Ex Aequo et Bono: Demystifying an Ancient Concept

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“Settlement of a dispute ex aequo et bono rather than on the basis of law, results neither from the nature of the dispute, nor from lacunae in international law, but solely from the decision of the parties to obtain such a solution.”

I. INTRODUCTION

The ancient concept ex aequo et bono holds that adjudicators should decide disputes according to that which is “fair” and in “good conscience.” Despite its long history in international adjudication, and even though it is enshrined in the Statute of the International Court of Justice, the concept of ex aequo et bono is often avoided on grounds that it operates outside of law, or is deemed to be contrary to law.

This Article argues that the concept has a valuable and emerging significance in modern law. It is ideally suited to resolving disputes between parties who are engaged in complex and long-term relationships or in emerging fields in which the law is either inadequately developed or unsuitable to resolve complex disputes.

The Article evaluates the negative conceptualization of ex aequo et bono. It argues against the overly artificial divide between equitable decisions, which accord with law, and ex aequo et bono decisions, which by inference do not.

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Tracing the evolution of the concept historically through the Medieval Law Merchant to modern times, the Article sets out how *ex aequo et bono* might be revitalized in both international and domestic law. Arguing that *ex aequo et bono* operates along a continuum rather than at a fixed point between law and non-law, the Article illustrates how it can be both formulated and applied. The Article demonstrates how to relate *ex aequo et bono* to the law of equity and how to reconcile it with “gap filling” under law. It also shows how discretion in applying *ex aequo et bono* can be subject to internal and external limits, and how parties can invoke it most effectively to resolve their disputes. The Article concludes by presenting a methodology by which to guide the application of *ex aequo et bono* to such disputes.

Section II discusses the current status of the doctrine of *ex aequo et bono*. It also considers key issues surrounding the doctrine, including the consent of the parties to its application and the attitude of international courts and tribunals to its ambit of operation. Section III outlines the evolution of *ex aequo et bono* historically and in modern public and private international law. Section IV evaluates the tension between equitable and *ex aequo et bono* decisionmaking. Section V explores “gap filling” in the exercise of adjudicator discretion. Sections VI and VII set out internal and external limits on *ex aequo et bono*. Section VIII examines the impact of *ex aequo et bono* upon party autonomy. Section IX proposes guidelines in which *ex aequo et bono* might operate.

The Article concludes that the viability of *ex aequo et bono* depends on the confidence with which parties adopt it and how effectively and fairly adjudicators apply it in accordance with practical reason.

II. THE STATUS OF *EX AEQUO ET BONO*

The concept *ex aequo et bono* is often negatively stereotyped, misunderstood, or both. It is supposed that an adjudicator, by deciding according to that which is “fair” and “good,” acts “outside of the law,” or more pejoratively, “acts notwithstanding the law.” It is in part for these reasons that both public and private parties to international agreements often avoid resorting to *ex aequo et bono* in resolving their differences.

The result is that, absent express party consent, decisions ordinarily are not reached *ex aequo et bono*. In limited instances adjudicators decide cases based on

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2 See Black's Law Dictionary 557 (West 6th ed 1990) (defining *ex aequo et bono* as “in justice and fairness; according to what is just and good; according to equity and conscience”).

3 For example, the International Center for the Settlement of Investment Disputes (“ICSID”) Convention on the Settlement of Investment Disputes between States and Nationals of Other States expressly provides that tribunals that invoke *ex aequo et bono* in the absence of express party consent are subject to annulment. ICSID Convention (1964), 17 UST 1270, available online at
principles not ordinarily contained in international law, including assurances that
treatment of the parties is humane and that remedies are proportionate, but only
if such action is permitted by the applicable law. The presumption is that such
principles are legitimately invoked because they are permitted by the applicable
domestic or international legal system and are not the result of an independent
decision by the adjudicator to decide *ex aequo et bono*.

Occasionally too, and invariably with the consent of the parties,
international arbitration may be decided *ex aequo et bono*. In effect, arbitrators
reach their decisions not on the basis of applicable law, but according to what
they consider to be “fair” and “in good conscience” in the circumstances.

Dynamic changes in international relations, typified by the growing
international investment disputes, have brought the concept of *ex aequo et bono*
back into focus. Parties are increasingly faced with little or no law in the
applicable field, or a situation where one or both parties mistrust the law or its
application to their particular dispute. Coupled with this is a growing interest in
the expeditious resolution of disputes in emerging areas of law, particularly the
law as it relates to the internet, intellectual property, and state-investor disputes.
The expertise of international adjudicators may be viewed as outweighing
reliance on inapplicable law. A system which depends on conceptions of fairness
may also be considered preferable to the law of an applicable state. Finally,
parties engaged in a long-term relationship may be interested in resolving their

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4 For a discussion on equitable decisions under law compared to *ex aequo et bono* outside of law, see Section IV.

5 Mohsen Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* 115 (Kluwer
1999) (citing E. Fouchard, *L'Arbitrage Commercial International* No. 559 (1965)).

6 This development is also reflected in the mushrooming of investment treaties. See Taida Begic,
*Applicable Law in International Investment Disputes* 219–230 (Eleven Ind 2005).

7 Such “gaps” in the law are most evident in emerging areas of international practice such as
investment practice in which the pre-existing may be silent on the issue at hand. See Section V.C.

8 Considerations of fairness are also appropriate between parties of unequal bargaining power,
notably in employer-employee relations and in the award of monetary damages. See, for example,
*Gilbert Castille v Commission of the European Communities*, Combined Cases 173/82, 157/83, 186/84,
1986 ECR 497 (Feb 6, 1986) (where *ex aequo et bono* is also used in determining nonmaterial
damages due to an employee in employment cases, such as for the considerable delay that
occurred before the employee's personal file was brought up to date).
disputes by *amicable compositeur*\(^9\) or *ex aequo et bono* in order to maintain their ongoing association.\(^{10}\) *Ex aequo et bono* has the most to offer in respect of such relational agreements, as distinct from discrete transactions.\(^{11}\)

The result is international organizations' mounting interest in dispute resolution *ex aequo et bono*, most notably that of the International Chamber of Commerce ("ICC").\(^{12}\) One key issue for consideration relates to how the concept of *ex aequo et bono* might evolve in the future, including how it could be constituted to suit modern international needs.

### III. The Problem Stated

Parties to international law disputes—both public and commercial—ordinarily resolve disputes *ex aequo et bono* only as an exception, not as the rule. The vast majority of decisions are resolved according to the parties' choice of law.\(^{13}\) Any resort to *ex aequo et bono* occurs only if the parties expressly choose it in substitution for, or in addition to, their choice of law.\(^{14}\)

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\(^{10}\) Broches, *Selected Essays* at 231 (cited in note 1). See also Section III.

\(^{11}\) "Relational" agreements, revolving around the "relationship" between the parties tend to be more informal and less legalistic than discrete "transactions." See generally David Campbell, ed, *The Relational Theory of Contract: Selected Works of Ian MacNeil* 257–64 (Sweet & Maxwell 2001).

\(^{12}\) The ICC appointed a Task Force on *amicable composition* and *ex aequo et bono* in September 2005 with the mandate (1) "to identify the essential features of *amicable composition* and of *ex aequo et bono*" and (2) to "study the role of the arbitrators when acting as *amicable compositeurs* or when deciding *ex aequo et bono*, [particularly] jurisdictional, procedural, or substantive problems that may arise." The Task Force is co-chaired by Edouard Bertrand (France) and Ronald King (United Kingdom). See ICC, *Task Force on Amiable Composition and ex aequo et bono*, available online at <http://www.iccwbo.org/policy/arbitration/id6566/index.html> (visited Nov 17, 2007). The ICC provides for arbitration *ex aequo et bono*, with the consent of the parties. See ICC, International Court Rules of Arbitration, art 17, 36 ILM 1606, 1612 (1997).

\(^{13}\) On the provision in the ICSID for the parties to make a choice of law, see Section V.C.

\(^{14}\) On the provision for the parties to expressly authorize the rendering of awards *ex aequo et bono* under the rules of the ICC, see Aron Broches, *A Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 1965: Explanatory Notes and Survey of its Application*, 18 YB Comm Arb 627, 666 (1993).
Under international law, the power of an international tribunal to decide *ex aequo et bono* is restricted. The tribunal must have regard for "the general principles of international law, while respecting the contractual obligations of the parties and the final decision of international tribunals that are binding upon the parties." According to the International Court of Justice, the choice of the parties to adjudicate *ex aequo et bono* must be expressly made and will not be implied.

Critics of adjudication *ex aequo et bono* conceive of it as involving diplomatic decisionmaking more fitting to a legislature than a judicial tribunal. Skeptical of judicial resort to *ex aequo et bono*, the late Judge Sir Hersch Lauterpacht noted that deciding *ex aequo et bono* "introduces the possibility of the law being changed in accordance with justice and political requirements."

Despite its critics, decisionmaking *ex aequo et bono* is formally permitted in public international law, and limitations on it are either imagined or arbitrary. Article 38 of the Statute of the International Court of Justice ("ICJ") specifically entitles the Court to decide cases *ex aequo et bono*, so long as the parties so choose, although the Court will not invoke the doctrine itself. At the same time, the International Court has never decided a case based on *ex aequo et bono*. Its concern is that issues of fairness that arise outside of law ought to be resolved in the political arena. The overriding view is that to decide *ex aequo et bono*...

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15 See generally Section V.B.
17 On the requirement that the parties expressly so choose, see, for example, Hersch Lauterpacht, *The Function of Law in the International Community* 379 (Oxford 1933).
18 These factors account for a tendency to expressly forbid decisions *ex aequo et bono*. An example of a decision that expressly forbids a tribunal from so acting is *Burbidge, et al.*, Judgements UN Admin Trib No 1311 (Nov 22, 2006) (decision forthcoming), summary available online at <http://webfarmext.un.org/hrmtribunal/unat_review_case_digest_number.asp?ATJ_Number=1311> (visited Nov 17, 2007).
21 To the author's knowledge, no decision of the International Court of Justice to date has rested squarely on principles of *ex aequo et bono*. For more on the treatment of *ex aequo et bono* by international courts and tribunals, see notes 25 and 26.
*bono is to diminish the standing of the Court.* To recast itself into a conciliator is to clothe it with powers it ought not to have. To replace legal principles with open-ended conceptions of fairness is to compromise its mandate as a judicial body.

For the most part, the principle of *ex aequo et bono* is either not mentioned in international law decisionmaking, or it is confused with conceptions of equity. It is only expressly forbidden in a few cases, such as under the constituent treaty of the Eritrea-Ethiopia Claims Commission. There is also ample evidence that *ex aequo et bono* is recognized, though not as such, in decisionmaking, both internationally under Article 38(4) of the Statute of the International Court of Justice, and also through its accretion into multiple domestic jurisdictions. International adjudicators also make painstaking efforts to recast *ex aequo et bono* decisions outside of law into equitable decisions under law. The intention of those who subscribe to its spirit but not its letter is to reach fair decisions under the law so as to avoid a *non liquet,* or gap in the law, or carefully avoiding being seen to decide *contra legem,* contrary to the law.

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23 The view that *ex aequo et bono* has no application under international law was most emphatically argued by the late Justice Lauterpacht. See Lauterpacht, *The Function of Law* at 324–28 (cited in note 17).


25 On the Court’s avoidance of *ex aequo et bono* in deciding cases, see the Observation of Kellogg, J. in *Free Zones of Upper Savoy and the District of Gex (France v Switzerland)*, 1930 PCIJ (Ser A) No 24 at 5–7, 21–22, 34–40 (Dec 6, 1930).


28 See note 64. See also Statute of the International Court of Justice, art 38(4) (cited in note 20).

29 On this recasting of *ex aequo et bono* into the law of equity, see Section V.C. For an excellent discussion on the International Court’s treatment—or nontreatment—of *ex aequo et bono,* see Franck, *Fairness in International Law* at 54–56 (cited in note 20).

30 On the different categories of equity invoked by international tribunals, see Franck, *Fairness in International Law* at 47–80 (cited in note 20).
A feature of both international and domestic law is the distinction that is sometimes drawn between decisions based on the law of equity and decisions \textit{ex aequo et bono}.\textsuperscript{31} Whereas decisions in equity are deemed to be \textit{praeter legem}, that is, part of the law, decisions \textit{ex aequo et bono} are imputed to an extra-legal realm.\textsuperscript{32} The rationale behind this distinction is that adjudicators may “fill gaps” in the law based on principles of equity, but not based on notions of fairness that are not reduced to legal principles and rules of law. Whereas equity is part of an applicable legal system, notions of equality associated with \textit{ex aequo et bono} are deemed to reside in a moral, social, or political realm that is external to the law.\textsuperscript{33}

Those who support the distinction between decisions in equity and decisions \textit{ex aequo et bono} treat equitable decisionmaking as part of international or domestic law with its own body of rights and duties and legal relationships.\textsuperscript{34} They differentiate this body of equitable law from the nonlegal relationships they associate with \textit{ex aequo et bono} adjudication.\textsuperscript{35} As the late Justice Lauterpacht of the ICJ asserted: “adjudication \textit{ex aequo et bono} amounts to an avowed creation of new relations between the parties.”\textsuperscript{36} As such, “it differs clearly from the application of the rules of equity” and “form[s] part of international law as indeed, of any legal system.”\textsuperscript{37} Lauterpacht’s assumption was that tribunals that decide \textit{ex aequo et bono} create new relationships outside the law, and in doing so, are not constrained by existing legal rights and duties.\textsuperscript{38}

Despite the distinction between equitable and \textit{ex aequo et bono} decisions, legal commentators disagree on the nature of the distinction. For some like

\textsuperscript{31} See id at 47–80.
\textsuperscript{32} This distinction is also made in investment disputes, the most fertile field of \textit{ex aequo et bono} decisionmaking. See Section V.C.
\textsuperscript{34} See, for example, the request by the Australian government for \textit{ex aequo et bono} proceedings in order to “create new rights” in its trade dispute with the United States. World Trade Organization, \textit{Second Submission of Australia Regarding the Continued Dumping and Offset Act of 2000}, ¶ II(3) (Feb 27, 2002), available online at <http://www.dfat.gov.au/trade/negotiations/disputes/217_Australia_rebuttal_submission.html#_ftn3> (visited Nov 17, 2007).
\textsuperscript{36} Hersch Lauterpacht, \textit{The Development of International Law by the International Court} 217 (Steven 1958).
\textsuperscript{37} Id.
\textsuperscript{38} See id. See also Begic, \textit{Applicable Law} at 228–230 (cited in note 6).
Judge Lauterpacht, decisions in equity and decisions *ex aequo et bono* are quite distinct.\(^{39}\) As the International Court of Justice pronounced in the *Fisheries Jurisdiction* case, equitable decisionmaking "is not a matter of finding simply an equitable solution, but an equitable solution derived from the applicable law."\(^{40}\) For others,\(^{41}\) the words "equity" and "*ex aequo et bono*" are used interchangeably.\(^{42}\) For yet others, the wide latitude accorded to adjudicators to decide *ex aequo et bono* is an integral part of the discretion which common law judges exercise as a matter of equity.\(^{43}\)

Structural distinctions between equitable and *ex aequo et bono* decisionmaking are overstated, however. The demarcation between equitable discretion in law and discretion unrestrained by law is often difficult to draw. What differentiates them is primarily the pronouncement or inference by adjudicators themselves that they are making decisions according to law or *ex aequo et bono*, whether or not they are doing so in fact. Those who insist on a strict division between equity within the law and fairness outside the law achieve structural symmetry at the expense of the substantive ends which both conceptions of equity under law and fairness outside law share. Those shared ends include arriving at fair results suited to each case. If *ex aequo et bono* decisions are directed at redressing injustice, then surely they should embody comparable ends to those sought through the law of equity.

At most, "gap filling" under the law of equity and decisions *ex aequo et bono* that are directed at fairness between the parties operate at different stages along the same continuum. There is no strict divide between the two.\(^{44}\) It follows that


\(^{40}\) See *Fisheries Jurisdiction (United Kingdom v Iceland)*, 1974 ICJ 33, ¶ 78 (July 25, 1974).

\(^{41}\) See, for example, Mohsen Mohebi, *The International Law Character of the Iran-United States Claims Tribunal* 116 (Kluwer 1999) (on this conflation between *ex aequo et bono* and equity).


\(^{44}\) See Franck, *Fairness in International Law* at 47-80 (cited in note 20). Franck identifies at least three different conceptions of equity: "Corrective equity," "broadly conceived equity," and "common heritage equity." "Corrective equity" is identified with procedural fairness, consisting of "broadly conceived equity" that is expressed in some rules of the 1982 UN Convention on the Law of the Sea and in the impending rules on the Non-Navigational Uses of Watercourses. Franck identifies the "common heritage equity" over natural resources with the patrimony of humanity, as is exemplified by a common heritage interest in the deep sea bed, the moon, and Antarctica.
the issue is less whether adjudicative discretion is grounded formally in equity or *ex aequo et bono*, but in how adjudicators employ it to decide particular cases. Of concern is not whether adjudicators are claiming to “fill gaps” in the law avoid a *non liquet*, or act outside of the law, but how they employ their discretion in fact and whether the exercise of that discretion accords with practical reason.\(^{45}\)

V. **EX AEQUO ET BONO DECISIONS IN ACTION**

This Section explores the use of *ex aequo et bono* in historical and conventional trade and investment practice, first in light of the Medieval Law Merchant and then under the modern law of international trade and investment. It argues that medieval merchant courts—rough precursors to modern international commercial arbitrators—decided disputes *ex aequo et bono* in response to “the law” of commercial practice, quite apart from “the law” of princes.\(^{46}\) Particular emphasis is given to the application of *ex aequo et bono* to international trade disputes through the United Nations Commission on International Trade Law (“UNCITRAL”)\(^{47}\) and to the settlement of investor-state disputes through the International Center for the Settlement of Investment Disputes (“ICSID”).\(^{48}\) Central to the discussion of *ex aequo et bono* decisions is the paramount interest of the parties in resolving disputes expertly, informally, expeditiously, and fairly, rather than according to formal law.\(^{49}\)

A. **THE MEDIEVAL LAW MERCHANT**

Merchant judges under the Medieval Law Merchant decided cases *ex aequo et bono* according to merchant codes devised, adopted, and applied by merchant judges.\(^{50}\) These merchant judges resolved disputes among itinerant merchants at regional fairs, markets, towns, and ports—outside the jurisdiction of courts and judges who administered the law of local princes.\(^{51}\) Against this background, merchant judges decided disputes *ex aequo et bono*, encompassing “fairness between the parties” and the prompt dispensation of justice.\(^{52}\) The rationale

\(^{45}\) On the internal and external limits imposed upon the exercise of discretion *ex aequo et bono*, see Sections VI and VII.

\(^{46}\) On the law of princes in medieval times and prior to the creation of the nation state, see Leon E. Trakman, *The Law Merchant* 7–17 (Rothman 1983).

\(^{47}\) On the UNCITRAL, see Section V.B.

\(^{48}\) On the ICSID, see Section V.C.

\(^{49}\) For a discussion of these paramount interests of the parties, see Section IX.


\(^{51}\) Id.

\(^{52}\) Id at 12.
behind this process of reaching decisions was that itinerant merchants who traveled with their goods from guild to guild, fair to fair, and port to port should receive an expeditious remedy before a merchant court without having to delay their mercantile journey. So significant was this interest in expedited resolutions of disputes that Medieval Law Merchant courts in parts of what are now France were named pueblo or “dusty feet” courts, presumably obligated to provide remedies before the merchant parties could shake the dust off their feet.

In essence, the purpose of ex aequo et bono decisionmaking was to use an informal, time- and cost-effective process so as to arrive at results that were “fair” to the parties, not according to the law of the land but in light of merchant usages and party practice. Merchant judges decided cases on the basis of a combination of merchant codes and merchant practice. For example, they decided disputes over the “just price” in light of merchant codes and merchant practices that redressed usurious transactions while also preserving an uninterrupted flow of goods. In dispensing merchant remedies, they provided a balance between expedient and fair results by which merchants could continue their business activities with minimal disruption.

Far from relying on an abstract conception of “the good,” the virtue of the Law Merchant resided in the fact that it was devised by merchants in response to the expectations of merchants. The process of ex aequo et bono decisionmaking was intended to be market sensitive, informal, and responsive to the dynamics of the particular trade, region, and parties. Decisions ex aequo et bono were not to be guided by the naked discretion of merchant judges nor by their personal sense of fair play, decency, or expediency. They were to be grounded in the tenets of mercantile fairness, developed according to the manner in which merchants conducted trade, and responsive to trading relations among merchant parties. Cosmopolitan in nature and adaptable in operation, the Law Merchant was meant to transcend the law of local princes, while studiously trying to avoid conflicting with it.

53 Id at 16.
54 Id at 13, 17.
55 Id at 33.
56 On the “just price” doctrine in the Medieval Law Merchant, see id at 8.
However imperfect the Medieval Law Merchant may have been, accusing its merchant judges of lawlessness in deciding disputes *ex aequo et bono* is unduly harsh. Whether merchant decisions are viewed as based on a pre-existing “law” embodied in merchant codes or whether they evolved more directly out of merchant practice depends on how merchant “law” was conceived in medieval times. If merchant decisions were deemed to have derived from merchant codes, then medieval merchant judges decided cases according to merchant “law.” If decisions were viewed as evolving out of continually changing merchant practice, then merchant judges conceivably exercised discretion beyond these codes of merchant law. However, in neither case did merchant judges exercise unchecked discretion. Their discretion was circumscribed by the requirement that they apply mercantile custom, usage, and practice as distinct from deciding on the basis of unbridled discretion.60

**B. THE UNCITRAL**

The conception of *ex aequo et bono* has also evolved into the so-called Modern Law Merchant.61 Most notable among these is the provision for *ex aequo et bono* decisionmaking in the UNCITRAL Arbitration Rules. Article 33 of the Arbitration Rules states:

1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

2. The arbitral tribunal shall decide as amiable compositeur or *ex aequo et bono* only if the parties have expressly authorised the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.

3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.62

Article 33(2) epitomizes the ambivalence towards *ex aequo et bono*. Arbitral tribunals can decide cases *ex aequo et bono*, not because of the inherent virtue of resorting to such a process of decisionmaking, but because the parties have expressly adopted it. Article 33 of the UNCITRAL Arbitration Rules is widely
known and its implications are well-understood in *ex aequo et bono* decisionmaking. Its enactment has influenced national and state legal systems that have provided for decisions *ex aequo et bono* in their commercial codes, model laws, and judicial decisions. Despite its influence, however, there is limited evidence of adjudication that relies extensively on the UNCITRAL model of *ex aequo et bono* decisionmaking.


> Should the parties decide not to follow the normal judicial process, they shall stipulate in the articles of incorporation whether the arbitrators settling the disputes are *de jure* or *ex aequo et bono* and make the respective appointments. If the above provision is not in the instrument, it shall be understood that the partners shall opt for a ruling by two *ex aequo et bono* arbitrators."


65 Typifying the application of *ex aequo et bono* in the law of restitution, see Lord Mansfield in *Moses v Macfarlan*, 97 Eng Rep 676, 680 (1760) (stating that an action in restitution lies "for money which *ex aequo et bono* the defendant ought to refund").

C. INVESTMENT DISPUTES

The case for deciding cases *ex aequo et bono* is especially palpable in complex investment disputes between private investors and states. New issues not anticipated at the time of concluding an investor-state agreement sometimes arise when reliance on the terms of that agreement may be unsatisfactory, when the agreement is unlikely to be modified, and when submitting an intervening dispute to arbitration *ex aequo et bono* may avoid having to rely on the law of the investor state. Such investment situations typify situations between investor-state parties involved in ongoing relationships in which the *ex aequo et bono* resolution of disputes may be most fitting.\(^{67}\)

A provision for deciding state-investor disputes *ex aequo et bono* is contained in the Convention on the Settlement of Investment Disputes between States and Nationals of Other States ("ICSID Convention").\(^{68}\) Article 42(3) of the ICSID, consistent with Article 38(4) of the Statute of the International Court of Justice,\(^{69}\) authorizes "any Arbitral Tribunal" to decide *ex aequo et bono* with the consent of the parties.\(^{70}\) The parties may presumably also request that the arbitrator act as an *amicable compositeur*, in which case the arbitrator may invoke Article 42(3) "to decide a dispute *ex aequo et bono* if the parties so agree."\(^{71}\) The parties may also have resort to *dépeçage* in resolving different issues according to different laws.\(^{72}\)

Reaching a decision *ex aequo et bono* under the ICSID Convention does not preclude the arbitral tribunal from applying an applicable law. The ICSID still provides the parties with a choice of law that is binding on the ICSID arbitrator. However, the parties remain free to authorize the resolution of their disputes in

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\(^{67}\) On such relational agreements, see note 11.


\(^{69}\) On Article 38(4) of the Statute of the ICJ, see text accompanying note 20.

\(^{70}\) See ICSID Convention, art 42(3) (cited in note 3). See Atlantic Triton Co Ltd v People's Revolutionary Republic of Guinea, ICSID Case No ARB/84/1, Award of April 21, 1986, ¶ 1, 3 ICSID Rep 13, 17 (1995) (where it was specifically stated that "the disagreement shall be settled *ex aequo et bono* in accordance with the provisions of Article 42(3) of the [ICSID] Convention").

\(^{71}\) ICSID Convention, art 42(3) (cited in note 3). This resort to Article 42(3) is a reasonable interpretation in light of the ICSID Convention, notably Article 25(1). Id, art 25(1). Article 23 of the Report of the Executive Directors of the Convention provides that "[c]onsent of the parties is the cornerstone of the jurisdiction of the Centre. Consent to jurisdiction must be in writing and once given cannot be withdrawn unilaterally (Article 25(1))." International Bank for Reconstruction and Development, Report of the Executive Directors on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, art 23 (1965), available online at <http://icsid.worldbank.org/ICSID/StaticFiles/basedoc/partA.htm> (visited Nov 17, 2007).

\(^{72}\) *Dépeçage* in private international law refers to cases in which different issues in the same case are governed by the laws of different states. See Begic, *Applicable Law* at 155–164 (cited in note 6) (discussing the use of *dépeçage* under the ICSID in relation to state-investor disputes).
whole or in part *ex aequo et bono* through the initial or a supervening agreement, which can be reached during the course of arbitral proceedings.\(^7\) They may also limit *ex aequo et bono* decisionmaking in accordance with a binding treaty or other agreement.\(^7\)

A few ICSID decisions illustrate the resort to *ex aequo et bono* in state-investor practice. In *Agip v Congo*, the Congolese Government proposed in its Counter-Memorial that the Tribunal should act as informal *amicus compositeur*.\(^7\) Agip did not agree.\(^7\) As a result, the Tribunal considered itself bound to decide in accordance with the applicable law and not as an *amicus compositeur*.\(^7\)

In *Benvenuti v Congo*,\(^7\) a case in which the parties did not make a choice of law, the Tribunal decided *ex aequo et bono*. There, the Claimant proposed in the course of arbitration proceedings that the Tribunal decide *ex aequo et bono*, which the Respondent rejected.\(^7\) During arbitration the parties agreed to negotiate a settlement by *amicus compositeur*, and failing such agreement, to authorize the Tribunal “to render its award as quickly as possible by judgment *ex aequo et bono*.”\(^8\) After negotiations failed, the Tribunal applied Article 42(3) of the ICSID Convention and decided the arbitration *ex aequo et bono*.\(^8\)

Controversial here is whether an *ex aequo et bono* decision can be reached in the absence of party consent under the ICSID. The answer is that the agreement of the parties is required at the commencement or during the course of proceedings in order for ICSID arbitrators to entertain decisions *ex aequo et bono*. Arbitrators who decide *ex aequo et bono* in the absence of express party consent risk being accused of exceeding their jurisdiction and having their awards annulled.\(^8\)

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\(^7\) On the express authorization of the parties for an ICSID tribunal to decide *ex aequo et bono*, see Begic, *Applicable Law* at 222–26 (cited in note 6).

\(^7\) This is inferred by reading together ICSID Article 42(1), entitling the parties to choose the applicable rules of law, with ICSID Article 42(3), entitling the parties to consent to an award *ex aequo et bono*. ICSID Convention, arts 42(1), 42(3) (cited in note 3).


\(^7\) Id.

\(^7\) Id at 318.

\(^7\) *Benvenuti and Bonfant Srl v People's Republic of the Congo*, ICSID Case No ARB/77/2, Award of Aug 8, 1980, 1 ICSID Rep 330 (1993).

\(^7\) Id at 338–342. The Claimant made the proposal at the first session of the hearing on June 14–15, 1978, but was rejected by the Respondent; an agreement was formally reached by the Parties on June 5, 1979 and communicated to the Tribunal. Id at 342.

\(^8\) Id at 342.

\(^8\) Id at 349.

Finally, the separation between equitable and *ex aequo et bono* decisions is doubtful under the ICSID. For example, the authority of adjudicators to intertwine an applicable law with an *ex aequo et bono* decision is implicit when reading Article 42(1) of the ICSID Convention together with Article 42(3). Even when the parties grant adjudicators the authority to decide *ex aequo et bono*, such as under Article 42(1) of the ICSID Convention, the arbitral award that results sometimes embodies an amorphous mixture of equity under law and discretion beyond law.

VI. GAP FILLING

Given this role *ex aequo et bono* plays in dispute resolution, a formal distinction exists between “gap filling” in law and deciding cases *ex aequo et bono*. An adjudicator who “fills gaps” in the law acts in terms of the law. An adjudicator who decides *ex aequo et bono* does not “fill a gap,” but engages in action unrelated to law. Illustrated in relation to investor-state disputes under the ICSID, “the function of filling lacunae [gaps] is different from the application of equity under Article 42(3).”

The notion that discretion that does not “fill gaps” in the law is thus outside of law is based on several assumptions. The first is that adjudicators who decide *ex aequo et bono* may exercise discretion based on objective conceptions of fairness such as those embodied in trade practice or upon their own subjective views. The second is that, in both cases, adjudicators may not be acting in terms of the law. The third is that these adjudicators may be challenged for not complying with the law in so deciding. A possible inference is that, in

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*Article 42(1) of the Convention provides that a Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. ICSID Convention, art 42(1) (cited in note 3). The parties are free to agree on rules of law defined as they choose. Id. They may refer to a national law, international law, a combination of national and international law, or a law frozen in time or subject to specified modifications. On art 42(3), see note 3. For a commentary on the ICSID Convention, see Schreuer, *The ICSID Convention* (cited in note 68). For a repository of ICSID documents at the World Bank, see *ICSID Conventions, Regulations, and Rules*, available online at <http://www.worldbank.org/icsid/basicdoc/basicdoc.htm> (visited Nov 17, 2007).

*See, for example, Benvenuti & Bonfant Srl v People’s Republic of the Congo at 338–342 (cited in note 78). The use of the word “equitable” in Section 9 is intended to refer to decisions *ex aequo et bono*, as distinguished from the law of equity. See UNCTAD, *Dispute Settlement: 2.6 at § 9* (cited in note 3).

*See Carlos Garcia Bauer, *La Controversia sobre el Territorio de Belice y el Procedimiento Ex-aequo et Bono*, 54 Am J Intl L 205, 205 (1960) (arguing that the purpose of *ex aequo et bono* is not to fill gaps in the law; *ex aequo et bono* is not employed in order to avoid a situation where there is no applicable law).
exercising discretion in this manner, they may be acting not only outside the law, but also contrary to it.  

This inference is debatable. As a preliminary matter, whether or not an adjudicator exercises discretion that is deemed to “fill gaps” in the law in the interests of justice or arrives at a fair result outside of the law, the exercise of discretion in both cases is ordinarily motivated by comparable ends: to treat the parties evenhandedly and to arrive at a just decision.  

As a practical matter, the demarcation between discretion in accordance with law or outside law ignores the continuum along which discretion is exercised in fact. The key issue is not to establish that exact point at which an adjudicator “fills gaps” in the law or acts outside it. Rather, the overriding purpose is to determine when, why, and how that adjudicator exercises discretion. That determination is established in light of the nature of the discretion exercised, the context in which it is applied, and its impact on party relations. Nor does the stage at which that discretion is deemed to be excessive reside at an exact point between equity in law and ex aequo et bono, but instead operates along a variable continuum.  

Only at the polar extremes of that continuum can it be said that the exercise of discretion may be in accordance with or outside the law. For example, discretion that clarifies a simple ambiguity in a statute or regulation is likely to comport with law. A discretion that is invoked to protect a party’s interest, which is not protected by a legal right, such as a party’s moral interest in preserving the environment, may arise outside the law. Most cases do not lie at either extreme, and it is in relation to most cases that the division between “gap filling” under law and discretion outside of law is most doubtful.  

Operating along a spectrum of discretion does not render decisions ex aequo et bono contrary to law. Instead it reaffirms the application of law according to the values that are ascribed to party practices and to the customs surrounding those practices. It ensures the co-existence, not the antipathy, between the strict application of law and the functioning of discretion beyond it. It also transcends
the distinction between “gap filling” to avoid a *non liquet* and adjudicative discretion to avoid an injustice.\(^{93}\)

**VII. EXTERNAL LIMITS ON *EX AEOQU ET BONO***

When has an adjudicator engaged in the unreasonable exercise of discretion *ex aequo et bono*? Alternatively phrased, when has an adjudicator moved so far along the spectrum as to have crossed the boundary between a practically reasonable and an unreasonable use of discretion?

The rationale that the power to decide *ex aequo et bono* somehow permits adjudicators to decide wholly at will flies in the face of practical reasonableness in decisionmaking.\(^{94}\) Determining when discretion *ex aequo et bono* is excessive depends on a functional test that subjects discretion to external and internal limits that are grounded in practical reason.\(^{95}\)

External limits are imposed on discretion as a matter of construction in the context in which that discretion is exercised, and not *a priori* as a principle of law.\(^{96}\) At its narrowest, that limit requires that attention be given to the practices of the parties. At its broadest, it anticipates consideration of the analogous practices of others that have crystallized into common usages, shared habits, and emerging customs. Article 33(3) of the UNCITRAL Arbitration Rules provides as much in stipulating of *ex aequo et bono* that: “in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.”\(^{97}\)

Grounded in natural law, the principle of practical reason imputes to decisionmakers the ability to differentiate between rational and irrational action, free will, and coercion.\(^{98}\) If the adjudicative decision is to be “fair,” it must be fair against the background of rational actors exercising their free will. If it is to be practically reasonable, it must be reasonable in light of a natural conception

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\(^{93}\) Law is conceived of as “complete” or as having a “*non liquet,*” namely, as being incomplete. See Lauterpacht, *The Function of Law* at 63–64 (cited in note 17).

\(^{94}\) This is apparent on an examination of cases in which *ex aequo et bono* arises, such as under the ICSID. See, for example, the Congo cases discussed in notes 75–81.

\(^{95}\) See also Sections V, VI.

\(^{96}\) On the rationale that *ex aequo et bono* discretion is more fitting in relational agreements than discrete transactions, see note 11.

\(^{97}\) See UNCITRAL Arbitration Rules, art 33(3) (emphasis added) (cited in note 62).

of rights that guides decisionmaking, not because of the wholly personal conceptions of fairness of whosoever happens to be the adjudicator.

VIII. INTERNAL LIMITS ON EX AEO ET BONO

The exercise of discretion is also circumscribed by internal limits. Adjudicators are subject to internal rules that require them to reach decisions through a process of reason that is "fair" and guided by "good conscience."102

Like external limits, internal limits are grounded in practical reason. Those internal limits on discretion are set by intelligent human subjects exercising free will who decide according to reasons that are based on morality.103 Such internal limits on discretion arise, for example, when judges impose penalties, not according to their subjective values, but based on higher moral precepts by which they determine the nature and limits of "fair" punishment.104

Precepts of due process of law embodying natural law values may serve as internal limits upon ex aequo et bono decisions, such as when they base a party's right to be heard on a moral foundation. However, internal limits set on the exercise of discretion ex aequo et bono are also distinguishable from due process. In particular, the process of deciding ex aequo et bono is grounded in notions of fairness that are not necessarily attributable to law.105

99 This natural conception of rights is grounded in a "new classical theory" of natural law. See George, In Defence of Natural Law at 231–234 (cited in note 98); Grisez, 10 Natural L F at 168–201 (cited in note 98). But see Russell Hittinger, A Critique of the New Natural Law Theory (Notre Dame 1987). On the expression of this natural conception through practical reason, see further Section VIII.

100 There is ample authority that international commercial arbitrators who are expressly authorized by the parties to decide as amiable compositeurs or ex aequo et bono do so on the basis of international commercial custom and usage, as distinct from principles of law. See, for example, Berthold Goldman, La Lex Mercatoria dans les Contrats et L'arbitrage Internationaux: Réalité et Perspectives [Lex Mercatoria in International Contracts and Arbitration: Reality and Prospect], 1979 J du droit international 1; Eric Loquin, L'Amiable Composition en Droit Compari et International (Librairies Techniques 1980). See also Section IX.

101 It is arguable, but not self-evident, that the UNCITRAL Arbitration Rules, art 33 (cited in note 62) anticipates such internal rules to govern the process of decisionmaking ex aequo et bono. See Section IX.

102 On the identification between practical reason and the actions of intelligent human subjects exercising free will, see Russell Hittinger, A Critique of the New Natural Law Theory (cited in note 99); George, In Defence of Natural Law (cited in note 98).

103 On guidelines in determining that which is excessive, see Section IX.

104 It is understandably difficult to arrive at internal rules by which to measure concepts like fairness and good conscience. However, it is equally difficult to arrive at internal rules to govern "the rule of law," "natural justice," and "due process of law." For a preliminary discussion of the internal rules of ex aequo et bono arbitration, see J. Brian Casey, Arbitration Law of Canada: Practice and
Ultimately, internal limits upon discretion *ex aequo et bono* depend on the application of practical reason to human subjects rather than resort to analytical deduction from strict legal principles.\(^{106}\) No matter how informal and expeditious that application of practical reason may be, adjudicative proceedings should also be transparent and applied evenhandedly to the parties.\(^{107}\)

**IX. ESTABLISHING GROUND RULES**

However much *ex aequo et bono* is rationalized along a spectrum of discretion and is subject to internal and external limits, adjudicators can only act *ex aequo et bono* if they enjoy the confidence of those who are the subject of their decisions. The parties need to know, not only that internal and external limits can be placed on adjudicative discretion, but also that adjudicators will apply those limits.\(^{108}\)

A problem that must be faced is that even parties who favor *ex aequo et bono* decisionmaking may choose that adjudication process in only broad terms, without providing the particular means by which adjudicators are to decide a dispute.\(^{109}\) This raises the question as to whether and how parties can be helped, not only to refine *ex aequo et bono* clauses in their agreements, but also to appreciate more fully how such recourse may benefit them. Part of the solution is to develop a coherent conception of an *ex aequo et bono* method of deciding cases that earns the respect of those who ultimately are free to choose whether and how to adopt it.

Parties also need to have reasons for resorting to *ex aequo et bono* decisionmaking more viable than their trust in adjudicative discretion or even their wish to avoid the vagaries of an applicable law. They need to know that the adjudicator will pay due regard to their particular relationships and will reach a


\(^{107}\) This relationship between practical reason and deciding in accordance with that which is “fair and right” goes to the very roots of *ex aequo et bono*. See Section I.

\(^{108}\) This is consistent with the fact that the parties are free to choose decisionmaking *ex aequo et bono*, and would ordinarily be disinclined to choose it if it is perceived as giving rise to unbridled adjudicative discretion.

\(^{109}\) The words used to empower adjudicators to decide *ex aequo et bono* ordinarily state only that the parties can authorize such action, and on occasions, that the adjudicator can so decide when the applicable law permits it. See Section III.
determination that is practically reasonable. They should recognize when an *ex aequo et bono* decision best suits their particular ends, as when it can operate informally, expeditiously, and guided by a sense of fair play. Parties also need to feel comfortable that both the adjudicative process and the result reached can preserve their long-term relationship on the one hand, yet be enforceable on the other.

In addition, adjudicators should be cautious not to overreach in the exercise of discretion, given the risk of having their decisions nullified on grounds of having acted *ultra vires*. As is apparent from Article 33(2) of the UNCITRAL Arbitration Rules, adjudicators may decide *ex aequo et bono* only if the parties have expressly so agreed and only if that recourse is permitted by the applicable law.

Ultimately, the viability of *ex aequo et bono* decisions resides in the capacity of adjudicators to adhere to processes that respond to practical sensibility, rather than to formal rules of law.

X. GUIDELINES IN APPLYING *EX AEOQUO ET BONO*

Guiding the application of *ex aequo et bono* decisionmaking are the needs: (1) to evaluate it in light of each relational context and not in the abstract; (2) to encompass within it "fairness" between the parties in their circumstances; (3) to embody in relation to the parties an assessment of the wider context of conventions, customs, and usages, including legal usages that impinge upon the practices of those parties; (4) to engage in an expeditious process of decisionmaking; (5) to arrive at results that are transparent and evenhanded in their treatment of the parties; and (6) to so decide according to a moral order that is expressed through practical reason.

Far from being wholly arbitrary, the foundations of *ex aequo et bono* are situated in functional processes that are directed at resolving realistic, but often complex, problems. The decisionmaker is neither bound to apply nor to disregard the law as a matter of principle, but to exercise discriminating judgment on the practical and moral reasons by which to decide each case. Those reasons may reflect specific patterns of fact, identifiable party practices, and applicable customs and usages that may inform the moral basis of the
The practical reasons that guide decisions *ex aequo et bono* may also justify adopting alternative processes of dispute resolution, including but not limited to those that are provided for by law.\textsuperscript{115}

Distinguishing formally between *ex aequo et bono* and equitable decisions in law is doubtful at best and confusing at worst. Even granting wide latitude to adjudicators to decide *ex aequo et bono* may necessarily include reliance on principles of law, as when legal principles like freedom of contract inform the usages and practices upon which adjudicators rely. Practical reason may well be determined in law, but not by the a priori determination to exclude law.\textsuperscript{116}

The rationale that adjudicators who decide *ex aequo et bono* engage in executive lawmaking that is better left to legislatures overstates the division between making law and applying it.\textsuperscript{117} There is ample evidence of gaps in law being filled by adjudicators who exercise discretion of the widest latitude. Against this background, circumscribing *ex aequo et bono* discretion with practical reason grounded in morality, informed by common sense, and applied in light of practice and usage is assuredly more evenhanded and transparent than a comparatively unchecked discretion supposedly exercised under the law of equity.\textsuperscript{118}

\section*{XI. CONCLUSION}

This Article argues for a process of reasoning that is based on morality and informed by practical reasoning. Conceptual, historical, and pragmatic considerations alike suggest that adjudicators who resolve disputes *ex aequo et bono* inevitably must act within permissible and practical limits. Those limits are determined functionally, not in terms of strict legal doctrine, but according to a

\textsuperscript{114} These rules of practice, in turn, are grounded in practical reasonableness. This conception of practical reasonableness is a tangible attribute of the Modern Law Merchant. See generally Harold J. Berman and Felix J. Dasser, *The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy*, in Thomas E. Carbonneau, ed, *Lex Mercatoria and Arbitration* 21 (Juris 1990); A. Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* 116 (Cambridge 2003). See also Section VI.

\textsuperscript{115} Conciliation is one such alternative process, but it is by no means the only one that might be applied. See John Graham Merrills, *International Dispute Settlement* 110–111 (Cambridge 2005). Merrills suggests that conciliation in the *Rainbow Warrior* case is comparable to arbitration *ex aequo et bono* in the *Free Zones* case. (*New Zealand v France*), 20 Rep Intl Arb Awards 217 (1994) (cited in note 25).

\textsuperscript{116} See Section VI.

\textsuperscript{117} For the argument that deciding *ex aequo et bono* constitutes executive lawmaking that is ill-fitting for courts of law, see Lauterpacht, *The Function of Law* at 379 (cited in note 17).

\textsuperscript{118} The distinction between *per se* reasonableness and practical reasonableness is primarily related to context. It is in the context of party practice that reasonableness is measured. See Trakman, *The Law Merchant* at 23–37, 39–60 (cited in note 46).
contextual analysis with moral foundations. The permissible reach of *ex aequo et bono* depends, not simply on being able to decide outside the law, but upon reasonable practices, usages and customs that facilitate such decisions. This approach has the benefit of paying regard to more than legal rights and duties, including important interests that are not ordinarily protected as rights. It can also help to salvage party relationships in the face of potentially complex and protracted disputes.\(^\text{119}\)

Condemning *ex aequo et bono* decisions on grounds that they operate not only outside the law but contrary to it does more than challenge adjudicative activism. It discourages adjudicators—and the parties who empower them—from pursuing the fair resolution of disputes when it is most needed: when the law fails to react adequately to the need for justice. Those who prefer to wait for the law to respond to injustice and social inequity rather than use *ex aequo et bono* decisionmaking may have to wait indefinitely when legal reform is impeded by political inaction or is fragmentary.

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\(^\text{119}\) On the distinction between “interests falling short of rights” and per se rights, see Leon E. Trakman, *Rights and Responsibilities* 47–82 (Toronto 1999).