1938

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JUDICIAL LEGISLATION IN INTERNATIONAL LAW

By R. Y. JENNINGS*

A major problem which faces the modern international lawyer is that of devising machinery for the revision of legal rights. In the words of Westlake, the problem centers round that class of cases "in which opinion is felt to be outgrowing a rule, so that a change in the law may be asserted in good conscience to be necessary, and yet, from the want of an international legislature, it is difficult to effect such change otherwise than by setting the example of it."¹ The day when the international community will possess a legislature in the true sense of the word seems almost as far distant as when Westlake wrote. Meanwhile, lawyers can but examine such primitive machinery for international change as does exist and to attempt to estimate its value and limitations. It is the purpose, therefore, of this article to inquire into certain experiments which have been made in the way of judicial legislation as a rudimentary method of effecting international change and for grappling with that class of cases where to enforce clear legal rights is just as clearly inequitable; cases which illustrate what Senor de Madariaga has called "the injustice of justice."

The Behring Sea Arbitration of 1893² is an excellent example of the kind of dispute which cannot be settled by the mere determination of legal rights, and it appears to have been the first case in which the devise of legislation by the arbitrators was employed.³ It was a controversy of long standing involving important economic interests. The valuable fur bearing seals of the Behring Sea had attracted both American and Canadian

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¹International Law (2nd ed. 1910), Pt. I, 301.
³In his speech at the closing session of the tribunal Senator Morgan spoke of "this new and untried field of experiment". See Moore, op. cit. 934. See also Renault in Revenue Générale de Droit International Public, Vol. I (1894), 44.
fishermen. The latter adopted the method of intercepting and killing the seals on their passage across the Behring Sea; a method which, while causing a wasteful slaughter of the animals, was immediately highly profitable. These operations were carried on in the open sea well outside the three mile limit. Nevertheless, the annual slaughter of vast numbers of the fur seals necessarily conflicted with the interests of the American fishing industry centered on the Islands of St. Paul and St. George. The combined operations of the rival fishermen threatened, indeed, to settle the dispute in a remarkably short time by the simple process of the complete extermination of the fur bearing seal in the Behring Sea. But the Alaska Commercial Company persuaded Congress to attempt the regulation of the industry in the Behring Sea, even beyond the limits of territorial waters. With a view to enforcing the regulations British vessels were seized as much as seventy miles from the coast. Thus, when it was finally agreed to submit the dispute to arbitration, there were two quite distinct questions involved, both of which were to be answered if the controversy was to be settled to the satisfaction of both parties:

(i) The strictly legal question of the freedom of the seas and its corollary of the rights of British vessels to traverse those seas without let or hindrance.

(ii) The practical question of the necessity of devising measures for the protection of the fur seals and the preservation of the industry from extinction.°

In a communication of August 2, 1890, Lord Salisbury had offered to submit the whole matter to arbitration. Mr. Blaine, the American Secretary of State, replied in a letter dated December 17, 1890, in which, after setting forth certain questions which it was suggested should be submitted to the tribunal, he added that if the determination of those questions should leave the subject in such a position that the concurrence of Great Britain were still necessary for the protection of the fur-seal, it was further proposed that the tribunal of arbitration should determine what measures were necessary for that purpose. The devising of such regulations was obviously a matter requiring technical knowledge. Accordingly, the pro-

°For a statement of the technical issues involved see Barclay in Revue de Droit International, Vol. XXV, 417.

British & Foreign State Papers, Vol. 82, 277.

British & Foreign State Papers, Vol. 82, 277.
posal was closely associated with a parallel proposal for the appointment of a commission of experts. Both suggestions were embodied in Articles VII and IX of the Treaty of February 29, 1892.

The Award of August 15, 1893, being generally in favor of the British contentions in the matter of legal right, regulations were adopted, consisting of nine articles, by which were established, a zone where all seal fishing was prohibited, a closed season for the rest of the waters of the Behring Sea, and restrictions on the method and means of fishing, where and when it should be allowed. The tribunal also adopted three declarations. The first suggested that these regulations should be supplemented by further regulations applicable within the limits of the sovereignty of each of the two powers; the second contained the proposal that the two governments should come to an understanding with a view to prohibiting any killing of fur seals either on land or sea, for a period of two or three years, or at least one year; the third declared that in the opinion of the

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7 Article VII.—“If the determination of the foregoing questions as to the exclusive jurisdiction of the United States shall leave the subject in such position that the concurrence of Great Britain is necessary to the establishment of regulations for the proper protection and preservation of the fur-seal in, or habitually resorting to, the Behring Sea, the Arbitrators shall then determine what concurrent regulations outside the jurisdictional limits of the respective Governments are necessary, and over what waters such regulations should extend, and to aid them in that determination the Report of a Joint Commission, to be appointed by the respective Governments, shall be laid before them, with such other evidence as either Government may submit.”

8 Article IX.—“The High Contracting Parties having agreed to appoint two Commissioners on the part of each Government to make the joint investigation and Report contemplated in the preceding Article VII, and to include the terms of the said Agreement in the present Convention, to the end that the joint and several Reports and recommendations of said Commissioners may be in due form submitted to the Arbitrators, should the contingency therefor arise, the said Agreement is accordingly herein included as follows:

“Each Government shall appoint two Commissioners to investigate, jointly with the Commissioners of the other Government, all the facts having relation to seal-life in Behring Sea, and the measures necessary for its proper protection and preservation.

“The four Commissioners shall, so far as they may be able to agree, make a joint Report to each of the two Governments, and they shall also report, either jointly or severally, to each Government on any points upon which they may be unable to agree.

“These Reports shall not be made public until they shall be submitted to the Arbitrators, or it shall appear that the contingency of their being used by the Arbitrators cannot arise.”

9 British & Foreign State Papers, Vol. 84, 48.
10 British & Foreign State Papers, Vol. 85, 1158.
arbitrators "the carrying out of the regulations determined upon by the Tribunal of Arbitration should be assured by a system of stipulations and measures to be enacted by the two Powers." This method of implementing the regulations was observed by both parties: in Great Britain the Behring Sea Award Act\textsuperscript{11} was passed on April 23, 1894; the United States gave effect to the award in an Act of Congress\textsuperscript{12} of April 6, 1894.

In Article 9\textsuperscript{13} of the regulations the arbitrators had wisely provided for their revision. Nevertheless, as early as January 24, 1895, Sir Julian Pauncefote wrote to the Earl of Kimberley that:

"A strong effort is being made to reopen the whole question of the Fishery Regulations, on the ground that the Award Regulations are shown by experience to have entirely failed in their object, which was the preservation of the fur-seal species, and that, unless a speedy change be brought about in those Regulations extermination of the herd must follow."\textsuperscript{14}

This proved to be the prelude to a long dispute between the two governments as to whether the regulations had fulfilled their purpose. But they were finally shown to have been quite ineffectual to preserve the fur-seals, and a treaty was signed February 7, 1911\textsuperscript{15} between Great Britain and the United States, prohibiting pelagic sealing for a period of fifteen years, the articles to take effect as soon as an international treaty with similar stipulations should have been concluded between Great Britain, the United States, Japan and Russia. The contemplated treaty was signed at Washington July 7, 1911,\textsuperscript{16} and the ratifications were exchanged December 12, 1911.

A similar machinery for change, though differing in some important respects, was employed in the dispute between Great Britain and the United States concerning the North Atlantic Fisheries.\textsuperscript{17} By the Treaty of Peace of 1783, the inhabitants

\textsuperscript{11} Stat. 52 (1894).
\textsuperscript{12} Article 9, para. 2.—"The said concurrent Regulations shall be submitted every five years to a new examination, so as to enable both interested Governments to consider whether, in the light of past experience, there is occasion for any modification thereof."
\textsuperscript{14} U. S. Treaty Series, No. 564.
\textsuperscript{15} Scott, Hague Court Reports, 141.
of the United States continued to enjoy unimpaired their privileges of fishing in North Atlantic waters, in common with British subjects. After the war of 1812 a dispute arose as to whether the war had abrogated the treaty. On October 20, 1818, a new treaty was concluded, redefining the rights of the United States fishermen. Article I established certain limits within which the privileges were to continue. The United States then renounced for ever all liberties of taking, drying, or curing fish "on, or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above mentioned limits." Differences soon arose as to the meaning and scope of this article, and American fishing vessels were seized. The controversy was finally submitted for settlement to the Permanent Court of Arbitration, in accordance with the General Treaty of Arbitration, April 4, 1908. A special agreement was signed on January 27, 1909, setting forth the questions which were to be determined by the arbitrators. Article IV of this special agreement had the following provision:

"The Tribunal shall recommend for the consideration of the High Contracting Parties rules and a method of procedure under which all questions which may arise in the future regarding the exercise of the liberties above referred to may be determined in accordance with the principles laid down in the award. If the High Contracting Parties shall not adopt the rules and method of procedure so recommended, or if they shall not, subsequently to the delivery of the award, agree upon such rules and methods, then any differences which may arise in the future between the High Contracting Parties relating to the interpretation of the treaty of 1818 or to the effect and application of the award of the Tribunal shall be referred informally to the Permanent Court at The Hague for decision by the summary procedure provided in Chapter IV of The Hague Convention of the 18th of October, 1907."

While this article undoubtedly gave the arbitrators power to devise a method of procedure for the ready determination of

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controversies which might arise in the future, that determination was, in the language of the article, to be "in accordance with the principles laid down in the award." In other words, the framers of the compromise probably did not contemplate the article as enabling an actual modification of the law to be made, but only for the devising of regulations for the operation and enforcement of existing rights. But it is not only in primitive law that rules of procedure come very near in practice to being rules of substantive law, and the arbitrators were, in fact, able to employ these apparently restricted powers conferred upon them by Article IV, in order to secure what was essential a modification of the operation of the principles of law which they themselves had laid down in connection with the first and the fifth questions submitted to them.

The first question related to the claim of Great Britain of the right of regulating by municipal laws the exercises of the liberties allowed to the United States by the Treaty of 1818, in respect of such matters as times and methods of taking fish, provided only that such regulations were equitable and fair between local fishermen and the inhabitants of the United States, and not so framed as to confer any undue advantage on the former. It was contended by the United States that such regulations might not be issued by Great Britain "unless their appropriateness, necessity, reasonableness, and fairness be determined by the United States and Great Britain by common accord and the United States concurs in their enforcement." In point of law the tribunal found that Great Britain, in the exercise of her sovereign power, undoubtedly had the right to make such regulations as she claimed, quite independently of the United States. But, on her own admission, both in the Special Agreement and before the tribunal, such regulations must be fair and reasonable. It was precisely for the determination of questions which might arise in the future with regard to such matters, that the tribunal had been authorized to establish a procedure under the terms of Article IV of the Agreement. Accordingly, the tribunal restored to the very simple devise of

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21 Even Judge Kellog, in his observations in the Swiss-French Free Zones Case (infra, note 29), was willing to allow that the P. C. I. J. might make regulations which "are merely for the enforcement and enjoyment of the existing legal rights and obligations of the Parties". Series A. Nos. 24, 39.
recommending the establishment of Permanent Mixed Fishery Commissions, consisting of a representative of each Power. Where the national members failed to agree the matter was to be referred to a third non-national member to be appointed ad hoc. The total effect, of course, was much the same as would have been a rule of substantive law that the power of making regulations was vested not in Great Britain alone but in that country and the United States conjointly. It is true that the actual process of making the regulations was still vested in Great Britain, but, in the event of a dispute, the United States had what amounted to a power of veto where the regulation in question could be shown to be unfair or unreasonable. In other words, the claim of the United States that regulations should only be made by common accord, the United States concurring in their enforcement, was virtually allowed even after it had failed in point of strict legal right.

The tribunal employed the powers conferred by Article IV in still more startling fashion in connection with the fifth question submitted to it, which was, “from whence must be measured the three marine miles of any of the coasts, bays, creeks, or harbours” within which limits the United States had, in the Treaty of 1818 renounced all privileges of taking, drying or curing fish? To this question the arbitrators could, in point of law, give nothing more satisfactory than the following answer:

“In the case of bays the three marine miles are to be measured from a straight line drawn across the body of water at the place where it ceases to have the configuration and characteristics of a bay. At all other places the three marine miles are to be measured following the sinuosities of the coast.”

But the award went on to admit that though this was correct in principle it was not very practical, and accordingly, the arbitrators proposed to recommend a more concrete formula. Precedents were then examined where a ten mile limit had been adopted. Although these precedents were not sufficient to constitute a rule of international law, nevertheless, in pursuance of Article IV, the tribunal recommended that:

“In every bay not hereinafter specifically provided for the limits of exclusion shall be drawn three miles seaward from a straight line across the bay in the part nearest the entrance at the first point where the width does not exceed ten miles.”
Although the arbitrators describe this as a "method of procedure for determining the limits of the bays hereinbefore enumerated," the disguise of this rule as one of procedure is certainly very thin indeed. For, to establish the ratio by which a dispute is to be decided is clearly to establish what amounts to a rule of substantive law. Indeed, Drago, in his dissenting judgment, says that the ruling is "without the scope of the award."

But it is clear that, from the outset, the arbitrators interpreted Article IV as being designed not merely to provide for rules of procedure for the determination of future questions on the basis of the principles of law which they should find to be applicable to the case, but, despite the clear language of the Article, as a means of securing what amounted in practice to a modification of that law in the interests of justice. Writing in *Das Recht*, Professor Lammasch, the President of the tribunal, mentioned that the case contained elements of a compromise, "for which, however, the Tribunal had received special and exceptional authorization." An editorial comment appeared in the American Journal of International Law, pointing out that "a careful rereading of the special agreement fails to disclose evidence of the special and exceptional authorization mentioned by the President as justifying what he admits to be a compromise." Lammasch replied in the pages of that journal, explaining that he "alluded of course to the recommendations which the tribunal had proposed to both governments in virtue of Article IV of the special agreement concluded between the litigating Powers." Whether Article IV did in fact authorize the tribunal to compromise in this way may be open to doubt, but there can be no doubt that the result of their courageous interpretation of that Article was a statesmanlike solution of a controversy which had proved impossible of solution by the ordinary methods of diplomacy.

The success of the regulations recommended in this case is in sharp contrast with the almost unmitigated failure of those reached in the Behring Sea Arbitration. The contrast would seem to be due in no small measure to the differences of

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20 March 10, 1911, 147.
21 Vol. V (1911), 725.
22 Vol. 6 (1912), 178. See also Rechtskraft Internationaler Schiedsverträge, 65.
the subject matter of the respective regulations. The arbitrators in the last named case were called upon to deal with a highly technical matter in which the data were disputed even by experts. It is recorded in the correspondence\textsuperscript{25} that the expert commissioners who visited the islands in 1891 "found themselves unable to agree except as to a few vague general statements, and presented Reports in which they differed widely, not only as to the remedial measures necessary, but even as to many of the most important facts in seal life". Where experts were unable to agree it was hardly to be expected that laymen would be able to devise satisfactory regulations. Even in a highly developed system of municipal law possessing a legislature in the proper sense of the word, it is probable that regulations governing so technical a matter would be referred to an administrative function. Moreover, it became evident that a satisfactory system of regulations was only possible with the cooperation of Japan and Russia, countries which were not parties to the arbitration.\textsuperscript{26}

The Fisheries Arbitration also differs from the Behring Sea case in that the tribunal was only to "recommend" rules for the "consideration" of the high contracting parties in the former case, and provision was made to meet the contingency of the parties refusing to adopt such rules as the arbitrators might think fit to recommend. Thus, these recommendations were not legislation in any sense of the word; they merely formed the basis of discussion for the definitive treaty subsequently concluded between the parties,\textsuperscript{27} and in fact an examination of the rules recommended in the award and those actually adopted in that treaty reveals differences of detail. This variation of method is important, being one way in which the machinery which is eventually to bring the parties ad idem may be made more elastic. A compromise which embodies such a clause is much more likely to prove acceptable to the party which is in a position to benefit by the strict application of the law as it stands, than one which provides for the wholesale modification of that law,

\textsuperscript{25}The Earl of Kimberley to Sir J. Pauncefote, May 17, 1895; British & Foreign State Papers, Vol. 89, 786.
\textsuperscript{26}Mr. Olney to Viscount Gough, June 24, 1895; British & Foreign State Papers, Vol. 89, 818.
\textsuperscript{27}Signed at Washington, July 20, 1912; U. S. Treaty Series, No. 572.
and, at the same time, binds that power unequivocally to abide by such modification, the extent of which is as yet an unknown quantity.

Machinery for legal decision followed by judicial legislation was constituted though not actually employed in the controversy between France and Yugo-Slavia, concerning loans issued in France. The French Government and the Serb-Croat-Slovene Government entered into a special agreement of April 19, 1928, in which certain questions relating to the basis of payment were submitted to the Permanent Court. But the ascertaining of the legal position was not sufficient to dispose of the question since it was evident from the financial position of the Serbian Government that certain concessions would have to be made. Accordingly, the special agreement provided that within one month from the decision of the legal question, the representatives of the bondholders and of the creditor government should enter into negotiations with a view to making equitable concessions. In the event of the break down of these negotiations within three months from their initiation, the question of the concessions and of the method of giving effect to them was to be submitted to one or more arbitrators to be appointed by agreement between the two governments, or failing such agreement by the President of the Permanent Court. The negotiations, however, resulted in a convention signed July 26, 1933. Accordingly, the arbitral machinery was never actually brought into action. It will be noticed that this case introduced a variant of method in that the judicial legislation was to be done by a body different from that which determined the issue of right.

Since the judgment and opinions expressed in the Swiss-French Free Zones Case, it is doubtful whether the Permanent Court itself will ever undertake to perform such a legislative function. This dispute came before the Permanent Court by virtue of a Special Agreement reached between the parties in October 30, 1924, which submitted to the court the question of the interpretation of Article 435, paragraph 2, of the Treaty of Versailles, dealing with the customs and economic regime of the free zones of Upper Savoy and the Pays de Gex. It was intended that as soon as the Court had concluded its deliberations.

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*P. C. I. J., Series A, Nos. 20, 21.  
**P. C. I. J., Series A, Nos. 22 and 24.
ations on this question it should inform the parties of its opinion and allow them a specified time to conduct further direct negotiations on that basis. The court found itself unable to do this conformably with its statute, but resorted to the device of delivering what amounted to an interlocutory judgment in the form of an order of the Court relative to the time to be allowed for further negotiations, but which, incidentally, served to acquaint the parties with the probable content of the final judgment. On this basis direct negotiations were again instituted but without success. Consequently, it became necessary to have recourse to Article 2 of the Special Agreement, which provided that:

"Failing the conclusion and ratification of a convention between the two Parties within the time specified, the Court shall by means of a single judgment rendered in accordance with Article 58 of the Court’s Statute, pronounce its decision in regard to the question formulated in Article I and settle for a period to be fixed by it and having regard to present conditions, all the questions involved by the execution of paragraph 2 of Article 435 of the Treaty of Versailles."

But the order made December 6, 1930, revealed that the Court was sharply divided on the question of the powers of legislation which were thus sought to be conferred upon it. The majority expressed the opinion that "even assuming that it were not incompatible with the Court’s Statute for the Parties to give the Court power to prescribe a settlement disregarding rights recognized by it and taking into account considerations of pure expediency only, such power, which would be of an absolutely exceptional character, could only be derived from a clear and explicit provision to that effect, which is not to be found in the Special Agreement."

The main objections preferred by the majority appear to be twofold: first it was thought inconceivable that the court should initiate a settlement of a dispute which was contradictory to the principles which it had itself previously laid down with regard to the same dispute; secondly, that the judgment on the legal position would cease to have any object if it could immediately thereafter be disregarded. In anticipating the first objection, after referring to the Behring Sea Arbitration, the North
Atlantic Fisheries Arbitration, and the Serbian Loans case, Professor Basdevant, the French counsel, had pointed out that the contradiction was only apparent, for really the Court is asked to exercise two distinct functions.

"Mais la contradiction est purement apparante; elle n'existe pas au fond. Et vous voyez le meme tribunal exercer successivement deux attributions differentes,—se placant, tout d'abord, sur un terrain purement juridique, et ensuite sur le terrain de la convenance et de l'opportunité; pour l'exercice de la mission speciale qui lui a ete conferee d'etablir un nouveau regime juridique."3

This duality of function is aptly illustrated by a dispute which arose in the course of the Behring Sea Arbitration. The first case presented by the United States contained not only arguments of law but also evidence of facts necessary for the determination of the regulations provided for in Article VII. But the British case, when presented, was found to contain nothing but legal arguments, and no evidence of facts necessary for the determination of regulations. By the direction of the President of the United States a protest was addressed to the British Minister at Washington representing this as a failure to comply with the requirements of the Treaty. Britain replied that questions of right depended upon matters of law and not upon the habits of seals, and that the regulations under Article VII were to be adopted only in the contingency that the decision under Article VI was unfavorable to the United States. Nevertheless, the British Government offered to submit the report made by the British Commissioners under the provisions of Article IX, and the offer was accepted.31

The same difference was again in evidence during the argument of the case, Mr. Phelps for the U. S. A. contending that the whole case of each side should be presented together. Sir Charles Russell for Great Britain asserted that upon the interpretation of the treaty, the question of rights should first be disposed of before the regulations were considered. Without definitely committing himself to one view or the other the President asked that counsel, so far as possible in the arrangement of their arguments, should keep separate the discussion of matters

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31 Moore, International Arbitrations, 306.
relating to right and those relating to the regulations which might eventually be proposed. This requirement that the presentation of data relative to the two functions of the tribunal shall be kept separate is not merely one of convenience. In deciding what modification of the law is necessary, the arbitrators can only take into consideration those facts which are put before them by the counsel of the parties to the dispute. The essence of any law suit consists in the narrowing down of a dispute to a few outstanding issues. Obviously, such a process is entirely unsuited to be a preliminary to legislation. Hence, the supreme importance of keeping the cases relating to law and to regulation distinct.

The second objection of the majority of the Permanent Court, based on the argument of redundancy, has more substance. The question presents itself, why this duality of function at all? If it be recognized that some modification of the law is necessary why not empower the arbitrators immediately to devise equitable rules to govern the relationship of the parties? The answer to this question appears to be threefold.

In the first place it will be observed that in all cases referred to, the first part of the award, dealing with the legal question, was a vindication of a protest against unilateral action. In the Behring Sea case Great Britain recognized that a reglement for the control of fur seal fishing was necessary but denied that the United States acting alone might institute such a regime. In the North Atlantic Fisheries case the United States demanded to be allowed to play her part in the devising of rules governing the fisheries. In the present case Switzerland was protesting against the suppression of the free zones by unilateral action on the part of France.

Secondly, this method is peculiarly well adapted to that class of cases where there is, at the outset, some doubt as to the law as it stands. In the Behring Sea case, notwithstanding the confidence of the British lawyers that the legal position was perfectly clear, the American lawyers were equally confident of making out a perfectly good case based on the law of nature and bonos mores. Similarly, in the Fisheries case it was by no means obvious that the power of making regulations was vested in Great Britain alone. Of course, where the dissatisfied

Moore, International Arbitrations, 908. See also id. at 912.
party admits that she has no case based on existing legal rights then this dual method can have no useful application. But where the contrary obtains the question of right ought first to be determined before modification is essayed. There can be no modification of that which is itself uncertain and undetermined.

Lastly, in all the cases passed under review, the process of making regulations was one of modification of the old law and not of unrelated new legislation. The new regulations were evolved from considerations of expediency and equity, but it becomes part of the equity that the existing structure of legal rights should be interfered with as little as possible consistently with the exigencies of the circumstances which make modification desirable. Consequently, the first process of the determination of rights, far from being redundant, becomes the very basis of the modified system. The truth of this is singularly well illustrated by the Behring Sea case. That award remains the *locus classicus* of the doctrine of the freedom of the seas; the regulations were abandoned rather less than two decades after the date of the award. Even had the latter proved successful, the first part of the award would have remained the fundamental law, the regulations being, as it were, the exceptions which proved the rule.

This is the answer to those who claim that the process is nothing more than one of conciliation by an arbitral tribunal. Actually, it is a process which differs considerably from the ordinary modes of conciliation. Conciliation aims at a reconciliation of the policies of the parties; the process we are discussing aims at the reconciliation of equitable claims and legal rights. That end is sought by the use of a *judicial* reasoning. A quotation from Professor Brierly is apposite:

"Reason in this context does not mean the unassisted reasoning powers of any intelligent man, but a *judicial reason*, which means that a principle to cover the new situation is discovered by applying methods of reasoning which lawyers everywhere accept as valid; for example, the consideration of precedents, the finding of analogies, the disengagement from

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This assumption seems to be implicit in the *Observations* of Mr. Kellog in the *Free Zones Case*. See Series A, Nos. 24, 41.
accidental circumstances of the principles underlying rules of law already established." 34

Thus, for instance, in the Atlantic Fisheries case the ten-mile test for bays was adopted not because it was a peculiarly convenient figure in the circumstances, nor yet because it was most likely to please both parties, but because there was already in the relations of the two parties considerable precedent for the adoption of such a test. That this process does in fact differ considerably from conciliation is shown by the fact that a dispute thus settled by arbitration is also ex hypothesi one which had defied the ordinary methods of conciliation by diplomacy.

A more extreme statement of the conservative position is to be found in the Observations of Judge Kellog in the Free Zones case, where he objected that the view expressed by the majority left it open to the Court in some future case to decide "purely political questions upon considerations of expediency without regard to the legal rights of the Parties". In view of the plain language of Article 38 of the Statute of the Permanent Court that "This provision shall not prejudice the power of the court to decide ex aequo et bono, if the parties agree thereto," it is difficult to follow Mr. Kellog's argument that this provision does not mean what it plainly says. But the principle objection of Mr. Kellog appears to be that the court should decide a case on strictly judicial lines and not admit compromise on the ground of equity or expediency, a function which is proper to an arbitral tribunal rather than to a court of justice. "It seems to me incontestable", he says, "that nothing could be more fatal to the prestige and high character of a great International Court of Justice than for it to become involved in the political disputes pending between nations, questions which may arise because of economic rivalry or racial, social or religious prejudices. No principle of law can be invoked for the settlement of such questions." It may be objected that equity itself is a principle of law. But if by a "principle of law" is meant a rule of strict law, then the argument, it is submitted with great respect, contains its own refutation. No principle of law will serve to settle many of these disputes, but rather, taken alone, will aggravate them. The application of principles of equity in such cases will serve to augment the

34 Law of Nations (2d ed. 1936), 55.
prestige of the Permanent Court rather than to lower it, and, incidentally, greatly widen its sphere of usefulness.

In conclusion, it may be said that there is here a valuable method of attempting to reconcile those apparently irreconcilable essentials of law, certainty and change. But it is a method which ought properly to be resorted to only with the special authorization of the parties. The fiasco of the Maine Boundary Arbitration\textsuperscript{35} is a monumental warning against the danger of an arbitral tribunal usurping functions which it was never authorized to perform. Finally, it must be remembered that this machinery for judicial legislation is, at the most, a temporary devise for ensuring that the law will not become entirely stultified, until such time as the international community possesses a legislature in the true sense of the term; for this it is not and cannot be an adequate substitute. Its value is not permanent. It is not an end in itself but a means to an end, for it suffers from the weakness inherent in any system whereby the same individuals are asked to perform entirely different functions calling for such entirely different kinds of skill, as do judicial decision and legislation. The fact that those individuals may have the assistance of commissions of experts whereby necessary technical data are supplied does not really meet this objection. The fact remains that the arbitrators themselves are left to translate that data into legislation. That they have information which would ordinarily be available only to statesmen does not make them any the more skillful in using that information. As has been well said by Sir John Fischer Williams, "it would be the insincerest flattery to pretend that a great international judge or lawyer is the same thing as a great international statesman".\textsuperscript{36}

\textsuperscript{36} International Change and International Peace (1932), 9.
KENTUCKY LAW JOURNAL

Volume XXVI January, 1938 Number 2

Published four times a year by the College of Law, University of Kentucky: Issued in November, January, March, and May.

Subscription Price $2.50 per Year....................75c per Number

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