Equity as a Concept of International Law (continued)

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EQUITY AS A CONCEPT OF INTERNATIONAL LAW*

B. EQUITY AS INTERPRETED IN ARBITRAL AWARDS

Beginning with the Jay Treaty of 1794 the United States has during the whole period of its history been drafting arbitral agreements in which equity is made a part of the material applicable law. In a number of cases arising under such agreements the precise meaning of the term has been brought in issue. The earliest case in which the question was raised seems to have been the Florida Bonds case decided by the British-American Claims Commission under the Treaty of 1853.¹⁰⁴ The claim of England to recover for debts contracted by the territorial government of Florida was rejected. Thomas, the American agent, in his argument asked to what kind of equity the British counsel referred when he placed his claim "upon the principles of equity, reason and public morals." He must be alluding to a "transcendental equity which belongs not to man to administer." If it were a legal equity the claims should have been brought before the American courts. The claimants admit that the courts of the United States have no jurisdiction. "The equity, then demanded, is that which has heretofore been too subtle for courts of justice, and the case is brought before this Commission under the supposition that it is endowed with superhuman power."

The Rio Grande cases decided in 1873 by the British-American Claims Commission is notable for the protest of Commissioner Frasier against a broad interpretation of the term "equity".¹⁰⁵ "The doctrine that this commission may by its decisions, disregard the law of nations, in deference to whatever undefined notions of 'equity and justice' the several members of the commission may happen to entertain from time to time, is to me a very great surprise." Equity does not depend on the individual conscience of the chancellor; "'equity follows the law'—abides by it—not only obeys but maintains it, and administers justice according to a system of known and established

*The first installment of this article appeared in the November issue of the Kentucky Law Journal.
principles sanctioned by precedent.’’ The rules of international law furnish the full measure of obligation in a given case, and ascertain what equity is. The agent for Great Britain argued that the arbitration agreement vested the tribunal with an extraordinary discretion since only equity and justice are mentioned as the juridical bases without any reference to international law.\(^{106}\) The Jay Treaty gave more limited power since international law was expressly laid down as a ground of decision. Irrespective of international law the claims must be satisfied if ‘‘justified in the conscientious judgment of the commissioners by justice and equity.’’ Equity should therefore refuse to follow the technical rule of prize law that probable cause not merely excuses, but in some cases justifies a capture. If, however, the rule of probable cause were to be adopted, the tribunal should work out its own doctrine of probable cause ‘‘unembarrassed by the special and technical rules of the prize code.’’ The tribunal rendered an award in favor of the English claim, but the decision was meager in its reasoning and the tribunal appears to have assumed that it acted according to international law.

The Venezuelan Arbitration cases of 1903 contain some of the most elaborate discussions of the meaning and application of equity. The compromís provided that judgment should be ‘‘on a basis of absolute equity, without regard to objections of a technical nature or of the provisions of local legislation.’’ In the Aroa Mines case, Umpire Plumley of the British-Venezuelan Commission adhered to the general principle of international law that a state is not responsible for the wrongful acts of unsuccessful rebels committed against resident aliens.\(^{107}\) The Umpire pointed out that the ‘‘course of commissions has rarely strayed from equity and justice by a too close adherence to technical objections.’’\(^{108}\) In finding the law to govern the case, the tribunal must first look to its oath, and then to the terms of the arbitral agreement.\(^{109}\) In case of conflict between the two the former is the superior rule of action. Although international law is not mentioned in the compromís ‘‘since it is a

\(^{106}\) Ibid., 103, 104.

\(^{107}\) Venezuelan Arbitrations of 1903; Report of Jackson H. Ralston, 344.

\(^{108}\) Ibid., 380.

\(^{109}\) Ibid., 385-6.
part of the law of the land of both governments, and since it is
the only definitive rule between nations, it is the law of this
tribunal interwoven in every line, word, and syllable of the
protocols, defining their meaning and illuminating the text, re-
straining, impelling, and directing every act thereunder.”

Plumley says: “The phrase ‘absolute equity’ used in the
protocols the umpire understands and interprets to mean equity
unrestrained by any artificial rules in its application to a given
case.” International law is assumed to conform to justice
and to be inspired by the principles of equity.” If, however, in-
ternational law is opposed to equity, or is inadequate or inapplic-
able, then the underlying principle of justice and equity enter
into play. But international law is to be applied as far as
possible, since it has stood the test of time and experience, and
a careless departure would result in entering upon uncharted
seas.

The same issue of law was involved in the Sambiaggio case
before the Umpire Ralston of the Italian-Venezuelan Commiss-
ion, and a similar result was reached. It was the Commiss-
ion’s duty “to apply equitably to the various cases submitted
the well established principles of international law.” The
Commission first dealt with the facts “from the standpoint of
abstract right,” leaving the analysis of precedents and treaties
to later consideration. The Venezuelan government was not
liable for three equitable reasons: that the revolutionists were
not the agents of the government; that their acts were aimed at
the government, which should not be held liable for the acts of
its enemies seeking its very life; and that they were beyond the
control of the government. Equity will not consider political
expediency. Hence the contention that a holding of no re-
ponsibility would encourage rebels to seize the property of
foreigners was rejected. The equitable rights of the injured
aliens were held to be inferior to the equitable rights of the
government not to be charged with wrongs it never committed:
a sort of balancing of equities. “In the view of the umpire, the
ture interpretation of the protocol requires the present tribunal,

101 Ibid., 386.
102 Ibid., 387.
103 Ibid., 666.
104 Ibid., 679-680.
105 Ibid., 692.
disregarding technicalities, to apply equitably to the various cases submitted to them the well-established principles of justice, not permitting sympathy for suffering to bring about a disregard for law."

In the Padron case the question of responsibility also came before the Spanish-Venezuelan Commission, which permitted the claimants to recover on the ground of equity, the umpire conceeding that ordinarily there was no legal liability. The effect of the "absolute equity" proviso was to make necessary the separate examination of each claim without its being allowable to lay down an abstract principle stated in general terms, which would simultaneously decide several claims. In order to establish that the commission was "created as a tribunal of equity only," objections of a technical nature and provisions of local legislation were not to be considered. Umpire Gutierrez-Otero lays down the rule that the objection of a want of responsibility for the acts of unsuccessful revolutionists is a technical one because it does not conform to equity. The view of Merignhaec to the effect that such a protocol leaves absolute equity to the arbitrator is accepted as correct. Absolute equity permitted the Commission to decide "without conforming to law, which is what essentially characterizes arbitrators." The protocol shows the desire of the parties to have the case decided according to the principles of morality, and promotes recourse to arbitration since it broadens the scope of arbitration and permits the decision of a greater variety of cases.

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118 Ibid., p. 927. The Umpire also cites the opinion of Lafayette: "When it is according to their conscience, sentiments of equity, or the principles of natural law, that the arbitrators must render their sentence, they constitute a tribunal of equity; if, on the contrary, it is according to previously established principles of international law, we have a court of justice." Calvo, International Law, III, 464, note 1. Reliance also is put on the last clause of the recommendation by the Institute of International Law in its rules of August, 1875, for use in arbitration agreements: "The arbitral tribunal shall judge according to the principles of international law, unless the compromis imposes different rules upon it or leaves its decision to the free opinion of the arbitrators." Revue de Droit International, 1875, p. 281.
The same commission laid down the latter rule of responsibility in the Mena case. The tribunal as one of equity has absolute liberty to hand down a decision "which is not against good conscience, inspired by a true estimation of absolute justice, and which permits finally, taking into consideration of all the circumstances of the case, conceding equitably what is not a matter of obligation and cannot be demanded, and, in a word, proceeding, as arbitrators proceed, that is, without regard for law."

The Permanent Court of Arbitration at the Hague had occasion to pass on the meaning of equity in the Orinoco Steamship Company case. In revising the award of the United States-Venezuelan Commission which was empowered to decide according to "absolute equity," the court held that the protocol "did not vest the arbitrators with discretionary powers." The Venezuelan agent used as his "capital argument" the contention that the phrase had conferred unlimited discretion upon the Commission, Merignac, Weiss, and Fiore were cited as authorities. The United States, on the other hand, did not quote publicists, but alleged the continued practice of the United States in using such language in arbitral agreements without its ever having been construed to give such authority.

The Court reversed the rules laid down in the award appealed from, that absolute equity authorized the rejection of a claim on the grounds of failure to resort to the local courts, and of failure of the claimant assignee to notify the transfer of his debt to the debtor, a proceeding required by the local law. The arbitral convention of 1903 and 1909 made the local jurisdiction incompatible with the arbitration. Want of notice to the debtor was excused on the ground that the rule requiring it was merely a local one, and hence not required by absolute equity, especially since the debtor had actual knowledge of the cession.

One of the most important cases during the last decade discussing the meaning of equity was the Norwegian Shipping Claims case against the United States in 1922. The award

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120 Ibid., 931-933.
121 Scott, Hague Court Reports, 232.
122 Ibid., 69.
123 Ibid., 18, 30, 32.
124 Venezuelan Argument, 65.
125 Ibid., 121, 218, 20.
126 17 A. J. I. L., 582
lays down a kind of principle of eminent domain in international law when a state seizes the property of foreign citizens. The *compromis* provided for decision according to the "principles of law and equity." As to the meaning of this phrase the tribunal said: "The majority of international lawyers seem to agree that these words are to be understood to mean general principles of justice as distinguished from any particular system of jurisdiction or the municipal law of any state."\(^{128}\) They cannot be understood "in the traditional sense in which these words are used in the Anglo-Saxon jurisprudence." Hence the municipal law of the United States was not binding. It would not be followed where it violated the principle of equity of the parties, or the principles of justice common to every civilized country. The damages and interest appear to have been assessed on an equitable basis. "It has been somewhat difficult to fix the real market value of some of these shipbuilding contracts. The value must be assessed *ex aequo et bono.*"\(^{127}\) As to interest the tribunal asserts that it is competent to allow it "as part of the compensation *ex aequo et bono*, if the circumstances are considered to justify it."\(^{128}\) The award was accepted by the United States, but not without serious protest.\(^{129}\) Secretary Hughes in a letter to the Norwegian minister at Washington refused to accept what he termed the "apparent bases" of the award as being expressive of international law or as binding the United States as a precedent.

The most extensive discussion of equity is to be found in the recent Cayuga Indians case decided by the British-American Claims Commission.\(^{130}\) The United States was held liable on a contract in the form of a treaty made by the State of New York with the Cayuga Tribe of Indians, part of whom had migrated to Canada after the making of the treaty. The tribunal expressly stated that the United States was not legally liable for such a debt, but was equitably liable because the Indians had no international status and because of their dependent legal status. The tribunal also held the United States legally liable under the Treaty of Ghent, so that the finding of equitable

\(^{126}\) Ibid., 384.
\(^{127}\) Ibid., 393.
\(^{128}\) Ibid., 395.
\(^{129}\) Ibid., 287-289.
\(^{130}\) "*Report of Fred K. Nielsen*, 202-231, 307. Dean Roscoe Pound was one of the three members deciding the case.
liability was seemingly unnecessary. "There are cases in which—like the court of the land—these tribunals must find the right and the law, in general considerations of justice, equity, and right dealing guided by legal analogies and by the spirit and received principles of international law." Equity does not involve compromise. The _ex aequo et bono_ clause of article 38 of the Statute of the Permanent Court is distinguished in its purpose. That clause calls for a "degree of compromise" and not for principles of equity. Equity involves "general and universally admitted principles of justice and right dealing, as against the harsh operation of strict doctrines of legal personality in an anomalous situation for which such doctrines were not desired and the harsh operation of the legal terminology of a covenant which the covenantees had no part in framing and no capacity to understand." As authority the tribunal relies on Merignhac, Lammoseh, Bulmerineq, and the opinion in the Norwegian Shipping Claims case.

In two other cases decided by the same tribunal, composed, however, of different members, a strict interpretation was placed on the phrase. In the Hardman case it was held that the United States was not liable for the destruction of the property of aliens in time of war in the interest of the preservation of the health of military forces. An act of grace was, however, recommended. Both agents urged a limited interpretation of the word "equity." Hurst, the British agent, contended that the use of the word "and" instead of "or" to connect "international law" with "equity" showed that equity was to be applied only where there was no rule of international law. Clark, the American agent, argued that where there is no applicable rule of strict international law, the tribunal will apply the following principles in the named order: (1) principles of private international law; (2) maritime law; (3) "the fundamental principles of the jurisprudence of the various systems of law, particularly the common law (and, I include in that term the common law and equity as understood in the United States and Great Britain) and the principles of the civil law;"

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131 Ibid., 314-315.
132 Ibid., 320.
133 Ibid., 68.
134 7 A. J. I. L., 687-706.
135 Ibid., 687.
(4) the fundamental principles of law of the parties involved;  
(5) any positive principles of law of the defendant nation, and  
(6) any positive principle of law of the plaintiff nation.  

Equity has had a great looseness of usage and interpretation by international tribunals. It is erroneous for them “to administer abstract equity regardless of the law,” and “to try to conceive what was the abstract equity involved in any particular case.” The conception of equity of the individual arbitrator in the case must not govern. The advancement of international arbitration would be impeded by such an interpretation. “If nations come to feel in submitting differences to the arbitrators that the decision will probably not be according to the law involved but will be according to the ideas of the tribunal, as to abstract right and justice, then I say to you arbitration cannot live. No nation would know where an arbitral tribunal might go in a controversy to which it was a party.

In the case of Eastern Extension, Australasia and China Telegraph Company, Ltd., the tribunal held that a belligerent nation cutting cables belonging to neutrals and connecting enemy and neutral territories was under no equitable obligation to make compensation. Equity must give way in the face of a treaty or a rule of international law. “If the strict application of a treaty or of a specific rule of international law conduce to a decision, which, however justified from a strictly legal point of view, will result in hardship, unjustified, having regard to the special circumstances of the case, then it is the duty of the tribunal to do their best to avoid such a result, so far as may be possible, by recommending some course of action by way of grace on the part of the respondent government.” The brief of counsel for the United States cites the Rio Grande, Orinoco, and Santiago cases as controlling in the definition of equity. Nielson, agent for the United States, asserts that equity as a ground of decision might well be eliminated from arbitral compromis, but that it has come into a conventional use.
thinks that it "has seldom furnished excuse for an abuse of judicial discretion, and that the interpretation which has generally been put upon it is that cases are to be decided with impartial, even-handed justice—by the application of law." He would confine the term to matters specifically designated as "equities" or "equitable" in the compromis, to the assessment of damages, and to claims to lands where there is no domestic law.\textsuperscript{143} The British agent argued for a wider use of the term on the ground that international law had not yet reached the stage of development where all pecuniary claims were regulated by positive rules of law.\textsuperscript{144} The tribunal must therefore have the power to make awards based on justice in certain cases even though no positive rules of international law exist.\textsuperscript{145}

Summarizing the results of the awards of arbitral tribunals, one must conclude that arbitrators have been inclined to adopt a narrower concept of equity than have the publicists. International judges have shown a tendency to identify equity with analogy, as something to be resorted to as a mode of filling the gaps in international law. The recommendation of acts of grace and the function of amiable composition have been distinguished from the application of equity. Judges have seldom ridden rough-shod over well-established rules of international law. Decisions according to equity have been decisions according to international law, and there has been no addition to substantive international law. It seems wholly unlikely that there will grow up any body of "equity" apart from international law. A concise review of the awards plainly demonstrates this. In the Venezuelan cases of 1903, technical rules of local legislation were rejected. But local rules are not \textit{ex proprio vigore}

\textsuperscript{143} \textit{Ibid.}, 61-62.
\textsuperscript{144} \textit{Ibid.}, 68.
\textsuperscript{145} Other cases discussing the meaning of equity are: Guastini, \textit{Venezuelan Arbitrations of 1903}; \textit{Report of Jackson H. Ralston}, 730; Kummerow, 526; Turnbull, Manoa Co., Ltd., and Orinoco Co., Ltd., 244; Gentini, 730; Davis, 402; Mazzei, 693; Brignone, 710; Hony, \textit{Morris' Report on United States and Venezuelan Claims Commission}, 97; Boulton, Bliss and Dallett, 101; Barberie (also known as Cadiz) 4 \textit{Moore, History and Digest of International Arbitrations}, 4200, 4203; Landreau, 6 \textit{A. J. L.} 1002; Russian Indemnity, Scott \textit{Hague Court Reports}, 297; Island of Timor, 354; Pious Fund, 48, 53; \textit{Venezuelan Preference, The Venezuelan Arbitration Before the Hague Tribunal: Report Wm. L. Penfield}; Perche, \textit{French American Claims Commission (Boutwell's Report)}, 41; Lebret, 194; McCallmont, Treaves and Co., \textit{Report of the British-American Claims Commission under Treaty of 1853}, 341; Lespes, 2 \textit{Moore, International Arbitrations}, 1300, note 2.
binding in tribunals applying strict international law. The Aroa Mines and Sambiaggio cases denied the liability of a government for the acts of unsuccessful revolutionists in the absence of a showing of a lack of due diligence by the government. This is the ordinary rule of international law. In the Padron and Mena cases the Spanish-Venezuelan Commission asserted liability on the ground of equity. When it is borne in mind, however, that the better constituted commissions found the other way, and further that the rules of responsibility are not fully agreed upon at international law, the result is not particularly anomalous. In the Cayuga Indians case the issue of the liability of the central government on the contracts of a division or state of the nation was involved. The tribunal expressly stated that there was no legal liability but held that the United States was equitably liable. The result is not especially indefensible from the standpoint of international law, as the responsibility in this type of cases is also somewhat unsettled, and there are several precedents of central governments having been held liable under not wholly dissimilar circumstances. There was perhaps a gap in the law which equity might properly fill by resort to analogies, which in this case would not be difficult to find. In the Florida Bonds case the English agent asserted that the United States was equitably liable for debts contracted by the territorial government of Florida. Although the arbitral agreement provided for application of law and equity, the claim was rejected. Thus it seems that the doctrine of responsibility of a government has not been greatly stretched by equity.

Although the tribunal accepted the liberal interpretation of the word "equity" in the Norwegian Shipping Claims case, no unusual doctrines were laid down. The United States was held liable for the seizure by the government of Norwegian ships for war use. But well recognized rules of international law require compensation for such acts. The damages awarded may have been excessive. It is not clear from anything the Court said in its opinion, however, that any positive principles of international law as to damages were violated. The subject of damages seems at present to be a controverted one. In the Hardman and the Eastern Extension, Australasia and China Telegraph Company, Ltd., cases the British-American Tribunal seems to have adhered to a strict application of international
law, so that the award in the Cayuga Indians case is quite fully counterbalanced. In the former case the United States was held not liable for the destruction of the property of aliens in time of war with the object of maintaining the health of its military forces. Yet an act of grace was recommended. In the latter case the tribunal held that a belligerent cutting cables belonging to neutrals and connecting enemy and neutral territories was under no equitable obligation to make compensation. The conclusion seems inevitable that tribunals authorized to apply equity have adhered rather strictly to rules of international law, and that when they have gone beyond its principles, the departures have not generally been extensive in scope.

C. CONCLUSION AS TO MEANING OF EQUITY.

The views of the leading publicists and the definitions as found in the leading awards have been set forth. It is now perhaps possible to frame a definition of equity as used in international law, having especially in view compromise which make equity a ground of decision or associate it with international law as legal bases. At the outset it is apparent that it is not identical with the equity of the Anglo-American judicial system. Nor is it a developed code of law, apart from the rules of international law. It is not an aggregate of substantive and procedural rules. It is not limited to any one field of law, nor based on historical accident. It is not applied by a separate set of tribunals, nor is it generally applied consciously by the regular international judicial bodies apart from international law. It is improper to speak of arbitration commissions as being courts of equity, since as has been seen they apply international law to the same extent as courts of international justice. Nor is equity identical with principles of private law.

Equity is not the subjective ethical views of the individual arbitrator. The arbitrator does not examine his individual conscience to see how he would decide a case apart from rules of law. Nor is it equivalent to what might be called objective morality, the morality of popular opinion. It is not identical with compromise, and is not based on considerations of political expediency.

What then is equity? Equity, it appears, is the compound of legal and semi-legal materials used to fill the gaps in international law. It is based largely on analogy. This analogy is
to be drawn from legal science or jurisprudence as developed in close connection with the actually existing and accepted rules of international law. The scope of equity must not be too broadly stated. It will not alter positive rules of international law. Equity is not contrary to international law, but instead follows it to the extent of its existence. The theory is that international law is based in part at least on consent, and this would no longer be true if the tribunal could alter the rules. But while equity may not modify positive rules, it may fill the gaps in international law. International law is not regarded as a completely developed legal system, as are the private law systems of the leading nations of the world. As to many subjects of international relations there is no law at all. On other questions the law is but slightly developed or is very uncertain and obscure. It is the task of equity to make possible solution of such questions. Equity will make use of the existing rules of law and out of them will seek to draw further principles. It will resort to analogies. But in the use of analogies it will be careful not to stride too rapidly. Analogies will be based on closely related categories and not on unrelated fields of the law. As Mr. Justice Holmes says: "I recognize without hesitation that judges do and must legislate, but they can only do so interstitially, they are confined from molar to molecular motions." 148

In one aspect equity in international law means morality. But it is a morality in close contact with existing rules of law. It is not simply a matter of generosity and sympathy and mercy. In selecting analogies and the other legal data to fill the gaps judges will inevitably be affected by ethical concepts. But the ethics will be those of a lawyer trained in the various fields of law and their bearing on one another, that is, the judge will not allow considerations of morality to so dominate as violently to upset the qualities of certainty and predictability in the law.

In one sense it may be said that equity is a mode of application of the law rather than a source of law itself. That is, the international tribunal will apply international law equitably. 147

146 Southern Pacific Co. v. Jensen (1917), 244 U. S. 205.

147 The arbitrator "should take account of equity, of the ideas of morality and justice which are found at the basis of international law, in the interpretation which he believes should be given to the principles of this law." Weiss, Revue Generale de droit international public (1910), 121.
Equity is a quality which pervades or should pervade the whole field of international law. Therefore to shut it off into a separate compartment is somewhat misleading.

Six or seven different meanings have been given to the word equity as a general term of jurisprudence. It has been thought to mean simply analogy. It has been also identified with interpretation. Historically as far back as Aristotle it has been defined as reasonable modification of the letter of the law, especially of statutory law. In a somewhat broader sense it has been used as a synonym of reasonableness or fairness in general. Thus it might modify both statutes and case law. In a fifth sense it has been used as equivalent to morality. In this sense it may mean the objective morality of public opinion or the subjective conscientious views of the judge. Occasionally it has been used in the same sense as public utility. A few writers reduce it to a mere compromise based on expediency. In international law it would seem that equity may include the ideas of analogy, interpretation, reasonable modification of treaties, and reasonableness in general as to the application of both customary and treaty law. When the application of these still leave some doubt the tribunal may resort to morality. This morality will likely be the ethical views of the judges themselves, as there is no mode of measuring objective public morality. Considerations of public utility and compromise would seem to be excluded except as they coincided with morality.

Finally in connection with the whole subject of equity in international law, one last word of skepticism seems necessary. Even when the arbitrator is empowered to decide simply according to international law, it seems that he is not barred from resort to analogy and to considerations of reasonableness and morality. The international judicial process is not so utterly unlike the process of a national court that the tribunal is to be denied all creative functions. Moreover, it is not seen why, equity, which constitutes one of the bases of the positive municipal law of nations, should not also constitute one of the bases of international law, and be taken into consideration in a reasonable manner in the application of this latter law. Especially since in one of its acceptations, the law of nations is taken as synonymous with natural law, consecrating the principles of morality and justice accepted by all peoples and opposing itself to the positive law of the various states.” Merignac, L’Arbitrage International,
national awards shows that international law has been developed to a certain extent through them. Arbitral tribunals have proceeded to fill the gaps in international law, although the compromis have made no mention of equity. The judicial process of international tribunals is very similar irrespective of the terms of the compromis. The tribunal regards itself as bound to apply international law even if the arbitral agreement goes so far as to make "absolute equity" a basis, and even amiable compositeurs have been known to declare themselves bound by international law. It is doubtless true that an award may be regarded as invalid on account of an excess of power in not following the legal bases set out in the compromis. But such procedure is comparatively so rare as hardly to merit consideration. Where a nation fails to protest at once, the excess must be regarded as waived. The search and use of the sources by the tribunal is not a highly conscious process. Too often it is merely a disappointed agent who attacks the juridical character of the award. It is much to be doubted whether nations have attached much importance to the precise wording of the legal grounds of decision. In fact private law judges in most nations.

sec. 298. For analysis of the judicial process in municipal law courts, see Cardozo, The Nature of the Judicial Process; Gray, Nature and Sources of the Law.

In 1877 the Institute of International Law suggested four grounds for the nullity of an award: nullity of the compromis, excess of power, fraud of the arbitrators, and essential error. Annuaire de l'Institut de droit International, I, 1877, p. 133. A failure to follow the grounds of decision set out in the compromis is regarded as excess of power and possibly essential error. Lammasch, who has made a careful study of the subject, approves of only two grounds for nullity, excess of power and fraud of the arbitrators.

Die Lehre von der Schiedsgerichtsbarkeit in ihrem ganzem Umfange, II, 221-222. Thus a failure to follow the prescribed legal bases would be a ground of nullity under his view also. Perhaps the leading examples of awards which were regarded as invalid for such a failure was that in 1827 of the King of Netherlands as to the Maine Boundary and that in the original Orinoco Shipping Company case. In the former the award drew an intermediate boundary line based on compromise. In the latter the award was set aside by the Hague Tribunal for a failure to decide according to "absolute equity," as the compromis had prescribed.

Weiss asserts that the sanction of nullity of an award applies particularly to a failure to follow the legal grounds set out in the compromis, and that where equity is but one basis, especially a subsidiary basis according to the compromis, the award is assailable. Revue Generale de droit international public, 120-126. But Merignac points out that even cases of the larger category—excess of power—have been very rare, and that the objection is more theoretical than practical. L'Arbitrage International, sec. 331.
are not formally bound to apply the law in any certain mode or in any certain order as to legal categories, and yet the results arrived at are generally satisfactory. It would seem improper therefore unduly to emphasize the significance or the formal sources of law set out in the arbitral agreements. The supremacy of international law seems to be assured in most all cases no matter what language is used.

V. GAPS IN INTERNATIONAL LAW.

One of the most mystifying problems of international law is the existence of what are called "gaps" in the law.\textsuperscript{151} That such lacunae exist is tacitly and often expressly recognized by publicists. The compromis of arbitral agreements very seldom provide for decisions according to international law exclusively, but generally provide for resort to other sources of law, such as the principles of municipal law, the decisions of international and national tribunals, the opinions of authoritative writers, and principles of equity and justice. While the purpose of such provisions is perhaps in some instances to prevent a decision according to strict principles of international law, and may in other cases represent mere redundancy of legal language, there can be no doubt that on many occasions the parties have stipulated to such effect in order to avoid a non liquet, that is, a refusal of the tribunal to decide the case on account of the inadequacy or obscurity of the law. Article 37 of the Hague Convention providing for awards by the Hague Tribunal "on the basis of respect for law" instead of simply "on the basis of law" indicates that the framers viewed international law as an incomplete system. The Statute of the Permanent Court of International Justice manifestly had this in mind when they prescribed in Article 38 the following material law to be applied by the Permanent Court:

"1. International conventions, whether general or particular, establishing rules expressly recognized by the contesting States;
"2. International custom, as evidence of a general practice accepted as law;
"3. The general principles of law recognized by civilized nations;
"4. 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.

\textsuperscript{152}The German term for gap is "lucke," French and Italian, "lacune," and Latin, "lacuna."
"This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."

The recent United States-British Arbitration Tribunal seems to have had gaps in view when they said that "even assuming that there was . . . no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case . . . it cannot be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles." 152

Kantorowicz, writing of the problem of gaps in any legal system points out that the word may be given an exceedingly broad meaning.153 "The fact that the construction of a statutory rule or the interpretation of a judicial opinion is dubious, is a proof that a logically stringent decision is impossible; and the assertion that the case before the court is ‘similar’ to a certain precedent, generally implies a subjective evaluation that the differences between the two cases are insignificant and an admission that there is no established rule governing the case in question in its full individuality. So the lawyer is, in fact, always faced with the ‘gaps’ in the law and this demonstrates the importance of the gap problem."

There are, in the view of Kantorowicz, two opposing tendencies in the law; the formalistic, which applies the law exactly as it has developed historically; and the purposive or productive, which has prevailed in the Anglo-American legal system in practice though not in theory, and which uses the law as a means to the end of controlling life in its shifting facts.154 The former school adopts the *Geschlossenheitstheorie*, that law is a closed system free of gaps. The latter school should regard formal law as subject to gaps (the *Luckentheorie*). The theory of the Anglo-American legal system has been obscured, however, because the lawyers have "considered law as a closed system

152 Nielsen's Report, 73, Eastern Extension, Australasia and China Telegraph Co., Ltd.
154 Ibid., 699-701.
and therefore believed that they had to disguise their own juristic and judicial creations as mere applications of the law."'

Gaps are of two types: material, where the rule of law itself is lacking; and, textual, where only an adequate textual expression of the purpose of the law is lacking. The textual gaps, or as Zitelmann calls them, the "apparent" gaps are caused by the fact that the purpose of the statute is broader than its meaning, as where the word "man" is used to include both men and women. The textual gaps must be filled by "free interpretation," based on the purpose of the statute, as tested by its social effect if it were adopted at the time of the controversy. "Material" gaps exist both in code and case-law systems.

"The material gaps have to be filled up by different forms of the free law, the order of which is determined in part by positive rules, in part by considerations of legal philosophy." Article I of the Swiss Code lays down a specific order. In the absence of positive rules the following order is suggested: formal explicit law, formal implicit law, nascent explicit law, nascent implicit law, desired explicit law, and desired implicit law. Three important mistakes in filling the gaps are suggested. In the first place the court may apply "one alone out of several equally possible interpretations as the only one to fill up the gap." In the second place, it may act "in pretended accordance with the whole system, but without regard to the peculiarity of the problem or case in question." Thirdly, it may err "by an unsuitable transference of a concept from a technically well developed branch to a less developed one. In the first instance we have the systematical, in the second the pseudo-systematical, in the third the cross-selective (grenzverwirrende) type of legal conceptualism."

Kiss also ascribes a broad meaning of the term as one of jurisprudence. He asserts that "the specific facts in individual cases produce 'gaps' in every legislative provision." Gaps are not limited to technical errors in drafting statutes, obvious mistakes on the part of the legislator, or important errors in drafting statutes, obvious mistakes on the part of the legislator, or important

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155 Ibid., 701-702.
156 Ibid., 705-706.
158 Ibid., 159.
159 Ibid., 160.
changes in economical and social conditions. It "is not possible to
draw a sharp distinction between statutes that provide for
all cases and those that contain 'gaps'. The line is altogether
vague." The general framework of the statute is to be filled
in by interpretation, that is, by carrying out the principles of
the statute. The court is to supply what the statutes omit,
but always through interpretation. In the case of statutes there
are 'gaps' in a narrow and technical sense when there is a lack
of detailed, abstract rules by which a submitted case may be
decided. In the view of Kiss it seems that gaps are confined to
statutory law.

The views of the two writers as just stated are from the
point of view of law in general. One of the most recent con-
siderations from the point of view of international law is that
of Verdross. The expression "gap in the law" is ambiguous

160 Ibid., 161-162.
162 Ibid., 72. Most of the publicists seem inclined to reject the pos-
sibility of a non liquet in international law. By the term seems to be
meant a refusal of a court to decide a case on account of the obscurity
or inadequacy of the law. Article 4 of the French Civil Code, requires
the national courts to decide in all cases. The subject was discussed by
the Advisory Committee of Jurists which drew up the World Court
Statute. Hagerup was of the view that to avoid the possibility of a
non liquet, the court must not be allowed to dismiss the case, for want
of a material applicable rule. Hence, he favored the joint Scandi-
navian project submitted to the Committee allowing the court to resort
to general principles of law and even to decide according to what it
thought ought to be the law. Advisory Committee of Jurists, Perma-
nent Court of International Justice, Proces Verbaux, 286. Root in-
sisted that if the court were given compulsory jurisdiction, in cases
where there was no applicable law, it should dismiss the case, or con-
fine itself to making a recommendation. If the court's jurisdiction was
to be voluntary, however, he had no objection to the application of sub-
jective conceptions of justice in such cases. Ibid., 303-323. Descamps
denied that the absence of treaty or customary law meant that the
court could not decide. Loder pointed out that the Dutch law did not
permit a non liquet, and that the same principle could apply in inter-
national law. De Lapradelle, like Loder, could not conceive of a non
liquet. Ricci-Busatti defended Root's position, urging that what is not
forbidden is allowed. Hence, if a claimant state can point to no legal
rule in its favor, the court need simply declare the absence of a mate-
rial applicable rule and thereby establish the legal situation. Hagerup
was willing to accept this position if the English system of judge-made
law were taken over, so that the court might resort to analogies and
precedents. Lord Phillimore pointed out that in private cases where
the plaintiff had merely a right of a moral order, the case must be dis-
missed in the absence of positive law in support of his claim. The gaps
in international law should be filled through legislation by the Assem-
bly of the League, or by reference of the dispute to the Council. He
asserted that Root's view based on the Anglo-American demurrer.
On the whole, it seems best to conclude that an international court can-
and equivocal. In a broad sense it may mean that international law does not fulfill the needs of international society. But to regard international law as wanting in this respect, one must have in mind an ideal law of which existing law is only a part. But this, in the view of Verdross, is only a "political" gap. In the second place, by the existence of gaps in international law may be meant that not all international disputes may be settled by reference to international law. In the third place it may mean that a non liquet has been provided for. As to the second meaning suggested, Verdross points out that not all cases can be solved on the basis of the immediately applicable rules, and that a partial resort to analogy is necessary. If we call such gaps "legal" gaps, the modern penal code is free from these gaps, since in accord with the maxim nullum crimen sine lege an analogous carrying over of the criminal facts is excluded, so that each case on the basis of these rules must lead to a sentence or an acquittal. The modern civil codes have "legal" gaps, however, since in some cases an analogous application of their directly applicable rules is necessary. But this hiatus is not based on a defect in the legal system, but rather on its fullness, and it is the design of the legal system to refer the judge to analogy. That is, the judge resorts to analogy not because the case could not otherwise be decided, but because the law desires in certain cases not a strict but an analogous application of the directly applicable rules. In fact if the legal system failed to direct any resort to analogy, all legal claims not founded on the applicable rules would be rejected, so that no legal gaps would exist. The "legal" gap is thus created in the first instance by the design of the legal system not to place all cases under the directly applicable rules, but to make use of statutory and legal analogy when a strict application of these rules would violate the spirit of the legal system.

The third possible meaning above mentioned is that the
judge is not in position to decide certain cases, so that the controversy has to suspend with a *non liquet*.\(^{163}\) Such a gap is termed by Verdoss an "application" gap. Such a gap may arise out of the nature of the legal system, as when the judge is directed not to decide under all circumstances, but under fixed hypotheses to pronounce a *non liquet*, and to leave the decision to another as the law giver. Hence these "application" gaps form no gaps in the legal system. They arise not because the judge cannot decide the case, but because it is the design of the legal system that it shall not be resolved by him. Such a case arises in international law when an arbitral agreement on the one hand empowers the tribunal to decide on the basis of settled rules, and on the other hand expressly or tacitly forbids the rejection of those claims which cannot be founded on these principles.\(^{164}\) In such cases the settlement is left to the mutual understanding of the parties. Real "application" gaps exist when the law contains a principle governing the case at issue, but such principle is too uncertain to be capable of application to the extent that the legal system furnishes no authority to resort to analogy or free discretion. "Since in this case, a technical flaw in the legal order is involved, these 'application' gaps may be called 'technical' gaps."

A legal system may intentionally exclude certain cases. Thus from this point of view the legal system contains gaps only to the extent that it wishes to do so. Such gaps are not unwilled gaps. No matter how incomplete the legal system viewed from this apart, a decision is always possible, all claims not founded on principles of law, not being recognized as existing in law. The theoretical controversy depends on whether the legal system asserts the claim to regulate all cases, or whether it undertakes not to lay down principles for certain cases. Under the former state of facts the legal system is, aside from the technical gaps, free from gaps despite all its deficiencies. But even under the latter assumption, the gaps are not clefts in the legal system, but only a figurative expression for the subjects not encompassed within the area of rules of law. Disputes over the issues could be settled by the application of international law,

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but the parties have forbidden it. The "rechtsleere Raum" does not emerge until the parties have limited themselves. In cases before the World Court the third clause of Article 38 will provide for "technical" and "legal" gaps.

Oppenheim assumes the existence of gaps in international law, but is not explicit as to what is their nature. "It is not the task of the writer to fill in the gaps in the existing rules of international law unless a conclusion per analogiam suggests itself with such force that its acceptance is obvious and absolutely necessary. Of course, the gaps must be brought into view, and the writer may offer an opinion de lege ferenda, how to fill them in." The English common law judges fill in gaps in Municipal law with case law. "Do they not fill in the gaps of the law with new law which they find per analogiam?"

Lammasch, in his excellent analysis of the arbitral process, has studied the problem of gaps and the methods of filling them. His concept is much like the "legal" and "technical" gaps referred to by Verdross. "In many cases a completely applicable and indisputable legal basis for the legal conception of the arbitral tribunal will be lacking. Positive international law has not been developed for a very long time; hence in some cases it can give to questions which come up only a partly certain answer. The gaps in international law are all too many." Under such a state of facts the arbitral tribunal may not apply the local law of one of the parties, unless both parties agree thereto. Just as the arbitrator must apply international law when a rule exists, so in the case of a gap, he may not fill it according to his individual legal conviction. He should apply rules in the spirit of existing international law. It is the task of jurisprudence to develop the rules where gaps exist. But such jurisprudence is not to act on the mere personal opinion of jurists, but on a legal science operating in close unity with positive law. In such cases, in which positive rules of international law are lacking, it is legal analogy, and scientific development

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252 Ibid., 337.
254 Ibid., 43-44.
255 Ibid., 47.
which must form the basis of the award." 160 This in the view of Lammaseh is what is meant by a resort to equity. 170

Alvarez suggests that there are three kinds of gaps in international law. 171 The simplest type is of a case which has not been foreseen, but of a nature identical or similar to that of other cases which have been foreseen. Such a gap is to be filled by the application of general principles of law, especially by resort to analogy. But caution must be used in applying private law analogies. The second sort of gaps is "a wholly new case involving the appearance of a new relation due to social and economic changes." To fill this gap recourse must be had "to the principles of law, and in their absence to those of justice and equity, the solution most conformable to their nature must be found according to these later principles: otherwise, the development of the law would be impeded." The third type of gap is a case arising out of "the special situation of a continent and which has not been foreseen." That is, there might be a gap in international law as relates to South America. This gap is to be filled like the second type.

Enrich has also given some attention to the problem of gaps. 172 He contends that on account of the incompleteness and gaps in international law, arbitrators cannot decide wholly according to strict law. "An international arbitral tribunal to be sure cannot decide contrary to recognized principles of international law, but when the present materials of development of international law and its numerous gaps are brought in view, the claim cannot be unopposedly maintained that the decisions of international arbitral tribunals must be based exclusively on jus strictum. 173 Writing before the Permanent Court of International Justice was established, Enrich maintains that a world court should have the right to decide according to justice and equity, because under present world conditions it is impossible to have such a court decide only according to recognized rules of international law. 174 He seems to be of the view that a gap

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160 Ibid., 48.
161 La Codification Du Droit International, 162-164.
162 Probleme der internationalen Organisation, 3-9.
163 Ibid., 3-4.
164 Ibid., 5.
165 Ibid., 7.
is a considerably broader hiatus in the law than a mere defect which can be cured by a resort to analogy. The international judge exercises two functions: finding the law and the use of free discretion (das freie Ermessen). The problem of free discretion of the judge is closely connected with that of finding the law. "The discretion of the judge which here has a wide field to act in and which often will be of decisive significance cannot be unquestionably identified with his 'law-finding' function in connection with questions of the kind mentioned here; in the first place it is less a matter of filling the gaps in the law, than ascertaining the facts and applying the right consideration to them." When all is said and done, it seems that the problem of gaps in international law is not wholly dissimilar from that in private law. If it be asserted that the failure of international law to meet the needs of international relations proves that it contains gaps, manifestly gaps must be said to exist in private law since there is no one who concedes that the legal system of any country fully meets its needs. The common law is constantly being altered by judicial decisions while the Continental codes acquire new meaning through interpretation and the passage of new laws. The existence of political questions in international law does not necessarily indicate that there are lacunae in the law, inasmuch as it is the deliberate will of the nations themselves that certain questions be regarded as political. It is submitted that practically every dispute that might arise can be settled according to legal principles if the parties actually desire a legal adjustment. While it is true that international law is

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175 Ibid., 9.

in its infancy, yet the armory of legal norms is full enough to make possible the adjudication of most controversies according to law. It is moreover a notable fact that even well developed private law systems such as that of the United States, have their categories of political questions of which the national courts cannot take jurisdiction. The Supreme Court of the United States leaves to the political department such questions as the existence within a state of the Union of a republican form of government, and the recognition of foreign states. If the two defects suggested, that of the failure of international law fully to meet the needs of the family of nations, and of the existence of political questions be considered as gaps, it seems that they must be filled in by international legislation, and not by judicial decision.

A gap in the legal sense, one must conclude is the non-existence or the obscurity of detailed rules for the settlement of concrete cases. The international jurist must become conscious of such gaps, not, however, by resort to his individual subjective attitude towards a given problem of international relations, but by bringing to bear his trained legal point of view, so as to become aware that the problem admits of solution by resort to analogy and interpretation. Otherwise there would be chaos in world adjudication, since a claimant nation would readily find a gap in the law, based on its desire for relief. Gaps of this kind may exist both in treaties and in customary law. The international tribunal has the right to bring about a solution by a resort to analogy. That is, it may look to the existing legal principles which in logic and reason seem more directly to bear on the problem and draw from them a new rule. Perhaps several analogies will occur to the tribunal, and at this stage the court will be led to examine considerations of equity. This examination will result in the courts having to consider questions of reasonableness and morality and international sociology. Thus even at this date natural law with, however, a changing content may still play a part in the law of nations. It may be that because of the inequality in the strength of the different nations and because of the infancy of international law that
considerations of morality operate within a more limited scope in international adjudication, but that equity must still play a part cannot successfully be denied.

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