EDITORIAL COMMENT

"LAW OF TREATIES" ISSUE OF THE JOURNAL

The present issue of the JOURNAL is devoted chiefly to the law of treaties, and in particular to some of the important and controversial problems suggested by current efforts to codify much of that law in treaty form. In the summer of 1966 the International Law Commission finally reported its Draft Articles on the Law of Treaties,[1] which will play an important part in the work of the international conference called by the United Nations for 1968 and 1969 to deal with this field.[2] If substantial agreement can be reached, a convention on the law of treaties will mark the culmination of two decades of United Nations work on this subject.

There seems little need to emphasize the growing importance of the law of treaties. All students of international law are impressed with the rapidly increasing number, variety and complexity of international agreements, both bilateral and among many nations, which in so much of international legal relations largely replace custom by more clearly defined rules chosen by the parties to meet their needs. Most of the international law problems which arise today, whether in private legal practice or between national foreign offices or in international organizations, involve international agreements. As the law contained in treaties has become the predominant part of our field, the principles and practices pertaining to the making, effect, application, interpretation, modification and termination of international agreements become an ever more vital part of international customary law. This growth of the "written" international law, comparable to the great growth of legislation in the internal law of most modern states, renders more and more acute the problems of the binding force and effect of treaties, of their interpretation, and the possibilities of lawfully modifying or terminating obligations under them.

One might observe that, by and large, we have developed in modern times fairly adequate methods of making international agreements to register what it is possible for states to agree upon. We are in some areas at least at the threshold of machinery for giving consent in advance to be bound by later-adopted rules to which formal assent is not necessary at the time when they are adopted, though we are still far from any true legislative process in which rules are adopted by majority vote or anything less than unanimous consent of the parties to be bound. (But one should note that the formulation of treaties in international conferences operating under a two-thirds vote may well mean that a particular nation will find only the choice of accepting a rule which it does not like or not becoming

[1] Contained in the Report of the International Law Commission, published in 61 A.J.I.L. 248, 263–285 (January, 1967).

[2] See General Assembly Resolution 2166 (XXI), adopted Dec. 5, 1966 and reprinted in 61 A.J.I.L. 656 (April, 1967).

a party to the treaty at all.) Problems of interpretation of treaties, like problems of interpretation of other legal instruments, are frequently present but lend themselves particularly well to arrangements for third-party settlement in case the parties to the treaty cannot reach agreement upon the meaning and effect of the words used. But it would seem that our most serious legal problems with treaties arise today in situations where one state wants to escape the obligations of a treaty into which it has entered, or at least to be excused from performing some part of them, and the other party or parties want to keep the treaty in force and demand continuing performance. This may suggest the parts of the Draft Articles on the Law of Treaties concerning which the most difficulties seem likely to arise.

This "law of treaties," or law *about* treaties, has long received attention from writers on international law, while governments and learned groups working to codify international law have dealt with it. The 1928 Pan American Convention on Treaties appears to have been one of the earliest efforts which achieved any substantial intergovernmental approval, but ratifications were few.[3] National co-operative efforts of importance include the unofficial though influential "restatements" by the Harvard Research in International Law in 1935,[4] and by the American Law Institute thirty years later.[5] As is well known, the International Law Commission has worked long and hard on the law of treaties, with first Professor J. L. Brierly, then Professor (later Judge Sir) Hersch Lauterpacht, then Sir Gerald (now Judge) Fitzmaurice, and finally Professor (now Sir) Humphrey Waldock as its successive rapporteurs on the subject. As the I.L.C. Drafts have become available, the American Society of International Law has established a Study Group on the Law of Treaties, with Professor Oliver Lissitzyn as Chairman and Professor Egon Schwelb as Rapporteur.[6] This issue of the JOURNAL represents a further effort of the Society to bring together articles and comments dealing with some of the important problems suggested by the 1966 Draft Articles; further relevant material is included in the documentary portions. We are fortunate that our contributors to this issue include the Chairman and the Rapporteur of the Society's Study Group, as well as one present member of the International Law Commission (Dr. Shabtai Rosenne), and another (Professor Herbert Briggs) who was a member during the time when most of the Commission's work on the law of treaties was in progress.

It is hoped that this issue of the JOURNAL may, in turn, stimulate others to study and comment further upon both the aspects of the law of treaties

[3] Conveniently reprinted in 22 A.J.I.L. Supp. 138 (1928), and 29 *ibid.* 1205 (1935).

[4] 29 A.J.I.L. Supp. 653 (1935).

[5] American Law Institute, Restatement of the Law, Second, Foreign Relations Law of the United States (1965), Part III. *Cf.* Covey T. Oliver, "The American Law Institute's Draft Restatement of the Foreign Relations Law of the United States," 55 A.J.I.L. 428 (1961).

[6] The documentation of the Study Group remains informal and unpublished, although some of the work of the Group contributed to articles and comments in the present issue of the JOURNAL.

here covered, and upon other treaty questions of similar importance and interest.[7]

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THE INTERNATIONAL LAW COMMISSION'S DRAFT ARTICLES UPON INTERPRETATION: TEXTUALITY *REDIVIVUS*

Scire leges non hoc est verba earum tenere, sed vim ac potestatem—Celsus, *Dig.* 1.3.17

The great defect, and tragedy, in the International Law Commission's final recommendations about the interpretation of treaties is in their insistent emphasis upon an impossible, conformity-imposing textuality.[1] This unhappy emphasis makes an appearance in, and dominates, the goal for interpretation which the Commission implicitly postulates but never critically examines; the deprecatory appraisal which the Commission offers of the potentialities that inhere in the rational employment of principles of interpretation; and the content and ordering of the particular principles which the Commission puts forward for canonization as "obligatory" rules of law.

In explicit rejection of a quest for the "intentions of the parties as a subjective element distinct from the text," the Commission adopts a "basic approach" which demands merely the ascription of a meaning to a text.[2] The only justification offered, and several times repeated as if in an effort to carry conviction, is that "the text [of a treaty] must be presumed to be the authentic expression of the intentions of the parties" and hence that "the starting point of interpretation is the elucidation of the meaning of the text, not an investigation *ab initio* into the intentions of the parties."[3] This arbitrary presumption is described as "established law" because of approval by the Institute of International Law and pronouncements by the International Court of Justice. The Court, it is noted, "has more than once stressed that it is not the function of interpretation to revise treaties or to read into them what they do not, expressly or by implication, contain."[4]

In justifying the inclusion within its draft articles of any principles of interpretation—principles whose "utility and even existence" have been

[7] In the present volume of the JOURNAL one could point, for instance, to K. J. Keith, "Succession to Bilateral Treaties by Seceding States," 61 A.J.I.L. 521 (April, 1967). The JOURNAL expects to prepare a similar collection of articles and comments concerning various problems of international legal protection of human rights for publication as one of its 1968 issues, probably that for October.

[1] The draft articles we criticize appear in Report of the International Law Commission, U.N. General Assembly, 21st Sess., Official Records, Supp. No. 9 (U.N. Doc. A/6309/Rev. 1) (1966), hereinafter referred to as "Report"; reprinted in 61 A.J.I.L. 248 (1967).

[2] Report at 49.

[3] *Ibid.* at 51.

[4] *Ibid.* at 52. What is ignored by the Court and the Commission is that a failure to apply an agreement because of some alleged verbal gap or inadequacy in the text may be equally a "revision" of the genuine shared expectations of the parties.