EQUITY IN INTERNATIONAL LAW: ITS GROWTH AND DEVELOPMENT

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I. INTRODUCTION

According to Montesquieu, human reason is the heart of law, and for that reason it is not difficult to find similarities in the fundamental principles of all legal systems. Human reason should be supported by morality and a sense of justice. Thus, law comes closer to equity.

The relationship between law and equity found expression in ancient laws. It found expression not only in the Biblical[1] law but also in other scriptures. The canon law of Rome gave a definite recognition to equity, and in fact, the term "equity" is derived from the Roman *aequitas*. Early societies used to interpret the sanctity and function of law in relation to morality. Even at a later date, Lord Chancellor Woolsey maintained that:

> [The King] ought of his royal dignity and prerogative to mitigate the rigour of the law, where conscience hath the most force; therefore, in his royal place of equal justice, he hath constitute a chancellor, an officer to execute justice with clemency, where conscience is opposed by the rigour of law. And therefore the Court of Chancery hath been heretofore commonly called the Court of Conscience; because it hath jurisdiction to command the high ministers of the common law to spare execution and judgment, when conscience hath most effect.[2]

However, the importance of equity in the administration of justice can hardly be over-emphasised. The recognition of this aspect of justice has been explicit in some legal systems and implicit in others, but nowhere can a clear definition of equity be found. Consequently, this has given rise to much speculative work on the nature, content, and uses of equity not only in municipal legal systems, but also in the sphere of international law.

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[1] *Isaiah* 59:14.

[2] 5 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 219 (3d ed. 1945).

II. PROBLEMS OF DEFINITION

According to Jowitt's *Dictionary of English Law*,[3] "equity" means "fairness or that rule of conduct which in the opinion of a person or class ought to be followed by all other persons." The term "fairness" is the crucial word in this context. Despite the jurisprudential complexity attached to the word, it may be safer to assume that the meaning of the term should be traced in its benignant spirit and in the complex of circumstances. Jowitt further elaborated that moral equity "should be the genius of every kind of human jurisprudence; since it expounds and limits the language of the positive laws, and construes them not according to their strict letter, but rather in their responsible and benignant spirit." However, in all fairness it may be stated that in his attempt to "define" equity, Jowitt "described" equity. Because the connotation of the term covers a wide area, it is difficult to define it. Therefore, equity has been descriptive rather than definitive. The question then arises: In what sense does equity form a part, if any, of international law? The most logical answer to this question was given by Lauterpacht who stated that:

> It forms part of it to the same degree to which considerations of morality, good conscience and good faith have been generally adopted as part of the municipal systems of various States. Some of these principles have obviously found their way into English equity in the restricted meaning of the term; others have found a place in the English common law proper just as they have found a place in the Codes of France, Germany, or Switzerland.[4]

Therefore, the meaning of equity can always be found in its attributes, which are traceable both in the municipal and international legal systems. It is in this sense that equity has been applied by international tribunals, arbitral or otherwise, in the administration of justice.[5] How-

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[3] W. JOWITT, DICTIONARY OF ENGLISH LAW 724 (C. Walsh ed. 1959).

[4] 1 H. LAUTERPACHT, INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSH LAUTERPACHT 257 (E. Lauterpacht ed. 1970) [hereinafter cited as 1 H. LAUTERPACHT, COLLECTED PAPERS].

[5] Decisions illustrative of the meaning and applicability of equity are: Fisheries Case (United Kingdom v. Norway), [1951] I.C.J. 116; North Sea Continental Shelf Cases, [1969] I.C.J. 3; Chorzow Factory Case, [1927] P.C.I.J., ser. A, No. 9; Serbian and Brazilian Loans Cases, [1929] P.C.I.J., ser. A, Nos. 20, 21; Diversion of Water from the Meuse Case, [1937] P.C.I.J., ser. A/B, No. 70; Venezuelan Preferential Case (Germany v. Venezuela), Hague Court Reports (Scott) 55 (Perm. Ct. Arb. 1904); Orinoco Steamship Company Case (United States v. Venezuela), Hague Court Reports (Scott) 226 (Perm. Ct. Arb. 1910); North Atlantic Coast Fisheries Case (Great Britain v. United States), 11 U.N.R.I.A.A. 167 (Perm. Ct. Arb. 1910); Island of Palmas Case (Netherlands v. United States), 2 U.N.R.I.A.A. 829 (Perm. Ct. Arb. 1928); Cayuga Indians Case

ever, in the *North Sea Continental Shelf Cases*,[5.1] the International Court has been quite specific as to the meaning of equity. The Court said:

> On a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves—that is to say, rules binding upon States for all delimitations;—in short, it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles, in accordance with the ideas which have always underlain the development of the legal regime of the continental shelf in this field, namely:
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> > *(a)* the parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it;
> > *(b)* the parties are under an obligation to act in such a way that, in the particular case, and taking all the circumstances into account, equitable principles are applied,—for this purpose the equidistance method can be used, but other methods exist and may be employed, alone or in combination, according to the areas involved . . . .[6]

The Court found that the Continental Shelf of any state must be the natural prolongation of its land territory and must not encroach upon what is the natural prolongation of the territory of another state. What was noticeable in the judgment was that as "no one single method of delimitation was likely to prove satisfactory in all circumstances, . . . [a] delimitation should, therefore, be carried out by agreement (or by reference to arbitration); and . . . that it should be effected on equitable

(Great Britain v. United States), 6 U.N.R.I.A.A. 173 (1926); Carlos Klemp Case (Germany v. Mexico), 5 U.N.R.I.A.A. 577 (1927); the Hudson Bay Company and Puget Sound Agricultural Company disputes, 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS 237 (1898); The "Betsey," 4 J. MOORE, INTERNATIONAL ADJUDICATIONS 179 (Modern Series 1931).

[5.1] [1969] I.C.J. 3.

[6] *Id.* at 47.

principles."[7] Therefore, on a further interpretation of the Court's statement, it may be stated that even where "practice" is not uniform and consequently law is not uniform either, decisions should be effected on equitable principles not only to uphold justice but also to avoid inconsistency with certain basic legal notions. This is not true, of course, if the parties themselves agree to settle the dispute by agreement or to refer such a dispute to arbitration. The Court also found that in order to attribute appropriate meaning to equity, various relevant factors should be considered, as were geological and geographical factors in the present case,[8] and a reasonable degree of proportionality among factors should be maintained.

However, the meaning of equity should not be extended too far. At this point caution should be exercised as to the elements which should be included in explaining the meaning of equity. First, in examining the growth of equity in international law, no attempt should be made to emphasise the contribution of any particular municipal legal system. Secondly, "equity" does not necessarily imply "equality,"[9] because in order to maintain equality in the theoretical sense, an inequity may be created. The International Court of Justice, in connection with the apportionment of the Continental Shelf according to the equidistant method, went on to say:

> There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf, any more than there could be a question of rendering the situation of a State with an extensive coastline similar to that of a State with a restricted coastline. Equality is to be reckoned within the same plane, and it is not such natural inequalities as these that equity could remedy. . . . It is therefore not a question of totally refashioning geography whatever the facts of the situation but, given a geographical situation of quasi-equality as between a number of States, of abating the effects of an incidental special feature from which an unjustifiable difference of treatment could result.[10]

What the Court brought out in its statements was the legal interpretation of equality; *i.e.*, equality should be interpreted in a relative sense. Consequently, any departure from that kind of interpretation would

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[7] *Id.* at 36.

[8] *Id.* at 51. *See also* Brown, *The North Sea Continental Shelf Cases*, 23 CURRENT LEG. PROB. 191, 193 (1970).

[9] North Sea Continental Shelf Cases, [1969] I.C.J. 3, 50.

[10] *Id.*

lead to an inequity.[11] Thirdly, the differences between the "meaning" of equity and equity in the context of *ex aequo et bono* should be maintained. Lauterpacht observed that:

> '*Ex aequo et bono*' in this context has little, if anything, in common with equity conceived as a legally recognized qualification and modification of the law by considerations of morality and fairness. Settlement *ex aequo et bono* is a legislative settlement which consciously departs from the existing law. It is not a source of existing law; it is the basis of future law.[12]

That it is the basis of future law has been clearly indicated by the phrase "if the parties agree thereto," which is found in article 38(2) of the Statute of the International Court of Justice. In other words, such functions of the Court do not emanate from within the Court; in order to function in this situation, the Court will have to have powers conferred from outside; *i.e.*, by the parties to the dispute themselves. This touches upon the "application of existing law" vis-à-vis the "creation of new law." No doubt, difficulties are likely to be encountered in order to maintain the difference between the application of the existing law and the creation of new law; *i.e.*, between the legislative and judicial functions. The object of article 38, paragraph 4, of the Statute of the Permanent Court of International Justice, as pointed out by Fachiri, was "to meet the eventuality of a case where the issues were unsuitable for decision on strictly legal grounds and yet the parties desired to have recourse to the court to obtain from it a binding decision arrived at 'according to equity and good conscience.' "[13] It would be irrelevant at this stage to prolong this point, but mention should be made that the Permanent Court of International Justice in the *Case of the Free Zones of Upper Savoy and the District of Gex*[14] considered whether it was authorised by its statute to exercise such a function.[15] However, as Habicht stated:

> If two States recognize, as did France and Switzerland in 1919 in regard to the Free Zones of Upper Savoy and the District of Gex, that

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[11] Judge Hudson, however, supported the maxim of English equity, "equality is equity," in his individual opinion in the *Diversion of Water from the Meuse Case*, [1937] P.C.I.J., ser. A/B, No. 70, at 77.

[12] 1 H. LAUTERPACHT, COLLECTED PAPERS, *supra* note 4, at 256. *See also* H. LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 313-28 (1933).

[13] Although Fachiri made this remark with reference to the Permanent Court of International Justice, it would be equally applicable if brought before the International Court of Justice. A. FACHIRI, THE PERMANENT COURT OF INTERNATIONAL JUSTICE: ITS CONSTITUTION, PROCEDURE AND WORK 104 (2d ed. 1932) [hereinafter cited as A. FACHIRI].

[14] [1930] P.C.I.J., ser. A, No. 24 [hereinafter cited as Free Zones Case].

[15] This position is held by Mr. Kellogg in his Observations. *Id.* at 37 *et seq.*

> the rights and obligations in force "no longer correspond to the present circumstances" and if they do not succeed in formulating a new and more equitable legal relationship, an advisory opinion *ex aequo et bono* by the court would facilitate an understanding between the parties as to a future more equitable regime.[16]

Fachiri emphasised that:

> The intention, it is submitted, is precisely to provide for cases where the application of rules and principles of law is either inappropriate or impossible, and to enable the court to arrive at a decision according to what appears to be fair, reasonable, and expedient in the particular circumstances. It cannot, however, be too strongly insisted upon that this faculty is exceptional, and can never be exercised without the consent of both parties. That it will be resorted to sparingly, if at all, may be inferred from the fact that the court has not so far been called upon to make use of it.[17]

However, the question remains whether the Court is bound to give a decision even though the parties have agreed to seek a decision *ex aequo et bono*. This is primarily because the functions of the Court are essentially judicial.[18] Yet, it may perhaps be stated that decisions *ex aequo et bono* imply decisions based on considerations of expediency which might necessitate a departure from strict law.[19]

III. THE NATURE AND CONTENT OF EQUITY IN INTERNATIONAL LAW

The history of equity in the international legal system dates back as far as the 18th century. Although there is no definition of equity, it may be said that the nature and content of equity in the international legal system is no different from that in municipal legal systems. On the other hand, the principal legal systems of the world, by virtue of their antiquity or because of their experience crystallised through ages, made a good impact upon the administration of justice in the international legal

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[16] M. HABICHT, LE POUVOIR DU JUGE INTERNATIONAL DE STATUER "EX AEQUO ET BONO" 90 (1935) [hereinafter cited as M. HABICHT].

[17] A. FACHIRI, *supra* note 13, at 106.

[18] C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 374 (rev. ed. P. Corbett transl. 1968).

[19] Article 14 of the Covenant of the League of Nations provided that the Court might also give an advisory opinion upon any dispute or question referred to it by the Council or by the Assembly. The Covenant did not, however, mention under which paragraph of article 38 the question would fall. When the *Free Zones Case* was referred to the Court, it said, "[T]he Court, being a Court of justice, cannot disregard rights recognized by it, and base its decision on considerations of pure expediency . . . ." Free Zones Case, *supra* note 14, at 15. *See also* Cheng, *Justice and Equity in International Law*, 8 CURRENT LEG. PROB. 202 (1955).

system. At this point, it may be useful to determine the nature and content of equity.

"The principles of equity illustrate, nay illuminate, but never precisely define, the concept which lies behind, understood but unexpressed."[20] Though "unexpressed" the effects are conspicuous in the deliverance of justice. Friedmann, in stating the meaning of law said that "the rule of law simply means the 'existence of public order.' It means organised government, operating through various instruments and channels of legal commands. In this sense, all modern societies live under the rule of law, fascist as well as socialist and liberal States."[21] The question arises: What is the rule of law to establish a public order *stricto sensu*? In this sense of "order" or "justice," every tyrant upholds law and establishes an "order." Presumably, Friedmann had not this kind of "order" in his mind as he qualified his statement by use of the term "organised government." Therefore, a legal autonomy of the law may not be sufficient for the purposes of society; it will be short of any functional approach. Equity is founded upon "reason" and "conscience."[22] The presence of reason and conscience in equity gives it the capacity to conform with the norms of the society. Keeton, in determining the scope of modern equity, said that "[i]t may mean a principle embodying a recent development in the law, and not necessarily having an origin in pre-existing equitable rules, remedying a defect which had formerly existed, and which therefore, to that extent, embodies once again an abstract ideal of justice."[23] It is this inherent characteristic of equity, to embody a recent development in the law, that makes up for the deficiencies of law. The English jurists explained this as "gloss" on common law. In more general terms, it may be said that equity fills in the gaps in law.

In illustrating the above statement, it may also be stated that in the national and international spheres, equity connotes "ideas of fairness," "good faith," and "moral justice," and it is in this sense that equity is recognised as a basis of international law. "Good faith" coincides with one of the fundamental principles of customary international law. Concerning "moral justice," Lauterpacht said:

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[20] F. EVERSHED, ASPECTS OF ENGLISH EQUITY 17 (1954).

[21] W. FRIEDMANN, LAW AND SOCIAL CHANGE IN CONTEMPORARY BRITAIN 281 (1951).

[22] *See generally* H. HART, THE CONCEPT OF LAW (1961); L. FULLER, THE MORALITY OF LAW (1964).

[23] G. KEETON, AN INTRODUCTION TO EQUITY 6 (6th ed. 1965). For the incidence of the growth of equity in the English legal system, *see* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 675-707 (5th ed. 1956); S. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 74-87 (1969).

> While the securing of moral justice is an essential object of the law, that object cannot always be achieved. It must yield, in particular cases, to requirements of certainty, stability and fulfilment of legitimate expectations—all of which are directly related to moral justice. It is in that sense that there must be understood the various treaties providing for arbitral settlement of disputes between States on the basis of 'law and equity' or 'international law and equity.'[24]

Although the completeness of the sources of law rests with the freedom of action of a state, the ultimate basis of law is a discretionary process which is not determined by legal considerations. It is determined by reference to a political and social reality actually in operation. Where there is no discretion, there is no law. Discretion helps bring out the natural reason of the case. Therefore, where positive law is unwritten or unclear, natural equity—natural reason of the case—comes into play.[25] The ultimate basis of international law, far from being arbitrary, represents the obtainable maximum of approximation between law and reality.[26] Reality touches upon reason and justice, and equity consists of reason and justice.

IV. THE USES OF EQUITY IN INTERNATIONAL LAW

The uses of equity in international law were not clear until 1920 despite the fact that efforts to humanise law in the international sphere were deemed to be a continuous process. The uses of equity and the development of equitable principles have evolved slowly in international law owing to the absence of any force capable of compelling obeisance. On the other hand, the use of equity in municipal legal systems, whether in common law or civil law, has been common and conspicuous. The elements of good faith in the law of contracts, remedies in case of mistakes, valid consent in the case of legality of contracts, unjust enrichment, and torts are only a few of the equitable concepts in a municipal legal system.[27]

Equity originated to provide necessary flexibility in the law. Radbruch rightly pointed out:

> [T]he history of law, on two separate occasions, shows us a splendid example of equity, though first invoked simply as a means of correct-

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[24] 1 H. LAUTERPACHT, COLLECTED PAPERS, *supra* note 4, at 85.

[25] J. DERRETT, JUSTICE, EQUITY AND GOOD CONSCIENCE IN CHANGING LAW IN DEVELOPING COUNTRIES 120 (J. Anderson ed. 1963).

[26] For an examination of the role of equity in the civil law and common law systems see Yntema, *Equity in the Civil Law and the Common Law*, 15 AM. J. COMP. L. 60 (1966).

[27] For a good discussion of this aspect of the topic see Newman, *Equity in Comparative Law*, 17 INT'L & COMP. L.Q. 807 (1968).

> ing specific laws, freeing itself more and more from this restricted function and becoming an independent source of fresh rules of law, first, institutions, indeed complete new systems of law; I mean the *aequitas* of the ordinances of the Roman Praetor, on the one hand, and Equity in English law, on the other hand.[28]

The history of law, whether municipal or international, is bound with the social and political attitudes in a community. The concept of sovereignty has always put the rule of law in the international community in jeopardy. This was reiterated by the Permanent Court of International Justice in the *Case of the S.S. Wimbledon*.[29] It appears from the decision of the Court that a state may enter into treaty obligations which effectively limit its sovereignty, and it may thus agree to submit all classes of disputes to arbitration whether such disputes be regarded as justiciable or non-justiciable. As it was contended that disputes of the latter type could not be solved in accordance with the general principles of international law, it was argued that they might be solved by the application of equitable principles. The possibility of settling non-justiciable disputes by the application of legal rules appeared to meet both theoretical and practical difficulties. However, it was Vattel who, as early as 1758, championed the cause of arbitration in the settlement of non-justiciable disputes in international society.[30] This term was also used by Grotius.[31] Without going into the historical details of this matter, it may be said that many writers including Lorimer, Westlake, and Rouard de Card questioned the suitability of arbitration in the settlement of all kinds of non-justiciable disputes, especially those relating to national independence. Westlake, in particular, championed the cause of arbitration in other spheres of international law, but he unfailingly pointed out the dangers of deciding a dispute by means of an obsolete rule.[32] What Westlake pointed out in the early part of the 20th century is still valid today. This is due to the absence of an effective international legislature, which could make possible the enactment of binding legal rules and which could fill the gaps in the law created by social and political changes. One must also consider the gaps due to discrepancies in state practice. The gaps in the existing system of international law

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[28] G. RADBRUCH, JUSTICE AND EQUITY IN INTERNATIONAL RELATIONS 2, The New Commonwealth Institute Monographs, London, series B., no. 1.

[29] [1923] P.C.I.J., ser. A., No. 1, at 23-28.

[30] 2 E. DE VATTEL, LE DROIT DES GENS (1758).

[31] Grotius' idea of the functions of an arbitrator in international law later raised controversies. H. GROTIUS, DE JURE BELLI ET PACIS (1625).

[32] 1 J. WESTLAKE, INTERNATIONAL LAW 332-50 (1904).

and the defects which arise from the absence of an international legislature were made manifest at the First Codification Conference at The Hague in 1930. Particular reference was made to disputes concerning the breadth of territorial waters and the responsibility of states for injuries to aliens. Pragmatically, the possibilities of establishing an effective international legislature are small. Conflicts of interests between members of the international community are too great, and the needs and demands of members of the international community change too rapidly. Given the nature of the international community, the concept of general acceptance by states of obligatory means of settling disputes in accordance with strict principles of international law may be unworkable.

The nature of the international community necessarily rules out the possibilities of deciding cases invariably by judicial process *stricto sensu*. When an unforeseen and unparalleled dispute regarding treaty obligations arises, it may be difficult to decide it in accordance with existing law, and recourse to equitable principles would be in order. As stated before, the English legal system also encountered the same difficulties in so far as its domestic legal disputes were concerned.

However, the absence of any well-defined norm in early 18th century international society, coupled with the problem of proof of custom, and the uncertain scope and impact of the concept of international public policy, did not help to create a congenial atmosphere for the application of equity. Thus, during this early developmental phase there was a general non-acceptance of equitable principles and an unavailability of equitable remedies in the international sphere. The reason for the reluctance of states to settle disputes by the application of equitable principles is explained "by the fact that the potential scope for, and probable effect of, the application of equitable principles by international adjudication cannot readily be foreseen in any detail, particularly as equity in its formative stages is largely a matter of adapting principles to circumstances." [33]

The concept of the equitable solution of international disputes has been understood since the Jay Treaty of 1794, in which the word "equity" was first used. Jenks observed that equity has an "amorphous quality" and lacks the institutional consistency necessary to crystallise principles into clear-cut obligations.[34] It was not until the establishment of the Permanent Court of Arbitration that decisions on the basis of

[33] C. JENKS, THE PROSPECTS OF INTERNATIONAL ADJUDICATION 318 (1964).
[34] C. JENKS, LAW IN THE WORLD COMMUNITY 10 (1967).

equitable principles received institutional recognition as a method of deciding disputes in the international community.

On the other hand, one should not ignore the controversy prevalent among jurists as to the suitability of using equitable methods in solving disputes in international law. Scott found that unlike a judge, an arbitrator "is free to decide the controversy according to the terms of the submission, the equity of the case or the dictates of his own conscience";[35] and he found justification for making a distinction between the award of an arbiter and the judgment of a court in the statement made by Aristotle that "the arbiter looks to what is fair, the judge to what is law." Scott's view was supported by Baldwin, Elihu Root, and even by Wehberg, though Wehberg had earlier held a different opinion. At the same time jurists were apprehensive of the enormous discretion which arbitrators might exercise, and arbitral procedure also appeared to them to be based on a *compromis*,[36] even though a *compromis* very often helped indicate whether international law and equity, or equity alone, should be the governing rule in deciding a dispute.[37] Exponents like Balch[38] and Lauterpacht and also the Advisory Committee of Jurists in drawing up the Statute of the World Court upheld the importance and admissibility of arbitration as a legal process. This was the pattern of conflicts among international jurists, and it had a considerable bearing upon the growth of equity in the international community.

At this point it may be worthwhile to mention that the scope of equity in international law is not only found in the multilateral treaties like the U.N. Charter, but also in the international customary law. As far as the U.N. Charter is concerned, the pledges of the Member States to fulfill the obligations in good faith and to respect the general principles of good neighbourliness, as expressed in paragraph 4 of article 2, and article 74 respectively, are two direct examples of the recognition of principles of equity. The role played by equity in the international cus-

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[35] 1 J. SCOTT, THE HAGUE PEACE CONFERENCES OF 1899 AND 1907, at 189 (1909) [hereinafter cited as 1 J. SCOTT].

[36] Under this category come Dennis and Leiber.

[37] A *compromis*, in brief, is the legal instrument which forms the judicial basis of the jurisdiction of the arbitrator, which fixes the limits of his powers as judge. In certain cases, a completely changed situation would demand a decision of a dispute by the application of equitable principles; this does not seem necessary where a treaty provides for the application of principles of law existent at the time of the dispute. *See* 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS 653 *et seq.* (1898); 1 J. SCOTT, *supra* note 35, at 243.

[38] It has been pointed out that the recent tendency is to "confound International Arbitration with Municipal Arbitration and to minimize if not indeed to deny entirely the judicial quality of arbitration as a component part of the Law of Nations." Balch, *"Arbitration" as a Term of International Law*, 15 COLUM. L. REV. 590 (1915).

tomary law is similar. The principles of good faith and valid consent have more often than not been the guiding principles of treaty relations, and in the course of time, they have been accepted in international customary law. In some cases such transition is overt, while in others creeping,[39] but in every case it has been welcome.[40]

V. APPLICATION OF EQUITABLE PRINCIPLES IN INTERNATIONAL CASES

Despite the differing opinions of jurists, the international community has come to recognise the applicability of equitable principles. The growth of equity and the role played by it in international law may be traced by reference to various decisions of the claims commissions and other judicial tribunals. In this connection the Commission set up by the Jay Treaty in 1794 between Great Britain and the United States is instructive. British subjects had suffered losses in failing to recover pre-war debts. There were certain legal and political objections in the United States to the recovery of such debts. The Commission appointed under the Jay Treaty was instructed to ascertain the losses according to the merits of the several cases, due regard being had to all the circumstances thereof, and as equity and justice shall appear to them to require.[41] The American commissioners withdrew from the Commission because of serious differences over some issues germane to the dispute; *i.e.*, the meaning of the term "lawful impediments" and the ascertainment of interest on debts during the period of war. The American commissioners pleaded that the Commission should be guided by equity. The withdrawal of the American commissioners from the Commission was due more to "national differences" rather than the absence of equity in deciding these issues. The Commission had, however, failed to determine the equities of each individual case.[42] Moore has pointed out that the disruption of the Commission originated in the controversy as to the propriety of obtaining the determination of fundamental questions of "construction and principle" as "preliminary points" separately and in advance, instead of deciding them step-by-step in the examination and determination of the facts and the law in individual cases. Moore also observed that:

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[39] *See* Schwarzenberger, *Equity in International Law*, in THE YEAR BOOK OF WORLD AFFAIRS 346, 353 (G. Keeton & G. Schwarzenberger eds. 1972) [hereinafter cited as Schwarzenberger].

[40] Good faith, valid consent, or principles of equity in general have not only been found in the jurisprudence of various claims commissions, but also in the administration of justice by various arbitration tribunals in the settlement of boundary disputes.

[41] Treaty with Great Britain on Amity, Commerce, and Navigation, Nov. 19, 1794, art. 7, 8 Stat. 116 (1794), T.I.A.S. No. 105 (effective Oct. 28, 1795).

[42] This dispute was finally decided by the Treaty with Great Britain on Claims, Jan. 8, 1802, 8 Stat. 196 (1802), T.I.A.S. No. 108 (effective July 15, 1802).

> [T]his policy potentially involved more than a matter of procedure, in proportion as the principles sought to be established would have the effect of dispensing with the consideration and proof of facts, or of classes of facts, in the allowance of claims. . . . [T]he wisdom of imposing as a matter of fixed policy, against reasoned dissent and opposition, the antecedent determination of general principles after the evidence in the claims was before the commission and ready for examination in the ordinary way, is open to question.[43]

Despite the "national differences" between the United States and Great Britain, the United States did not deny the importance of a decision on the basis of equitable principles, although they failed to find a suitable definition of equity.

In the *Aroa Mines Case*,[43.1] the umpire of the British-Venezuelan Commission emphasized that the Commission should decide all claims upon a basis of absolute equity.[44] He also noted that international law is assumed to conform to justice and to be inspired by the principles of equity. The umpire also stated that where equity and justice differ, equity must yield, because the obligation of the prescribed oath (that decisions be made according to justice) is the superior rule of action.[45] This aspect of equity was again confirmed by the arbitration tribunal in the *Cayuga Indians Case*.[46] The tribunal's decision was based on equitable principles as well as the consideration that the Indians had no independent international status. The tribunal justified its award to the Cayugas on the grounds, *inter alia*, that in case of a legally anomalous situation, as was in the present case:

> [R]ecourse must be had to generally recognized principles of justice and fair dealing in order to determine the rights of the individuals involved. The same considerations of equity that have repeatedly been invoked by the courts where strict regard to the legal personality of a corporation would lead to inequitable results or to results contrary to legal policy, may be invoked here. In such cases courts have not hesitated to look behind the legal person and consider the human individuals who were the real beneficiaries. Those considerations are even more cogent where we are dealing with Indians in a state of pupilage toward the sovereign with whom they were treating.[47]

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[43] 3 J. MOORE, INTERNATIONAL ADJUDICATIONS 263 (Modern Series 1931).

[43.1] J. RALSTON, VENEZUELAN ARBITRATIONS OF 1903, S. DOC. No. 316, 58th Cong., 2d Sess. 344 (1904) [hereinafter cited as J. RALSTON].

[44] *Id.* at 386.

[45] *Id.*

[46] (Great Britain v. United States), 6 U.N.R.I.A.A. 173 (1926).

[47] *Id.* at 179.

Again, in describing the historical development of equity, the tribunal said:

> An examination of the provisions of arbitration treaties shows a recognition that something more than the strict law must be used in the grounds of decision of arbitral tribunals in certain cases; that there are cases in which—like the courts of the land—these tribunals must find the grounds of decision, must find the right and the law, in general considerations of justice, equity and right dealing, guided by legal analogies and by the spirit and received principles of international law. Such an examination shows also that much discrimination has been used in including or not including "equity" among the grounds of decision provided for. In general, it is used regularly in general claims arbitration treaties. As a general proposition, it is not used where special questions are referred for arbitration.[48]

The application of equitable principles in the administration of justice is also found in the Hudson Bay Company and Puget Sound Agricultural Company disputes with the United States,[49] as well as in a 1903 protocol between the United States and Venezuela.[50] In the protocol the countries agreed that "[t]he commissioners, or, in case of their disagreement, the umpire, shall decide all claims upon a basis of absolute equity, without regard to objections of a technical nature, or of the provisions of local legislation."[51] The firm conviction of the umpire in the *Aroa Mines Case* was that although international law is not invoked in these protocols, neither is it renounced. In the judgment of the umpire, since it is a part of the law of the land of both governments, and since it is the only definitive rule between nations, "it is the law of this tribunal interwoven in every line, word, and syllable of the protocols . . . ."[52] This conviction indicates the arbitral trend toward accepting equitable principles in the administration of justice.

Of the cases decided by the Permanent Court of Arbitration, particular mention should be made of the *North Atlantic Coast Fisheries Case*[53] and the *Norwegian Shipowners' Claims Case*.[54] One of the questions submitted to the tribunal in the *North Atlantic Coast Fisheries Case* was whether or not fishing rights, granted to the United States in common with British subjects in accordance with the treaty of 1818,

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[48] *Id.* at 180.

[49] 1 J. MOORE, HISTORY AND DIGEST OF THE INTERNATIONAL ARBITRATIONS 237-70 (1898).

[50] Protocol with Venezuela on the Arbitration of Claims, Feb. 17, 1903, T.S. No. 420.

[51] *Id.* art. I.

[52] J. RALSTON, *supra* note 43.1, at 386.

[53] (Great Britain v. United States), 11 U.N.R.I.A.A. 167 (Perm. Ct. Arb. 1910).

[54] (Norway v. United States), 1 U.N.R.I.A.A. 307 (1922).

were subject to reasonable regulation by Great Britain, Canada, or Newfoundland without the consent of the United States. One of the criteria of reasonableness was that the regulations be "equitable and fair as between local fishermen and the inhabitants of the United States exercising the said treaty liberty, and not so framed as to give unfairly an advantage to the former over the latter class."[55] The tribunal found in favour of Great Britain, basing its judgment essentially upon reasonableness and equitable principles. The tribunal also recommended the adoption of such guidelines for all future disputes between the parties.[56]

In the *Norwegian Shipowners' Claims Case*, the tribunal discussed the *compromis* provision for a decision in accordance with the "principles of law and equity." In determining the meaning of the phrase, the tribunal said:

> The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any State. . . .
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> . . . The Tribunal cannot ignore the municipal law of the Parties, unless that law is contrary to the principle of the equality of the Parties, or to the principles of justice which are common to all civilised nations.[57]

According to Habicht, this understanding of the phrase "permits the judge to disregard positive domestic law in so far as it is contrary to the general principles of justice."[58]

It is also worth considering whether or not the World Court has recognised equitable principles in the relevant cases brought before it or set any pattern in this regard. In the *Diversion of Water from the Meuse Case*,[58.1] Judge Hudson observed that "under Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."[59] Judge Hudson supported the maxim "equality is equity," which exercised a great influence in the creative period of the development of the Anglo-American law.[60] Nevertheless, he cautioned that:

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[55] North Atlantic Coast Fisheries Case (Great Britain v. United States), 11 U.N.R.I.A.A. 167, 179 (Perm. Ct. Arb. 1910).

[56] *Id.* at 189.

[57] Norwegian Shipowners' Claims Case (Norway v. United States), 1 U.N.R.I.A.A. 307, 331 (1922).

[58] M. HABICHT, *supra* note 16, at 66.

[58.1] [1937] P.C.I.J., ser. A/B, No. 70.

[59] *Id.* at 77.

[60] *Id.*

> The general principle is one of which an international tribunal should make a very sparing application. It is certainly not to be thought that a complete fulfilment of all its obligations under a treaty must be proved as a condition precedent to a State's appearing before an international tribunal to seek an interpretation of that treaty. Yet, in a proper case, and with scrupulous regard for the limitations which are necessary, a tribunal bound by international law ought not to shrink from applying a principle of such obvious fairness.[61]

There are also certain other cases where equitable principles have been referred to by the Permanent Court of International Justice; for instance, in the *Mavrommatis Jerusalem Concessions Case*[62] and the *Serbian and Brazilian Loans Cases*.[63] In the former case, equitable principles were applied in connection with the assessment of compensation, while in the latter case the Court held that "[t]he economic dislocations caused by the war did not release the debtor State, although they may present equities which doubtless will receive appropriate consideration in the negotiations . . . ."[64]

In the *Fisheries Case*,[64.1] the International Court of Justice regarded certain economic interests and geographical factors, for example, unusual configuration of the coast,[65] as equitable rather than legal considerations. The Court said, "there is one consideration not to be overlooked, the scope of which extends beyond purely geographical factors: that of certain economic interests peculiar to a region, the reality and importance of which are clearly evidenced by a long usage."[66] In other words, the Court emphasised the functional aspect of law. In the *North Sea Continental Shelf Cases*, the Court emphasised the importance of taking resort to equitable principles when it said that "the international law of continental shelf delimitation does not involve any imperative rule and permits resort to various principles or methods, as may be appropriate, or a combination of them, provided that, by the application of equitable principles, a reasonable result is arrived at."[67] The Court went on to say that "[a]s the operation of delimiting is a matter of determining areas appertaining to different jurisdictions, it is a truism to say that the determination must be equitable; rather is the

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[61] *Id.*
[62] [1925] P.C.I.J., ser. A, No. 5.
[63] [1929] P.C.I.J., ser. A, Nos. 20, 21.
[64] *Id.* at 40.
[64.1] [1951] I.C.J. 116.
[65] *Id.* at 133.
[66] *Id.*
[67] North Sea Continental Shelf Cases, [1969] I.C.J. 3, 49.

problem above all one of defining the means whereby the delimitation can be carried out in such a way as to be recognized as equitable."[68] In his separate opinion in the *Barcelona Traction, Light & Power Co. Case*,[68.1] Judge Fitzmaurice reminded of the necessity of applying equitable principles in deciding a dispute. He emphasised the point that:

> There have been a number of recent indications of the need in the domain of international law, of a body of rules or principles which can play the same sort of part internationally as the English system of Equity does, or at least originally did, in the Common Law countries that have adopted it.[69]

It can, therefore, be said that there has been a tendency to apply or at least to speak of equitable principles in the administration of justice both by the limited tribunals,[70] such as the claims commissions, and the international judicial institutions, such as the Permanent Court of Arbitration or the World Court. In most cases the treaties themselves refer to equity, and in such instances the application of equitable principles are certainly within the limits of law. However, where no reference to the application of equitable principles is made (*i.e.*, the written law), the court or the arbitration tribunal, as the case might be, must take the initiative to attain justice through the application of equitable principles. Equity not only fills in the gap in the law in such cases, but also prevents the pronouncement of *non liquet*.[71] "There must be a final solution to each problem with which courts are confronted, and in no case may the judge refuse to give judgment on account of a supposed gap in the law."[72] In case of a supposed *non liquet, i.e.*, absence of any normative law, the function of the judge will be to pronounce judgment by resorting to such considerations which would make the judgment reasonable and appropriate in a given situation; otherwise, judicial passivity would

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[68] *Id.* at 50.

[68.1] [1970] I.C.J. 3.

[69] *Id.* at 85 (separate opinion).

[70] The tribunal in the *Cayuga Indians Case* (Great Britain v. United States), 6 U.N.R.I.A.A. 173, 180 (1926), emphasised that only the General Claims Arbitrations provided decisions "in accordance with treaty rights, and with the principles of international law and equity" or "according to justice and equity" as a matter of course. Other arbitrators decided "according to such evidence as shall be laid before them"; *i.e.*, all equity considerations were omitted, leaving only questions of fact.

[71] For a short discussion of *non liquet* see J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT 153-64 (1959). Stone foresees certain situations where a court might find it necessary to declare *non liquet*.

[72] R. ANAND, COMPULSORY JURISDICTION OF THE COURT OF INTERNATIONAL JUSTICE 59 (1961).

amount to a denial of justice.[73] In his evaluation of the sources of international law, Lauterpacht stated: "[A]lthough the choice of the ultimate basis of the law is a discretionary process inasmuch as it is not determined by legal considerations, it is not an arbitrary process. For it is determined by reference to a political and social reality actually in operation."[74]

VI. THE PATTERN OF EQUITY IN INTERNATIONAL LAW

The evolutionary pattern of equity, if any, will be indicative of its inherent qualities. The establishment of any pattern by any force is closely linked with the consistency of its application and use. Consequently, the pattern is largely in the hands of the persons who are empowered to apply such a force. Over the centuries, equity has been in the hands of administrators of justice. According to Professor Schwarzenberger, three factors influence the application of the *jus aequum* rule: (1) the consensual basis of the jurisdiction of all international arbitral judicial bodies; (2) the duties of good faith imposed by treaty obligations upon both parties to a treaty with respect to their relations with each other and with the tribunal, and the duties of good faith imposed upon the arbitrators and judges themselves; and (3) the discretion which, by implication, the judicial bodies may exercise in the administration of justice.[75] Justice Cardozo noted, however, that whatever the conduct of a judge may be at a particular time, the teleological conception of his functions must be ever in his mind.[76] As stated earlier,[77] the element of "fairness" in equity bears the testimony of dynamism, and the attribute of equity has kept international law functioning in accordance with the contemporary concept of justice.[78] In performing this function, equity directly confronts irrelevant ideas so that a functional approach to the law may be justified. In the *Fisheries Case* the

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[73] In interpreting article 38(3) of the Statute of the Permanent Court of International Justice, Lauterpacht stated:

> Article 38(3), by throwing open to the judge the unbounded field of the legal experience of mankind, in substance removes altogether the possibility of the absence of an applicable rule of law; at the same time it formally achieves the same end for the simple reason that the prohibition of *non liquet* is in itself a general principle of law recognized by civilized States.

1 H. LAUTERPACHT, *supra* note 4, at 243.

[74] *Id.* at 92.

[75] Schwarzenberger, *supra* note 39, at 363.

[76] B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 102 (1921).

[77] *See* text accompanying notes 20-26 *supra*.

[78] *See* Fisheries Case, [1951] I.C.J. 116 and Cayuga Indians Case (Great Britain v. United States), 6 U.N.R.I.A.A. 173 (1926).

International Court of Justice rejected the contention of the United Kingdom that Norway's base line was unjustifiable, stating:

> [A]lthough it is not always clear to what specific areas [the ancient concessions] apply, the historical data produced in support of this contention by the Norwegian Government lend some weight to the idea of the survival of traditional rights reserved to the inhabitants of the Kingdom over fishing grounds included in the 1935 delimitation . . . . Such rights, founded on the vital needs of the population and attested by very ancient and peaceful usage, may legitimately be taken into account in drawing a line which, moreover, appears to the court to have been kept within the bounds of what is moderate and reasonable.[79]

Indeed, in the *North Sea Continental Shelf Cases*, the International Court emphasised the importance of the utilization of rules of equity in the disposition of justice:

> Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles.[80]

In that case the Court pointed out the inappropriateness of the application of equity "simply as a matter of abstract justice."[81] It emphasised that the propriety of the application of equity will be maintained if it is applied "in accordance with the ideas which have always underlain the development of the legal régime of the Continental Shelf."[82] This aspect of the Court's finding was certainly indicative of a teleological approach to international law.[83] The Court made use of equitable principles in order to render a practical decision. It accounted for such external factors as geography and geology. By rendering a functional decision, with equity as its aide, the Court gave a proper interpretation to its statute in accordance with the mores of the day. Equity reaffirmed the principle that the basis of law is to be found in social utility.

In a *de facto* system of conflict resolution, however, it is not the court system, but a system of direct bargaining between the parties that

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[79] Fisheries Case, [1951] I.C.J., 116, 142.

[80] North Sea Continental Shelf Cases, [1969] I.C.J. 3, 48.

[81] *Id.* at 47.

[82] *Id.*

[83] For a good discussion of the teleological approach to international law see Cheng, *The First Twenty Years of the International Court of Justice*, in THE YEAR BOOK OF WORLD AFFAIRS 241 (G. Keeton & G. Schwarzenberger eds. 1966).

works. Conflicts are often settled not upon legal considerations but upon the "basis of straight bargaining power and ability to wait."[84] In such a situation, the dispute will normally not be referred to arbitration[85] or to any other form of judicial tribunal, but if the dispute is referred, even by way of unilateral application,[86] the judicial tribunal may be unable to discharge its functions.[87] The question of applying equitable principles becomes remote not only because of the complexity of the issues, but also because of the behaviour of states in international society, whether organised or unorganised. The *jus strictum* rule, as opposed to the *jus aequum* rule, reigns supreme in the unorganised international society. This can be verified by considering international customary law.[88] The *jus aequum* rule is not totally absent in the unorganised international society; however, its subordination to *jus strictum* makes it practically inoperative. Nevertheless, the failure of states to apply *jus aequum* may create a form of estoppel, which may bear directly upon the subsequent action of the states.[89] In such a situation, "reciprocity", "reasonableness", etc., are not the main considerations of justice, because arbitrariness in the name of *jus strictum* comes into play. The political law maker, as the representative of certain interests, will establish rules favourable to himself, rather than rules justified by *jus aequum*:

> [He] may attempt to disguise his partisanship by referring to wider community interests, or he may subordinate the immediate interests of the groups he represents to longer-term interests of the body politic on the basis of values he holds or asserts. But he is under no obligation to derive his decision from the prevailing norms.[90]

As long as international law is an embodiment of "power" there is no

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[84] Bredemeir, *Law as an Integrative Mechanism*, in SOCIOLOGY OF LAW 52, 65 (V. Aubert ed. 1969).

[85] In 1837, France made a series of demands arising out of the alleged unjust treatment of her subjects in Mexico. Mexico proposed to submit the claims to arbitration but France rejected such a proposal. The dispute between Colombia and the United States concerning the recognition of the State of Panama by the United States is another example. The Government of Colombia rejected the legality of the United States action and proposed to submit their dispute, which also involved the application of article 35 of the treaty of 1946 with New Granada, to the International Court of Arbitration, but the United States rejected this proposal. *See* [1903] FOREIGN REL. U.S. (1904).

[86] *See, e.g.*, Case of the S.S. "Wimbledon," [1923] P.C.I.J., ser. A., No. 1.

[87] *See, e.g.*, Free Zones Case, *supra* note 14.

[88] *See* G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 118 (1971).

[89] Bowett, *Estoppel before International Tribunals and its Relation to Acquiesence*, 33 BRIT. Y.B. INT'L L. 176 (1957). *See also* MacGibbon, *The Scope of Acquiesence in International Law*, 31 BRIT. Y.B. INT'L L. 143 (1954).

[90] M. KAPLAN & N. KATZENBACH, THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW 15 (1961).

necessity, nor is there a duty, to apply the rules of *jus aequum*.[91] Consequently, *jus aequum* has little influence upon the development of fundamental principles of international customary law in unorganised international society. Professor Schwarzenberger rightly observed that "[u]nder international customary law, neither the *jus aequum* rule nor any other rule of international law constitutes part of *jus cogens*."[92]

However, in the organised international society, equitable principles have been accepted in a less reserved manner. Nevertheless, there are certain areas, namely sovereignty, recognition, self-defence, freedom of the seas, and international responsibility, where the application of the *jus aequum* rule cannot always be assumed.[93] Power corrupts, and corruption makes the working of *jus aequum* impossible. As long as matters of international law are politically charged, *jus aequum* is relegated to a subordinate status. The provisions of article 2, paragraph 4, of the U.N. Charter read in conjunction with articles 51, 53, 106, and 107 are only pious vows, although indicative of good faith in the field of self-defence. On the more humanitarian level (for example, with regard to pollution of the seas or conservation of natural resources), pledges of good faith are not pledges of "good faith" in its true connotative sense and thus are remote from *jus aequum*. Consequently, *jus aequum* plays the same narrow role irrespective of the kind of the international society, whether organised or unorganised. The improvement, if any, of the position of *jus aequum* in organised society is of a notional nature. Room has been made for *jus aequum* not in place of *jus strictum*, but alongside of it. The pledges of the Member States, as embodied in article 74 of the U.N. Charter, confirms that their policy with regard to non-self-governing territories must be based on the general principles of good-neighbourliness. The vows of equal treatment concerning the basic objectives of the trusteeship system, as appears in article 76, paragraph (d), of the U.N. Charter is another example in this regard. "Good neighbourliness, like tolerance, is a principle with a potential of applications in specific legal obligations which we have only begun to explore."[94] A renewed effort has been made in the Universal Declaration of Human Rights to maintain the equality of all human beings on the principles of equity. Less politically charged international institutions of a limited nature have, however, been able to administer justice in accordance with the principles of equity:

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[91] This does not, however, apply to the international laws of reciprocity and co-ordination. *See* G. SCHWARZENBERGER, POWER POLITICS 222-26 (1964).

[92] Schwarzenberger, *supra* note 39, at 358.

[93] *Id.* at 363-67.

[94] C. JENKS, LAW IN THE WORLD COMMUNITY 90 (1967).

> This does not imply that the specialised agencies of the United Nations are or can ever be political eunuchs unmoved by the passions of the world. . . . None of them is entitled to claim that its field of action is so technical that it should be immune from the political consequences of decisions taken in a proper manner by the political organs of the United Nations. What it does imply is a general recognition that the responsibility for primarily political decisions should rest with the political organs . . . .[95]

Essential and practical applications of *jus aequum* can be seen in the workings of the international financial institutions, such as the International Monetary Fund and the International Bank for Reconstruction and Development. They are even evident in certain limited arbitration tribunals like the Administrative Tribunal of the International Labour Organization.[96]

With reference to the International Monetary Fund, it should be mentioned at the outset that the power of interpretation of its articles is vested in its Executive Directors and Board of Governors and not in any judicial body. This is true even though the Fund is authorised by its relationship agreement with the United Nations to request advisory opinions of the International Court of Justice upon any legal question which may arise within the scope of its activities, except those questions which relate to its relationship with the United Nations. Although the method of interpretation adopted by the Fund is not a thoroughly judicial one,[97] "it has never been claimed that the Fund's power of interpretation is of a metalegal character . . . ."[98] Given the nature of its power of interpretation, the reasons for its taking resort to the principles of equity may be examined.

One of the cardinal characteristics of equity is its inherent ability to meet the challenges posed by the inadequacies in the existing law. The incidence of such inadequacies in the existing law of the international community is due largely to the rapidly changing nature of the international community. A rigid interpretation of law, which does not account for the realities of the situation, will only produce an inequity. Gold has

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[95] *Id.* at 111-12.

[96] *See* Advisory Opinion on the Judgments of the Administrative Tribunal of the International Labour Organizations, [1956] I.C.J. 77, 100.

[97] In explaining the nature of article XVIII of the Fund Agreement, Fawcett observed that it "is doubtful whether the language of Article XVIII and its connected clauses can be read as implying that the task of interpretation under Article XVIII is judicial and that the Executive Board must act in these cases as a court." Fawcett, *The Place of Law in an International Organization*, 36 BRIT. Y.B. INT'L L. 321, 326-27 (1960).

[98] Gold, *Interpretation by the International Monetary Fund of its Article of Agreement—II*, 16 INT'L & COMP. L.Q. 289, 291 (1967) [hereinafter cited as Gold].

rightly observed that "[t]he readiness of the Fund to adopt a teleological approach to interpretation when appropriate has given the Fund the capacity to deal with the problems of a constantly and sometimes rapidly evolving international monetary order."[99] The Fund has proved this in many instances, notable of which are its resistance to multiple rates of currency and recently, in its policy concerning "special drawing rights."

The endeavour made by the Western European countries in 1958 to render their currencies externally convertible (in order to enable a non-resident holder of such a currency to purchase any other currency against it freely) is an example of the former situation. According to article IV, section 5(a), a member shall not propose a change in the par value[100] of its currency except to correct a fundamental disequilibrium. According to article IV, section 6, if a member changes its par value in total disregard of the objection of the Fund, the member will be declared ineligible to use the Fund's resources unless the Fund determines otherwise. Such provisions of the Fund Agreement give rise to two obligations: (1) that no member shall be allowed to abandon the par value without establishing another one, and (2) that since the obligation to maintain exchange stability and the exchange margin of 1 percent[101] is based on the system of par value, any fluctuation of the exchange rate outside the permitted margin and established unitary rate will amount to a breach of obligation. In 1950, owing to the continued investment of capital in Canada from the United States, Canada abandoned the par value for its dollar. Such an action on the part of the Canadian Government constituted a clear breach of obligation with the Fund Agreement. The Fund's response to Canada's action certainly indicated that recourse should be taken to fairness and equity in the settlement of an issue, whether economic, legal, or both. The Fund recognised the economic necessities for Canada's action and observed:

> The circumstances that have led the member to conclude that it is unable both to maintain the par value and immediately select a new one can be examined; and if the Fund finds that the arguments of the member are persuasive it may say so, although it cannot give its approval to the action. The Fund would have to emphasize that the withdrawal of support from the par value, or the delay in the proposal

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[99] *Id.* at 293.

[100] In terms of article IV, section 1(a), and article XX, section 4(a), each member is obliged to establish a par value for its currency in terms of gold or the United States dollar.

[101] International Monetary Fund Articles of Agreement, Dec. 27, 1945, art. 4, §§ 3, 4(a), 60 Stat. 1401 (1945), T.I.A.S. No. 1501, 2 U.N.T.S. 39.

> of a new par value that could be supported, would have to be temporary, and that it would be essential for the member to remain in close consultation with the Fund respecting exchange arrangements during the interim period and looking toward the early establishment of par value agreed with the Fund. No other steps would be required so long as the Fund considered the member's case to be persuasive . . . .[102]

The Fund retained its right to take action against Canada at any time if justification for Canada's action became no longer sustainable. By pronouncing such a decision, the Fund indirectly filled in the gap in the Agreement that under certain circumstances the stringent policy of the par value may have to be relaxed.

Another important area where the principles of equity play a great role in making decisions is in the mechanics of the "special drawing rights" operated within the Fund. For the purpose of brevity, a reference will be made only to the bases of allocation and cancellation of such rights where the essence of fairness and justice also become manifest. The basic idea behind the special drawing rights is to provide a system whereby the quantity of international liquidity can be objectively regulated in the perspective of the prevailing economic climate. It is for this reason that such rights are not granted on a permanent basis. The nature of the drawing rights in this context has not yet been fully determined; *i.e.*, whether the drawing rights are in money or credit, international legal tender, or international fiat money.[103] It has, however, been realised that because of the function that the special drawing rights perform, any legal settlement of an issue arising in relation to such rights may not be attained by legislative enactments which are in disregard of the political, economic, and social factors related to that legal issue.[104] In other words, an inequity will be attained by the failure to account for the nonlegal factors which influence the legal issue.

The decision-making process with regard to allocation of special drawing rights is operated initially by an informal consultation between the national representatives and the Managing Director of the Fund. Any proposal for allocation (or cancellation) will be made by the Managing Director in accordance with article XXIV, section 1(a), of the Articles of Agreement of the Fund. The provisions of this article require that the long-term global need must be taken into account, and that all

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[102] 1951 IMF ANN. REP. 40.

[103] *See* Gold, *The Next Stage in the Development of International Monetary Law: The Deliberate Control of Liquidity*, 62 AM. J. INT'L L. 365, 379-80 (1968). *See also* Busschau, *The Role of Gold in World Monetary Arrangements*, 2 J. WORLD TRADE L. 363, 371 (1968).

[104] *See* M. SHUSTER, THE PUBLIC INTERNATIONAL LAW OF MONEY 198-226 (1973).

forces tending to inflate or deflate the world monetary situation will have to be discouraged.

In cancelling the special drawing rights of a member, the principles of equity are observed. Special drawing rights are granted for a basic period, which is usually 5 years; however, this rule is not a rigid one. Section 3 of article XXIV authorises the Fund to change the length of the basic period or to start a new basic period, if at any time the Fund finds it desirable to do so because of an unexpected major development. In order to observe "fairness" in dealing with each case, the terms and conditions of these rights are allowed to vary according to the nature of the transaction. "The characteristics of special drawing rights are not the result of any single approach. They are the distillation of a chemistry—some might say an alchemy—in which many theories and many compromises, economic, legal and political, went into the alembic."[105] In ascertaining the approach of the Fund to interpretation of its Articles of Agreement, Gold has remarked that "[a] close study of the interpretative work of the first two decades of the Fund would undoubtedly show great catholicity in the approach to that work."[106] The catholicity in the approach to its interpretative work is germane to the purposes of the Fund Agreement (article I) which lists as one of its purposes: "To give confidence to members by making the Fund's resources available to them under adequate safeguards, thus providing them with opportunity to correct maladjustments in their balance of payments without resorting to measures destructive of national or international prosperity."[107]

In conclusion, it is still appropriate to rehearse what Friedmann said:

> The challenge posed by the changes in the structure of the international society of our time does not mean the abolition of self-interest in international relations; it does, however, radically affect the *dimensions* and *objectives* of self-interest. Such new developments as the international financial and welfare agencies . . . are a tentative expression of new world-wide interest in security, survival and co-operation for the preservation and development of vital needs and resources of mankind. . . .
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[105] J. GOLD, SPECIAL DRAWING RIGHTS: CHARACTER AND USE 28 (Int'l Monetary Fund Pamphlet No. 13, 1970); *see* J. POLAK, SOME REFLECTIONS ON THE NATURE OF SPECIAL DRAWING RIGHTS (Int'l Monetary Fund Pamphlet No. 16, 1971).

[106] Gold, *supra* note 98, at 291.

[107] International Monetary Fund Articles of Agreement, Dec. 27, 1945, art. 1, § 4, 60 Stat. 1401 (1945), T.I.A.S. No. 1501, 2 U.N.T.S. 39.

> What is not yet sufficiently realised is that International Law is . . . a vital factor in the evolution of international society.[108]

Equity is a viable element of such a legal system.

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[108] W. FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 57, 59 (1964).

ERRATA

Volume 5, Issue 2

Please note the following changes to be made in the article "Equity in International Law: Its Growth and Development" by S.K. Chattopadhyay.

p. 381, n. *	insert "The author is also grateful to Professor T. Opsahl of Norway, Director of Studies during the session, for his very helpful guidelines and comments." at end of footnote
p. 383, n. 6	change "47." to "46-47."
p. 384, l. 35	insert "in law" after "*i.e.*, equality"
p. 385, n. 15	substitute "was" for "is"
p. 386, l. 26	change "is" to "are" and "that" to "those"
p. 387, l. 18	insert "The scope of equity is wider than that of law." after n. 22
p. 387, l. 28	insert "in all legal systems" at end of sentence
p. 388, l. 24	insert "which force is available in municipal spheres." at end of line
p. 390, l. 23	insert "presumably" after "policy,"
p. 390, l. 24	insert "generally" after "of equity"
p. 391, l. 16	insert "to" after "help"
p. 391, l. 22	insert "even though equity was well-recognised in municipal legal spheres." after "community"
p. 392, l. 6	insert "Some" after "Application of Equitable Principles In"
p. 392, l. 16-18	"according to the merits . . . shall appear to them to require" should appear as directly quoted material
p. 392, l. 25	substitute "inadequacy" for "absence"
p. 392, n. 41	change "art. 7" of Treaty to read "art. 6"
p. 393, l. 15	insert "and that it was a very important role of action prescribed to govern the Commission in its deliberations." after n. 44
p. 393, l. 17	substitute "emphasised" for "stated"
p. 395, l. 26	substitute "and/or" for "or"
p. 397, l. 20	insert "and in such cases also the application of equity may be deemed to be a judicial procedure." at end of line
p. 398, l. 17	substitute "the" for "both"
p. 398, l. 20	substitute "are granted" for "may exercise"
p. 400, l. 19	insert "in such circumstances" after "maker"
p. 401, l. 26	substitute "this notional change in so far" for "that"
p. 401, l. 35	insert "primarily" after "beings"; insert "It is noticeable that the" before "less"
p. 402, l. 9	substitute "The essence" for "Essential"
p. 403, l. 22	substitute "establishment of" for "established"