Still another most unexpected inducement to avoid a formal declaration of war, as revealed in the case of the conflict now going on between Japan and China, has been the natural desire to escape the disabilities of recent neutrality legislation of the United States, whereby the shipment of arms and munitions of war to belligerents is automatically forbidden. The question presents itself whether, in the absence of a formal declaration of war by either side, it should not be incumbent on neutral nations to brush all legal niceties aside and openly acknowledge a state of war where the laws of war and neutrality should apply. Nations intent on peace and determined to uphold the reign of law have a solemn duty to avoid any implied connivance in the evasion of international obligations. Neutrality is not merely to conserve national interests, but also to preserve an impartial rôle which may enable a nation to affirm with vigor the responsibilities and rights of peoples under international law.

The situation is certainly a most unhappy one. It is stultifying to discover that an idealistic agreement such as the Kellogg Pact, and neutrality legislation conceived for a generous purpose, should actually conduce to the fiction of the undeclared war. We are confronting the stark reality that, until men and nations reflect a much higher code of ethics and are ready to settle their differences in a spirit of mutual consideration, they will continue to obey the law of the jungle, which is to strike suddenly without warning. The problem is not legal or economic: it is moral and spiritual. We are witnessing a general lowering of ethical standards throughout the world. International law obviously will have no greater value than in the content changed men and nations will give to it. Nations composed of greedy individuals will have few scruples in undertaking undeclared wars of aggression. Individuals cannot be changed merely by legislation or institutions, or by economic systems. The desire of men for selfish profit and aggrandizement will only be curbed and eliminated by a thoroughgoing spiritual revolution. International law is not a schoolmaster or a preacher. It rises morally and ethically no higher than the great reservoir of human beings who compose international society. The ultimate problem of the law of nations is the individual. What we most need is a declared war on human selfishness, hate, lust and fear. "There is enough for every man's need but not enough for every man's greed."

PHILIP MARSHALL BROWN

SOME ASPECTS OF TREATY INTERPRETATION

> The first rule of hermeneutics, legal or otherwise, is that interpretation means finding in good faith that meaning of certain words, if they are doubtful, which those who used the words must have desired to convey, according to the usage of speech . . . the existing laws, common sense, and the general intent of that whole of which the doubted passage forms a part; and does not mean what ingenuity may apparently succeed in forcing into a passage.[1]

These words of Umpire Francis Lieber in an arbitral decision nearly seventy years ago seem to illustrate a tendency on the part of arbitral

[1] J. B. Moore, International Arbitrations, III, 2522.

agencies to declare the practical, common-sense nature of their tasks as interpreters. This is but natural in a legal system that depends so largely upon adjudications involving the meanings of treaty terms. Especially since the classic treatment of the subject by Vattel,[2] there has been much writing on so-called canons of interpretation. Without attempting even to summarize the views of publicists, it may be useful to consider some pronouncements of arbitrators which have some bearing upon the thought presented in the above quotation concerning the technique of assigning meanings to treaties.

What a concurring member of a British-Mexican tribunal once described as the "golden rule" of interpretation is that plain, clear meanings must be followed.[3] References to "evident," "manifest," or "natural" meanings are so common that numerous examples from modern adjudications might be cited. It is sometimes difficult to reconcile such pronouncements with the fact of serious disagreement which has occasioned the arbitrations or with honest differences of opinion among the arbitrators themselves. The author of a recent authoritative work on British practice has usefully pointed out that references to such things as a "general and ordinary meaning" or "the natural signification of words" have led to some misunderstanding, and have tended to erect a presumption into an absolute rule of interpretation.[4]

When, in the case of an unclear provision, evidence may justifiably be sought outside the text itself, there are still reasonable limits. In the Russell claim before the Special Claims Commission, United States and Mexico, Judge Nielsen warned against interpreters' going too far afield in seeking aids to ascertaining true meanings.[5] The intent of the parties in using such a noun as "coast" may be doubtful,[6] and the precise sense in

[2] *Le droit des gens*, Bk. 2, Ch. 17. For examples of stated rules of interpretation, see Sarropoulos *c.* État bulgare, *Tribunaux Arbitraux Mixtes, Recueil des Décisions*, VII, 52; award in the van Bokkelen claim, United States and Haiti, U. S. For. Rel. 1888, Pt. I, pp. 1007–1036, especially at p. 1025; claim of Georges Pinson, France and Mexico, *Jurisprudence de la commission Franco-Mexicaine (1924–1932)*, pp. 104–105. See also the reference by Attorney General Crittenden to "established rules for construing treaties," in V Ops. Atty. Gen. 324.

Pronouncements of the Permanent Court of International Justice are not dealt with in the present comment. Some of them, for the period from 1922 to 1930, are considered by the present writer in PROCEEDINGS of the American Society of International Law, 1930, pp. 39–46.

[3] Opinion in the Cameron claim, under the Convention of Nov. 16, 1926, Decisions and Opinions of the Commissioners, Oct. 5, 1929 to Feb. 15, 1930 (London, 1931), p. 39.

[4] A. D. McNair, The Law of Treaties (1938), pp. 175–176.

[5] Opinions of Commissioners, April 26, 1926, to April 24, 1931, pp. 71–72. In the same case the American Commissioner observed that "In dealing with the perplexing problem of responsibility, it would seem to be desirable and indeed necessary to avoid taking account too much of dictionary definitions of such terms as 'revolutionary forces.' . . ." (p. 77.)

[6] As pointed out by Lord Alverstone of the Alaskan Boundary Tribunal in the arbitration under the Treaty of Jan. 24, 1903, with Great Britain. Sen. Doc. 162, 58th Cong., 2d Sess., Pt. I, p. 37.

which such expressions as "bandits" or "revolutionary forces" have been employed may not appear from the text.[7] In such an event resort to the familiar practice of consulting *tradaux préparatoires* is to be expected, although it is of course apparent that the preparatory work may not be of such nature that its invocation will have decisive weight.[8]

References to the "spirit" of particular conventions often seem to be justifiable, but may raise questions of the subjective bases of rulings. The practical consequences of adopting a particular interpretation may engage the attention of a tribunal. On this, the official interpreters of the Dawes Plan said in 1927 that ". . . the Tribunal has to take the Plan as it finds it, interpreting its meaning as it thinks is correct, without allowing itself to be influenced by considerations as to whether or not its award will have consequences which might be looked upon as undesirable."[9] Considerations of what treaty-makers *ought* to have done were brought into the record of an early arbitration between the United States and Great Britain when, in the case of the *Betsey*, Commissioner Pinckney cited Rutherforth[10] as authority for the rule that "even where words are capable of *two senses*, either of which will produce some effect, you shall take that sense which is reasonable and consistent with that law which applies to the subject" and that "where nothing appears to the contrary, the presumption is that the parties meant what they ought to mean," and added:

> Are we, then, to uphold an interpretation of this instrument which is not only unauthorized by its language, but is unsuitable to the subject of it, and at variance with the undoubted rights of one party and the duties of the other? What Great Britain could not properly demand we are to *suppose* she did demand, what the United States ought to have insisted upon we are to *suppose* they abandoned, and that is to be done not only without evidence, but in direct contradiction to the declarations of the parties. This is so far from being conformable to the rule cited from Rutherforth that it seems to proceed upon a rule to this effect—"that even where words will fairly admit of *but one sense*, and that, too, consistent with *the law applicable to the subject*, we are to force upon them a sense incongruous with that law, and compel the contracting parties to mean *what they ought not to have meant.*[11]

The familiar rule that a treaty is to be taken as a whole instrument (*uno contextu*) has been so many times applied by arbitrators as not to require extensive illustrative citations. On the question of equity as a basis for a particular construction, one tribunal has cautiously observed that arbitrators

[7] Opinions of Commissioners (cited in note 5, *supra*), p. 123.

[8] See, for example, Weitzenhoffer *c.* État allemand, *Trib. Arb. Mix., ibid.*, V, 935, 941.

[9] *Entscheidungen des Internat. Schiedsgerichts zur Auslegung des Dawes Plan* (Sess. 2, 1927), pp. 223–224.

[10] Institutes of Natural Law. With the words which Commissioner Pinckney quoted from an earlier edition of Rutherforth's work may be compared the language found at p. 319, Vol. II, of the third (Philadelphia, 1799) edition.

[11] J. B. Moore, International Arbitrations, III, 3197, 3203–3204.

should not pass, in the name of equity, limits set by the treaty.[12] "Logical" interpretations are commonly acclaimed,[13] especially when they are found to be supported by a literal reading of the text.[14] In the Salem case a majority of the tribunal found that a grammatical construction of the protocol of January 20, 1931, was not the only possible one in determining the meaning of the words "American citizen." [15] While elementary literalism is questionable,[16] it has not always been regarded as the best technique to subscribe to a too subtle distinction,[17] or to base an interpretation upon a subtle political classification.[18]

Addressing itself to the question of extensive as compared with restricted interpretations, the German-Czechoslovak Mixed Arbitral Tribunal, taking account of the exceptional jurisdiction which it exercised, said in 1923:

> En principe, le Tribunal est lié par le texte du Traité. Lorsqu'il s'agit, en présence d'un texte imprécis, de déterminer la volonté des parties contractantes, *l'interprétation prudente doit être la règle, l'interprétation extensive ou restrictive, l'exception.* L'observation de cette règle s'impose surtout en matière de compétence . . .[19]

In other instances, very technical criticisms of certain expressions used in conventions have been opposed.[20] Usage may have a corroborative bearing upon the construction of an agreement.[21] But there must be more than a mere *invocation* of usage. The attention of a special boundary tribunal set up by Guatemala and Honduras in 1930 was invited (by both parties) to the "historic utilization" of the phrase *uti possidetis* in Latin American settlements, but an examination of the latter, and of the views of eminent jurists, did not "disclose such a consensus of opinion as would establish a definite criterion for the interpretation of the expression in Article V of the present treaty." [22] "Practical interpretations" are sometimes in-

[12] Sarropoulos *c.* État bulgare, *supra*, 47, 53.

[13] Office de vérification et de compensation français *c.* Office de vérification et de compensation allemand, *Trib. Arb. Mix., ibid.*, I, 593, 596; Clorialdo DeVoto *c.* État autrichien, *ibid.*, IV, 500, 502.

[14] Faure *c.* État turc, *ibid.*, VII, 954, 957.

[15] U. S. Department of State, Arbitration Series, No. 4 (6), p. 29.

[16] *Cf.* Raffinerie et Sucrerie serbo-tchèque Tchoupria *c.* État bulgare, *Trib. Arb. Mix., ibid.*, III, 185, at p. 191.

[17] See the statement in Peeters, van Haute et Duyver *c.* Trommer et Grüber, *ibid.*, II, 384, at p. 391. In contrast, an "unnecessarily crude" construction was noted by the Special Claims Commission, United States and Mexico (Opinions of Commissioners, April 26, 1926, to April 24, 1931, p. 63).

[18] Th. Gendrop case before the Franco-Mexican commission, *Jurisprudence de la commission Franco-Mexicaine (1924–1932)*, p. 205.

[19] Loy et Markus *c.* Empire allemand et Deutsch Ostafrikanische Bank A. G., *Trib. Arb. Mix., ibid.*, III, 998, 1004.

[20] See the American argument concerning the meaning of "due diligence" in the Geneva Arbitrations. J. B. Moore, International Arbitrations, IV, 4062–4063.

[21] As in the award in an arbitration between Chile and Peru, April 7, 1875. H. LaFontaine, *Pasicrisie Internationale* (1902), p. 165.

[22] Opinion and Award of Jan. 23, 1933 (Washington, 1933), p. 3.

voked,[23] and the intended meaning of an instrument may be properly sought in the light of "stipulations of other treaties concluded by the parties with respect to subjects similar to those dealt with by the treaty under consideration, and the conduct of the parties with respect to such treaties." [24] The fact of certain municipal laws may naturally enter into calculation, to show, for example, that negotiators would not have put into a convention a rule which, from their knowledge of existing municipal law, they must have known would be impossible of application.[25] The background of international law against which treaties are presumed to be made sometimes calls forth some statement on this point, as from the Mexican-French Claims Commission under the Convention of September 25, 1924.[26] Although resort to arbitration implies an engagement to submit in good faith to the award, it is still to be remembered, as pointed out in a legal opinion on which was based an award between Great Britain and Nicaragua in 1881, that the "interpretation of a treaty can never supersede the treaty interpreted, and the judicial decision creates no new right, but only affirms and establishes the existing right." [27]

Only a few aspects of a large subject have been referred to in this brief comment. The function of interpretation remains a necessary one and requires high judicial skill. To the ordinary difficulties are added, in the case of treaty construction, peculiar ones due to divergences in legal systems and to texts in different languages, more than one of which may be authentic. Whether evidence be principally of an extrinsic, or of an intrinsic sort, international judges must decide what has been intended and what has been done by treaty-makers. Much verbiage in the course of many arbitrations seems to attest the effort exerted to demonstrate the soundness of conclusions reached. In the last analysis, interpreters are expected, within and always subject to provisions of agreements authorizing their work, to perform a practical task with as much objectivity and impartiality as can be brought to bear upon it.

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INTERNATIONAL LAW AND "PUBLIC ORDER"

The astonishing changes which are taking place in political thought and methods among states today necessarily react upon international law, and

[23] As by the American members of the Alaskan Boundary Tribunal under the treaty of Jan. 24, 1903. Sen. Doc. (cited in note 6, *supra*), p. 49. The Americans endeavored to support their argument by a reference to a view which had become "part of the common understanding of mankind."

[24] Opinions of Commissioners, United States-Mexican Special Claims Commission under Convention of Sept. 10, 1923 (document cited in note 5, *supra*), p. 61.

[25] Societa commerciale d'Oriente *c.* Gouvernement turc, *Trib. Arb. Mix., ibid.*, IX, 612, 614.

[26] Georges Pinson claim, *Jurisprudence de la commission Franco-Mexicaine (1924–1932)*, p. 104.

[27] J. B. Moore, International Arbitrations, V, 4966.