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L. F. Goldie

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L. F. E. GOLDIE*

Equity and the International Management of Transboundary Resources

INTRODUCTION

Increasingly sophisticated human uses of natural resources and additional discoveries of mineral deposits with biological and energy potential mandate the creation of new management regimes for transboundary resources. The problem of establishing managerial and distributional regimes agreeable to the states which are adjacent to such deposits and which lay individual claims to share in the common resources presents important questions. In this article the question of how equitable principles arising under international law can provide both guidelines and benchmarks for the draftsmen of treaties establishing regimes of sharing and for policy makers involved in the apportionment of the resources will be discussed. This article has a three-fold purpose. First, the article will seek to establish the importance of the relationship of instrumental equities to economic efficiency as guides in the construction, participation, and management of regimes. Second, the value of replacing adversarial legal confrontations with managerial regimes of coordination and of distributive justice will be emphasized. These envisaged regimes are directed to the development of the regulated resource and are offered to improve the requisite techniques for more economical exploitation of the natural resources. Third, the article attempts to establish criteria for the equitable distribution of the wealth in terms of the equities of proportionality.

The application of equity in international law as an indispensable rectifying factor in the process of decisionmaking, including negotiation which culminates in agreement,¹ will be considered in the first part of this article. Equity will be discussed in terms of (1) the "General Principles of Law Recognized by Civilized Nations";² (2) the "General Principles of Law" and the *Ex Aequo et Bono* clause of Article 38 of the Statute of the International Court of Justice (ICJ);³ (3) the sources of

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*Professor of Law; Director, International Legal Studies Program, Syracuse University College of Law.

1. For a general discussion of equity in international law, see W. JENKS, *THE PROSPECTS OF INTERNATIONAL ADJUDICATION* 316-427 (1964).

2. Statute of International Court of Justice [hereinafter cited as ICJ Statute], Art. 38. See also Goldie, *Reconciling Values of Distributive Equity and Management Efficiency in the International Commons*, *THE SETTLEMENT OF DISPUTES ON THE NEW NATURAL RESOURCES* 335 (workshop sponsored by Hague Academy of International Law and United Nations University, 1983).

3. *Id.*, art. 38(2).

equitable principles applicable to the international negotiating and juridical processes; (4) the relation of international equity to international law; and (5) the offering of a provisional definition for international equity. The theses developed will then be applied in subsequent sections on the negotiation of regimes governing the use of shared resources lying under seabed areas common to two or more states. Alternative managerial regimes for the exploration and development of continental shelf resources will be discussed in light of the relevant doctrines of international equity and law which have emerged and are continuously emerging.

International law has long recognized the dual role of equity. Equity may serve to mitigate the rigors of the law or, in Aristotle's classic statement, to restore "the balance of justice when it has been tilted by the law."⁴ Equity, moreover, may act to make adjustments and allocations outside, or even contrary to, the law.⁵ This distinction is reflected in the generally accepted subsumption of principles and rules of equity of the ICJ.⁶ When the principle of equity is invoked to bring about a decision "outside" or "contrary" to the law, the consent of the parties is required. Equity, in this case, can be considered analogous to conciliation or legislation and cannot assume the consent of the parties. To deny to the parties the right of giving or withholding their consent would be an infraction of their sovereignty and their political independence.⁷

EQUITY IN INTERNATIONAL LAW

Equity and the "General Principles of Law Recognized by Civilized Nations"

Equity and general principles of law recognized by civilized nations are sources of rules of decision by the ICJ and are authoritatively provided

4. ARISTOTLE, NICHOMACHEAN ETHICS Book V, ch. 10 (J.K.K. Thomson trans. 1955). For a similar statement with specific reference to international law, see HUDSON, INTERNATIONAL TRIBUNALS, PAST AND FUTURE 103 (1944); the Diana (Masher Gardner) Case, 4 MOORE, INTERNATIONAL ADJUDICATIONS 333, 342-43 (Modern Series) (1931).

5. See ARISTOTLE, *supra* note 4; HUDSON, *supra* note 4; Diana case, *supra* note 4.

6. ICJ Statute, Art. 38.1.c.

7. I have sounded a previous warning against presuming that states' consent can be readily inferred to exist when their rights may be diminished or the burden of their obligations increased:

In the international arena, attempts to prescribe norms without appropriate notice, communication, interaction and sharing of values impose excessive stresses on the delicate mutual tolerances which exist at any given time to control the international community's expectations of acceptable or at least supportable behaviour. When the limits of those mutual tolerances are transgressed, purported constitutive prescriptions fail to convince or be credible. Furthermore, pressures to impose prescriptions without establishing the essentials of common goals and values, mutual consent and shared perspectives and purposes, burden the international community and its law-evolving processes with stresses on its acceptability as a system of control and restraint. This bodes ill for the effective future of other possibly more important developments.

Goldie, *International "Constitutionality": State Sovereignty and the Problem of Consent* in LEGAL CHANGE: ESSAYS IN HONOR OF JULIUS STONE 316, 317 (Blackshield ed. 1983).

in Article 38.1.c of the Court's Statute.⁸ The Statute's mission was explained by de Vissche:

The drafters of the Court's Statute considered ["the general principles of law recognized by civilized nations"] as a source of law independent of convention and custom, as belonging in virtue of their social foundation and rational character to a common legal fund, but as having acquired through recognition *in foro domestico* by civilized nations that positive character that make them rules of law and excludes what has been called the "ideal element" or mere aspiration, more or less widespread, to what is deemed a desirable organization of law.⁹

Other general principles of law include *res judicata*, *audi alteram partem*,¹⁰ reliance,¹¹ clean hands, good faith, proportionality,¹² and the direction that a tribunal "look to the substance rather than to the form."¹³

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8. This is the formulation of *aleana c* of Art. 38, para. 1, of the ICJ Statute which provides:

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The above formulation of *aleana c*. has been quite severely criticized. For example, Judge Ammoun has observed that the words "recognized by civilized nations" are inherently based on an assumption of the inequality of the developing countries; he suggested that they be changed to "recognized in national legal systems." *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 132-36.

9. C. DEVISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 400 (rev. ed., Corbett trns., 1968) citing 2 GENY, *SCIENCE ET TECHNIQUE* § 170.

10. See, e.g., *The Nuclear Test Cases*, 1974 I.C.J. 253, 265.

11. For examples of "reliance" and the preclusion of an argument or testimony contradicting a position held out to another and relied upon by that other, see the *Status of Eastern Greenland Case*, 1933 P.C.I.J. Ser. A/B, No. 53 at 36-37 and 69-73; the ICJ's legal appraisal of declarations by President Pompidou and by the French Ministers of Defense and Foreign Affairs in an announcement in the *JOURNAL OFFICIEL*; *The Nuclear Tests Case* 1974 I.C.J. 253, 265-71. In the *Nuclear Tests Case*, the court said:

In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large . . . its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. . . . [t]he Court holds that these statements constitute an undertaking possessing legal effect.

1974 I.C.J. 253, 269-70.

12. See, e.g., *North Sea Continental Shelf Cases*, 1969 I.C.J. 3, 53, 54; *Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. 18, 43-44, 75-76.

13. See, e.g., *The Cayuga Indians Arbitration (Great Britain v. United States)*, 20 AM. J. INT'L L. 574 (1926); NIELSEN REP. 203, 307 (1926).

The Roman law maxim, namely *inadimplenti non est adimplendum* (he who fails to fulfill his part of an agreement cannot enforce that bargain against the other party), has also been received into international law.¹⁴ These maxims or doctrines constitute bodies of principles and rules in a definite concept and reflect basic social values.

Briefly, "general principles of law" arise through the following process. A developing specific articulation of justice involves claims that create a demand for its legal implementation. New rules and doctrines are then forged either by the courts, legislatures, a combination of both, or by old legal theories gathered around a central idea of justice, thereby creating modalities of that idea's reception into law. After those rules and doctrines themselves become grouped around a central idea of justice they become clarified in the process of claim, counterclaim, and accommodation. The idea of justice both articulates the concept which governs those principles and rules which form the doctrine and provides the determinant of their interrelated grouping, as in a constellation around that central idea of justice. The reception and implementation of the central idea of justice into rules and standards constitute part of the necessary clarification process of society. The dispositive function of reception, however, is separate from the creative functions of emergence and clarification of legal principles. In both functions, creation and clarification on the one hand, and reception on the other, legislation is an appropriate source to identify the evolution of a "general principle of law recognized by civilized nations." Judicial decisions and the "teachings of the most highly qualified publicists of the various nations" are also appropriate mechanisms to accommodate the evolution of "general principles of law."¹⁵

The "General Principles of Law" and the "Ex Aequo et Bono" Clause

The relation of equity to both positive international law and the *ex aequo et bono* clause¹⁶ of the Statute of the ICJ becomes an important inquiry especially because the ICJ emphasized equitable factors so heavily

14. This maxim is reflected in Anglo-American equity, in the Rule in *Cherry v. Boulthée*, 4 My & Cr. 442, 41 Eng. Rep. 171 (ch. 1829) and its progeny. It was stated, for example, by Sargant J. in *Re Peruvian Railway Construction Co.*, [1915] 2 Ch. 144, 150 (Ch. Div.), *aff'd*, 2 Ch. 442 (C.A.) in the following terms: "When a person entitled to participate in a fund is also bound to make a contribution in aid of that fund, he cannot be allowed to participate unless and until he has fulfilled his duty to contribute."

The classical statement of this principle's incorporation into international law is, of course, that of Judge Anzilotti in the *Diversion of Water from the River Meuse Case*, 1937 P.C.I.J. Ser. A/B, No. 7 at 50, where he said, of the principle *inadimplenti non est adimplendum*, that it is "[s]o just, so equitable, so universally recognized, that it must be applied in international relations also."

See also, *infra*, notes 34 and 35 and accompanying text. See, further, *Tacna-Arica Arbitration*, 2 R. Int'l. Arb. Awards 929, 943-44.

15. Art. 38.1.d, ICJ Statute.

16. Art. 38, para. 2, ICJ Statute.

in the *North Sea Continental Shelf* cases.¹⁷ Professor Bin Cheng¹⁸ has argued that the "equity" of the *ex aequo et bono* clause includes "pure equity"¹⁹ in all its forms and comprehends equity "not only *secundum legem*, and *praeter legem*, but also, if necessary, *contra legem*."²⁰ The function of equity under Article 38, paragraph 1.c, is to bring "latent rules of law to light"²¹ and is contrasted with the function of equity to create new rules under paragraph 2: "[M]embers of the Committee were in agreement that a judge should not legislate."²²

This position may be fruitfully compared with that of Judge Anzilotti,²³ who distinguished between two connotations of equity. He saw equity, first, as constituting part of "the general principles of international law recognized by civilized nations" and hence as falling within the scope of Article 38.1.c of the Court's Statute. Second, however, he considered decisions rendered under the *ex aequo et bono* clause as more properly characterized not as equitable but as the result of compromise.²⁴

Perhaps a more descriptive term for the equitable principles asserted under the *ex aequo et bono* clause is *conciliation*. Conciliation is a settlement on the basis of one party's claims which are not given and may even be denied under existing principles or rules of law and equity. A possible situation where the states concerned empower the Court, by special agreement, to give a decision *ex aequo et bono* is described:

[Giving a decision *ex aequo et bono*;] would mean that the Court would have to decide according to non-legal principles of justice, of morality, of usefulness, of political prudence, and of common sense, which a municipal legislator or court would apply in a similar internal dispute, or which reasonable parties would adopt as their basis in concluding a treaty.²⁵

The distinction between equity and conciliation, to which writers attest, has been generally accepted by courts and arbitral tribunals. Thus the tribunal in the *Rann of Kutch Arbitration* stated, in February 1966:

17. 1969 I.C.J. 3.

18. BIN CHENG, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* 19-20 (1953).

19. *Id.* at 20. See also ROSENNE, *THE INTERNATIONAL COURT OF JUSTICE* 428 (2d printing 1961) (discussing the Court's use of the Anglo-Norwegian Fisheries Case, 1951 I.C.J. 116, as a means of developing equity "*intra legem*").

20. CHENG, *supra* note 18 at 20 n.85.

21. *Id.* at 19.

22. *Id.*

23. Anzilotti, Dionisio, 1869-1950, Italian jurist, Professor at Palermo, Bologna, and (1911-37) Rome; judge (1921-30) and president (1928-30). Permanent Court of International Justice. WEBSTER'S NEW BIOGRAPHICAL DICTIONARY 43 (1983).

24. D. ANZILOTTI, CORSO DI DIRITTO INTERNAZIONALE 64 (1928). See also Habicht, *Le Pouvoir de Juge International de Statuer "Ex Aequo et Bono,"* 49 ACADEMIE DE DROIT INT'L DE LA HAYE RECUEIL DE COURS 281, 284-305 (1949).

25. F. BERBER, *RIVERS IN INTERNATIONAL LAW* 266-67 (1959).

As both Parties have pointed out, equity forms part of International Law; therefore, the Parties are free to present and develop their cases with reliance on principles of equity. An international Tribunal will have the wider power to adjudicate a case *ex aequo et bono*, and thus to go outside the bounds of law, only if such power has been conferred on it by mutual agreement between the Parties.²⁶

The distinction between equity as a "general principle of law recognized by civilized nations" under Article 38.1.c of the Court's Statute and the *ex aequo et bono* clause of Article 38.2 was aptly expressed:

The Court has not been expressly authorized by its Statute to apply equity as distinguished from law. . . . Article 38 of the Statute expressly directs the application of "general principles of law recognized by civilized nations," and in more than one nation principles of equity have an established place in the legal system. The Court's recognition of equity as part of international law is in no way restricted by the special power conferred upon it "to decide a case *ex aequo et bono*, if the parties agree thereto." [Citations omitted.] It must be concluded, therefore, 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.²⁷

This notion of equity as a general principle of law is contrasted with the values of *ex aequo et bono* in the process of decision:

[T]he legal concept of equity is a general principle directly applicable as law. Moreover, when applying positive international law, a court may choose among several possible interpretations of the law the one which appears, in light of the circumstances of the case, to be closest to the requirements of justice. Application of equitable principles is to be distinguished from a decision *ex aequo et bono*. . . . The task of the Court in the present case is . . . bound to apply equitable principles as part of international law, and to balance up the various considerations which it regards as relevant in order to produce an equitable result.²⁸

26. *India v. Pakistan*, 7 I.L.M. 633 (1968).

27. Hudson, J., in his separate concurring opinion in *The Diversion of the Waters from the Meuse Case*, 1937 P.C.I.J. Ser. A/B, No. 70, at 76-77. See generally *id.* at 76-79; JENKS, *supra* note 1 at 32526. Arbitration of the "Norwegian Claims Against the United States of America" (Nor. v. U.S.), Hague Ct. Rep. (Scott) 39 (Perm. Ct. Arb. 1932) (1922). The Tribunal stated, in that case, that international lawyers generally understand words such as "the principles of law and equity" by which the parties had agreed to have their differences disposed of to indicate "the general principles of justice as distinguished from any particular system of jurisprudence of the municipal law of any State." HAGUE CT. REP. 2d (Scott) 39, 65 (Perm. Ct. Arb. 1932), 17 AM. J. INT'L L. 362, 384 (1923).

28. *Continental Shelf case (Tunisia/Libyan Arab Jamahiriya)*, 1982 I.C.J. at 18, 60. See also, *English Channel Continental Shelf Arbitration*, Court of Arbitration, The United Kingdom of Great Britain and Northern Ireland and the French Republic, Decision of 30 June 1977 in which the Court said "[F]rom the emphasis on 'equitable principles' in customary law that the force of the cardinal

Finally, the method of determining the content of a specific equitable principle or rule and qualifying it as a "general principle of law recognized by civilized nations" received an important clarification in Lord McNair's separate concurring opinion in the *Status of South-West Africa* case. He said that "[T]he true view of the duty of international tribunals . . . is to regard any features of terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions."²⁹

The Sources of Equitable Principles Applicable to the International Juridical Process

Recourse to the general principles of law first requires abstraction from the particular, the technical, and the parochial municipal laws of a number of states when these laws reflect a common underlying policy or value. The next process involves a synthesis of the common pervading principles underlying the disparate usages. The process is never a pure and simple transfer of elements of municipal law into international law.³⁰ A principle is first derived from common social necessities. It is then determined how often these necessities recur internationally and call for application of the same principle.³¹ Recourse to the general principles of law can be considered a limited exercise in the policy of the law.³²

Equity, however, does not permit a party to demand fulfillment of a contract which he himself is not ready to fulfill or which he has violated.³³ Thus, for example, the Permanent Court of International Justice asserted:

[A] principle generally accepted in the jurisprudence of international arbitration, as well as by municipal courts, [is] that one Party cannot avail himself of the fact that the other has not fulfilled some obligation

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principle of 'natural prolongation of territory' is not absolute, but may be subject to qualification in particular situations." *Id.* at 168-69.

Writing in Aristotelean terms of "restoring the balance," the Arbitral Tribunal asserted that:

The Court accepts the equitable considerations invoked by the United Kingdom as carrying a certain weight; and, in its view, they invalidate the proposal of the French Republic restricting the Channel Islands to a six-mile enclave around the islands, consisting of a three-mile zone of continental shelf added to their three-mile zone of territorial sea. They do not, however, appear to the Court sufficient to justify the disproportion or remove the imbalance in the delimitation of the continental shelf as between the United Kingdom and the French Republic which adoption of the United Kingdom's proposal would involve. The Court therefore concludes that the specific features of the Channel Islands region call for an intermediate solution that effects a more appropriate and a more equitable balance between their respective claims and interests of the Parties.

Id. at 173-74.

29. 1950 I.C.J. 128, at 148.

30. DE VISSCHER, *supra* note 9, at 400.

31. *Id.*

32. *Id.*

33. *Id.* at 497 n.66. DE VISSCHER cites from Anzilotti's opinion as: Judgment of June 28, 1937, Case of the Meuse Canals, P.C.I.J. Ser. A/B, No. 70 at 50, 77.

or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.³⁴

[I]t is a principle of international law, and even a general conception of law, that any breach of an engagement involves an obligation to make reparation.³⁵

Finally, the ICJ has articulated territorial state's peacetime responsibilities of vigilance and care: "[c]ertain general and well recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communications; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States."³⁶

Rules, principles, doctrines, or institutions are not examined for external similarities, but for common underlying policies and values. This process of developing general principles of law fulfills several important functions. First, the principles of law become the source of various rules of law, not merely repetitive expressions of these principles.³⁷ Second, juridical principles which interpret and apply the rules of law are developed.³⁸ Third, the principles of law can be applied directly to the facts of the case wherever there is no formulated rule governing the matter.³⁹ In international law, where precisely formulated rules are few, this last function of general principles of law acquires special significance and has contributed greatly toward defining the legal relations between States.⁴⁰ The nature of these principles is not inherent in any particular system of law, but is common to them all.⁴¹

*The Relation of International Equity to International Law*⁴²

Unlike English equity which developed in the Court of Chancery and wields the weapon of the common injunction against those who sought to enforce unconscionably obtained rights at common law, and unlike the Roman *jus gentium* which was the child of the *Praeter Peregrinus*, a different magistrate from the official who administered the law governing

34. *Factory at Chorzow (Jurisdiction) Case*, 1927 P.C.I.J. Ser. A, No. 9, at 31.

35. 1928 P.C.I.J. Ser. A, No. 17, at 29.

36. *Corfu Channel Case*, 1949 I.C.J. 4, at 22. In that case the Court said: "This indirect evidence is admitted in all systems of law, and its use is recognized by international decisions." *Id.* at 18.

37. CHENG, *supra* note 18, at 390.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. The term "international equity" is used to mean the equitable rules accepted under Article 38.1.c.

the relations of Roman citizens (the *Praetor Urbanus*),⁴³ equity in international law is and always has been part and parcel of the law administered by international courts and tribunals. Equity operates as an ameliorating and adjusting factor in the decisionmaking process of international law, without reference to an independent international jurisprudence or a separate tribunal.

The sources of international equity are channelled through the creative application of Article 38.1.c of the ICJ's Statute which is a collection or category of general principles of law recognized by the community of nations.⁴⁴ Given this provenance, international equity operates symbiotically with the two sources of law which precede it in Article 38, namely, treaty and custom. Equitable values which have generally emerged, however, are available to temper the interpretation and application of treaties.⁴⁵ Equity clearly can operate both *secundum legem* and *praeter legem* when applied to modify treaty effects. Whether equity can also operate *contra legem*, however, raises the issue of whether the Court seeks to ameliorate the impact of obsolete and potentially unjust positive law rules, or whether the Court is operating outside the scope of its permitted jurisdiction altogether and is, therefore, transforming itself into a conciliation commission without the parties' consent.⁴⁶ This would, of course, be impermissible. On the other hand, creativity in fashioning a case's rules of decision is not necessarily precluded.

A Provisional Definition

Contingently, international equity may be defined as the compendium of concepts supporting, promoting, and implementing those entitlements, benefits, and satisfactions which are validated by society's contemporary sense of justice and fairness. In international law, these concepts reflect the basic principles of jurisprudence and legislation which articulate and apply justice, reason, and values which are extensively diffused throughout the major legal systems of the world today. International equity, in the sense used in this article, further operates to temper the rigors of positive international law's application to those specific situations where generalizations would produce anomalies, inequities, or injustices, or, in Aristotle's terms, "imbalances."⁴⁷

43. For a comparison of Roman and English equity in their formative years, see SIR. H. MAINE, *ANCIENT LAW* 48-78 (Sir. F. Pollock ed. 1906).

44. See, e.g., *supra* notes 27 and 29 and accompanying text. This was also the underlying assumption of the ICJ's references to equity in the North Sea Continental Shelf Cases.

45. As illustrated in the classic case of *The Diversion of the Waters of the Meuse*, see *supra* note 27 and accompanying text.

46. See *supra*, the distinction made in the text accompanying notes 17-30.

47. ARISTOTLE, *supra* note 4.

While international equity may operate *secundum legem, praeter legem, intra legem*⁴⁸ and even, under special circumstances, *contra legem* by avoiding or excluding the application of an otherwise appropriate rule rather than judicially nullifying or overruling it, equity does not subjugate the law.⁴⁹ Secondly, international equity is not a separate jurisprudence. It still should be seen as acting as a reforming emollient and a "gloss" upon the rules and institutions of the traditional positive law.⁵⁰ International equity should also be seen as merging into international law, thus ensuring its application in individual cases as well as its progressive development as a body of *jurisprudence*. The equitable concepts stressed by the ICJ in the *North Sea Continental Shelf* cases⁵¹ effectively operated both as a gloss upon the law and as merging equity into international law to ensure progressive development. The relevant equitable concepts which developed and gave new depth to the continental shelf doctrine generally emphasized the claims of justice and utility and were not perceived as overriding customary law. Equitable concepts, moreover, tempered the rigors which would have resulted in the special circumstances of the North Sea's configuration had an alternative application of the continental shelf doctrine been used.⁵² Finally, because international equity is still in its formative stages, it would be unjust to the ICJ to ignore the importance of its pioneering efforts of reasoning in terms of specific wealth-creative, utilitarian equities in the *North Sea Continental Shelf* cases,⁵³ the *Fisheries Jurisdiction* cases,⁵⁴ and the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case.⁵⁵

INTERNATIONAL EQUITIES AND INDIVIDUAL STATES' CLAIMS TO NEW AVAILABLE NATURAL RESOURCES

The review which follows will stress that the principles of equity are included in the principles of positive international law. Secondly, principles involving abuse of rights, unjust enrichment, reliance, conscience, reciprocity, the fulfillment of obligations and expectations, and knowledge through notice lie at the heart of not only English equity, but also of international and civil law equity. Lastly, then, principles of equity operate *mutatis mutandis* at the transnational and domestic, as well as the international level.

48. For this interesting concept, see ROSENNE, *supra* note 19, at 428.

49. JENKS, *supra* note 1, at 425.

50. MAITLAND, *EQUITY* (2d rev. ed. 1936).

51. 1969 I.C.J. 3.

52. 1969 I.C.J. 3, at 52. *See also* at 50.

53. 1969 I.C.J. 3.

54. Fisheries Jurisdiction Case (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1974 I.C.J. 3. *See also* Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland), 1974 I.C.J. 175, at 196.

55. 1982 I.C.J. 18.

A Preliminary Explanation and an Example

The equitable principles adumbrated in the following paragraphs refer to the notion of equity as instrumental in wealth-creation.⁵⁶ The origin of instrumental equities, accordingly, is from numerous sources: international and domestic case law, domestic legislation, and the international and domestic law of treaties.

To take an example from a field quite distinct from that under review, at the 1979 World Administrative Radio Conference, the International Telecommunications Union (ITU) passed a resolution calling a conference to be held in 1985 for the purpose of finding an agreed formula, or at least an approach, to guarantee "for all countries, equitable access to the geostationary satellite orbit and space service frequencies."⁵⁷ The conference may provide a satellite service-type plan for satellite communications and revise existing conflict resolution procedures. Indeed, experts in the field perceive a possible conflict of values: those reflected in the "rationing approach"⁵⁸ and those espousing the "engineering approach."⁵⁹ The present counterpoint of claims arises from recent developments in international law governing the distribution of access to the simultaneous exploitation of both the geostationary orbit and the electromagnetic spectrum. Critics of the present system with its protection of existing ("grandfather") rights tend to underscore dissatisfaction with existing norms in the context of both conflict resolution procedures and the legal norms governing access to geostationary orbital positions.⁶⁰ On the other hand, a country-by-country allocation approach is criticized as leading to wasteful use or non-use of at least some of the available segments of the geostationary orbit.⁶¹ The dilemma is that the current system is efficient, and maximizes the useful employment of equatorial orbital positions needed for geostationary satellites. It is, on the other hand, regarded as inequitable since there appears to be little deference, if any, to claims of distributive justice. Discussion of this dilemma will be deferred to a later analysis of how the instrumental equities of wealth creation are to be fruitfully managed in a context which can achieve a

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56. Discussion of the relationship between distributive justice and equity will be reserved for later paragraphs.

57. Resolution No. 3, Relating to the use of the Geostationary Satellite Orbit and to the Planning of Space Services Utilizing It, in INTERNATIONAL TELECOMMUNICATIONS UNION, FINAL ACTS OF THE WORLD ADMINISTRATIVE RADIO CONFERENCE, GENEVA, 1979, 744-45 (1980).

58. See, e.g., Rothblatt, *Satellite Communication and Spectrum Allocation*, 76 AM. J. INT'L L. 56, 67-70, 73 (1982). See also D. Smith, Conflict Resolution in Outer Space: International Law and Policy 13-14 (1982) (unpublished paper presented at the Hague Academy of International Law Workshop on the Resolution of Disputes over New Natural Resources, November 8-10, 1982).

59. Rothblatt, *supra* note 58, at 67-70.

60. Rothblatt, *id.* at 67-73; see also Goldie, *supra* note 2, at 347-48.

61. Rothblatt, *id.* Goldie, *id.*

minimal level of distributive justice, or at least reduce tensions which could otherwise arise from perceived senses of injustice.⁶²

Abuse of Rights (and Unjust Enrichment Arising Therefrom)

In the *Fisheries Jurisdiction* cases,⁶³ the ICJ clearly enunciated the policy of international law regarding the perceived inequities of misusing rights. The Court refused to recognize the transformation of a right, validly asserted to vindicate one purpose, to achieve a different purpose which would deny another state's valid and subsisting rights.⁶⁴ The Court further disallowed the abuse of preferential fishing rights to exclude the established fishing rights of other states by referring to equity: "[I]n order to reach an equitable solution of the present dispute it is necessary that the preferential fishing rights of Iceland, as a State specially dependent on coastal fisheries, be reconciled with the traditional fishing rights of the Applicant."⁶⁵

In addition to the equities of unjust enrichment prominent in the judgment, values stemming from reliance and variously called "laches," "*treu und glauben*" (*trust and confidence*), or *confidence* (as an aspect of "preclusion") also played an important role in evaluating the historic rights to the Icelandic Fishery of the English and German fishing communities whose traditional and historic claims the Court so unequivocally vindicated. Similarly, arbitration tribunals have not allowed unjust enrichment which might arise from a refusal to fulfill an obligation, or from redefinition of a right which changes the basis of the obligation.⁶⁶

62. See *infra* section entitled *Possible Alternative Regimes*.

63. *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1974 I.C.J. 3, at 27-28. See also *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), 1974 I.C.J. 175, at 196.

64. The Court said:

The concept of preferential rights is not compatible with the exclusion of all fishing activities of other States. A coastal State entitled a preferential right is not free, unilaterally and according to its one uncontrolled discretion, to determine the extent of those rights. The characterization of the coastal State's rights as preferential implies a certain priority, but cannot imply the extinction of the concurrent rights of other States, and particularly of a State which, like the Applicant, has for many years been engaged in fishing in the waters in question, such fishing activity being important to the economy of the country concerned. The coastal State has to take into account and pay regard to the position of such other States, particularly when they have established an economic dependence on the same fishing grounds. Accordingly, the fact that Iceland is entitled to claim preferential rights does not suffice to justify its claim unilaterally to exclude the Applicant's fishing vessels from all fishing activity in the waters beyond the limits agreed to in the 1961 Exchange of Notes.

65. *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), 1974 I.C.J. 3, at 30.

66. The *Lena Goldfields Arbitration* (*Lena Goldfields v. Russia*), [1929-30] ANN. DIG. 3 (Case No. 1, 1930); *United Dredging Company Case* (*United States v. Mexico*) 4 R. INT'L ARB. AWARDS 263 (General Claims Commission 1927); *Union Land Company Case*, 4 MOORE, ADJUDICATIONS, *supra* note 4, at 3434, 3452-53 (1839). See also JENKS, *supra* note 1, at 417. But cf. Dickson Car

Reliance and Notice as Equities

Conduct stemming from perception or knowledge of a situation turns on the mode of information whereby that knowledge was imparted or that perception received. When that knowledge or perception has been imparted to the actor through the words or conduct of another, that other is responsible towards the actor, at least to the extent that the information should not have been fraudulently or negligently imparted. Thereafter that other party should not be permitted unilaterally to change the actor's position, or the posture of the factual situation regarding which the knowledge was imparted. To change the situation unilaterally, either in whole or in part, or to give misleading, partial or incomplete information, is to act inequitably whenever the actor has, in reliance and good faith, altered his position on the assumption of the truth of what he was led to understand or believe. The faith of the actor has its counterpart in the need for conscience, and for conscionable conduct, on the part of the other party.⁶⁷

Alternatively, the knowledge which may be attributed to an actor in determining, or appraising, his rights is neither more nor less than the knowledge imparted. The actor is entitled to rely on the information of which he has been made aware and cannot be held to know of other information or facts. Nor can his rights be circumscribed by virtue of the existence of facts or events of which he was not apprised. A reasonable inquiry, however, following imparted or notified information might reveal further data. If conscionable conduct were to call for such further reasonable inquiry then, clearly, the actor should be held responsible for failure to meet that standard. The equities of such imputed notice on the basis of imparted knowledge are clear and can only be invoked when the actor's failure to inquire was itself inequitable and when the information would have been available upon diligent inquiry.

The Equities of Estoppel and Laches

The concepts of equitable estoppel and laches emerge from the same fundamental ideas of reliance, confidence, the duty to give notice, and the attribution of knowledge in the one to whom notice is given. Equitable estoppel in Anglo-American equity has been defined as follows: "A party is prevented by his own acts from claiming a right to the detriment of

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Wheel Company Case (United States v. Mexico), 4 R. INT'L ARB. AWARDS 669, at 676 (General Claims Commission, 1931).

67. In domestic and transnational commercial law this is known as the doctrine of notice. In public international law, reliance and notice are reflected in the transnational commercial arbitrations of the Lena Goldfields Arbitration, [1929] ANN. DIG. 3 (Case No. 1, 1930), and the California Asiatic Oil Company and the Texaco Overseas Petroleum Company v. the Libyan Arab Republic, 53 INT'L L. REP. 389 (1979), I.L.M. (Dupuy, Sole Arbitrator, 1977). Notice and reliance are found in international tribunal decisions. See International Court of Justice in the South-West Africa Advisory Opinions, 1950 I.C.J. 128; 1962 I.C.J. 319.

another party who was entitled to rely on such conduct and has acted accordingly. . . ."⁶⁸

Estoppel in international law was similarly defined by the Permanent Court of International Justice, in the *Chorzow Factory* case.⁶⁹ An extension of the principle of estoppel is that a state's intention to be bound by its unilateral acts is to be determined by the interpretation of the act.⁷⁰ Moreover, when a state makes a statement limiting its freedom of action, that statement is to be restrictively interpreted.⁷¹ Such statements require no essential form and "[w]hether a statement is made orally or in writing makes no essential difference. . . ."⁷² The binding character of an international obligation assumed by unilateral declaration is based on good faith.⁷³ "Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected."⁷⁴ Public statements made by a State's governmental officials may also create an obligation on the part of that State. The precise nature and limits of the obligation "must be understood in accordance with the actual terms in which they have been publicly expressed."⁷⁵

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68. Estoppel is a bar or impediment which precludes allegation or denial of a certain state of facts in consequence of previous allegation, or denial or conduct or admission or adjudication of the matter in a court of law. It operates to put party entitled to its benefit in same position as if the thing represented were true.

BLACK'S LAW DICTIONARY 494 (5th ed. 1979).

69.

[O]ne Party cannot avail himself of the fact that the other has not fulfilled some obligation, or has not had recourse to some means of redress, if the former Party has, by some illegal act, prevented the latter from fulfilling the obligation in question, or from having recourse to the tribunal which would have been open to him.

1927 P.C.I.J. Series A, No. 9, at 31. *See also* Danzig Railway Officials, Advisory Opinion, 1928 P.C.I.J. Series B, No. 15, at 27; Jurisdiction of the European Commission of the Danube, Advisory Opinion, 1927 P.C.I.J. Series B, No. 14, at 23; and the *Societe Commerciale de Belgique* Case, 1939 P.C.I.J. Series A/B, No. 78, at 176. *See also* Diversion of the River Meuse Case, 1937 P.C.I.J. Ser. A/B No. 70, at 25, where the Permanent Court applied the principle "allegans contraria non audiendus est"; and the Nuclear Test Case, 1974 I.C.J. 253, 267-72 (Opinion of the Court), 285 (separate opinion of Judge Gros). *See also id.* at 314 (separate Opinion of Judge Petren).

70. 1974 I.C.J. 253 at 267-68. *See also* the Temple at Preah Viher Case, 1961 I.C.J. 3 at 311, quoted in the Nuclear Tests Case, 1974 I.C.J. 253 at 268. In the Nuclear Tests Case the Court added: "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential."

71. 1974 I.C.J. 253 at 267-68.

72. *Id.*

73. *Id.* at 268.

74. *Id.*

75. *Id.* at 270. Statements were made, respectively, on 25 July 1974 by the President of the French Republic; on 16 August and 11 October 1974 by that country's Minister of Defense; and on 25 September 1974, in the General Assembly of the United Nations by its Minister for Foreign Affairs. *See* ICJ's legal appraisal, *supra* note 11.

The ICJ's predecessor, the Permanent Court of International Justice, said, with regard to a juridically rather similar unilateral statement:

In the *International Status of South-West Africa* case,⁷⁶ the ICJ found that certain declarations made by the Government of the Union of South Africa (now the Republic of South Africa) constituted a recognition on its part of an obligation to submit to continued supervision in accordance with the Mandate. The Court added: "Interpretations placed upon legal instruments by the parties to them, though not conclusive as to their meaning, have considerable probative value when they contain recognition by a party of its own obligations under an instrument."⁷⁷ In sum, international law and transnational commercial law, like Anglo-American equity, impose an obligation upon a state whose words or conduct have led others to rely upon it and alter their position in that reliance, to be thereupon bound by its own acts.

The underlying moral values of good faith and reliance also form the foundation of the doctrine of laches. The concept of laches is "based upon a maxim that equity aids the vigilant and not those who slumber on their rights."⁷⁸ Laches is defined as neglect to assert a right or claim which, taken together with lapse of time and other circumstances, causes prejudice to the adverse party, and operates as a bar in a court of equity.⁷⁹

The principle of "extinctive prescription," that is, the barring of claims in international law through the lapse of time, "has been applied by arbitration tribunals in a number of cases."⁸⁰ The justification of this international law concept, furthermore, is rooted in equitable premises, as stated by Sir Hersch Lauterpacht. "Delay in the prosecution of a claim once notified to the defendant State is not so likely to prove fatal to the success of the claim as delay in its original notification, as one of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of his inability to obtain evidence in regard to a

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What Denmark desired to obtain from Norway was that the latter should do nothing to obstruct Danish plans in regard to Greenland. The declaration which the Minister for Foreign Affairs gave on July 22, 1919, on behalf of the Norwegian Government, was definitely affirmative: "I told the Danish Minister today that the Norwegian Government would not make any difficulty in the settlement of this question."

The Court considers it beyond all dispute that a reply of this nature given by the Minister for Foreign Affairs on behalf of his Government in response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.

1933 P.C.I.J. Ser. A/B No. 53, at 71. The Court characterized the "Ihlen Declaration" as "unconditional and definitive." *Id.* at 72.

76. 1950 I.C.J. 128.

77. *Id.* at 135-36. For similar points of view in both the Permanent Court and the present Court to that quoted in the text, see Advisory Opinion Concerning the Competency of the International Labour Organization, 1922 P.C.I.J. Series B, No. 2, at 41; Advisory Opinion on the Competence of the General Assembly Regarding Admission to the United Nations, 1950 I.C.J. 9; and the case concerning the Rights of Nationals of the United States in Morocco, 1952 I.C.J. 176 at 200.

78. BLACK'S LAW DICTIONARY 787 (5th ed. 1979).

79. *Id.*

80. 1 LAUTERPACHT, OPPENHEIM'S INTERNATIONAL LAW (PEACE) 349-50 (8th ed. 1955). For a list of cases exemplifying the proposition in the text, see *id.*

claim of which he only became aware when it was already stale.”⁸¹ The underlying policy (namely that of reliance) of extinctive prescription in international law “resembles the *laches*, or acquiescence, of English Equity rather than the statutory limits governing Common Law claims,”⁸² in that a fixed period of time is not required, but an alternation of position, a detrimental reliance, is.

In other terms, consider A who possesses a right unknown, at least in its relevant particulars, to B. B then, because of A's inaction, alters his (B's) position by the investment of time, effort, money, and technological skills, in pursuing what he (B) considers to be his (B's) right. A is then said to have at least permitted B to believe that A would acquiesce in and accept B's activity and investment. Accordingly, A cannot later argue that B's good faith efforts were invalid to create a right enuring to B on account of A's pre-existing right. Should A have wished to preclude B's activity from ripening into a vested entitlement, A should have given timely notice to B of his (A's) intention to activate his pre-existing right. Here again the basic values of equity involving reliance, notice, and good faith create the applicable principle. A far different outcome, of course, results when B invades A's right with knowledge thereof and merely anticipates inaction by A. In such a case, equity recognizes A's right to assert claim both to his original entitlement and to B's improvements thereof.⁸³ In addition to vindicating conscionable behavior and reprobating unconscionable conduct, the equities of reliance and good faith constitute instruments for creating the environment of stability and predictability necessary for wealth creation.

Proportionality as an Equity

The concept of proportionality as an equitable principle was articulated by the ICJ in the *North Sea Continental Shelf* cases.⁸⁴ The states were

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81. *Id.*

82. *Id.* at 349 n.4.

83. The old English case of *Ramsden v. Dyson*, [1866] L.R. 1 H.L. 129, illustrates this point with the following propositions:

(a) If a stranger begins to build on land supposing it to be his own, and the real owner, perceiving his mistake, abstains from setting him right, and leaves him to persevere in his error, equity will not afterwards allow the real owner to assert his title to the land; and

(b) But if a stranger builds on land knowing it to be the property of another, equity will not prevent the real owner from afterwards claiming the land, with the benefit of all the expenditures upon it.

Id. For an equivalent theory in international law, see LAUTERPACHT, *PRIVATE LAW SOURCES AND ANALOGIES OF INTERNATIONAL LAW* §§ 87-89 (1927), and the cases, state practice and agreements there cited. See also the *Certain German Interests in Polish Upper Silesia Case*, 1925 P.C.I.J. Series A, No. 6, at 19.

84. 1969 I.C.J. 3. See also *id.* at 54.

called upon to recognize a reasonable degree of proportionality to determine "the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines."⁸⁵ Proportionality is distinguishable from the argument that each state should "receive a just and equitable share" of the divisible area.⁸⁶ The ICJ rejected this argument because it was based on a premise of distributive justice which would control the partitioning of an area held in common or undivided shares. The Court saw the continental shelf of each North Sea state as already appurtenant to that state and only the problem of demarcation of the boundaries remained. The Federal Republic of Germany argued for the distribution of a common property in terms of equitable shares, whereas the ICJ held its function was the determination of the boundaries between the separate and individually controlled areas which constituted the several coastal states' appurtenant continental shelves. In these circumstances, the Court saw equity as having an important role in the delimitation of boundaries. Equity was not to provide the criteria of "fair shares" or equality in the sense of parity or of levelling but, rather, to correct anomalies.⁸⁷ Thus the Court said:

Equity does not necessarily imply equality. There can never be a 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

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85. 1969 I.C.J. 3, 52.

86. Note that Germany contended that

[A]n equitable apportionment of the continental shelf of the North Sea among the surrounding States could not be achieved by determining the boundary lines between each pair of adjacent or opposite States as an isolated act. The boundary problem must rather be considered as a joint concern of all North Sea States, taking into account the effect of each boundary on the apportionment as a whole.

Reply of Federal Republic of Germany, 1 North Sea Continental Shelf Cases, I.C.J. Pleadings 389, 423 (1968). See also 1 Pleadings at 76. Be that as it may, the Federal Republic's view of distributive justice and equity was encapsulated in the following thesis:

(I) In apportioning the continental shelf among coastal States, the breadth of their coastal frontage facing the North Sea should be the principal criterion for evaluating whether the area allocated to one of these States is a just and equitable share.

(II) The most equitable apportionment of the continental shelf among the coastal States would be a sectoral division based on the breadth of their coastal frontage facing the North Sea.

(III) As to the delimitation of the continental shelf between the Parties, the equidistance method cannot find application, since it would not apportion a just and equitable share to the Federal Republic of Germany.

(IV) The boundary line dividing the continental shelf between the Parties must be settled by agreement in accordance with the judgment of the Court.

1 Pleadings at 89.

87. On the history of equity as the "correction of anomalies," see MAINE, *supra* note 44, at 62-63.

within the same plane, and it is not such natural inequalities as these that equity could remedy.⁸⁸

The ICJ reviewed equity and proportionality as providing criteria to determine the location of boundaries rather than functioning as simple distributive justice.

A final factor to be taken account of is the element of a reasonable degree of proportionality which a delimitation effected according to equitable principles ought to bring about between the extent of the continental shelf appertaining to the States concerned and the lengths of their respective coastlines,—these being measured according to their general direction in order to establish the necessary balance between States with straight, and those with markedly concave or convex coasts, or to reduce very irregular coastlines to their truer proportions.⁸⁹

The notion of equity as a means of correcting anomalies in the delimitation of the continental shelf boundaries is reinforced by the Court's assertion that "[i]t 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."⁹⁰

The ICJ's judgment of the *North Sea Continental Shelf* cases, however, is not in harmony with the perception of proportionality which Professor J.P.A. Francois quoted in his *Memorandum on the Regime of the High Seas*⁹¹ for the International Law Commission. Professor Francois suggested that the extent "*des eaux 'juridictionelles'*" of each state be proportionate to population density, the extent of the national territory, and the length of its coastline.⁹² Indeed, this thesis of proportionality, like the argument of the Federal Republic of Germany claiming that each state should receive "a just and equitable share" of the area to be apportioned amongst them, would appear to follow a different path from that trodden by the Court.

More recently the ICJ, in the *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case⁹³ referred to its analysis of proportionality in the *North Sea Continental Shelf* cases:

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88. 1969 I.C.J. 3, at 49-50.

89. 1969 I.C.J. 3, at 52.

90. 1969 I.C.J. 3, at 50.

91. U.N. Doc. A/CN. 4/32, [1950] 2 Y. B. INT'L L. COMM'N 67 (1950).

92. *Id.* at 110-11, citing Azcarraga, *Los Derechos Sobre la Plataforma Submarina*, 2 REVISTA ESPAÑOLA DE DERECHO INTERNACIONAL 47 (1949).

93. *Continental Shelf (Tunisia/Libyan Arab Jamahiriya)* case, 1982 I.C.J. 4.

It should be reaffirmed that the continental shelf, in the legal sense, does not include the sea-bed areas below territorial and internal waters; but the question is not one of definition but *proportionality as a function of equity*. . . . Furthermore, the element of proportionality is related to lengths of the coasts of the States concerned, not to straight baselines drawn round those coasts. The question raised by Tunisia: "how could the equitable character of a delimitation of the continental shelf be determined by reference to the degree of proportionality between areas which are not the subject of that delimitation?" is beside the point; since it is a question of proportionality, the only absolute requirement of equity is that one should compare like with like.⁹⁴

POSSIBLE ALTERNATIVE REGIMES

Selected pronouncements of the International Court of Justice and its predecessor, the Permanent Court of International Justice, have been reviewed to extract from them evidence of an unfolding equity jurisprudence enriching public international law and the decisional process of international tribunals in general. A number of vital doctrines have been identified. In the present section these doctrines provide the criteria for identifying appropriate managerial regimes established, or advocated, for the purpose of equitably utilizing and distributing the benefits of the resources contained in common geological structures which lie athwart the boundaries separating the continental shelves of two or more states. The proposed regimes are not concerned with establishing boundaries by reference to equitable principles, as was called for in the *North Sea Continental Shelf* cases,⁹⁵ but are more concerned with the management, exploitation, and distribution of resources to be found in common geological structures.⁹⁶ The suggested model of the "managerial or administrative conciliation regime"⁹⁷ and the proposal for a multinational public enterprise⁹⁸ have some analogies to offer to the development of a common regime for exploring or exploiting the mineral resources of common continental shelf resources. These possible regimes are discussed in the light of: (1) goals; (2) areas; (3) participants; and (4) measures.

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94. 1982 I.C.J. 18, 76 (emphasis added).

95. *North Sea Continental Shelf* cases, 1969 I.C.J. 3.

96. Analogies for such common regimes may be provided by fisheries agreements. For example, the type of fisheries regime denominated the "agent state" regime may fruitfully provide valuable analogies for framing regimes for working common mineral deposits. See Goldie, *The Oceans' Resources and International Law—Possible Developments in Regional Fisheries Management*, 8 COLUM. J. TRANSNAT'L L. 1, 44-45 (1969).

97. *Id.* at 45-46.

98. *Id.* at 46-51.

Goals

In the *North Sea Continental Shelf* cases,⁹⁹ Judge Padillo Nervo, in an independent concurring opinion, formulated the purpose of the continental shelf doctrine and convention:

The purpose of the continental shelf doctrine and of the Convention is to *contribute* to a world order, in the foreseeable rush for oil and mineral resources, to avoid dangerous confrontation among States and to protect smaller nations from the pressure of force, economic or political, from greater or stronger States.¹⁰⁰

If a regime's main function is merely the settlement of boundaries, this formulation of purpose may suffice. Distributive managerial regimes, however, should be guided by more affirmative goals which include: (1) improvement of techniques to optimize world welfare and the rewards which the continental shelf mining industry may offer to states participating in it; (2) facilitation of participating states' domestic policies, whether the policies are the creation of employment opportunities or the expectation that the deep-ocean mining activities will contribute to those state's economies either by earning foreign currency or by preventing importation of such necessary items as oil and gas; (3) assurance that equities arising from reliance, notice (including estoppel and laches), proportionality, and unjust enrichment are adequately provided for; and (4) generation of an economic value in the right to mine or drill in the common continental shelf areas lying between two or more states made subject to the regime by limiting access thereto. This economic value could be recovered for the regime in the form of license fees, royalties, or taxes. Such resources could be applied on behalf of the mining regime as a whole to defray such costs as research, administration, and control. Surpluses should also be available for general purposes both within and without if the participating states agree.

Controlling access to a given deposit could be the strategy best suited for realizing these additional affirmative goals, in most cases. Controlling access to a particular deposit calls for the joint action of all states participating in the regime to delegate, to a common regulatory authority and for the benefit of all, a part of each one's separate authority and, in particular, the pre-existing right of each to act preemptively. As the whole industry increases in value, so will the share of each participating state. Such a share could exceed in value what any one state might have previously accrued by unilateral preemptive action at the expense of all the others. The goals could best be achieved by a functional integration of the resource's uses by a supranational agency.

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99. *North Sea Continental Shelf* cases, 1969 I.C.J. 3.

100. 1969 I.C.J. 3, 92.

Areas

The possible areas of regimes which can be offered as alternatives to one which simply provides the means for carving up state's exclusive submarine zones will vary with the choices made by the participating states. For shallow submarine areas adjacent to two or more states the regime could optimally include the whole of the region in question; or it could be limited to the areas of the states prepared to negotiate and conclude a convention for the regulation of the area governed by that agreement. Finally, the areas brought under a managerial regime might include those where the exploitation of a single geological structure extends across a continental shelf boundary, thereby calling for a single common exploitation activity for purposes of efficiency and conflict avoidance.

Participants

The participants of a supranational regional managerial regime regulating the exploration and exploitation of the whole of a continental shelf region's resources should be limited to the coastal states agreeing to establish the regime. If the regime is limited to a disputed area or, alternatively, to the total shelf region (or portions only thereof), participation in the regime should be limited to those nations. When a managerial regime is established to regulate a single geological structure extending into two or more national shelf regions, then its participants should only include those states in whose submarine areas the structure exists, and which also agree to establish the regime. An outside state could be added by agreement of all the others on the basis of its technological, managerial, capital investment, or other contributions.

Measures

A managerial regime, irrespective of the area it covers, should acknowledge the importance of technological and economic research. The yield from continental shelf oil drilling and mining should not only be regulated by engineering criteria but also by considerations which ensure the optimum uses of the deposit's mineral resources. All forms of discrimination, moreover, between enterprises on the basis of nationality should be eliminated, provided the enterprise has the support of at least one of the states participating in the regime.

Alternative Regimes

While the focus of this article is managerial regimes governing common continental shelf mineral deposits, arguments and ideas from existing

fisheries regimes,¹⁰¹ to the extent they are relevant, are discussed for the purpose of enriching and inspiring possibilities of acceptable and productive blueprints for the exploration and use of common mineral resources.

Agent State

The type of fisheries regime which has been denominated "agent state"¹⁰² has some useful parallels for the development of a regime limiting access to a common mineral deposit which extends beyond a common continental shelf boundary.

Fisheries and the "Agent State" Model

The Fur Seal Convention between Russia, Japan, the United States, Great Britain, and Canada¹⁰³ established the leading example of this type of regime.

[The Fur Seal Convention] is unique among all conservation treaties in that it appoints two "agents"—the United States and Russia—to carry out the management and harvesting of the herds on their islands. Pelagic sealing is prohibited, and provision is made for sharing the proceeds amongst the signatories. In effect, the agreement creates sole ownership in each of the two areas.¹⁰⁴

One or more of the participating states may be accepted as the "fishing agents" of a community of states in a regime. The other members' claims to participate are then converted into claims for compensation. There is no inherent reason, however, why managerial regimes could not consist of all the states of a region or even of the world, provided they have a resource to contribute or a concrete interest to serve. Some states might then choose to trade their claims to a share in the resource for other gains which might be collateral to or independent of it. This should be discouraged. Accordingly, the principle of abstention,¹⁰⁵ a fisheries concept, could be further developed. Abstention relates to the appointment of, and the distribution of, vested equitable rewards to the regimes' "agent states." The principle of abstention, moreover, can be used to establish the trade-offs utilized to satisfy claims merely for participation in the regime.

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101. See, e.g., Goldie, *supra* note 97.

102. F. CHRISTY & A. SCOTT, *THE COMMON WEALTH IN OCEAN FISHERIES* 196 (1965).

103. The first of these treaties, the Convention Between the United States and Other Powers Providing for the Preservation and Protection of Fur Seals, was signed July 7, 1911, 37 Stat. 1542. The most recent was signed in 1957 and amended in 1963. See Interim Convention on the Conservation of North Pacific Fur Seals, signed Feb. 9, 1957, [1957] 8 U.S.T. 2283, T.I.A.S. No. 3948, 314 U.N.T.S. 105, and the Protocol Amending the Interim Convention. . . . done Oct. 8, 1963, [1964] 15 U.S.T. 316, T.I.A.S. No. 5558, 494 U.N.T.S. 303.

104. CHRISTY & SCOTT, *supra* note 102, at 196.

105. Goldie, *supra* note 96, at 28-31, 45.

*The "Essential Unity of a Deposit of Oil and Gas"*¹⁰⁶

Measures for protecting oil deposits from wasteful practices,¹⁰⁷ such as legislation in the United States,¹⁰⁸ Canada,¹⁰⁹ and the United Kingdom,¹¹⁰ reflect a policy of unitization.¹¹¹ Unitization is the policy of maintaining the "essential unity of a deposit of oil and gas."¹¹² The United Nations Secretariat has also promoted the policy goal of the "essential unity of a deposit."¹¹³ Support for this policy is also reflected in scholarly writings,¹¹⁴ and in at least six international agreements.¹¹⁵ The policy has,

106. For the provenance of this term, and especially for the U.N. Secretariat's use of it early in the thinking and discussion of the utilization of the resources of a continental shelf region which are to be found on both sides of an international boundary line, see U.N. Secretariat Memorandum on the Regime of the High Seas 109, U.N. Doc. A/CN.4/32 (mimeo July 14, 1959), [1950] 2 Y.B. INT'L L. COMM'N 67, 112 [hereinafter cited as A/CN.4/32]. Since the publication of A/CN.4/32, the term has tended to become as much the accepted term in international law as "unitization" has become for an analogous private law situation in American oil and gas municipal law.

107. Deriving from the application of the "Rule of Capture" to the winning of oil and gas. See *Westmoreland & Cambridge Natural Gas Co. v. DeWitt*, 130 Pa. 235, 18 A. 724 (1889). See also *Walls v. Midland Carbon Co.*, 254 U.S. 300 (1920). For a classic statement of the "Rule of Capture" and its correlative offset rule, see *Barnard v. Monongahela Natural Gas Co.*, 216 Pa. 362, 65 A. 801 (1907).

108. 30 U.S.C. § 181 (1982), 41 Stat. 437 (1964); 60 Stat. 952, as amended 68 Stat. 583, 584-85 (1954) and 74 Stat. 780 (1960) 30 U.S.C. § 226(j) (1964). See also Mineral Leasing Act for Acquired Lands of 1947, 30 U.S.C. §§ 351-59 (1982).

For a history of the development of § 17(b) and its social background, see MYERS, *THE LAW OF POOLING AND UNITIZATION, VOLUNTARY-COMPULSORY* 294-97 (1957). The Federal Regulations pursuant to the Act are the Unit Plan Regulations, 16 Fed. Reg. 77 (1951), 43 C.F.R. 192.20, 192.21 (1951).

109. See, e.g., Oil and Gas Conservation Act of 1955, SASK. STAT. c.88 § 35; Oil and Gas Resources Conservation Act of 1952, REV. ALTA. STAT. c. 46.

110. Great Britain, Petroleum (Production) (Continental Shelf and Territorial Sea) Regulations 1964, Schedule 2 (Model Clauses for Production Licenses), cl. 19, Stat. Instr. 1964, No. 708.

111. "Unitization" is the term used in American oil and gas law to reflect the idea of the "essential unity of a deposit of oil and gas." It is distinct from the idea of "pooling" (which means the "bringing together of small tracts sufficient for the granting of a well permit under applicable spacing rules"), 6 WILLIAMS & MEYERS, *OIL AND GAS LAW* § 901, at 2 (1964). "Unitization" means "the joint operation of all or some part of the producing reservoir." *Id.* at 3.

112. *Supra* note 106.

113. See *supra* note 106.

114. See, e.g., A/CN.4/32, *supra* note 106, at 109; Lauterpacht, *Sovereignty over Submarine Areas*, 27 BRIT. Y.B. INT'L L. 376, 410 n.4 (1950); Mouton, *The Continental Shelf*, 85 HAGUE ACAD. INT'L L. 345, 421-23 (1954-I).

This writer, however, feels compelled to doubt Lauterpacht's statement that "[i]t will be noted that the phenomenon of common pools independent of political boundaries is relied upon in the recitals of the Proclamation of the United States of 1945." There would appear to be no direct reference to such a phenomenon in the recital to which Lauterpacht referred. Furthermore, the federal policy in these matters, as embodied in § 17(b) of the Mineral Leasing Act, 30 U.S.C. § 226(j) (1964), was not added to the domestic legislation until the year following President Truman's Continental Shelf Proclamation in 1945.

For an early international arbitration (in 1909) recognizing the principle of the unity of a resource (crustaceans), see *Grisbadarna Case*, 13 U.N.R.I.A.A. 147, Hague Ct. Rep. (Scott) 121 (Perm. Ct. Arb. 1911), 4 AM. J. INT'L L. 226 (1910) (Perm. Ct. Arb. 1909).

115. See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Relating to the Exploration of Single Geological Structures Extending Across the Dividing Line on the Continental Shelf under the North Sea, Netherlands No. 1 (1965). Cmnd. No. 2830.

however, been given different interpretations. Thus, for example, Admiral Mouton observed: "We believe that the principle . . . that a dividing boundary-line should not cross an oil pool . . . is a guide for countries in framing their delimitation agreements or for the arbitrator who is called in in the case of dispute."¹¹⁶

The first two articles of the United Kingdom-Netherlands Single Structure Agreement¹¹⁷ provide:

Article 1

If any single geological mineral oil or natural gas structure or field extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the Contracting Parties will seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the costs and proceeds relating thereto shall be apportioned, after having invited the licensees concerned, if any, to submit agreed proposals to this effect.

Article 2

Where a structure or field referred to in Article 1 of this Agreement is such that failure to reach agreement between the Contracting Parties would prevent maximum ultimate recovery of the deposit or lead to unnecessary competitive drilling, then any question upon which the Contracting Parties are unable to agree concerning the manner in which the structure or field shall be exploited or concerning the

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116. MOUTON, *supra* note 114, at 422. In the Grisbadarna arbitration, the Permanent Court of Arbitration did not recognize that Norway might have an equity remaining in the Grisbadarna banks. Such an equity might well have been capable of transformation into a claim for compensation out of a proportion of the Swedish catch. Instead, Sweden was awarded a monopoly of the Grisbadarna lobster fishery, and Norway was given a monopoly of the lobster fishery of the Skjottegrunde. *Supra* note 114. Additionally, Admiral Mouton has said:

The arbitrators held that the boundary line ought to be traced: "so that it would pass midway between the Grisbadarna banks on the one side and Skjottegrunde on the other." The arbitrators did not want to cut through a bank, which is in fact also an application of the same principle of leaving intact the unity of a deposit, this time not of minerals but of marine resources. A demarcation, so the award continues, which would assign the Grisbadarna to Sweden is supported by the circumstances that "lobster fishing in the shoals of Grisbadarna had been carried on for a much longer time, to a much larger extent, and by a much larger number of fishermen by the subjects of Sweden than by the subjects of Norway." . . . On the other hand it was averred that "the Norwegian fishermen have almost always participated in the lobster fishing on the Skjottegrunde in a comparatively more effective manner than at the Grisbadarna," which warranted a demarcation assigning the Skjottegrunde to Norway.

MOUTON, *supra* note 114, at 422.

117. See Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of the Netherlands Relating to the Exploration of Single Geological Structures Extending Across the Dividing Line on the Continental Shelf under the North Sea, Netherlands No. 1 (1965), Cmnd. No. 2830.

manner in which the costs and proceeds relating thereto shall be apportioned, shall, at the request of either Contracting Party, be referred to a single Arbitrator to be jointly appointed by the Contracting Parties. The decision of the Arbitrator shall be binding upon the Contracting Parties.

Like Admiral Mouton's thesis "never two straws in one glass,"¹¹⁸ these provisions of the single structure Agreement make possible the unified working of a single resource or deposit. Unlike the suggestion that one state, not necessarily in the fiduciary role of an "agent state," should alone work a common geological structure, these provisions call for an equitable apportionment of the costs and proceeds. The equities underlying such an apportionment could be measured by reference either to the proportion which each state's share of the common deposit bears to the whole, or to their technological, managerial, or monetary contribution. Setting aside the instrumental equities, the relative needs of each state could bring about distributive justice by using the resource's capacity, if equitably managed, to ameliorize the per capita wealth of each adjacent nation. Once the choice of equitable values is settled, one state could become the "agent state" of all the others, and distribute burdens and benefits according to the measured or agreed upon norms or standards of apportionment. On the other hand, a common supranational managerial agency controlling the resource and distributing its benefits would provide at least the appearance of the greater objectivity and, hence, of greater functional equity.

Another interesting variation on the idea of the unitized working of a mineral deposit without establishing an international managerial regime is provided by the 1939 agreement between the Netherlands and the German Reich.¹¹⁹ This regime provided for the most economic mining of a common coal deposit on either side of the two countries' frontiers. Each country, independently of the surface boundaries, followed its own vein of the mineral.¹²⁰ The boundary between the two countries on the surface was not applied in the coal galleries. There was neither any

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118. MOUTON, *supra* note 114, at 421.

119. See Treaty Between the German Reich and the Kingdom of the Netherlands for the Determination of the Working Boundary of the Coal Mines Situated on Both Sides of the Frontier Along the River Worm, May 17, 1939, [1939] *Staatsblad van het Koninkrijk der Nederlanden* No. 30, 199 L.N.T.S. 251. One method contemplated as a possible outcome of the negotiations was the unified working of a single resource or deposit with an apportionment, among the parties, of the costs and proceeds. To work the deposit in a unified way as the agent state that state would, in effect, have to be given a usufructory right over the resources on the other side of the boundary coupled with an obligation to account and to act, generally, in a fiduciary manner. For a fuller indication of this "agent state" model see Goldie, *The North Sea Continental Shelf Cases—A Ray of Hope for the International Court?* [hereinafter cited as Goldie, *Ray of Hope*], 16 N.Y.L. FORUM 327, 370 (1970), and Goldie, *supra* note 96, at 44, 45.

120. See Treaty Between Germany and Netherlands, *supra* note 119.

recognition of an obligation to compensate the state in whose territory a deposit was to be worked in any given case, nor any concept of a community of interest which might best be made manifest in a common and fiduciary regime governed by such equitable principles as reliance and proportionality. Presumably, the mutual equities of the states would cancel one another as both states intended to cross each other's boundaries as the exigencies of mining and the presence of seams demanded. This last variation, however, although of interest, is clearly not suitable for the rational working of an oil or gas deposit.

Continuing Conciliation

Disputes between states attempting to exercise legal rights to a resource often cause both a rise in international tensions and a loss of opportunities for developing that resource. A purely legal dispute tends to focus attention upon the analysis of the validity of the exclusive and contending claims put forward, rather than upon the resource's potential for development. In contrast to the barrenness of purely legal disputes, the flexible procedures offered by managerial regimes to disputants include the possibility of developing a resource and of reallocating the increased productivity or value. Surely such values, and even the procedures through which they are expressed, are available for negotiators and draftsmen of regimes which govern the development of a single geological structure common to the legal continental shelves of two or more states.

The value of such flexible procedures is illustrated in the resolution of sterile legal confrontations between India and Pakistan by the settlement which the "good offices"¹²¹ of the International Bank for Reconstruction and Development achieved in the dispute between those two countries over the waters of the Indus River.¹²² By raising extensive credits, and by working with engineers and administrators whose focus of interest centered far more upon the development of the resource than upon disputes about legal rights to its value at the current level, the factual basis of the dispute was changed, with salutary results.¹²³ The bank, through its pow-

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121. The late Professor Baxter has pointed out that:

While the International Bank for Reconstruction and development referred to its role as one of "good offices" its function actually went beyond "good offices" or "mediation" in the technical senses of these terms. As the real differences were brought to light, the Bank was forced to play a more active part in working out a solution. The Bank pursued its own enquiries into the facts, and it was the Bank which at various stages suggested principles upon which the agreements might be based—a process which might be describes as "continuing conciliation."

Baxter, *The Indus Basin*, in *THE LAW OF INTERNATIONAL DRAINAGE BASINS* 443, 477 (Garretson, Hayton & Olmstead eds. 1967).

122. *Id.*

123. Baxter, *supra* note 121, at 476, has written:

Instead of there being a limited and insufficient quantity of water to quarrel over,

erful negotiating position, was able to insist on what was, in effect, a supranational administrative organ making transnational allocations in terms of the equities for which it was able to obtain agreement.

As a practical matter one cannot assume that funds of the magnitude of those raised by the bank for the Indus Valley project would be available to develop a common submarine geological structure stretching across the continental shelves of a plurality of adjacent and/or opposite states. Such financial power as the bank brought to bear in the interest of amicable settlement would not, in most cases at least, be at the disposal of the commissions established to engage in supranational administrative activity unless the participating states overcame their usual reluctance to relinquish their ultimate power to define their goals, policies, and values. There is, however, one basis for optimism: even if the lack of financial power were to deprive the supranational managerial agency of a coercive authority, common sense inducements which stem from expectations of benefits from an optimally developed resource might well provide the administrative body with an authority which the parties could voluntarily concede as a matter of enlightened self-interest.

Despite its utility to the settlement of the Indus River dispute, and even to the resolution of conflicting claims in international river systems in general, the blueprint of continuing conciliation may not be completely apposite for the problems of exploiting transnational common submarine mineral deposits. These regimes cannot entertain the goal of achieving any final distribution of rights over their resources similar to the goal of final settlement of disputed rights to the waters of an international river system. Accordingly, the term "administrative conciliation" is suggested to indicate the function of an agency empowered to regulate the development and exploitation of a mineral stock common to a number of states. The agency would be empowered to balance disparate equities advanced by diverse claimants, maintain economic returns on investment in the resource and its utilization, and engage in scientific and conservation activities. A managerial regime dedicated to the administrative concili-

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the supply of water would be increased to a level that would permit the needs of both parties to be satisfied. The slate was wiped clean of the existing rights and obligations of the parties, whatever they might be considered to have been.

He concluded his analysis of the dispute over the waters of the Indus River and of the International Bank of Reconstruction and Development's "continuing conciliation" with the following observation:

The possibility of adjusting the dispute is enhanced if the mediator or conciliator is authorized not merely to divide the existing water supplies but to work out a scheme for the wider and more effective use of the water resources within the basin. The argument that both parties can secure more water from the basin through cooperative effort offers, if not a guarantee of success, at least some inducement for the parties to work together.

Id. at 478.

ation of two or more coastal states' continental shelf¹²⁴ would not only achieve a far better utilization of the present resource than such partition arrangements as those envisaged under Article 6 of the Continental Shelf Convention, but also it would lead to the cultivation and enhancement of the value of mining industry in question, to the great benefit and general welfare of all the states concerned. Finally, a managerial regime could achieve more equitable distribution of rights to exploit the resource by improved means than would a regime legally bound within the scope of existing know-how and technology.

Administrative Conciliation

Although it would necessarily involve a continuing conciliation approach, administrative conciliation, as a proposed means of investing competence in a supranational managerial agency endowed with the mission of developing a resource lying across the common geological structure in the common continental shelves of two or more adjacent or opposite states, would involve a number of important differences.

An administrative conciliation regime would not look to any final settlement of claims. Rather, it would seek to provide a framework for resolving differences by continually redistributing the satisfactions. In fact, market fluctuations and technology changes call for continuing reappraisal of the basic criteria of the resources distribution among the countries involved. Administrative or managerial conciliation does not indicate a process of widening the area of agreement by building on previously settled aspects of a dispute. Instead, its purpose is to indicate the continuous management of the development, distribution, and redistribution of the resources to accommodate continuously changing controlling factors. To carry out its tasks effectively, a conciliation commission would have to operate without any goal of achieving final solutions. It would,

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124. The amounts committed by the contributing states to the Indus Basin Development Fund by December 31, 1968, (in U.S. Dollar equivalents as determined by the International Bank for Reconstruction and Development for accounting purposes at that date) were as follows:

Australia	\$ 26,061,000.
Canada	36,246,361.
Germany	51,600,000.
IBRD Loan & IDA Credit	138,540,000.
India	168,803,200.
Pakistan in L sterling	1,188,000.
in rupees	371,824,292.
United Kingdom	91,288,270.
United States dollar grant	295,590,000.
dollar loan	121,220,000.
rupees	235,000,000.
	\$1,537,361,123.

Letter from Piero Sella, Esq., Assistant General Counsel, IBRD, to the author (Jan. 28, 1969).

in fact, become a permanent administrative body regulating the region to enhance the local transnational continental mining industry's efficiency and value, and to achieve a just distribution of its products. If such a commission were invested with supranational powers, the transnational industry which would emerge, and all those who depend upon it, would be better served. The commission would be able to administer the industry as a single unit without having to respect the special claims of sovereign states through which it would otherwise have to operate.

*Multinational Public Enterprises*¹²⁵

Multinational public enterprises are currently employed for many diverse purposes and in many different areas of international economic activity, each established and justified by pragmatic and functional criteria. They are brought into being when the states creating them seek to attain common ends, "by making use of the present social and scientific opportunities to link together particular activities and interests, one at a time, according to need and acceptability, giving each a joint authority and policy limited to that activity alone."¹²⁶

Secondly, although they are called upon to fulfill very divergent tasks, these entities "possess certain common characteristics which distinguish them from other international organizations. They perform economic tasks of a public nature, for which they require the long-term investment of capital and a permanent organization. They generally perform operational functions, and are vested with a power of direct action."¹²⁷ Multinational public enterprises are, therefore, "clothed with the power of government, but [are] possessed of the flexibility and initiative of private enterprise."¹²⁸

Adequately designed, a multinational public enterprise could effectively combine the advantages of the "agent state"¹²⁹ solution with those of administrative conciliation. Such an enterprise could either engage directly in continental shelf mining as a multinational enterprise or, alternatively, license mining corporations to ensure compliance with the standards set by the enterprise for equipment safety, employment policies,

125. For the choice of this term, from among a number of possibilities, see FLIGLER, *MULTINATIONAL PUBLIC ENTERPRISES* 7-8 (IBRD Study 1967).

126. Mitrany, *The Prospect of Integration: Federal or Functional*, 4 COMMON MKT. STUDIES 119, 135 (1965). See also MITRANY, *A WORKING PEACE SYSTEM* 41 (1966).

127. FLIGLER, *supra* note 125, at 7.

128. Friedmann, *International Public Corporations*, 6 MODERN L. REV. 185, 186 (1943), quoting President Roosevelt's characterization of the Tennessee Valley Authority. For a discussion of the more detailed aspects of a blueprint for a multinational public corporation to regulate a regional fishery, see Goldie, *supra* note 96, at 47-51.

129. For a discussion of the concept, in the context of fisheries management, of the "agent state," see CHRISTY & SCOTT, *supra* note 102, at 196; Goldie, *supra* note 96, at 44-45. For a discussion of this concept in terms of both fisheries and minerals, see Goldie, *Ray of Hope*, *supra* note 119, at 327, 370-74 (1970).

and economic efficiency. In either case, the enterprise would have to be accorded either administrative control or a monopoly of the industry. It would enjoy the advantages of the agent state, as it would be the delegate to all states participating in the regime. The public enterprise approach would, in addition, avert the disadvantage of the agent state since no state, or group of states, would be favored. The public enterprise, moreover, would provide the advantage of the administrative conciliation procedure, since its blueprints should include an equitably-oriented commission with authority to give overall directions to the corporation in light of the values, demands, expectations, and contributions of the participating states. Such a public intergovernmental corporation would have a further advantage, one which multinational public enterprises have in common, namely that of building transnational habits of cooperation and of problem-solving. These transnational attitudes and habits expand to become coterminous with the area and mandate of the regime rather than that of any participating state.¹³⁰

The charter of an intergovernmental organization established for the purpose of managing a multinational regional mineral deposit should include provisions governing the entity's juridical personality (and nationality, if any), structure and control powers, privileges and immunities, and the available procedures for the settlement of disputes. These various considerations will be very briefly surveyed.¹³¹

Constituent Instrument

The enterprise should be created by a treaty setting forth the main outline of its structure, the political organ to which it is answerable, its purposes, the basic guidelines of its policies, the framework of its intended action, its obligations towards its member states and theirs towards it. The statutes, articles of association, and powers to promulgate bylaws should also be established by international agreement, preferably in the form of a protocol or annex to the constituent treaty. The alternative, namely the creation of the enterprise or, at least, the formulation of its

130. See, e.g., FLIGLER, *supra* note 125, at 10; CLAUDE, SWORDS INTO PLOUGHSHARES 348 (1964).

131. International public enterprises are deservedly becoming an important topic of study for international lawyers. In addition to the works already cited, the following represent a useful selection: SEWELL, FUNCTIONALISM AND WORLD POLITICS (1966); HANSON, PUBLIC ENTERPRISE AND ECONOMIC DEVELOPMENT (1965); BAXTER, THE LAW OF INTERNATIONAL WATERWAYS 91-148, 306-41 (1965) (but note Baxter's conclusion at 340-41 and his "Articles on the Navigation of International Canals" at 343-45); FRIEDMANN, THE CHANGING STRUCTURE OF INTERNATIONAL LAW 216-20 (1964); FINER, THE T.V.A., LESSONS FOR INTERNATIONAL APPLICATION (1944); Johnson, *International Cooperation in Satellite Communications Systems*, 61 PROC. AM. SOC. INT'L L. 24 (1967); Note, *Corporations Formed Pursuant to Treaty*, 76 HARV. L. REV. 1431 (1963); Sereni, *International Economic Institutions and the Municipal Law of States*, 96 RECUEIL DES COURS 133 (1959-I); Parry, *The International Public Corporation*, THE PUBLIC CORPORATION: A COMPARATIVE SYMPOSIUM 495 (Friedmann ed. 1954); and see Friedman, *A Comparative Analysis*, *Id.* 541, 593-94 (Friedmann ed. 1954).

articles of association under the laws of a member state, might tend to give that state a fulcrum to lever an undue advantage. Accordingly, the format of an intergovernmental enterprise incorporated under the domestic laws of one of the member states should be avoided.

Juridical Personality or Nationality

Juridical personality has been accorded to multinational public enterprises by conferring on them the nationality of one of the member states.¹³² Whatever the merits of such a conferral may be in general, it would not be appropriate for the enterprise proposed here, since the state whose nationality had been conferred might well be placed in a position to obtain favorable treatment *vis-à-vis* the enterprise, and the distribution of its benefits. Accordingly, the constituent treaty should be drafted to confer international legal personality on the enterprise. Since the enterprise would not be universal, or even general, this conferral might not be accepted as coming entirely within the scope of the decision of the ICJ in the *Injuries* case.¹³³ On the other hand, if the international personality established in the treaty is necessary for the tasks the enterprise is structured to perform, then an objective juridical personality should be considered as having been created over and above that merely established by the member states adherence and recognition alone. This thesis has an important practical significance. In order to establish its credit for the purpose of entering into contractual relationships with public or private entities in third countries, the enterprise must establish its legal capacity to enter into binding engagements. This depends not only upon the competence accorded to the enterprise in its constituent instrument and upon its juridical status under international law, but also upon the laws of the third countries in which it wishes to engage in business transactions.

Structure and Control

The enterprise could be organized either as a licensing and supervisory authority, a producers' cooperative, or an independent public entrepreneurial entity. In any case, it should be required to permit miners from the member states to participate, without discrimination, in its activities, whether as licensees or as employees. Distinct from the cooperative, entrepreneurial, or licensing and supervisory structure of the enterprise, a council or governing board made up of representatives of the member states should be established with authority to exercise general overall

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132. Parry, *supra* note 131.

133. Advisory Opinion on Reparations for Injuries Suffered in the Service of the United Nations, 1949 I.C.J. 174, 185. See also Advisory Opinion on Certain Expenses of the United Nations 1962 I.C.J. 151.

supervision, but not day-to-day management. This entity would be charged with the task of insuring the public accountability of the enterprise and of providing a forum for the release, or at least debate, of political pressures which would remain. The governing board or council would also insure that the enterprise's general direction would remain responsive to those represented interests dependent on the exploration of the resources brought under the regime but which have no direct participation in it, for example, consumers and exporters. Strictly business decisions, on the other hand, should remain the function of the Board of Directors. The Board of Directors, which should be seen as an executive body at the apex of the enterprise, would reach decisions on the distribution of mining licenses or on the quantity of the mineral to be mined from the perspective of the requirements of an orderly market and of the optional exploitation of the resource. The Board of Directors should also balance the distribution of the surplus return, designated "the economic rent of the resource,"¹³⁴ with other significant values and interests germane to the industry and pressing for recognition.

Powers

The constituent instruments should, clearly, grant all necessary and proper powers to the enterprise to enable it to perform its functions adequately. These should include the power to engage in business undertakings and agreements of all kinds; buy, own, and sell land and all other forms of property; accept gifts; sue and be sued; compound claims; and perform all conditions necessary to the fulfillment of its purposes. The enterprise should also be empowered to negotiate and conclude agreements with member states and third states as a subject of public international law. States should also be answerable to the enterprise for breaches of agreements, wrongs apart from agreements, and injuries to it and its employees under international law. The enterprise should, finally, be independently answerable for wrongs as a distinct bearer of international rights and duties.¹³⁵ The contracting states should be bound to take all action necessary to facilitate the enterprise's operations and to give adequate priorities to it in their respective economic development plans. Finally, the constituent agreements should explicitly state that all implied powers necessary for the enterprise's adequate fulfillment of its functions and purposes should be imputed to it.

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134. For a discussion of this criterion, in terms of the economic uses and management of fisheries, see Goldie, *supra* note 96, at 21-23.

135. For similar suggestions, but with respect to the liability of international organizations engaged in activities in outer space, see FAWCETT, *INTERNATIONAL LAW AND THE USES OF OUTER SPACE* 45-47 (1968).

Privileges and Immunities

The operational needs of the enterprise should dictate the scope of its privileges and immunities. On the one hand, if the enterprise had no privileges and immunities, it could be vulnerable to undue pressure of its host state (or states) and become little better than an instrument of its (or their) policy.¹³⁶ On the other hand, if its privileges and immunities were to exceed its functions, the enterprise might become a refuge for privilege and incompetence. The proper scope of the enterprise's privileges and immunities is what is necessary for the impartial, efficient, and economical discharge of the functions of the organization.¹³⁷ In particular, the tax status of the enterprise, as distinct from that of its members, may create problems of independence. The enterprise should be accorded immunity from all forms of taxes on its assets and revenues, as well as on its acts, operations, services, and transactions.

Settlement of Disputes

The constituent agreements should contain special provisions for the friendly settlement of disputes by conciliatory means in the governing body. Failing this, procedures for the peaceful settlement of disputes, perhaps analogous to those in Article 33 of the Charter of the United Nations,¹³⁸ should be provided. Finally, and as a matter of last resort, the treaty should provide for the establishment of a judicial tribunal with compulsory jurisdiction. Refusal to accept this jurisdiction, or to comply with the tribunal's judgment, should be enforced by expulsion from the regime or by such lesser enforcement measures as the governing board may determine. Ultimately, however, the peaceful settlement of disputes arising out of the efficient management of the regime's resources, the just participation in its activities and decisions, or the equitable distribution of its benefits, should be predicated on the self-interest of the disputants. The regime should be so conducted that each member state could readily perceive that a greater advantage enured to it by remaining a participating member state of the regime than by "going it alone." Such a perception should result from a freely determined and enlightened self-interest rather than coercion, intimidation, or victimization.

CONCLUSION

International judicial settlement, arbitration, and customary forms of conciliation, in their search for the single conclusive resolution of issues

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136. For an example acknowledging the importance of this consideration, see *Broadbent v. Organization of American States*, 628 F.2d 27 (D.C. Cir. 1980). See also *Brief for the United Nations as Amicus Curiae*, *Broadbent v. O.A.S.*, 628 F.2d 27 (D.C. Cir. 1980).

137. *Broadbent*, 628 F.2d 27.

138. U.N. Charter art. 33.

created by an adversarial posture of the parties, have traditionally looked to legal criteria for their modes of decision. This article has proposed a managerial basis for transboundary resource development in which disputes would be progressively conciliated rather than the adjudication of opposing claims. Equitable developments, standards, and values leading to the individualization of justice, provide the managerial regime with its modalities and materials of decision. Such a regime, directed to achieving equities as managerial goals, would have many advantages over the strict values commonly argued in confrontational situations and modes. Such an equitably grounded regime could, for example, increase the efficiency of the resource's production, thus reducing the cost of mining per measured amount. The regime could improve the engineering and managerial means of exploitation, thereby increasing the fund to be distributed between various developmental purposes of the region, and provide for further improvements of the uses of the continental shelf itself. The regime would, furthermore, be directed towards effectuating a distributive justice in allocating the benefits derived from the resource's economic exploitation. To enable the managerial regime to work efficiently, it would be necessary for participating states to waive whatever legal claims they might assert in a more traditional arena. Appropriately persuasive arguments, in terms of enlightened self-interest and impartial justice, could convince participating states to effectively waive their sovereign rights.

Five forms of international resource management have been considered relevant to international equitable principles: national quotas; agent states; continuing conciliation; administrative conciliation; and multinational enterprises. The models of administrative and managerial conciliation have been discussed in variable terms, namely: a commission to continuously regulate the conduct of a common continental shelf mining industry with a view to increased efficiency and economic returns. Finally, the regime of a multinational public enterprise has been offered to manage a given common resource or industry, either by means of a system of licenses or by establishing a common intergovernmental public entrepreneur acting on behalf of the participating states. The most beneficial regulation and development of a regional mining industry would best be served by one monopolistic multinational public enterprise. Between the two types of intergovernmental public agencies discussed in this article, the licensing authority and the operating enterprise, the enterprise which directly conducts the industry and acts as the sole employer and co-operative of the mining industry of the participating states is preferred for several reasons. It would be more effectively geared to achieving the goal of fuller managerial responsiveness to the equitable needs of the region, because the enterprise would control the industry and not merely function as an intermediary between the miners and the governing board. Also, the op-

erating enterprise would have more direct control over mining activities than would the licensing model, enabling it to effectively realize conservation and distributional welfare goals. The multinational public enterprise would provide the most effective substitute for the traditional dichotomy of the international law of the sea between seas subject to coastal states' exclusive rights and the free high seas open to all. Moreover, the multinational operating enterprise could provide models for effective and equitable regional regimes of participation in, and distribution of, the wealth of common continental shelf mining activities. Positive regimes would replace the traditional negative system predicated on, and justified by, the isolation and divisive contentiousness inherent in a legally severed, but geologically homogeneous and structurally unified, continental shelf. Finally, the type of blueprints proposed in the foregoing pages could offer alternatives to the legalistic perspectives which focus on contentions about opposing claims and, instead, provide machinery of administrative conciliation and conflict management transcending legalism.