Titles published in the Grotius Classic Reprint Series

I. H. Lauterpacht, *The Development of International Law by the International Court*

II. B. Cheng, *General Principles of Law as applied by International Courts and Tribunals*

GENERAL PRINCIPLES OF LAW

as applied by

INTERNATIONAL COURTS AND TRIBUNALS

BY

BIN CHENG, PH.D., LICENCIÉ EN DROIT
Lecturer in International Law
University College, London

WITH A FOREWORD BY

GEORG SCHWARZENBERGER, PH.D., DR.JUR.
Reader in International Law in the University of London;
Vice-Dean of the Faculty of Laws, University College, London

GROTIUS PUBLICATIONS
CAMBRIDGE UNIVERSITY PRESS

Chapter 3

GOOD FAITH IN TREATY RELATIONS

The law of treaties is closely bound with the principle of good faith, if indeed not based on it; for this principle governs treaties from the time of their formation to the time of their extinction.

A. Formation of Treaties

"Contracting parties are always assumed to be acting honestly and in good faith. That is a legal principle, which is recognised in private law and cannot be ignored in international law." [1]

States in negotiating and concluding treaties are, therefore, presumed to have proposed nothing which is illusory [2] or merely nominal.[3] Indeed,

" No construction shall be admitted which renders a treaty null and illusive, nor which leaves it in the discretion of the party promising to fulfil or not his promise." [4]

Nor can the contracting parties be presumed to have intended anything which would, under the circumstances, have been unreasonable,[5] absurd or contradictory,[6] or which leads to impossible consequences.[7]

[1] PCIJ: *Lighthouses Case* (1934), France/Greece, S.O. by Séfériadès, A/B 62, p. 47.

[2] Jay Treaty (Art. VII) Arbitration (1794): *The Betsey* (1797) 4 *Int.Adj.*, M.S., p. 179, at p. 239. In rejecting the British contentions, Commissioner Gore held inter alia that they " raise objections which render the provisions of the article [constituting the Commission] illusory—a consequence not to be admitted in the most trifling contract, if by any way it can be avoided; still more admissible in a solemn bargain between two wise and respectable nations."

[3] Brit.-U.S. Cl.Arb. (1910): *Cayuga Indians Case* (1926) Nielsen's *Report*, p. 203, at p. 322. The U.S. argued, on the basis of the history of the negotiations leading to Art. IX of the Treaty of Ghent that the " article was only a ' nominal ' provision, not intended to have any application," " that the promise has no meaning but was . . . a provision inserted to save the face of the negotiators." The Tribunal refused to subscribe to such an interpretation, and relied on the provision for the decision of the case.

[4] Jay Treaty (Art. VII) Arb. (1794): *The Sally*, Hayes, Master (1803) 4 *Int. Adj.*, M.S., p. 459, at p. 478.

[5] PCIJ: *Meuse Case* (1937), Neth./Belg., D.O. by Anzilotti. He would not enforce what " would be going beyond the reasonable intentions of the Parties " (A/B. 70, p. 47).

[6] PCIJ: *Polish Postal Service in Danzig* (1925) Adv.Op., B. 11, p. 39.

[7] PCIJ: *The Wimbledon* (1923) D.O. by Anzilotti and Huber, A. 1, p. 36: " It must not be presumed that the intention was to express an idea which leads to contradictory or impossible consequences or which, in the circumstances, must be regarded as going beyond the intention of the parties. The purely grammatical interpretation of every contract, and more especially of international treaties, must stop at this point."

" ' In case of doubt, treaties ought to be interpreted conformably with the real mutual intention, and conformably to what can be presumed, between parties acting loyally and with reason, was promised by one to the other according to the words used.' " [8]

As to the terms that a party employs, these are presumed to have been used in the contemporary [9] and general sense in which the other party would have understood them at the time the treaty was concluded.[10] If, therefore, a party wishes to use words in a special or a restricted sense, it must expressly say so. And " when one has made a promise and then excepted from its extent what the words might naturally have conveyed it is evident that he was aware of the effect of his language, and took from its comprehension all that was within his intention to except." [11]

In short, good faith requires that one party should be able to place confidence in the words of the other, as a reasonable man might be taken to have understood them in the circumstances.

Thus, in 1903, after three of Venezuela's many creditors had staged a blockade of her ports, Venezuela sent a representative to Washington with full powers to negotiate with the creditor Powers. In the course of the negotiations, the Venezuelan representative proposed to the representatives of the blockading Powers that " all claims against Venezuela " should be offered special guarantees.[12] A controversy arose as to whether the

[8] P.C.A.: *Timor Case* (1914) Neth./Port. 1 H.C.R., p. 354, at p. 365, quoting Heffter: *Völkerrecht*, § 90. Quoted also in Greco.-Bulg. M.A.T.: *Sarropoulos Case* (1927) 7 T.A.M., p. 47, at p. 52.

[9] *Cravairola Boundary Case* (1874) Swit./Italy, 2 *Int.Arb.*, p. 2027, at p. 2046. *Abu Dhabi Oil Arbitration* (1951) 1 I.C.L.Q. (1952), p. 247, at pp. 252–3.

[10] P.C.A.: *North Atlantic Coast Fisheries Case* (1910) 1 H.C.R., p. 141, at p. 181. " Now, considering that the Treaty used the general term ' bays ' without qualification, the tribunal is of opinion that these words of the treaty must be interpreted in a general sense as applying to every bay on the coast in question that *might be reasonably supposed to have been considered as a bay by the negotiators of the treaty under the general conditions prevailing*, unless the U.S. can adduce satisfactory proof that any restrictions or qualifications of the general use of the term were or should have been present to their minds " (italics added). See also *ibid.*, pp. 184, 187.

[11] Jay Treaty (Art. VII) Arb. (1794): *The Betsey* (1797) 4 *Int.Adj.*, M.S., p. 179, at pp. 217–8.

[12] *Venezuelan Preferential Claims Case* (1904) 1 H.C.R., p. 55, at p. 61, note 1.

words " all claims " referred to all the claims of the allied and blockading Powers, or to all the claims of every country, creditor of Venezuela. The Permanent Court of Arbitration decided:—

" The good faith which ought to govern international relations imposes the duty of stating that the words ' all claims ' used by the representative of the Government of Venezuela in his conferences with the representatives of the allied Powers . . . could only mean the claims of these latter and could only refer to them." [13]

In case of doubt, words are to be interpreted against the party which has proposed them, and according to the meaning that the other party would reasonably and naturally have understood.[14] In contracting with a party labouring under a special handicap, *e.g.*, Red Indians, terms should no longer be used in their technical meaning, but only in the meaning which can be understood by that party; for in case of dispute it is not the technical meaning of the terms of the covenant that an international tribunal would enforce, but only the " sense in which they would naturally be understood by the Indians." [15]

How far are States bound in good faith, pending the negotiation for a Special Agreement, to abstain from any surprise action capable of modifying the existing situation at law, or from resort to any tactical measures? The question arose to a limited extent in the *Eastern Greenland Case* (1933), but

[13] *Ibid.*, at pp. 60–1.

[14] Rum.-Germ. Arb. (1919): *David Goldenberg & Sons Case* (1928) 2 UNRIAA, p. 901, at p. 907. The question was raised whether § 4 of the annex to Arts. 297 and 298 of the Treaty of Versailles in obliging Germany to make reparation for " acts committed " meant only unlawful acts or any act done by Germany. Held: " The provision in question imposes an obligation on Germany. According to the rule constantly followed by the Rumano-German M.A.T., provisions of this kind should not be extended, by way of interpretation, beyond *the meaning which Germany could reasonably have attributed to the text submitted for her acceptance*. An ambiguous provision is, in principle, interpreted against the party which has drafted it " (Transl. Italics added).

PCIJ: *Brazilian Loans Case* (1929) A.20/21, p. 114: " 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 this representative, who had signed the bonds, had ' seen and approved,' it would seem to be proper to construe them 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."

Cf. Abu Dhabi Oil Arbitration (1951) 1 I.C.L.Q. (1952) p. 247, at p. 251.

[15] Brit.-U.S. Cl.Arb. (1910): *Cayuga Indians Case* (1926) Nielsen's *Report*, p. 203, at p. 326, quoting an American decision.

unfortunately the Permanent Court of International Justice had no occasion to consider it.[16] In the present state of international law, however, it does not seem that such an obligation exists, except perhaps in very special circumstances.

B. Treaties sub spe rati

The question whether treaties come into force on signature or on ratification depends, in each individual case, upon the intention of the parties. According to present practice, the greater number of treaties are " binding only by virtue of their ratification." [17] The International Court of Justice held in the *Ambatielos Case* (1952) that:—

" The ratification of a treaty which provides for ratification . . . is an indispensable condition for bringing it into operation." [18]

Yet, it may well be asked whether, before ratification, such a treaty, solemnly signed by plenipotentiaries of States, is of absolutely no legal effect. In the first place, it cannot be denied that that part of the treaty relating to ratification and its coming into force must necessarily be considered as validly concluded and binding upon the parties upon signature.[19] Secondly, the signing of a treaty at least " establishes," in the words of the International Court of Justice, " a provisional status " between the signatories, which would terminate either if the signature is not followed by ratification, or when the treaty becomes effective on ratification.[20]

It is perfectly true, as counsel for the United States in the *Iloilo Claims* (1925) maintained before the British-United States Claims Arbitral Tribunal (1910), that " when there still remains ratification and exchange of ratification or deposit of ratification as the case may be, it is utterly meaningless to say that a

[16] Denmark/Norway, A/B.53, pp. 43, 74.

[17] *Cf.* PCIJ: *International Commission of the River Oder Case* (1929) U.K., Czech., Denmark, France, Germany, Sweden/Poland, A.23, p. 20.

[18] Greece/U.K., *ICJ Reports, 1952*, p. 28, at p. 43. The I.C.J. recognised at the same time, however, that " such a conclusion might have been rebutted if there had been any special clause or any *special object* [" *une raison particulière* "] necessitating retroactive interpretation " (p. 40. Italics added). *Cf.* PCA: *Muscat Dhows Case* (1905), France/G.B., 1 H.C.R., p. 93, at p. 99.

[19] See Nisot, " La force obligatoire des traités signés, non encore ratifiés," 57 *Clunet* (1930) p. 878.

[20] See *Reservations to the Convention on Genocide* (1951) Adv.Op., *ICJ Reports, 1951*, p. 15, at p. 28.

treaty is binding from the time of signature." [21] As he admitted, however, there may be "some questions that may seem a little vexatious as to the effect of the signing of a treaty. . . . What is the vexatious question which has sometimes troubled courts a little and perhaps administrative officials? It deals with the maintenance, I should say, of the status quo between the time of the signing and the time of the exchange of ratification. If Germany by treaty cedes territory to Poland or to France, obviously Germany cannot prior to ratification proceed to cede that territory to some other nation, even though the treaty obviously is not, in accordance with its terms, in effect. If Germany is obliged to deliver commodities in kind, as we used to say in Paris, whether it be cattle or machinery, or pictures, she cannot dispose of those things to some other nations pending a certain period of time for ratification. If she does, that is a fraud on the other party to a treaty." [22]

Events similar to the above hypothesis arose in the case concerning certain *German Interests in Polish Upper Silesia* which was decided by the Permanent Court of International Justice in the following year (1926). In this case, Poland complained of certain transactions of the German Government regarding the latter's property in Upper Silesia as being in violation of the signed, but yet unratified, Treaty of Versailles (Art. 256, I, II).

"As, after its ratification, the Treaty did not, in the Court's opinion, impose on Germany such obligation to refrain from alienation, it is *a fortiori*, impossible to regard as an infraction of the principle of good faith Germany's action in alienating the property before the coming into force of the Treaty which had already been signed. In these circumstances, the Court need not consider the question whether, and if so how far, the signatories of a treaty are under an obligation to refrain from any action likely to interfere with its execution when ratification has taken place." [23]

It seems, however, even from the above passage, and from the rest of the Judgment that, in the opinion of the Court,

[21] Nielsen's *Report*, p. 382, at p. 398.
[22] *Ibid.*, at pp. 398–399.
[23] (Merits), A.7, pp. 39–40. For the facts of the case, see *infra*, pp. 126 *et seq.*

during the period in question, the parties must not act against the principle of good faith.[24]

The Greco-Turkish Arbitral Tribunal in an award delivered a few months later was even more explicit:—

"It is a principle of law that already with the signature of a treaty and before its entry into force, there exists for the contracting parties an obligation to do nothing which may injure the Treaty by reducing the importance of its provisions. . . . It is of interest to state that this principle—which really is only an expression of the principle of good faith which is the foundation of all law and all conventions—has received application in a number of treaties." [25]

Umpire Lieber of the Mexican-United States Claims Commission (1868) was of the opinion that:—

"If a peace were signed with a moral certainty of its ratification and one of the belligerents were, after this, making grants of land in a province which is to be ceded, before the final ratification, it would certainly be considered by every honest jurist a fraudulent and invalid transaction." [26]

Pending the ratification of a treaty,[27] therefore, the principle of good faith requires that each party should abstain from acts which would prejudice the rights—imperfect perhaps, but none the less rights—of the other party, as established by the signed treaty. Acts which violate the principle are fraudulent and invalid in the eyes of the law.[28]

[24] *Cf. ibid.*, at pp. 30, 37–9. See also Anzilotti, *Cours de droit international public*, Paris, 1929, p. 373. Anzilotti was one of the judges who decided the *German Interests Case* (Merits) (1926). *Cf.* also *Interpretation of Art. 260 of the Peace Treaty of Versailles Case* (1924), Germany/Reparation Commission, 1 UNRIAA, p. 429, at pp. 521–3.
[25] *Megalidis Case* (1926), 8 T.A.M., p. 390, at p. 395. (Transl.)
For examples of treaties, other than that given by the Tribunal, see Art. 38 of the General Act of Berlin, 1885 (Martens, II (10) N.R.G., p. 414); Protocol to the Convention for the Control of Trade in Arms and Ammunition, St. German-en-Laye, 1919 (Hudson: 1 *Int.Leg.*, p. 343).
[26] *Ignacio Torres Case*, 4 *Int.Arb.*, p. 3793, at p. 3801. On the effect of the signature of a treaty of peace on the permissibility of further hostilities pending ratification of the treaty, see *ibid.*, pp. 3800–1. See also *Id.*: *Anaya Case*, *per* Umpire Thornton, *ibid.*, pp. 3804–5.
[27] This excludes the case when it is certain that a treaty is not to be ratified. The principle of good faith does not necessarily condemn a refusal to ratify a signed treaty, when the ratifying authority deems it unsatisfactory, even if the treaty had been concluded pursuant to a *pactum de contrahendo*. See *Tacna-Arica Arbitration* (1925), Chile/Peru, 2 UNRIAA, p. 921, at p. 929.
[28] See *Harvard Research* (1935, Part III): *Draft Convention on the Law of Treaties*, Art. 9 and *Comment* thereon. Supplement to 29 A.J.I.L. (1935), pp. 778–87. The *Comment* is no doubt right in saying that whether an action indicates bad faith or not "depends entirely upon the circumstances of the

C. Pacta sunt servanda

" A treaty is a solemn compact between nations. It possesses in ordinary the same essential qualities as a contract between individuals, enhanced by the weightier quality of the parties and by the greater magnitude of the subject-matter. To be valid, it imports a mutual assent." [29]

" It need hardly be stated that the obligations of a treaty are as binding upon nations as are private contracts upon individuals. This principle has been too often cited by publicists and enforced by international decisions to need amplification here." [30]

" It cannot be that good faith is less obligatory upon nations than upon individuals in carrying out agreements." [31]

" From the standpoint of the obligatory character of international engagements, it is well known that such engagements may be taken in the form of treaties, conventions, declarations, agreements, protocols, or exchange of notes." [32]

" ' Treaties of every kind, when made by the competent authority, are as obligatory upon nations as private contracts are binding upon individuals . . . and to be kept with the most scrupulous good faith.' " [33]

case " (p. 782). We cannot agree, however, that the obligation to abstain from acts of bad faith is purely moral and non-legal (pp. 781 *et seq.*). The draft to a certain extent betrays the usual confusion between the coming into force of the substantive provisions of the treaty and the abstention from acts of bad faith pending ratification. This can be seen from the examples which the *Comment* gives of " hypothetical cases wherein the obligation of good faith referred to in Art. 9 might be regarded as being ignored." The first example is as follows: " A treaty contains an undertaking on the part of the signatory that it will not fortify a particular place on its frontier or that it will demilitarise a designated zone in that region. Shortly thereafter, while ratification is still pending, it proceeds to erect the forbidden fortifications or to increase its armament within the zone referred to " (p. 781). The act is plainly in violation of the terms of the treaty if the substantive provisions have come in force. But before that date, however, it cannot be said that the act was designed to prejudice the eventual execution of the treaty, nor to injure the inchoate rights of the other party, in case the treaty becomes ratified. In fact, the only party which would suffer, if the treaty is ratified, would be the State erecting these fortifications, because it would have to demolish them. The situation would be totally different if the treaty had provided not for demilitarisation, but for the maintenance of the military *status quo* in a given area. In such a case, the act of increasing the fortification in the area concerned during the interval between signature and ratification would indeed be an act of bad faith, and such an act, it is submitted, cannot be sanctioned, either by morality or by law.

[29] Fran.-Ven. M.C.C. (1902): *Maninat Case* (1905), Ralston's *Report*, p. 44, at p. 73.

[30] *Metzger & Co. Case* (1900), U.S.F.R. (1901), p. 262, at p. 276.

[31] *Metzger & Co. Case* (1900), *ibid.*, at p. 271.

[32] PCIJ: *Austria-German Customs Union* (1931), Adv.Op., A/B. 41, p. 47.

[33] *Van Bokkelen Case* (1888), 2 *Int.Arb.*, p. 1807, at pp. 1849–50, quoting Kent's *Commentaries*.

Pacta sunt servanda, now an indisputable rule of international law,[34] is but an expression of the principle of good faith which above all signifies the keeping of faith,[35] the pledged faith of nations as well as that of individuals. Without this rule, " International law as well as civil law would be a mere mockery." [36]

A party may not unilaterally " free itself from the engagements of a treaty, or modify the stipulations thereof, except by the consent of the contracting parties, through a friendly understanding." [37] " As long as the Treaty remains in force, it must be observed as it stands. It is not for the Treaty to adapt itself to conditions. But if the latter are of a compelling nature, compliance with them would necessitate another legal instrument." [38] The doctrine of *clausula rebus sic stantibus* has, therefore, no application in international law in the sense that what has been mutually agreed to by the parties can cease to be binding merely on account of changed circumstances. On the other hand, the doctrine is applicable in the sense that a treaty or contract cannot be invoked to cover cases which could not have been reasonably contemplated at the time of its conclusion.[39]

" Reparation is the indispensable complement of a failure to apply a convention, and there is no necessity for this to be stated in the convention itself." [40] It is, indeed, " a general conception of law, that any breach of an engagement involves an obligation to make reparation," [41] however short the breach

[34] See *Harvard Research* (1935 Part III), Supplement to 29 A.J.I.L. (1935), pp. 671–85; Kunz, " The Meaning and the Range of the Norm Pacta sunt Servanda " 39 A.J.I.L. (1945), pp. 180–97; and literature cited in both.

[35] See *e.g.*, Grotius, *De Jure Pacis et Belli*, III, xix–xxv; Bynkershoek, *Quaestionum Juris Publici*, II, x: " Pacta privatorum tuetur jus civile, pacta principum bona fides "; Vattel, *Le droit des gens*, II, xv, § 220.

[36] Ven.-U.S. M.C.C. (1903): *Rudloff Case* (Interlocutory Decision), *Ven.Arb. 1903*, p. 182, at p. 194. *Cf. Id.*: *Turnbull/Manoa Co., Ltd./Orinoco Co., Ltd. Cases*, *ibid.*, p. 200, at p. 244.

[37] The Protocol of London of 1871. See PCIJ: *Oscar Chinn Case* (1934), S.O. by van Eysinga, A/B. 63, p. 134. The Protocol of London of 1871 is found in Martens, 18 N.R.G., p. 278. See also *Chilean-Peruvian Accounts Case* (1875) 2 *Int.Arb.*, p. 2085, at pp. 2095, 2102.

[38] PCIJ: *Meuse Case* (1937), S.O. by Altimira, A/B. 70, p. 43. *Cf. contra*, ICJ: *Anglo-Iranian Oil Co. Case* (Jd.) (1952), U.K./Iran, D.O. by Alvarez, *ICJ Reports, 1952*, p. 93, at p. 126. Judge Alvarez' " New International law " is, however, still largely *de lege ferenda*.

[39] See *infra*, pp. 118–119.

[40] PCIJ: *Chorzów Factory Case* (Merits) (1928) A. 17, p. 29.

[41] *Ibid.*

may be in duration [42] and however relative it may be in importance, so that each party may "place entire confidence in the good faith of the other." [43]

D. Performance of Treaty Obligations

The principle that treaty obligations should be fulfilled in good faith and not merely in accordance with the letter of the treaty has long been recognised by international tribunals and is reaffirmed by the United Nations [44] "as an act of faith." [45]

In the *North Atlantic Coast Fisheries Case* (1910) the Permanent Court of Arbitration expressly affirmed that:—

"Every State has to execute the obligations incurred by treaty bona fide, and is urged thereto by the ordinary sanctions of international law in regard to observance of treaty obligations." [46]

This means, essentially, that treaty obligations should be carried out according to the common and real intention of the parties at the time the treaty was concluded, that is to say, the spirit of the treaty and not its mere literal meaning.[47]

[42] PCIJ: *Oscar Chinn Case* (1934), D. O. by Sir Cecil Hurst, A/B. 63, p. 119: "If a State is subject to engagement to do or not to do a certain thing, there cannot be read into it a provision that for short periods there shall be liberty to violate the engagement."

[43] Peruv.-U.S. Cl.Com. (1863): *Sartori Case*, 3 *Int.Arb.*, p. 3120, at p. 3123: "On the principle that reparation ought to be made in cases where responsibility is incurred, however small it may be, for non-compliance with the treaty, in order that each Government may place entire confidence in the good faith of the other, it seems to me that an equitable and reasonable indemnity ought to be granted to Mr. Sartori."

[44] U.N. Charter, Art. 2 (2).

[45] *Cf* UNCIO: 6 *Documents*, p. 79.

[46] 1 H.C.R., p. 143, at p. 167.

[47] PCA: *Timor Case* (1914) 1 H.C.R., p. 354, at p. 365.

Cf. UNCIO: 6 *Documents*, pp. 74–75. With regard to the term good faith, Dean Gildersleeve explained in Commission I of the UNCIO: "This is a customary phrase, which to our friends of the Latin countries, especially, conveys the meaning that we are all to observe these obligations, not merely the letter of them, but the spirit of them, and that these words do convey an assurance without which the principle would seem unsatisfactory to these friends of ours."

See also Planiol et Ripert, 6 *Traité pratique de droit civil français*, 1930, § 379: " . . . all our contracts are contracts *bonæ fidei*, which imply the obligation to behave like an honest and conscientious man not only in the formation, but also in the performance of the contract, and not to cling to its literal meaning. . . . To determine what is due [under the contract], we must ascertain what honesty allows us to demand as well as what it obliges us to do" (Transl.).

Harvard Research (1935, Part III): Draft Convention on the Law of Treaties, Comment *ad* Art. 20: "The obligation to fulfil in good faith a treaty engagement requires that its stipulations be observed in their spirit as well as according to their letters and that what has been promised be performed without evasion or subterfuge honestly and to the best of the ability of the party which made the promise" (Supplement to 29 A.J.I.L. (1935), p. 987).

This is one of the most important aspects of the principle of good faith and is in accordance with the notion that a treaty is an accord of will between contracting parties. As was held by the Franco-Venezuelan Mixed Claims Commission (1902):—

"A treaty is a solemn compact between nations. . . . To be valid, it imports a mutual assent, and in order that there may be such mutual assent there must be a similar understanding of the several matters involved. It can never be what one party understands, but it always must be what both parties understood to be the matters agreed upon and what in fact was the agreement of the parties concerning the matters now in dispute." [48]

Performance of a treaty obligation in good faith means carrying out the substance of this mutual understanding honestly and loyally.

As the ascertainment of this mutual understanding, *i.e.*, the real and common intention of the parties, is a matter of interpretation, it is also said that treaty interpretation is governed by the principle of good faith. Thus the Arbitrator observed in the *Timor Case* (1914), quoting the words of Rivier:—

"Above all, the common intention of the parties must be established: *id quod actum est*. . . . Good faith prevailing throughout this subject, treaties ought not to be interpreted exclusively according to their letter, but according to their spirit . . . . Principles of treaty interpretation are, by and large, and *mutatis mutandis*, those of the interpretation of agreements *between individuals*, principles of common sense and experience, already formulated by the Prudents of Rome." [49]

[48] *Maninat Case* (1905), Ralston's *Report*, p. 44, at p. 73.

Agreement must exist with regard to the *negotia essentialia* of the treaty. A treaty is not, however, vitiated because on a minor point the parties may have understood the words which they used in different meanings. See, *e.g.*, PCIJ: *Lighthouses Case* (1934), France/Greece, A/B. 62. In that case, the Court had to decide the exact meaning of "Contract duly entered into" in the Special Agreement between the parties. The parties agreed that the words were taken from Art. 1 of Protocol XII of Lausanne (pp. 16–17). But they understood the meaning of these words in the Protocol differently. France understood them as meaning only formalities under Ottoman law, while Greece took them to include objections of an international character (p. 17). This misunderstanding did not affect the validity of the treaty or of the provision.

[49] *Loc. cit.*, p. 365. *Cf.* Yü, *The Interpretation of Treaties*, 1927, Chap. V: "The so-called Rules of Construction and the doctrine of Uberrima Fides," pp. 203 *et seq.*

Cf. PCIJ: *The Wimbledon Case* (1923), D.O. by Anzilotti and Huber,

Indeed, he considered that there was "entire coincidence of private and international law on this point." [50] It should be pointed out, however, that where this common intention has been reduced to writing, it is primarily the common intention as set out in the text which is to be enforced.[51] The text of a treaty cannot be "enlarged by reading into it stipulations which are said to result from the proclaimed intentions of the authors of the treaty, but for which no provision is made in the text itself." [52] But "the intention of the parties must be sought out and enforced even though this should lead to an interpretation running counter to the literal terms of an isolated phrase, which read in connection with its context is susceptible of a different construction." [53] Moreover, the Permanent Court of International Justice has developed the teleological approach of interpreting the intention of the parties so that it is the real and practical aim pursued by the contracting parties that is enforced.[54]

A. 1, p. 36: "Though it is true that when the wording of a treaty is clear its literal meaning must be accepted as it stands, without limitation or extension, it is equally true that the *words have no value except in so far as they express an idea*. . . ." Italics added. See also PCIJ: *Meuse Case* (1937), D.O. by Anzilotti, A/B. 70, p. 46.

50 *Timor Case* (1914), *loc. cit.* p. 366.

51 Thus in the *Lighthouses Case* (1934), although it was the common intention of the parties that the meaning of the words "contracts duly entered into" was the same in Art. 1 of Protocol XII of Lausanne as in the Special Agreement (A/B. 62, pp. 16–17), the P.C.I.J. by the method of systematic or organic interpretation arrived at the conclusion that, in the Protocol, these words referred to formalities in Ottoman law (p. 15), while, in the Special Agreement, because the question whether the contract was "duly entered into" or not was linked with the question of enforceability against Greece, these words, in the intention of the parties, also referred to objections of an international character (pp. 13–16). Thus though the common intention was that the same words were to have the same meaning in both instruments, because they were expressed in different contexts, different meanings were attributed to them.

52 PCIJ: *Polish War Vessels in Danzig* (1931) Adv.Op., A/B. 43, p. 144. *Cf.* the importance to be attached to matters of form in treaty interpretation, ICJ: *Ambatielos Case* (1952), D.O. by Basdevant, *ICJ Reports, 1952*, p. 28, at pp. 69–70.

53 Germ.-U.S. M.C.C. (1922); *Mendel Case* (1926) *Dec. & Op.*, p. 772, at p. 791. For facts of the case, see *infra*, pp. 212 *et seq.* See also *Chevreau Case* (1931) 2 UNRIAA, p. 1113, at pp. 1137–8.

54 See *e.g.*, PCIJ: *Chorzów Factory Case* (Jd.) (1927) A. 9, pp. 24, 25; *Minority Schools in Albania* (1935) Adv.Op., A/B. 64, p. 17; *Electricity Co. of Sofia and Bulgaria Case* (Prel.Obj.) (1939) A/B. 77, p. 76; *Competence of the International Labor Organization (Personal Work of the Employer)* (1926) Adv.Op., B. 13, p. 18; *Greco-Bulgarian "Communities"* (1930) Adv.Op. B. 17, pp. 19 *et seq.* In many cases, Anzilotti would have preferred to go much further than the Court, a fact which explains many of his dissenting opinions, see *e.g.*, *The Wimbledon Case* (1923), Joint D.O. by Anzilotti and Huber, A. 1, pp. 36, 38; *Interpretation of the 1919 Convention concerning*

From the fact that it is the common intention of the parties or the spirit of the treaty that has to be respected, it follows that it is not permissible, whilst observing the letter of the agreement, to evade treaty obligations by—what the Permanent Court has called—"indirect means." If, for instance, it is the intention of the parties that freedom of navigation and commerce should be established in certain parts of their territory, it is not permissible for one party, while respecting the letter of the agreement, to evade its obligations in effect by an exaggerated exercise of its right to manage its national shipping.[55] Similarly, if State A has, by treaty with State B, granted to the inhabitants of State B the right to fish in certain parts of its coastal waters in common with its own nationals, and to enter its bays and harbours for the purpose of repairs, etc., State A may not, by an unreasonable exercise of its sovereign right to legislate for the preservation and protection of its fisheries, deprive the grant of its practical effect.[56] The unreasonable exercise of a right in such cases constitutes an abuse of right,[57] which being an act that is inconsistent with the duty to carry out the treaty in good faith, is considered as unlawful.

Again, if parties agree that disputes shall be submitted to judicial settlement only if they "cannot be settled by negotiation," "the condition in question does not mean . . . that resort to the Court is precluded so long as the alleged wrongdoer may profess a willingness to negotiate." [58] A party which is bound by a *pactum de contrahendo* to negotiate a certain treaty is responsible for the consequences of its acts of bad

Employment of Women During the Night (1932) Adv. Op., A/B. 50; *Oscar Chinn Case* (1934) A/B. 63; *Meuse Case* (1937) A/B. 70.

See also ICJ: *Reparation for Injuries Suffered in the Service of the UN* (1949) Adv.Op., *ICJ Reports, 1949*, p. 174, at pp. 177 *et seq.*, 182 *et seq.*; *United States Nationals in Morocco Case* (1952) *ICJ Reports, 1952*, p. 176, at p. 197.

55 PCIJ: *Oscar Chinn Case* (1934) A/B. 63, p. 86. The claim was dismissed because "The circumstances in which the impugned measures were taken are such as to preclude any idea that the Belgian Government intended by indirect means to escape the obligations incumbent on it." See also PCIJ: *Free Zones Case* (Jgt.) (1932) A/B. 46, pp. 167 *et seq.*

56 P.C.A.: *North Atlantic Coast Fisheries Case* (1910) 1 H.C.R., p. 141, see pp. 168, 169, 170, 171.

57 See *infra*, pp. 123 *et seq.*

58 PCIJ.: *Mavrommatis Palestine Concessions Case* (1924), D.O. by Moore, A. 2, p. 62.

faith.[59] It may be said that in such cases good faith consists in a sincere and honest desire, as evidenced by a genuine effort, to fulfil the substance of the mutual agreement. It is essentially a moral quality or perhaps what Judge Moore has described as the "ordinary conceptions of fair dealing as between man and man."[60] The enforcement of the principle of good faith may be considered as the enforcement of that degree of morality which is necessary for the functioning of the legal system.

Also, since it is the common intention of the parties and the spirit, rather than the letter, of the treaty which have to be observed, a party may not be allowed to make capital out of inexact expressions or mistaken descriptions in a treaty, when the real and common intention can be ascertained and the error established. *Falsa demonstratio non nocet.*[61]

While the principle of good faith prohibits the evasion of an obligation as established by the common intention of the parties, it also prohibits a party from exacting from the other party advantages which go beyond their common and reasonable intention at the time of the conclusion of the treaty, as, for example, by invoking the treaty to cover cases which could not reasonably have been in the contemplation of the parties at the time of its conclusion.[62] In this limited sense, the doctrine of

[59] *Cf. Tacna-Arica Arbitration* (1925) 2 UNRIAA, p. 921, at p. 930. See also *passim*, for the repeated emphasis on the requirement of good faith in executing the obligations resulting from a *pactum de contrahendo*.

[60] *Cf. Mavrommati: Palestine Concessions* (1924), D.O. by Moore, A. 2, p. 61.

[61] See P.C.A.: *Tinoc Case* (1914) 1 H.C.R. p. 354, Pt. VI, No. 4; Pt. VII, No. 7 of Award. PCIJ: *European Danube Commission* (1927) Adv.Op., B. 14 pp. 31–32. *Cf.* also P.C.A. *Chevreau Case* (1931) 2 UNRIAA, p. 1113, at pp. 1137–1138.

[62] An instance where a State considered it contrary to the principle of good faith for it to insist upon the letter of the treaty in order to gain advantages not in the mind of the parties at the time of the conclusion of the treaty may be seen from the Report of the Law Officers of the Crown to Earl Granville, February 24, 1872, quoted in McNair, *The Law of Treaties, British Practice and Opinions*, 1938, pp. 190–1, at p. 191.

Cf. PCIJ: *Meuse Case* (1937) Neth./Belg. The Belgian Government, in its written rejoinder (Ser. C. 81, pp. 180 *et seq.*), prayed the Court alternatively: "In case the Court should be unable on certain points to find in accordance with the submissions of the Respondent, to declare in any case that the Applicant is committing an abuse of right (*abus de droit*) in invoking the Treaty of May 12, 1863, in order to protect new interests (the Juliana canal and the canalised Meuse) which were not contemplated at the time of the conclusion of that Treaty, while the interests which that Treaty was intended to protect are not in any way threatened" (A/B. 70, p. 8). See also Ser. C. 81, pp. 208–9.

Cf. also PCIJ: *Free Zones Case* (Jgt.) (1932) A/B, 46 pp. 156–8. *Pensions of Officials of the Saar Territory Case* (1934) 3 UNRIAA, p. 1553, at p. 1566. *Abu Dhabi Oil Arbitration* (1951) 1 I.C.L.Q. (1952), p. 247, at p. 253.

clausula rebus sic stantibus is founded on the principle of good faith and is recognised by international law.[63]

Finally, the principle of good faith requires a party to refrain from abusing such rights as are conferred upon it by the treaty.[64]

E. Denunciation of Treaties

Where a party is free to denounce a treaty at any time, it should not do so immediately on learning that the other party wishes to invoke the treaty; for otherwise the treaty would, contrary to the true intention of the parties, be deprived of all practical effect. If, however, this right does not exist except at periodic intervals, a party may denounce the treaty at the end of a period even if it is at the same time notified that the other party wishes to invoke the treaty.[65]

Good faith in contractual relations thus implies the observance by the parties of a certain standard of fair dealing, sincerity, honesty, loyalty, in short, of morality, throughout their dealings. All these qualities may escape precise definition, but they may be considered as inherent in, or at least perceptible to, every common man. International law applies this standard in treaty relations between States to the extent described above, much as municipal law in contractual relations between individuals. In particular, all systems of law in accordance with the principle of good faith prescribe that promises should be scrupulously kept so that the confidence that may reasonably be placed upon them should not be abused. The importance

[63] *Cf.* D.O. by Alvarez in I.C.J.: *Competence of Assembly regarding Admission to the U.N.* (1950) Adv.Op., *ICJ Reports, 1950*, p. 4, at p. 17; also in *Anglo-Iranian Oil Co. Case* (Jd.) (1952) *ICJ Reports, 1952*, p. 93, at p. 126; D.O. by Winiarski in I.C.J.: *Interpretation of Peace Treaties* (1st Phase) (1950) Adv. Op., *ICJ Reports, 1950*, p. 65, at p. 94. Both learned judges, it is submitted, however, failed to distinguish the two different meanings of the *clausula*, wherein lies the main flaw in their argument. See further *supra*, pp. 113 *et seq.* and note 38.

[64] Peruv.-U.S. Cl.Com. (1863): *Sartori Case*, 3 *Int.Arb.* 3120, at p. 3122: "The honour and interests of the two republics represented in the joint commission require them to give proofs of the good faith with which each of the two countries fulfils the stipulations of the public treaty that binds them and requires that neither government shall allow the citizens so to abuse the protection and guarantees conceded to them by the treaty as to consider them a species of immunity under which they may infringe the laws."

[65] PCIJ: *Electricity Co. of Sofia and Bulgaria Case* (Prel.Obj.) (1939), D.O. by Anzilotti, A/B. 77, pp. 97–8; *Cf.* Ser. C. 88, pp. 430–1.

of this principle in any system of law and society cannot be over-emphasised. Indeed, as Aristotle said, most of our daily relations—namely, those that are voluntary—are regulated by contracts, and if these lose their binding force, human intercourse would cease to exist.[66] And the smoothness of this intercourse depends in large measure upon the degree of good faith with which our contractual or treaty relations are observed.

[66] *Rhetorica*, I, xv, 22.

CHAPTER 4

GOOD FAITH IN THE EXERCISE OF RIGHTS (THE THEORY OF ABUSE OF RIGHTS)

THE principle of good faith which governs international relations controls also the exercise of rights by States. The theory of abuse of rights (*abus de droit*), recognised in principle both by the Permanent Court of International Justice [1] and the International Court of Justice,[2] is merely an application of this principle to the exercise of rights.

A. The Malicious Exercise of a Right

The prohibition of malicious injury is an important aspect of the theory of abuse of right as it has been applied in most Continental legal systems.[3] In the international sphere, attention may be drawn to the following extract from the proceedings of the Fur Seal Arbitral Tribunal (1892), which clearly shows that the President of the Tribunal entertained no doubt as to its applicability in international law and that counsel for Great Britain was not indisposed to admit it. The question raised was whether the United States had a right to complain of the hunting of fur seals by British fishermen in that part of the Behring Sea adjacent to the American Pribilof Islands.

" Sir CHARLES RUSSELL: Where is the right that is invaded by that pelagic sealing? . . . It is not enough to prove that their industry (if I must use that phrase) may be less profitable to them because other persons, in the exercise of the right of sealing on the high seas, may intercept seals that come to them—that may be what lawyers

[1] *Cf. infra*, pp. 123, 127.

[2] *Anglo-Norwegian Fisheries Case* (1951), U.K./Norway, *ICJ Reports, 1951*, p. 116, at p. 142. See *infra*, p. 134, note 42. The theory of abuse of rights has been frequently referred to by judges of the I.C.J. in their separate and dissenting opinions. See *ICJ Reports, 1947-1948*, pp. 69, 71, 79 *et seq.*, 91, 92, 93, 103, 115; *ICJ Reports, 1949*, pp. 46, 47 *et seq.*, 75, 129 *et seq.*; *ICJ Reports, 1950*, pp. 14 *et seq.*, 19, 20, 29, 148, 348, 349; *ICJ Reports, 1951*, pp. 149 *et seq.*; *ICJ Reports, 1952*, pp. 56, 128, 133, 135.

[3] *Cf.* H. C. Gutteridge, " Abuse of Rights," 5 *Cambridge L.J.* (1933), p. 22.