Court rephrased the questions it had been presented with in the following manner: "What are the legal principles and rules applicable to the questions under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected?"[26] The Court maintained that it might be misleading to address only the questions asked.[27] In the past, the Court had occasionally rephrased questions, as had its predecessor, the Permanent Court of International Justice.[28]

---

23. *Id.* at 88.

24. *Id.* at 95. The Court did not feel it should refrain from issuing an Advisory Opinion merely because "political considerations" played a major role in the underlying situation. Indeed, the Court felt that that could increase the need for an agency to obtain an advisory opinion. Judge Morozov disagreed, note 12 *supra*.

25. Regarding the 1951 Treaty in general, one argument maintains that EMRO was established on 1 July 1949. The 1951 Treaty was a separate and later transaction, which merely provided for privileges, immunities, and facilities. The opposing view was that the 1951 Treaty was the culmination of a series of steps, and that EMRO was not finally established until the conclusion of the Treaty. *Id.* at 97.

Even assuming the 1951 Treaty were applicable, there was still disagreement as to whether section 37 applied to a transfer of EMRO. Section 37 reads as follows:

> Section 37. The present Agreement may be revised at the request of either party. In this event the two parties shall consult each other concerning the modifications to be made in its provisions. If the negotiations do not result in an understanding within one year, the present Agreement may be denounced by either party giving two year's notice.

One viewpoint holds that "revise," by its law dictionary definition, means a modification but not a termination or denunciation. Thus, since section 37 concerned revisions, the entire section, including the two year notice, was inapplicable. Since there is no provision for outright denunciation (as opposed to denunciation after unsuccessful attempts at revision), article 56 of the Vienna Convention on the Law of Treaties, and its counterpart in the International Law Commission's draft articles on treaties between states and international organizations, is applicable. Essentially, article 56 and its counterpart allow for denunciations if the right is implied, but require 12 months notice. *Id.* at 97; *see* [1979] Y.B. INT'L L. COMM'N 146.

The opposing viewpoint holds that "revise" really has a broader meaning, which includes termination. The *travaux preparatoires* of section 37 in the ILO-Swiss negotiations, for example, provide for denunciation after consultation and negotiation. That section is the same as that in the 1951 Treaty, and thus the same rationale applies. *See* 20 INT'L LEGAL MAT. 88, 97-98 (1980).

26. Although the Court articulated the arguments, as summarized above, it did not find any of them controlling, and rephrased the question before discussing the arguments in detail. *Id.* at 96.

27. *Id.*

28. *Id. Cf.* Note, 22 HARV. INT'L L.J. 429, 435 (1981), which distinguishes the cases cited by the Court in that it nevertheless limited its holding to the questions asked, which it did *not* do in the present Opinion.

Regarding the right of specialized agencies to transfer offices, the Opinion recognized that right, but stressed that it was not completely unfettered.[29] Specialized agencies are still subject to rules of international law. The establishment of EMRO at Alexandria (whether deemed created by the 1951 Treaty or not) did establish a "contractual legal regime"[30] between the WHO and Egypt. The essence of this regime was that both parties owe the other a duty to cooperate and act in good faith.[31] The exact obligations would depend on the exact circumstances, but in a situation as complex and involved as transferring a regional office, the Court indicated that the obligations would be substantial.[32] Considering sources other than the 1951 Treaty, the Court went on to state that before transferring EMRO, the transferring party would be required to give the other party reasonable notice, and to have a reasonable regard for the interests of the other party.[33] To that end, both parties must cooperate to ensure an orderly transfer.[34]

The Court determined that there was a duty to provide "a reasonable period of notice,"[35] but it did not define how long "reasonable" was. What was reasonable would depend on the circumstances in a given case, keeping in mind the "paramount consideration" of promoting "the objectives

---

29. Like states, international organizations are subject to international law in general, as well as to their own constitutions and to international agreements. 20 INT'L LEGAL MAT. at 95-96.

30. *Id.* at 98.

31. In addition to the existence of EMRO in Alexandria, both parties had mutual duties due to the fact Egypt was a member of WHO. *Id.*

32. While the practical problems to be resolved were the concern of WHO and Egypt, their magnitude could have a bearing on the legal conditions under which EMRO could be transferred. *Id.*

33. *Id.*

34. The substantive Court opinion concerning the duties and obligations under international legal principles came in three parts:

> In the first place, those obligations place a duty both upon the Organization and upon Egypt to consult together in good faith as to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effected.
>
> Second, in the event of its being finally decided that the Regional Office shall be transferred from Egypt, their mutual obligations of cooperation place a duty upon the Organization and Egypt to consult together and to negotiate regarding the various arrangements needed to effect the transfer from the existing to the new site in an orderly manner and with a minimum or prejudice to the work of the Organization and the interests of Egypt.
>
> Third, those mutual obligations place a duty upon the party which wishes to effect the transfer to give a reasonable period of notice to the other party for the termination of the existing situation regarding the Regional Office at Alexandria, taking due account of all the practical arrangements needed to effect the orderly and equitable transfer of the Office to its new site.

The ultimate purpose of the obligations was to transfer with a minimum of harm to the interests of either party. *Id.* at 99-100. Paragraph 49 became the actual holding.

35. *Id.*, part three of the substantive opinion.

and purposes of the Organization as expressed in its Constitution."[36] Although the Court did not specify a period of time it would consider reasonable (leaving that up to the parties),[37] it did mention section 37[38] and article 56 of the Vienna Convention on the Law of Treaties, as adopted by the International Law Commission's draft articles on treaties concerning international organizations.[39]

The Court did not "make" any new law. Nor was any of its reasoning without precedent. Nevertheless, the fact that the opinion was requested, the fact that the Court went beyond the question asked, and the holding itself, all have significance for the future.

With respect to the fact that the advisory opinion was requested by a United Nations specialized agency, that in itself is significant.[40] Certainly, a total of three such requests in the Court's history cannot be considered a "trend." Yet this Opinion could induce other specialized agencies to seek advisory opinions. Several agencies could face pressure to engage in retaliatory moves having nothing to do with their specialized function.[41] If an agency could not decide what course of action were proper, it could request an advisory opinion. Such a request also serves to diffuse the ill-feeling a disappointed party may feel towards the agency. Regardless of the nature of the question, or the party posing it, a greater use of the advisory opinion function could make the Court a more viable and insti-

---

36. *Id. But cf.* the opinion of Judge Gros, *supra* note 19, where he argues a transfer for political reasons is outside the WHO's Constitution.

37. 20 INT'L LEGAL MAT. at 100.

38. Section 37 provided for two years notice. The text is at note 25 *supra.*

39. This provided for 12 months notice. The article is summarized at note 25 *supra.*

40. This was only the third opinion ever requested by a specialized agency. Note 2 *supra.*

41. Five other specialized agencies are organized along the lines of WHO, with diverse regional offices in areas with actual and potential serious political differences. If WHO were allowed to be used as an instrument of political retaliation, several of the other agencies might also face pressure to transfer regional offices for retaliatory purposes.

For example, the International Bank for Reconstruction and Development and the International Development Association share offices in Nairobi, Abidjan, and Bangkok. However, fear of losing loans and contributions would probably inhibit any retaliatory moves. The International Labor Organization (whose own Headquarters Treaty was discussed in the WHO Opinion) has regional offices in Addis Ababa, Bangkok, and Lima, as well as 40 local offices. It could face regional partisan pressure for a move of its offices. The International Finance Corporation has regional offices in Manila, Nairobi, and Abidjan. It, too, could face political pressure for office transfers.

Two other agencies, the Food and Agriculture Organization (FAO) and the International Civil Aviation Organization (ICAO) have regional offices in Cairo. FAO also has regional offices in Accra, Bangkok, Rome, and Santiago. ICAO's other offices are in Dakar, Paris, Bangkok, Mexico City, and Lima. The WHO itself has other regional offices in Brazzaville, Washington, New Delhi, Copenhagen, and Manila. Several of the locations might have received pressure for transfers had this opinion made retaliatory transfers easier.

The other U.N. specialized agencies have one principle office, without regional offices over different parts of the world. *See* [1977] U.N.Y.B. 1067 *et seq.*, which describes each of the specialized agencies and their organization.

tutionalized source of international law.[42]

As the Court pointed out, not rephrasing a question posed could result in a misleading answer. However, as one commentator has pointed out, such rephrasing may inhibit agencies or parties from requesting advisory opinions; they may not want to risk an answer to a question they did not ask.[43]

The substantive portion of the opinion may prevent a pernicious manipulation of the specialized agencies as instruments of political retaliation to the detriment of their specialized functions. This manipulation could be even more harmful when employed in short term disagreements.[44] At the same time, however, the Court recognized the rights of members to run the agencies, and their particular regional offices, as they see fit, taking into account the rights of other parties. A drawback, however, is the use of other means of political retaliation.[45]

The abstractness of the substantive portion of the opinion offers a general standard to be considered, regardless of specific treaty provisions in a given situation.[46] The Court realistically states, for example, that reasonable notice is a function of the particular circumstances. Yet, it could have perhaps suggested a more concrete period of notice,[47] since the two parties are unlikely to agree on the matter. Along similar lines, there is the problem of defining good faith. Again, the two parties are unlikely to agree.

This opinion has another potential problem in that the actual implementing parties did not request the Opinion.[48] The WHO, as an institution, may be willing to follow the opinion, but the individual members of the Eastern Mediterranean Region may not be. Egypt also may not be willing to follow the Opinion, especially if it perceives that its neighbors are not doing so.

---

42. While more advisory opinion activity may give the Court a greater role in formulating international law, the Court runs the risk of losing its status and prestige if it becomes too active. M. POMERANCE, THE ADVISORY FUNCTION OF THE INTERNATIONAL COURT IN THE LEAGUE AND UNITED NATIONS ERAS (1973); Lalonde, *The Death of the Eastern Carelia Doctrine: Has Compulsory Jurisdiction Arrived in the World Court?*, 37 U. TORONTO FAC. L. REV. 80, 99 (1979).

43. Note, *supra* note 28, at 435-36.

44. While the Israel-Arab hostility is long term, the Egypt-Arab rift is not necessarily so.

45. In the Egypt-Arab rift, for example, the Economic Commission for Western Asia recommended admitting Egypt and the Palestine Liberation Organization in 1977. However, it later voted to suspend Egypt. [1977] U.N.Y.B. 604-07; W. LANDSKRON, ANNUAL REVIEW OF UNITED NATIONS AFFAIRS 181 (1981).

46. Such provisions include the duties of good faith, cooperation, and, if appropriate, notice. 20 INT'L LEGAL MAT. at 100, also listed in note 34 *supra*.

47. A compromise period of 18 months, for example, might have been workable and appropriate. That would have split the difference between the periods in section 37 of the WHO-Egypt Treaty and article 56 of the Vienna Convention on the Law of Treaties.

48. The WHO requested the opinion, not Egypt nor the EMRO members desiring the transfer.

Both the future of the specialized agencies and of the Court itself are likely to be affected by this Opinion. Specialized agencies have the prerogative to transfer their offices, but they must consult in good faith and give reasonable notice to the host state.[49] This duty exists regardless of particular host agreement provisions. This should serve to stifle manipulation of regional offices as a means of political retaliation for extrinsic differences. Moreover, other specialized agencies may now be more willing to seek advisory opinions from the Court. By rephrasing the questions asked, the Court was able to give a more complete answer, but it risks deterring requests for opinions by agencies wary of rephrasing. In the long run, this opinion should turn out to be a positive step for both the Court and the specialized agencies, and ultimately for all member states of the United Nations.

Charles A. Wintermeyer, Jr.

Risk of Loss in Shipping Under the Hamburg Rules

INTRODUCTION

In March 1978, the United Nations held a conference on the carriage of goods by sea in Hamburg, West Germany. Twenty-seven conference participants signed the resulting convention.[1] The rules embodied in the convention dramatically changed and simplified the basic legal relationships between cargo shipper and cargo carrier in regard to allocation of risk.

The purpose of this development is to examine the new rules of maritime shipping in light of historical experience and the contemporary environment. Inquiry will be made into the theoretical soundness and anticipated effects of the new rules. The prevailing pragmatic question of whether the rules can expect widespread ratification will also be entertained. First, a brief examination will be made of the rules traditionally

---

49. *See* 20 INT'L LEGAL MAT. at 99-100.

---

1. The United Nations Convention on the Carriage of Goods by Sea, Mar. 31, 1978, U.N. Doc. A/CONF. 89, *reprinted in* 27 AM. J. COMP. L. 421 (1979). The convention was signed by Austria, Brazil, Chile, Czechoslovakia, Denmark, Ecuador, Egypt, the Federal Republic of Germany, Finland, France, Ghana, the Holy See, Hungary, Madagascar, Mexico, Norway, Pakistan, Panama, the Philippines, Portugal, Senegal, Sierra Leone, Singapore, Sweden, the United States, Venezuela, and Zaire.