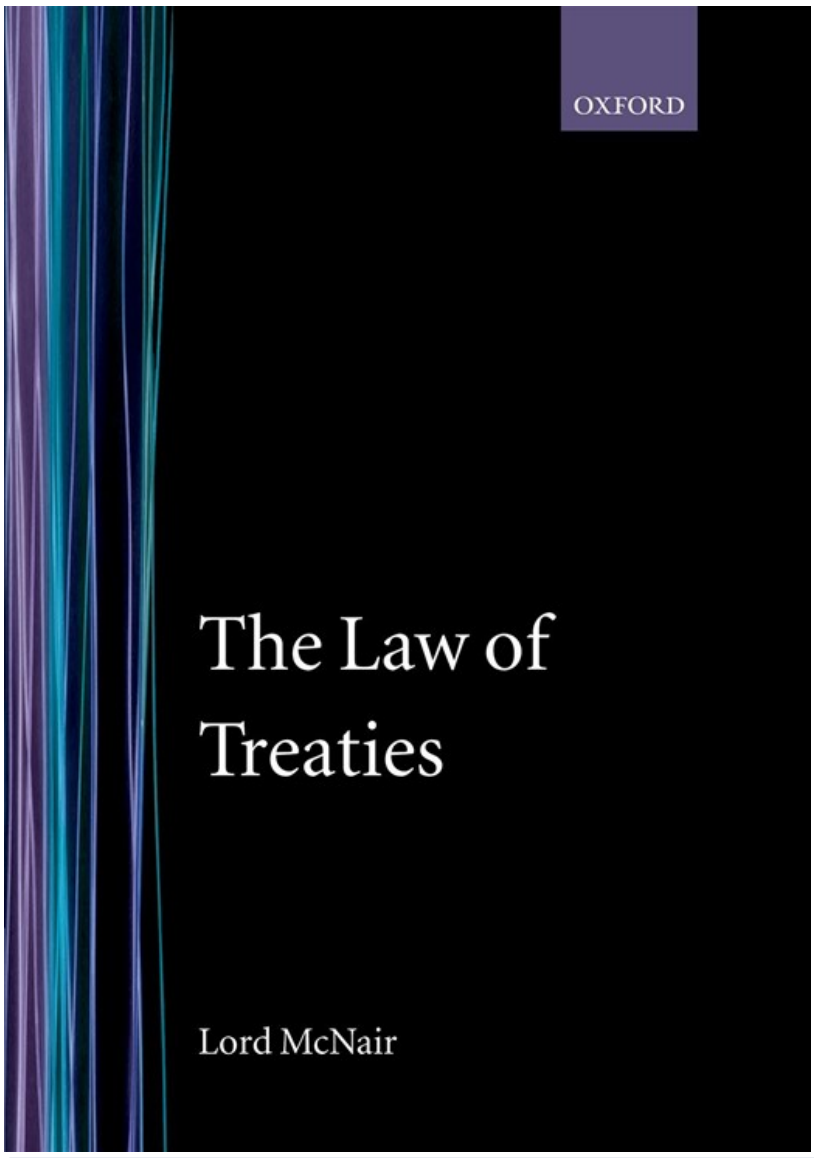

The Law of Treaties

Lord McNair

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CHAPTER

XXVII Miscellaneous Points

Lord McNair

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SUBJECT to the reservation already made upon the usefulness of the many supposed rules, maxims, doctrines, and presumptions that surround the question of interpretation, we shall now mention some of those which are

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less frequently encountered, together with a number of miscellaneous points.[1]

Leaning against any Provision which Hampers the Exercise by a State of its Sovereign Powers

This will be dealt with in the article entitled ‘Treaties and Sovereignty’ in Appendix A.

Leaning against the Creation of Unusual Rights

This leaning or tendency was invoked in the two Reports which follow, but it is submitted that the same conclusion would necessarily have been reached without invoking it.

Article 3 of the Oregon Treaty of 15 June 1840 between Great Britain and the United States[2] contained a provision to the effect that in a certain area ‘the possessory rights of the Hudson’s Bay Company and of all British subjects who may be already in the occupation of land or other property shall be respected’.

There being a difference of opinion between the United States Government and the Hudson’s Bay Company as to the meaning of that provision, the law officers in May 1854 made the following impressive Report.[3]

> My Lord,
>
> We are honoured with your Lordship’s Commands signified in Mr. Hammond’s letter of the 10th ultimo stating that he was directed to transmit to us a despatch from Mr. Crampton, Her Majesty’s Minister at Washington, together with a letter from the Hudson’s Bay Company, relative to the attempts of the United States Authorities in Oregon to deprive the Company of their right of trading with the Indians.
>
> p. 459 ↳ We are also honoured with Mr. Hammond’s letter of the 12th ultimo transmitting therewith a further letter from the Hudson’s Bay Company, inclosing a copy of the letter addressed by Sir George Simpson to Governor Stevens upon the subject in question.
>
> We are also honoured with Mr. Hammond’s letter of the 13th inst., transmitting a further letter from the Hudson’s Bay Company stating the extent and nature of their possessory and other rights in Oregon.
>
> We are also honoured with Mr. Hammond’s letter of the 16th instant enclosing therewith a further despatch from Mr. Crampton enclosing a copy of a note from the United States Secretary of State stating the grounds on which the United States Government refuse to admit the Right claimed by the Hudson’s Bay Company of trading with the Indians.
>
> We are also honoured with Mr. Hammond’s letter of the 23rd inst., transmitting a further letter from Mr. Shepherd, the Deputy Governor of the above Company, enclosing a Statement drawn up by the Solicitor of the Hudson’s Bay Company, respecting the rights of the Company as secured to them by Treaty; and Mr. Hammond is pleased to request that we would take this statement into consideration, together with the other papers now before us, and report to your Lordship our opinion thereupon, at our earliest convenience.
>
> In obedience to your Lordship’s Commands we have taken these papers into consideration and have the Honour to *report:*

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That the question between the Hudson's Bay Company and the United States depends on the true import and effect of the Third Article of the Convention[1] of the 15th June 1846, and of the term 'possessory rights' therein contained. We agree that whatever may be fairly considered as included under the term 'possessory rights' must be taken to be indefeasibly secured to the Company:—and we think that this term should be construed, not only according to the ordinary meaning of the words, but also with reference to the circumstances existing at the time of the Treaty.

In the Vocabulary of Conventions and Treaties the term 'possessory rights' is well known and has long exercised and borne a clear and well understood meaning. It refers to the enjoyment of land and the incidents thereof, and when used as in the Third Article of the Convention, its meaning is, that possession and absolute property shall be considered and treated as identical, and that whatever Lands, Tenements, or Territorial Franchises the Company, being the privileged party, is found to be in the actual *de facto* enjoyment of, they shall be considered as *de jure* entitled to, and the same shall be guaranteed to them accordingly.

But the term can never be construed as including, and therefore securing to the subjects of the Ceding Country now about to reside under the Sovereignty of the Guaranteeing Country, the same Municipal *personal* rights and legal privileges as the Law of the first Country allowed, but the Law of the other Country prohibits to its Citizens.

p. 460

So construed, it would be a stipulation, that the servants of the Company, ↳ and the Tenants of its Lands, being resident within the Territory of the United States, should live under English, and not American Law; It would prohibit the imposition of any Tax, the adoption of any fiscal regulation, or the Enactment of any municipal Law, which should have any bearing at all upon the incidental profits, advantages, or emoluments, indirectly derived by the Hudson's Bay Co. from the Lands in question at the time of the Treaty. Suppose (for instance) that Company had been in the habit of selling to the Indians, at Stores established on these possessions, large quantities of Rum, Arms and Gunpowder, would it be possible to contend that the stipulation, that the 'possessory rights' of the Company should be respected—would debar the United States from passing a Law declaring that the unlimited supply of such Articles was injurious to its Indian subjects, or dangerous to itself, and making such Commerce the subject of Regulation or Prohibition?

Such, however, must be the contention of the Hudson's Bay Company, if the construction contended for by them is to prevail.

But, independently of the proper meaning of the term 'possessory rights' we have arrived at the same conclusion with regard to the import of the third Article from considering the circumstances existing at the time of the Convention.[1]

We collect from the Papers before us that by the Laws of the United States, which were in force at the time of the Ashburton Convention,[2] permission to trade with the Indians was not given to Citizens of the United States. We infer that this was a Federal Law, binding on the whole union, and that, when the Convention ascertained[3] that such portion of the Oregon Country as lies to the south of the 49th parallel of Latitude was part of the Territory of the United States, this Law became binding on all subjects of the United States resident in that territory.

During the Negotiation and at the final settlement of the Treaty of the 15th June 1846, the existence of this Law of the United States must have been well known to the Hudson's Bay Company, and they must have foreseen that although the Lands and Possessions, of which they were in the actual occupation, were to be secured to them, yet, that their Tenants and Servants, occupiers of such Lands and Possessions, would thenceforth be resident within the dominions of the United States, and be bound to pay obedience to its Municipal Laws and Regulations.

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> If, therefore, it had been the intention of the High Contracting parties to stipulate for, and concede to, the Tenants and servants of the Hudson's Bay Company a 'Privilegium' which would not be common to the Citizens of the United States, it is impossible to suppose that it would not have been the subject of an express and distinct provision.
>
> So far, therefore, as the Hudson's Bay Company contends that the right to carry on trade with the Indians upon their possessions within the Oregon ↳ Territory of the United States *is secured to them* in the same manner in which they enjoyed and exercised it, at the time of the conclusion of the Treaty —we apprehend that they are in error, and that their construction of the term 'Possessory Rights' is not consistent with its usual meaning, and acceptation, or with the sense which, from the context, the circumstances existing at the time of the negotiation, and the nature of the right claimed, that term must be taken to bear, and to have been intended to bear, in the Treaty of the 15th of June 1846.
>
> We have the honor to be,
>
> My Lord,
>
> Your Lordship's most Obedient,
>
> Humble Servants,
>
> J. D. HARDING.
>
> A. E. COCKBURN.
>
> RICHARD BETHELL.

p. 461

There follows an *extract from a Report by the Queen's Advocate*, *Sir Robert Phillimore*, *dated 13 February 1866*,[1] on the subject of the grant by New Granada to the United States of America by the Treaty of 12 December 1846[2] of a right for the passage of troops across the Isthmus of Panama:

> The words in the 35th Article which more especially raise this point are these:
>
> The Government of New Granada guarantees to the Government of the United States that the right of way or transit across the Isthmus of Panama upon any modes of communication that now exist, or that may be hereafter constructed, shall be open and free *to the Government and citizens of the United States*, and for the transportation of any articles of produce, &c.
>
> It is maintained—apparently for the first time—that these words convey to the United States what jurists term a *jus transitÛs* of a very peculiar kind, namely, an unlimited right of sending armies across the Peninsula. I think that these words ought not to be so construed, for the following, among other, reasons:
>
> 1. Such a construction is not to be presumed in any case, for it confers an unusual and invidious privilege; and though it is a possible, it is by no means a necessary, construction. 'The Government' and the 'citizens of the United States' are indeed mentioned in the disjunctive; a right of transit is given to both: but a meaning may be well assigned to these terms without extending it so as to include, by implication, the passage of armies belonging to the Government. So very important and unusual a concession would naturally be conveyed in explicit terms, and not be left to rely upon an ingenious inference.

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p. 462

In dubio mitius

Closely connected with the previous rule is that which is sometimes referred to as *in dubio mitius*, that is to say, that, in case of ambiguity, the meaning should be preferred which is less onerous to the obligated party, causing less interference with its personal and territorial supremacy.[1]

> **Report by the King's Advocate dated 3 February 1835**[2]
>
> Doctors' Commons.
>
> My Lord Duke,
>
> I am honored with your Grace's Commands signified in Mr. Backhouse's letter of yesterday's date, stating that he was directed to transmit to me the inclosed copy of the Treaty signed at London on the 22nd April 1834 between Great Britain, France, Spain and Portugal, together with a copy of Four Additional Articles thereto, signed at London on the 18th August 1834; and requesting that I would report to your Grace my opinion on the following questions.
>
> 1st. As to the precise extent of the obligation which is imposed upon His Majesty's Government in virtue of the second additional Article of the above mentioned Treaty, by which England engages to furnish to Her Catholick Majesty such supplies of arms and warlike stores as she may require?
>
> One question which arises under this Article is, whether Great Britain is bound thereby to furnish such supplies at her own expense.
>
> 2ndly. What is the precise import, according to the Law of Nations, of the terms 'warlike stores'? Do the terms include the *fitting out* and *equipping* in English ports of Spanish armed Vessels?
>
> In obedience to your Grace's Commands, I have the Honor to report that, in the interpretation of Treaties, the terms of which are vague and indefinite, whatever tends to destroy the equality of a Contract, and to lay a burthen upon one only of the contracting parties, must be construed in a strict and limited sense, and that the obligation is not to be extended beyond what is actually expressed; now there being no stipulation in the Treaty in question that Great Britain should furnish arms and warlike stores at her own expense, and as the Contract would be manifestly unequal, and the burthen would be upon her only, if she were to furnish, without receiving payment, whatever supplies might be required by Spain, I am humbly of opinion that the extent of the obligation which is imposed by the Treaty upon His Majesty's Government is to furnish the supplies to Spain at the expense of Her Catholick Majesty.
>
> I apprehend that the term '*warlike stores*' as used in the Treaty in question imports whatever articles
> p. 463 are necessary for the equipment of ↳ naval, or military forces, but I am of opinion that it does not include the use of the English ports for the fitting out and equipping of Spanish armed Vessels.
>
> I have, &c,
>
> JOHN DODSON.

In its Advisory Opinion upon the *Interpretation of Article 3(2) of the Treaty of Lausanne* (the Mosul frontier between Iraq and Turkey) the Permanent Court said:[1]

> This argument appears to rest on the following principle: if the wording of a treaty provision is not clear, in choosing between several admissible interpretations, the one which involves the minimum of obligations for the Parties should be adopted. This principle may be admitted to be sound. In the

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> present case, however, the argument is valueless, because, in the Court's opinion, the wording of Article 3 is clear.
>
> 2 F.O. 83. 2368.

The Need of Express Terms to Alter an Existing Rule of Law

The high authority of the writer justifies, in spite of its antiquity, the following extract from a Report[2] by Sir Leoline Jenkins, Judge of the Admiralty Court, dated 23 February 1670–1, upon denial of justice:

> ... I do not deny, but that Sovereign Princes in their Treaties may so alter and abridge the Solemnities of Law now observed all *Europe* over in this Case, as to reduce all Formalities to the hearing and determining of their own Councils of State, or of their Publick Ministers Abroad, without other Instance or Process. But that this is already done or provided for by the Article now in Question, I dare not affirm. For,
>
> First, As it is a certain Rule in Law, that no Statute or Constitution [is] universally received, further than the Words of such Statute are express and decisive: So it is in Treaties, they are not to be understood as altering or restraining the Practice generally received, unless the Words do fully and necessarily infer an Alteration or Restriction.[3] Therefore if this Article, as it stands, be consistent with the ancient general Law, and with the Practice upon all former Treaties, I know not how it can be interpreted to introduce a new Method, and a Practice hitherto unknown in Reprisals.

p. 464

Contra proferentem[1]

The decisions contain frequent references to a rule that in case of ambiguity a provision must be construed against the party which drafted or proposed that provision, which appears to mean that in case of doubt the other party should have the benefit of the doubt.

In 1929 in the *Brazilian Federal Loans*[2] case the Permanent Court applied this rule to the interpretation, not of a treaty, but of a prospectus which was issued in relation to an issue of Government bonds and for which the Brazilian Government was responsible, so that the prospectus formed part of the contract contained in the bonds. The court said:

> Moreover, there is a familiar rule for the construction of instruments that, where they are found to be ambiguous, they should be taken *contra proferentem*. In this case, as the Brazilian Government by its representative assumed responsibility for the prospectus, which their representative, who had signed the bonds, had 'seen and approved', it would seem to be proper to construe them [the bonds] in case of doubt *contra proferentem* and to ascribe to them the meaning which they would naturally carry to those taking the bonds under the prospectus.
>
> 1 Phillimore, ii, p. lxxx.

Among the decisions of other tribunals may be mentioned the following:

(a) In 1923 the United States-Germany Mixed Claims Commission which, in dealing with the *Lusitania Claim*,[3] observed, on the question of exemplary damages, that:

> The treaty is based upon the resolution of the Congress of the United States, accepted and adopted by Germany. The language, being that of the United States and framed for its benefit,

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> will be strictly construed against it.

The Commission had, however, already held that the 'clear and unambiguous language [of the treaty] does not authorize the imposition of penalties'.

(b) In 1926 the Roumanian-German Mixed Arbitral Tribunal in *Wietzenhoffer* v. *Germany*[4] followed its earlier decision in which it had held that:

p. 465

> ↳ les clauses ambiguës du Traité devaient être interprétées contre leurs rédacteurs.

Good faith[1]

The performance of treaties is subject to an over-riding obligation of mutual good faith. This obligation is also operative in the sphere of the interpretation of treaties, and it would be a breach of this obligation for a party to make use of an ambiguity in order to put forward an interpretation which it was known to the negotiators of the treaty not to be the intention of the parties.

> **Report by the Law Officers dated 24 February 1872**
>
> My Lord,
>
> We are honoured with your Lordship's commands signified in Lord Tenterden's letter of the 20th instant, stating that, with reference to our Report of the 17th instant, he was directed by your Lordship to transmit to us a further letter from the Board of Trade on the duties imposed under the recent French Marine Marchande Law.
>
> Lord Tenterden was pleased to inclose copies printed of the previous letters from that Department adverted to in this communication, together with the Treaty of 1860, and its several Annexes, as already placed before us; the Correspondence presented to Parliament in 1867, referred to by the Board of Trade; and the recent Marine Marchande Law and Customs Circular; and in acquainting us that Lord Lyons had been instructed in the sense of our previous Reports; and that he (Lord Tenterden) was to request us to take the matter into reconsideration, and favour your Lordship, at our early convenience, with such further observations as we might have to offer.
>
> In obedience to your Lordship's commands we have the honour to report—
>
> That the only questions [*sic*] upon which we advised was the constructions [*sic*] of the Treaties, and we see no reason to alter our former opinion as to this point. The Board of Trade persists in regarding the 'surtaxe de pavillon' as a tax upon shipping, whereas it is a tax upon merchandize, although the motive for imposing it is to secure protection to French shipping, and, therefore, the tax is levied by reason of the flag under which it is imported being a foreign flag. At the same time, we must observe that the letter of the Board of Trade of the 17th instant raises a totally new point, namely, a question of good faith on the part of Her Majesty's Government in insisting upon our construction, having regard to the intentions of the negotiators of the Treaty, as now stated in that letter. If the facts therein
>
> p. 466
>
> mentioned are accurately stated, we must remark that, ↳ if our construction is insisted on, the French would be entitled to complain of advantage being attempted to be taken of the wording of the Treaty to impose obligations on them which it was known to the negotiators on both sides were not intended to be enforced; and, assuming that the intention of the English negotiators is known to our Government to have been opposed to what we consider the true construction of the Treaty, then we could not recommend such a course to be taken.

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> We have, &c.,
>
> J. D. COLERIDGE.
>
> G. JESSEL.
>
> TRAVERS TWISS.

The Background of International Law

Treaties must be applied and interpreted against the background of the general principles of international law.[1] Their very existence and validity rest on one of the earliest and most fundamental of those principles—*pacta sunt servanda*. Moreover, those principles are always available for the purpose of supplementing treaties,[2] and for interpreting them, when interpretation is necessary; for instance, in interpreting the word 'habitants' occurring in the Treaty of Paris of 20 November 1815 the Court of Appeal of Paris applied in the year 1939 the rules of international law as they were understood in 1815.[3]

p. 467 Borel made some pertinent observations in his Award in *The Kronprins Gustaf Adolf; The Pacific*,[1] when he said (translation):

> ... it is clear that the treaties themselves are part of the international law as accepted by both contracting powers and it may safely be assumed that, when the said treaties were concluded, both parties considered them as being agreed upon as special provisions to be enforced between them in what may be called the atmosphere and spirit of international law as recognized by both of them....

Contemporary meaning. There is authority for the rule that when there is a doubt as to the sense in which the parties to a treaty used words, those words should receive the meaning which they bore at the time of the conclusion of the treaty; unless that intention is negatived by the use of terms indicating the contrary, as is illustrated in the paragraph which follows.[2]

Relative Terms. Expressions such as 'suitable, appropriate, convenient', occurring in a treaty are not stereotyped as at the date of the treaty but must be understood in the light of the progress of events and changes in habits of life. Thus in one of the *Spanish Zone of Morocco Claims*[3] Great Britain demanded from Spain, as the Protector of the Maghzen of Morocco and responsible for his foreign relations, the use of premises in Tetuan suitable for a consulate in accordance with a treaty between Great Britain and the Maghzen of 1783 obliging the latter to make such provision, and with an exchange of letters in 1896 between the British and the Moroccan authorities. M. Max Huber as *Rapporteur* (in effect, as arbitrator) upheld the British claim, stating that Great Britain was entitled to

p. 468

> l'usufruit d'une résidence consulaire, à Tetuan ou dans le voisinage immédiat ↳ de cette ville, qui soit, *au point de vue des exigences actuelles*, aussi 'convenable' à cette fin que la maison à Rio-Martin l'était au point de vue de celles du début du XIX• siècle [italics ours].

The word 'convenable' occurred in the exchange of letters of 1896 but not in the Treaty of 1783.

This ruling by a distinguished lawyer must not be regarded as an indication that all treaties should be brought up to date for the purpose of their application. It is submitted that the *Rapporteur* gave the words of the Treaty a proper and commonsense interpretation which in no way conflicts with his important ruling as to the inter-temporal law in the *Island of Palmas* case.[1]

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Agreement on Interpretation

In the following Report[2] the King's Advocate, Dr. Jenner, advised that if there is any doubt upon the correctness of an interpretation which the parties are prepared to adopt it is desirable to make the interpretation the subject of a special convention between them:

> *May 31, 1834*
>
> Doctors' Commons
>
> My Lord,
>
> I am honoured with your Lordship's commands signified in Mr. Backhouse's letter of the 6th inst., stating that he was directed by your Lordship to request my opinion upon the following question, at my earliest convenience.
>
> By the 2nd Article of the Treaty of 1783, between Great Britain and the United States, it was agreed, that the boundaries between their respective Dominions should be 'From the North West Angle of Nova Scotia, vizt that Angle which is formed by a line drawn due North from the source of St. Croix River to the Highlands along the said Highlands, which divide those Rivers that empty themselves into the River St. Lawrence from those which fall into the Atlantic Ocean to the North Western most head of Connecticut River; V.V;' and further in the same article, this part of the Boundary is specifically described as follows; viz. 'East by a line to be drawn along the middle of the River St. Croix, from its mouth in the Bay of Fundy to its source, and from its source directly North, to the aforesaid Highlands, which divide the Rivers, that fall into the Atlantic Ocean, from those which fall into the River St. Lawrence.'
>
> That, after repeated surveys, and, after a reference of the question to Arbitration, it has been ascertained that no Highlands corresponding in every respect, to the definition contained in the Treaty can be discovered by following the due North Line, from the source of the St. Croix River:
>
> p. 469 That, in this difficulty the Government of the United States have suggested ↳ that means may be found for arriving at the object sought for, viz. Highlands, answering to the definition given in the Treaty,—by the adoption of what is stated to be a natural and uniform rule in the settlement of disputed questions of location. That it is alleged that in all questions of boundaries of tracts and countries designated by natural objects, the plain and universal rule of surveying is, first to find the natural object and then to reach it, by the nearest direct course, from any given point, and, with the least possible departure from the particular course called for in the original Deed or Treaty:
>
> That, according to this principle therefore, if Highlands answering to the definition given in the Treaty, could be any where discovered, it would be a legal Execution of the Treaty to draw a line from them to the given point, viz, the source of the St. Croix River, by the most direct route, without regard to the due North Line which is prescribed by the Treaty.
>
> And your Lordship is pleased to request that I would report my opinion whether this course can be followed, in the present case, consistently with the rules generally observed in the interpretation of Treaties.
>
> In obedience to your Lordship's Commands, I have the Honour to report that I humbly apprehend the general rule in the interpretation of Treaties to be; to adhere, as closely as possible to the precise point, agreed upon between the contracting parties and, if from unforseen circumstances, it shall be found impossible to comply strictly with the Treaty, in every particular that it shall be carried into effect

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> with the least possible deviation from the original stipulations. But I also, conceive that neither party is bound to consent to any Deviation from the terms originally proposed and consented to, if he shall by so doing be placed in so disadvantageous a situation, as to make it probable, that he would not have consented to them, if they had been in the first instance, offered for his acceptance. However just and reasonable therefore, the principle advanced by the American Government may be in ordinary cases, I am humbly of opinion that His Majesty's Government are not bound to adopt the new Boundary Line, proposed to be substituted for that so specifically described by the Treaty, if it shall be found to be materially prejudicial to the Interests of this Country. If, on the other hand, it shall appear that no serious inconvenience is likely to follow from the adoption of it, it is competent to His Majesty to consent to the alteration; but in a matter of such great Importance, as the Constitution of a Boundary between two conterminous Countries, it is indispensably requisite, that no opening shall be left to doubt, or cavil; and I am by no means prepared to say, that the rule of Interpretation, suggested by the American Government, is so perfectly clear and indisputable as not to be open to any possible question hereafter, whether the Treaty of 1783, has been legally executed or not, and, I therefore humbly submit that if the two Governments should come to an agreement as to a new line of division, that it should be made the subject of a special Convention between them.
>
> I have the honour, &c.,
>
> HERBERT JENNER.

p. 470 *Armistice*. Two general rules concerning the maintenance of the *status quo ante*, which form the background of an armistice convention, are stated by Sir John Dodson in a Report dated 27 November 1849, printed in the present writer's *International Law Opinions*, vol. iii, pp. 111–12 .

Treaties of Peace

The following paragraphs come from a *Report*[1] *by the Queen's Advocate* (*Sir Robert Phillimore*) *dated 20 October 1864*, upon certain Preliminaries of Peace[2] made between Denmark on the one hand and Prussia and Austria on the other on 1 August 1864:

> That the preliminaries of peace are of the nature of a contract, and subject to the same rules and principles of interpretation as the definitive treaty itself.
>
> . . . . . .
>
> That the distinction between just and unjust wars is wholly inadmissible to affect the question of the construction of the Treaty, which, as to this subject, must be interpreted as considering all parties upon equal footing.

Indian tribes. The Supreme Court of the United States has laid down an indulgent rule which requires treaties made with Indian tribes to be construed 'in the sense in which they would naturally be understood by the Indians'.[3]

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Inferences as to General Law drawn from Particular Stipulations in Treaties

English judges have frequently entered a caveat against two arguments based upon the contents of particular stipulations occurring in treaties. The first is that, if the framers of a treaty have thought fit to stipulate that a particular thing should be so, that is evidence that, as a matter of general customary international law, the reverse proposition is true, because otherwise it would be unnecessary to insert the stipulation. The second is that the occurrence of particular rules embodied in treaty stipulations is evidence of a general rule of law to the same effect.

An instance of the first of these arguments is found in *The Ringende Jacob*,[4] where it was unsuccessfully argued
p. 471 that 'because ↳ unwrought iron is excepted, in some treaties, as not contraband, therefore, where no exception is expressed, it is to be considered as contraband', that is, apparently, as absolute contraband. Upon which Lord Stowell very pertinently commented in rejecting the argument:

> Enumeration takes place in treaties, to prevent misunderstanding; it distinguishes what shall be contraband from what shall not; but the exception of particular articles is not to be there understood in the strict sense, in which it is sometimes said, *exceptio confirmat legem*.

He stated the iron to be an article *promiscui usus*, declined to treat it as absolute contraband, and referred it 'to the inspection of the officers of the King's Yards, that we may be assisted by their certificate, in determining whether [it is] to be considered as naval stores or not'.

Similarly, Dr. Lushington in his judgment in *The Franciska*,[1] in replying to this argument, said:

> I will observe that it may be not altogether unusual for a treaty to be made merely declaratory or the law, not giving any peculiar advantage to either of the contracting powers; and such is the opinion expressed by Mr. Wheaton.[2] With regard to the treaty with America in 1794, he says: 'The stipulation in the treaty intended to be enforced by this instruction seems to be a correct exposition of the law of nations, and is admitted by the contracting parties to be a correct exposition of that law, or to constitute a rule between themselves in place of it.'

An instance of the refutation of the second of these arguments will be found in an observation made by Lord Alverstone C.J., in *West Rand Central Gold Mining Co.* v. *Rex*.[3] In consider ing whether an alleged rule (the succession by an annexing State to the delictual liabilities of the State whose territory has been annexed in its entirety) he said:

> The views expressed by learned writers on international law have done in the past, and will do in the future, valuable service in helping to create the opinion by which the range of the consensus of civilized nations is enlarged. But in many instances their pronouncements must be regarded rather as the embodiments of their views as to what ought to be, from an ethical standpoint, the conduct of nations inter se, than the enunciation of a rule or practice so universally approved or assented to as to
> p. 472 be fairly termed, even in the qualified sense in which that word can be understood ↳ in reference to the relations between independent political communities, 'law'. The reference which these writers not infrequently make to stipulations in particular treaties as acceptable evidence of international law is as little convincing as the attempt, not unknown to our Courts, to establish a trade custom which is binding without being stated, by adducing evidence of express stipulations to be found in a number of particular contracts.

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Merger of rights, claims, and offers to settle, in a treaty. There are some decisions in which it has been held that when rights have been asserted and claims and offers of settlement made before the conclusion of a treaty, those rights, claims, and offers merge in the treaty and cannot be revived;[1] this must be a question of interpretation in each case.

Treaty obligations of co-belligerents. On this subject Bynkershoek[2] wrote as follows: 'Sed quid si foederato et socio auxilia promissa sint, et ei res sit cum amico meo? Puto promissis standum esse, et stari posse, quia foederati hactenus constituunt unam civitatem, communi auxilio defendendam.'

This rule was referred to in the following Report made during a war in which the Argentine and Brazil were allies against Paraguay.

> **Extract from Report by the Queen's Advocate dated 7 November 1865**
>
> In the next place, the Treaty of 1853 introduces a very specific exception to the general law of blockade, so far at least as it affects the parties to it. By that Treaty the Argentine Republic binds herself to allow British merchant-vessels to navigate freely the waters of the Paraná though the Republic be at war, provided they do not carry munitions of war.
>
> With reference to the obligations of the Argentine Republic under this Treaty towards England, I am of opinion that it matters not how the war broke out, or whether the Republic of Paraguay, or the Argentine Republic, were the authors of it.
>
> p. 473 ↳ The question arises whether these obligations extend to the case in which this Republic wages war with an ally. I am of opinion that they do.
>
> It is a principle of international law that allied belligerents in their relation to neutrals have the same rights and duties, *unam constituunt civitatem* according to the expression of Bynkershoek. The Treaty is therefore binding upon the Argentine Republic in this war. I think, moreover, that it is not competent to Brazil to set aside this Treaty while she wages war with the Argentine Republic as her ally, though if she were waging war without that alliance the Treaty would not affect her. But as she claims in this war the rights, she cannot escape from the obligations of her co-belligerent.
>
> ROBERT PHILLIMORE.

Note

Generalia specialibus non derogant: see Fitzmaurice, 33 *B.Y.* (1957), pp. 236–8; *Grants to be construed in favour of the grantor*, see Fitzmaurice, *ibid.*, at p. 238.

Notes

1 In some of the United States cases one finds a summary of general rules governing the interpretation of treaties, which are mainly rules of common sense and not all of which fit into the usual categories; for example, *Universal Adjustment Corporation* v. *Midland Bank*, A.D. 1935–7, No. 215, at pp. 462–3.

2 Moore, *Digest*, § 835, and Moore, *Arbitrations*, i, ch. viii.

3 F.O. 83. 2209: U.S.A., endorsed 29 May.

1 Crossed through and 'Treaty' written above.

1 Crossed through and 'ratification of the Treaty' written above.

2 Same correction.

3 A somewhat old use of this word and meaning 'made certain', 'ensured', 'secured'.

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1 Printed in full in my *Law of Treaties*, pp. 316–18.
2 Moore, *Digest*, § 337.
1 This is Grotius' distinction between odious and favourable promises; he says that, in the case of the former 'figurative language is in some small measure admitted, to avoid the odium' (*quo onus vitetur*). (11, xvi. 12. De Interpretatione.)
1 Ser. B, No. 12, pp. 6, 25.
2 Printed in full in Wynne's *Life of Sir Leoline Jenkins*, ii, p. 759, and in my *Law of Treaties*, 1938, pp. 228–32.
3 There may be some connexion between this view and the frequently made assertion that a treaty ought to be so interpreted as to harmonize as far as possible with existing rules of international law; for instance, *The Lusitania*, A.D. 1923–4, No. 196. And see *The Wanderer*, A.D. 1919–22, No. 120: 'Any such agreement, being an exception to the general principle, must be construed *stricto jure*.'
2 Ser. A, Nos. 20/21, pp. 93, 114. Rousseau, § 443, deals with this rule as akin to, or part of, the rule of construing a provision in favour of the party obligated by it; he refers to a number of decisions and texts.
3 A.D. 1923–4, No. 198; *A.J.*(1924), pp. 361, 373; and see A.D. 191922, No. 170.
4 A.D. 1925–6, No. 278; 5 *Recueil des Tribunaux arbitraux mixtes*, p. 936, following *Negreanu* v. *Meyer*, ibid., pp. 200, 206; see also *Goldenberg & Sons* v. *Germany*, A.D. 1927–8, No. 369, and *Sch.* v. *Germany*, A.D. 1931–2, No. 206.
1 Good faith is frequently referred to in decisions and it is difficult to give the expression a precise meaning: A.D. 1927–8, p. 400 n.; Cheng, *General Principles of Law*, ch. 3.
1 It is arguable that the relevance of a rule of international law in deciding upon the interpretation to be placed upon a treaty can be attributed either to the fact that the rule pertains to a legal system to which the contracting parties are subject or to a contractual basis. The latter explanation was put forward in the *North Atlantic Coast Fisheries Arbitration* (Oral Argument, pp. 1073 and 1282) both by Sir William Robson (the British Attorney-General) and by Senator Elihu Root on behalf of the United States of America. The former said (at p. 1073): 'Of course in dealing with international law in relation to treaties,— a subject with which I have already dealt at such length,—I admitted that international law, when well established and clearly proved, like municipal law, may be taken as the basis of a contract, and may be read into a contract on those matters as to which the contract is silent because, no doubt, the parties were contracting with knowledge of the law.' And Senator Elihu Root later said (p. 1282): 'The effect of a rule of international law, if such a rule there be, which may be relevant in any degree to the consideration of a treaty between two independent nations is rather that of a rule of construction than of a statute upon which rights are based. Again I am indebted to the learned Attorney-General for the very just exposition of that relation.' Senator Root then cited the passage just quoted.
2 This is well put in the *Georges Pinson* case, § 50, Franco-Mexican Commission (Verzijl, President), A.D. 1927–8, No. 292: 'Every international convention must be deemed tacitly to refer to general principles of international law for all questions which it does not itself resolve in express terms and in a different way,' and in the same case, ibid., No. 318; *Goldenberg* v. *Germany*, ibid., No. 369 (a different tribunal).
3 *In re Alkan*, A.D. 1919–42 (Supplementary volume), No. 48. For an instance of interpretation by reference to other treaties, see *Singer* v. *United States*, A.D. 1919–42 (Supplementary volume), No. 112.
1 A.D. 1931–2, No. 205.
2 See note in A.D. 1919–42 (Supplementary volume), p. 85 ; and *Behring Sea* (*Fur Seals*) *Arbitration Award*, Moore, *Arbitrations*, i, pp. 755–961 (meaning of 'Pacific Ocean' as used in 1825); *Muscat Dhows* (1905): 'Whereas in default of a definition of the term *protégé* in the General Act of the Brussels Conference [of 1890] this term must be understood in the sense which corresponds best as well to the elevated aims of the Conference and its final Act as to the principles of the law of nations, as they have been expressed in treaties existing at that time, in internationally recognized legislation and in international practice': Scott, *Hague Court Reports* (1916), p. 97; *North Atlantic Coast Fisheries*, ibid., p. 159, where the tribunal was unable to agree with the American contention that the liberties of fishing granted to the United States constituted an international servitude 'because there is no evidence that the doctrine of international servitude was one with which either American or British statesmen were conversant in 1818 ….'
3 *Residence at Rio-Martin*, 2 R.I.A.A., pp. 722–7; A.D. 1923–4, No. 8.
1 2 R.I.A.A., pp. 845, 846.
2 F.O. 83. 2206: U.S.A.
1 For the whole Report, see above, p. 407.
2 Martens, *Nouveau recueil général de traités*, &c., vol. xvii, partie ii, p. 470.
3 *Jones* v. *Meehan* (1899), 175 U.S. 1; for the formulation of this rule, see A.D. 1941–2, at pp. 3, 4; see also at p. 52 of this book, 'Parties and International Capacity'.
4 (1798) 1 C. Rob. 89, 92.
1 (1855) 2 Spinks Ecclesiastical and Admiralty, 113, 151; reversed 10 Moore P.C. 37, but not on this point.
2 The reference given in the report is 'Wheaton's *International Law*, vol. ii, p. 238', which is p. 1110 in the sixth English edition of 1929.

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3 [1905] 2 K.B. 391, 402.

1 For instance, *Cayuga Indians' Claims*, A.D. 1925–6, No. 300; see 20 *A.J.* (1926), at p. 576 ('By the terms of the latter treaty, in which, as we hold, the covenants of the earlier treaties were merged …') and *Maud Thompson de Gennes* v. *Germany*, ibid., No. 316.

2 *Quaestionum Juris Publici*, Lib. i, cap. ix: 'But what if we have promised aid to an ally who comes to blows with a power friendly to us? In my opinion we can and must fulfill our promises, since allies in this respect constitute one State to be defended by the resources of both powers': Frank's translation in the Carnegie Endowment edition. For a practical example of the inconvenience likely to arise when two allies are not at one on the rules of war to be applied, note the action taken by Great Britain and France on the outbreak of the Crimean War: McNair, *Opinions*, iii, p. 3 and Malkin's important article 'Inner History of the Declaration of Paris', 8 *B.Y.* (1927), p. 1 and, particularly, pp. 13 et seq.

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