on the other. Some benefits for both forms of activity might well be reaped from such analysis.

PITMAN B. POTTER

TREATY INTERPRETATION AND THE UNITED STATES—ITALY AIR TRANSPORT ARBITRATION

Paul B. Larsen's article on the *U.S.-Italy Air Transport Arbitration*[1] in the April, 1967, issue of this JOURNAL devoted four pages (pp. 511–514) to the interpretative methods used by the majority decision in arriving at its conclusion, with which he agrees, compared with those methods which he would have preferred. Using dramatic license, he portrayed the majority decision as an illustration of the "narrow textual analysis" interpretative method, as contrasted with the "broad contextual analysis" which he deemed preferable.

His misjudgment of the interpretative method of the majority decision is most baffling. It is explicable only in terms of an apparent desire to publicize a different and novel method which can often be unwieldy and unhelpful.

The issue and the decision in the arbitration can be restated quickly: "Does the Air Transport Agreement between the United States of America and Italy of February 6, 1948, as amended, grant the right to a designated airline of either party to operate scheduled flights carrying cargo only?" The majority decision by the German and American arbitrators (the Italian arbitrator dissented) answered in the affirmative.

Under one section (III) of the 1948 Agreement's Annex, designated air carriers of the United States and Italy, respectively, were granted "rights of transit and of stops for non-traffic purposes, as well as the right of commercial entry and departure for international traffic in passengers, cargo *and* mail at the points enumerated on each of the routes specified in the Schedules attached." Other sections of the Annex (I and II), however, referred to transport of "passengers, mail *or* cargo." The two countries had treated "all cargo" flights since 1948 as being covered by the Agreement, along with "mixed" flights. This was consistent with the predecessor Chicago Convention, and the Bermuda Agreement between the United States and the United Kingdom, which were intended to regulate all scheduled commercial air services, not to be confined to a particular kind of service.

Whether all-cargo flights were "covered" by the 1948 Agreement was important not only to the United States and Italy, but to all countries bound by similar agreements, amounting to 50 or 60: if "covered," frequencies could be added in the commercial judgment of the airlines without advance approval of the host government; if not "covered," they could not. Pan American and TWA, possessing jet cargo planes, in 1963 filed schedules adding to frequencies. Since Alitalia had no jet cargo planes

[1] 61 A.J.I.L. 496 (1967). The text of the majority and minority opinions has been reproduced in 4 Int. Legal Materials 974 (1965), and digested in 60 A.J.I.L. 413 (1966).

and was afraid the burgeoning cargo business might be heavily weighted toward its competitors unless it could delay matters while it secured jets, the Italian Government in that year for the first time argued that the Agreement covered only "mixed flights," stating that the phrase "passengers, cargo *and* mail" in Section III of the Annex must be read as so limited.

The 43-page majority decision (in the original, mimeographed version) consisted of a 7-page introduction, giving the "formal" facts—the *compromis,* the question presented, the composition of the tribunal; a 9-page statement of facts, tracing the origins of the 1948 Agreement, the 1944 Chicago Convention, the U.S.-U.K. Bermuda Agreement of 1946, the history of all-cargo services from 1945 to the time of decision, and the origins of the dispute; a 4-page summary of the major arguments of the parties; and a 20-page analysis leading to its conclusion.

As Larsen accurately describes the analysis,

> The U.S.-Italy Arbitration is an example of the way in which a tribunal proceeds in treaty interpretation, with textuality as its starting point. The Tribunal focuses first on the words "passengers, cargo and mail" [in Section III], then on Sections I and II, then on the entire 1948 Agreement, then on the Bermuda Agreement, then on the Chicago Convention in increasingly wider rings.[2]

This was of course exactly the obverse of a "narrow textual analysis." In fact it was an exemplification of a method where "the words become the axis around which the whole wheel of language, intent, and subsequent events revolves," which is what Larsen said he meant by "contextual analysis" (*loc. cit.* at 512).

The majority decision did not purport to break new interpretative ground. It used the normal method of interpretation employed by modern tribunals, domestic and international. The *Restatement of Foreign Relations Law of the United States* (2d ed., 1965) at Section 147 sets out these interpretative criteria quite clearly and correctly.

The task of treaty interpretation, the *Restatement* avers, is to "ascertain and give effect to the purpose of the international agreement which, as appears from the terms used by the parties, it was intended to serve." The factors "to be taken into account by way of guidance in the interpretative process include" the "ordinary meaning of the words of the agreement in the context in which they are used"; the title and statements of purpose included in the text; the circumstances attending negotiation;

[2] 61 A.J.I.L. at 511 (1967). Larsen was not so accurate in certain subsidiary observations. His characterization of the majority decision's treatment of "subsequent conduct" of the parties as "never having decisive value" is erroneous. The majority decision actually stated that "The conduct of the parties in their application of the 1948 Agreement is not, of course, in itself decisive for the interpretation of the disputed text," and then proceeded to assign great persuasive weight to such practice. Again, Larsen states that the Tribunal held that "only conduct subsequent to the 1948 Agreement is helpful in interpretation"; the Tribunal in fact took account of the pre-1948 negotiations and events but limited itself to post-1948 conduct only in considering, quite literally, the conduct of the parties "subsequent" to the 1948 Agreement.

the negotiating history; the subsequent practice of the parties in performance of the agreement; and some other named factors. The *Restatement* adds that the "ordinary meaning of the words" in context "must always be considered as a factor in interpretation," but that "there is no established priority as between the other factors enumerated, or as between them and additional factors not mentioned."

The *Restatement* expressly rejected the idea that there are "rules" of interpretation. Instead, it drew attention to "relevant" factors, indicating, as guidelines, the kinds of evidence which help to identify the intended purposes or expectations of the parties. In so doing, it gave "primacy without exclusionary effect" (Section 147, comment d (a), p. 453) to the first listed factor, "ordinary meaning in context."

This is precisely the interpretative method employed by the majority decision in the U.S.-Italy Aviation Arbitration. Beginning with the text of Section III of the Annex, the point of initial reference, the Tribunal considered the language in the direct context of that section, then in the wider context of other sections, then in the still wider context of the setting of the Agreement when negotiated (the Chicago Convention and the Bermuda Agreement), and finally in the light of subsequent practice under the Agreement, and certain related relevant factors. All were specifically considered as pieces of evidence concerning the intention or expectations of the parties. The analysis of each piece of evidence supported the analysis of the "ordinary meaning" of the language which had begun the process. There was no conflict between any of the pieces of evidence; all were mutually reinforcing. It was not a hard case.

Larsen's real, though not specifically stated, quarrel with the interpretative method of the majority decision appears to be a quarrel with the *Restatement,* and with American and international interpretative practice as well. It appears that he does not believe that one should look first, in the interpretative process, to the "ordinary meaning of the words of the agreement in the context in which they are used."

Thus, mentioning "economic and sociological elements involved which are not stated in the text, such as national air power, distribution and gain of wealth, ease of transportation and prestige" (some of which one would have a hard time unearthing in this case!), he describes these as the "real problems under scrutiny," and considers that as soon as these "problems have been identified, the arbitrators should express their objectives." Interpretation in his view should include "the entire chain of communications, beginning with the first expressed thought of one party to a listener." Implicit in all this seems to be the idea that the decider should not begin either thinking about the case or framing his decision with a consideration of the words with which the parties attempted to describe the relationships which resulted in controversy. If Larsen is being misrepresented herein, then what in the world is he saying?

This apparent rejection of "ordinary meaning in context" as the starting point of analysis, is quite unreal and impractical. Normally, legislators, and at least equally as often diplomats, know what they are saying

and know the words to use to say it; they are, like lawyers who are well represented in both groups, word merchants.

So far as legislators are concerned, American courts have long known that, as Judge Leventhal put it recently, the "plain meaning of words is generally the most persuasive evidence of the intent of the legislature"; courts will "not upset the balances among interests deliberately arrived at by the legislature," expressed in words which call for a "logical and sensible result."[8] Obviously this means that the point of departure in thinking about a case, as almost all with experience will attest, is: "What is the language of the statute [or treaty]?"

It is a truism that if domestic courts are chary of upsetting "balances among interests deliberately arrived at" through legislative language, international tribunals will be even more wary of changing such balances of national interests among countries which have negotiated with at least as great preparation and attention to detail and language expressive of their intentions as legislatures. Since countries are far less accustomed to, or sanguine about, third-party adjudication of their external disputes, if domestic tribunals consider that the point of departure for interpretation is the legislative language because it is both right and prudent that the interpretative process there begin, it is an *a fortiori* case that both domestic and international tribunals employ this method for resolving disputes concerning agreements amongst countries which they are asked to decide.

A recent United States Supreme Court case on treaty interpretation, *Maximov* v. *United States,* 373 U.S. 49 (1963), could not be more illustrative. The question was whether an American trust whose beneficiaries were British subjects and residents and which retained capital gains income realized in the United States, was exempt from Federal income tax on such gains by virtue of the 1945 Income Tax Convention between the United States and the United Kingdom, which exempted capital gains of a "resident of the United Kingdom." The Second and Ninth Federal Circuit Courts of Appeals had split on the issue, the former denying the exemption. The Second Circuit case, the *Maximov* case, was taken by the Supreme Court.

It is apparent from the question that the threshold inquiry was whether an American trust is an entity separate from its beneficiaries within the meaning of the convention. The Court, in a unanimous opinion by Mr. Justice Goldberg, immediately went to the convention's terms and found through analysis of its "plain language" that it afforded no support to the argument which would disregard the trust's separate entity.

When it was then contended that equality of tax treatment was the objective of the treaty and that it would not be served where the United Kingdom imposed no tax on capital gains in the reverse situation, Mr. Justice Goldberg's rejoinder was sharp and clear. The "immediate and compelling answer to this contention is" that the "language of the Con-

[8] District of Columbia National Bank *v.* District of Columbia, 384 F. 2d 808, 810 (1965), 121 App. D.C. 196, 198.

vention itself not only fails to support the petitioner's view but is contrary to it." Moreover, it is

> particularly inappropriate for a court to sanction a deviation from the clear import of a solemn treaty between this nation and a foreign sovereign, when, as here, there is no indication that application of the words of the treaty according to their obvious meaning effects a result inconsistent with the intent or expectations of its signatories.

The relevant materials concerning the intent of the parties to the convention showed that the general purpose of the treaty was not to assure complete and strict equality of tax treatment—"a virtually impossible task in light of the different tax structures of the two nations"—but rather to "facilitate commercial exchange through elimination of double taxation resulting from both countries levying on the same transaction or profit; an additional purpose was the prevention of fiscal evasion." Neither of these purposes "requires the granting of relief in the situation here presented."

Methods other than that employed by the Court in *Maximov,* by the Circuit Courts as in *D.C. National Bank,* by the *Restatement* in Section 147, and by the majority decision in the *U.S.-Italy Aviation Arbitration,* would be quite unrealistic. Not only does the use of the treaty or legislative language as the departure point for the interpretative process give proper weight to the rôle of the parties at their important point of engagement. It also saves time and energy, enabling easy cases to be handled without turning them into exhaustive and exhausting inquiries where every conceivable "participant," or "value," or "interest," or "objective," or other conceivable checkpoint on a checklist, has to be examined minutely, though its relative significance is small or quite obvious. At the same time, this common-sense interpretative method which *starts* with the legislative or treaty language but is in no sense limited thereto, and which does not consider interpretative guidelines to be rigid rules, assists in the task of giving proper weight to all the evidence of the intention or expectation of the treaty countries, which is the ultimate task of the treaty interpreter.

STANLEY D. METZGER

A DECADE OF LEGAL CONSULTATION: ASIAN-AFRICAN COLLABORATION

While the attention of international legalists in general tends to center upon the International Law Commission, and particularly at the present time upon that body's work on the law of treaties, it would seem appropriate to draw attention to other agencies whose efforts are relatable to such work. One such agency is the Asian-African Legal Consultative Committee. At first called the Asian Legal Consultative Committee (with members nominated by the governments of Burma, Ceylon, India, Iraq, Japan and Syria, respectively), it came into existence as from November 15, 1956. Its statutes were broadened with effect from April 19, 1958, to