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GENERAL PRINCIPLES OF LAW

as applied by
INTERNATIONAL COURTS AND TRIBUNALS

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that the trust that others may reasonably place in them shall not be betrayed. This is probably the most prominent feature of the Germanic conception of good faith: *Treu und Glauben*.

B. Duty to Maintain the Status Quo

In a previous Chapter mention was made of the duty of the parties to a treaty which is *sub spe rati* to refrain from any act which may prejudice the eventual execution of the treaty.⁸ A similar duty is that of the parties to a judicial process.

“Parties to a case must abstain from any measure capable of exercising a prejudicial effect in regard to the execution of the decision to be given and, in general, not to allow any step of any kind to be taken which might aggravate or extend the dispute.”⁹

The provisions in the Statute and in the Rules of the World Court which permit it to “indicate” interim measures of protection¹⁰ are, in the opinion of the Permanent Court, but an application of this principle “universally accepted by international tribunals.”¹¹

There are other circumstances in which States are required by the principle of good faith to maintain the *status quo* during a period between two events. The Arbitrator in the *Samoa Claims Case* (Preliminary Decision) (1902) had occasion to consider a situation of this nature. At the time in question, there were two contending parties in Samoa, the Mataafans and the Malietoans. On December 31, 1898, the Chief Justice of Samoa, in a decision, declared Malietoa Tanumafili King of Samoa. The parties to the dispute submitted to arbitration were Germany on the one hand and the United Kingdom and the United States on the other, *i.e.*, the three treaty Powers in Samoa. The question at issue was the legality of certain military measures taken unilaterally by the United Kingdom

⁸ *Supra*, pp. 109 *et seq.*

⁹ PCIJ: *Electricity Company of Sofia and Bulgaria Case* (Interim Protection) (1939), A/B. 79, p. 199. See also *Id.*: *South Eastern Greenland Case* (Order of August 3, 1932), A/B. 48, pp. 287 *et seq.*; ICJ: *Anglo-Iranian Oil Co. Case* (Interim Protection) (1951), *ICJ Reports 1951*, p. 89.

¹⁰ ICJ (also PCIJ): Statute, Art. 41; Rules, Art. 61. See *infra*, p. 268.

¹¹ *Electricity Company of Sofia and Bulgaria Case* (Interim Protection), (1939), *loc. cit.*, p. 199. See *infra*, pp. 267 *et seq.*

and the United States in support of the Malietoans against the Mataafans in March, 1899. Beside finding that the three treaty Powers should always act in common accord, the Arbitrator held:—

“ Furthermore, by proclamation issued on the 4th of January, 1899, the Consular representatives of the treaty powers in Samoa, owing to the then disturbed state of affairs and to the urgent necessity to establish a strong provisional government, recognised the Mataafa party, represented by the High Chief Mataafa and 13 of his chiefs, to be the provisional government of Samoa pending instruction from the three treaty powers, and thus *those powers were bound upon principles of international good faith to maintain the situation* thereby created until by common accord they had otherwise decided . . .

“. . . That being so, the military action in question undertaken by the British and American military authorities before the arrival of the instructions mentioned in the proclamation, and tending to overthrow the provisional government thereby established, was contrary to the aforesaid obligation.”¹²

The military measures were, therefore, considered unlawful, and the United Kingdom and the United States were held liable for their consequences.

It would appear from the cases just considered that whenever the parties have agreed to await a final decision concerning a certain matter, or are under an obligation to do so—a decision depending either upon the parties themselves or upon an independent third party—the principle of good faith obliges them to maintain the existing situation as far as possible so that the final decision, if taken on the basis of the *status quo*, would not be prejudiced in its effects by a unilateral act of one of the parties during the inevitable lapse of time.

C. *Allegans Contraria Non Est Audiendus*

It is a principle of good faith that “ a man shall not be allowed to blow hot and cold—to affirm at one time and deny at another. . . . Such a principle has its basis in common sense and common justice, and whether it is called ‘ estoppel,’ or by

¹² U.S.F.R. (1902), p. 444, at p. 446. Italics added.

any other name, it is one which courts of law have in modern times most usefully adopted." ¹³

In the international sphere, this principle has been applied in a variety of cases. In the case of *The Lisman* (1937), concerning an American vessel which was seized in London in June, 1915, the claimant's original contention before the British prize court "was not that there was not reasonable cause for seizure, or for requiring the goods to be discharged, but that there was undue delay on the part of the Crown in taking the steps they were entitled to take as belligerents." ¹⁴ In a subsequent arbitration in 1937, which took the place of diplomatic claims by the United States against Great Britain, the sole Arbitrator held that:—

"By the position he deliberately took in the British Prize Court, that the seizure of the goods and the detention of the ship were lawful, and that he did not complain of them, but only of undue delay from the failure of the Government to act promptly, *claimant affirmed what he now denies, and thereby prevented himself from recovering there or here upon the claim he now stands on, that these acts were unlawful, and constitute the basis of his claim.*" ¹⁵

This principle has also been applied to admissions relating to the existence of rules of international law. Thus in the case of *The Mechanic* (C. 1862), it was held that:—

"Ecuador . . . having fully recognised and claimed the principle on which the case now before us turns, whenever from such a recognition rights or advantages were to be derived, could not in honour and good faith deny the principle when it imposed an obligation." ¹⁶

In the *Meuse Case* (1937), it was held that, where two States were bound by the same treaty obligations, State A could not complain of an act by State B of which it itself had set an example in the past.¹⁷ Nor indeed may a State, while denying

¹³ England, Court of Exchequer: *Cave v. Mills* (1862) 7 Hurlstone & Norman, p. 913, at p. 927.

¹⁴ 3 UNRIAA, p. 1767, at p. 1779.

¹⁵ *Ibid.*, at p. 1790.

¹⁶ Ecua.-U.S. Cl.Com. (1862): *Atlantic and Hope Insurance Companies (The Mechanic) Case*, 3 *Int.Arb.*, p. 3221, at p. 3226.

¹⁷ PCIJ: A/B. 70, p. 25. *Cf.* also the apparently contradictory attitude of the Netherlands in the same case as to whether the *possibility* of an infraction constitutes an infraction (pp. 5 and 8) and the Dutch explanation (Ser. C. 81, pp. 137 *et seq.*).

that a certain treaty is applicable to the case, contend at the same time that the other party in regard to the matter in dispute has not complied with certain provisions of that treaty.¹⁸

This principle was also applied by the German-United States Mixed Claims Commission (1922) in the *Life-Insurance Claims Case* (1924) to preclude a State from asserting claims which, on general principles of law, its own courts would not admit, for instance, claims involving damages which its own municipal courts, in similar cases, would consider too remote.¹⁹ Incidentally, this case also shows one of the means whereby general principles of law find their application in the international sphere. A State may not disregard such principles as it recognises in its own municipal system, except of course where there is a rule of international law to the contrary.

In the *Shufeldt Case* (1930), the United States contended that Guatemala, having for six years recognised the validity of the claimant's contract, and received all the benefits to which she was entitled thereunder, and having allowed Shufeldt to continue to spend money on the concession, was precluded from denying its validity, even if the contract had not received the necessary approval of the Guatemalan legislature.²⁰ The Arbitrator held the contention to be "sound and in keeping with the principles of international law."²¹

This case is a clear application in the international sphere of the principle known in Anglo-Saxon jurisprudence as estoppel in pais or equitable estoppel, the application of which was also considered in the *Serbian Loans Case* (1929) and in the *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923). It appears, from the discussion of this principle in the last two mentioned cases, that it precludes person A from averring a particular state of things against person B if A had previously, by words or conduct, unambiguously represented to B the existence of a different state of things, and if, on the faith of that representation, B had so altered his position that the

¹⁸ PCIJ: *Mavrommatis Palestine Concessions Case* (1924), A. 2, p. 33. *Id.*: *Chorzów Factory Case* (Jd.) (1927), A. 9, p. 31.

¹⁹ *Dec. & Op.*, p. 103, at p. 139. *Id.*: *Hickson Case* (1924), *ibid.*, p. 439, at p. 443.

²⁰ See *Case of the U.S.*, Part II, Point II (*Shufeldt Claim*, USGPO, 1932, pp. 57 *et seq.*).

²¹ *Ibid.*, at pp. 869-70; or 2 UNRIAA, p. 1079, at p. 1094.

establishment of the truth would injure him.²² An intent to deceive or defraud is, however, not necessary. The principle is yet another instance of the protection which law accords to the faith and confidence that a party may reasonably place in another, which, as mentioned before, constitutes one of the most important aspects of the principle of good faith.

In its Advisory Opinion No. 14, the Permanent Court of International Justice was of the opinion that where States, acting under a multipartite convention, to which they are all parties, have concluded certain arrangements, they cannot, as between themselves, contend that some of the provisions in the latter are void as being outside the mandate conferred by the previous convention.²³

The principle applies equally, though perhaps not with the same force, to other admissions of a State which do not give rise to an equitable estoppel. Thus it has been held that a State cannot be heard to repudiate liability for a collision after its authorities on the spot had at the time admitted liability and sought throughout to make the most advantageous arrangements for the Government under the circumstances.²⁴ Again, if a State, having been fully informed of the circumstances, has accepted a person's claim to the ownership of certain property and entered into negotiation with him for its purchase, it becomes "very difficult, if not impossible" for that State subsequently to allege that he had no title at the time.²⁵ If a State, which is

²² PCIJ: *Serbian Loans Case* (1929), A. 20/21, pp. 38-39. *Aguilar-Amory and Royal Bank of Canada (Tinoco) Case* (1923), 1 UNRIAA, p. 369, at pp. 383-4. See also *Shufeldt Case* (1930), *Case of the U.S.*, Part II, Point II (*loc. cit.*) and the definition of estoppel by conduct of Lord Denman C.J. in *Pickard v. Sears* (1837) (6 Ad. & E., p. 469, at p. 474) therein cited.

See further Halsbury, *Laws of England*, *sub voce* Estoppel, §§ 538, 541, 547; Phipson, *The Law of Evidence*, 1952, pp. 704-710; Broom's *Legal Maxims*, 1939; M. Cababe, *Principles of Estoppel*, 1888; L. F. Everest and E. Strode, *Law of Estoppel*, 1923.

²³ *European Danube Commission* (1927), B. 14, p. 23.

See also *Costa Rica-Nicaragua Boundary Case* (1888), 2 *Int. Arb.*, p. 1945, at p. 1961.

²⁴ Brit.-U.S. Cl.Arb. (1910): *The Eastry* (1914), Nielson's *Report*, p. 499. See also *Id.*: *The Kate* (1921), *ibid.*, p. 472, *The Lindisfarne* (1913), *ibid.*, 483. Cf. Art. 2 of the Terms of Submission, *ibid.*, p. 9. Mex.-U.S. Cl.Com. (1868): *Hammaken Case*, 4 *Int. Arb.*, p. 3470, at p. 3471.

Cf. decisions of the Granadine-U.S. Cl.Com. (1857): "*Panama Riots Cases*" (2 *Int. Arb.*, p. 1361) with *U.S. and Paraguay Navigation Co. Case* (1860) (*ibid.*, 1485) as to whether the agreement to submit claims to arbitration is an admission of liability.

²⁵ Brit.-U.S. Cl.Arb. (1910): *Union Bridge Co. Case* (1924), Nielsen's *Report*, p. 371, at p. 378.