



# The Prospects of Equity in International Economic Law



Thomas Cottier

Restoring Trust in Trade  
International Colloquium  
University of Maastricht  
December 17, 2018

- 
- 
- 

# The Issue

- Equitable doctrines are not well developed in WTO law and dispute settlement
- To what extent can equity assist in the process of interpretation and adjustment to new regulatory challenges?
- What can be learned from other areas of international law?



•  
•  
•

# Equity in International Law

- The Quest for Global Equity
- The Maxims of Equity and General Principles of Law
- Equity and the Law of the Sea
- Equity in Trade and Investment Law

# The Quest for Global Equity

- Equity plays an important part in the process of decolonization and towards independence
- Equity called upon to remedy global imbalances
  - New International Economic Order
  - The Law of the Sea Convention: Area and Enterprise in deep seabed mining
- Intergenerational Equity and sustainable development (Climate Change mitigation and adaptation, SDGs)

# Aristotle: Nicomachean Ethics

- [A]ll law is universal, but there are some things about which it is not possible to speak correctly in universal terms. ... So in a situation in which the law speaks universally, but the issue happens to fall outside the universal formula, it is correct to rectify the shortcomings, in other words, the omission and mistake of the lawgiver due to the generality of his statement. Such a rectification corresponds to what the lawgiver himself would have acted if he had known. That is why the equitable is both just and also better than the just in one sense. It is not better than the just in general, but better than the mistake due to the generality. And this is the very nature of the equitable, a rectification of its universality.
- Aristotle, *Nicomachean Ethics*, trans. Martin Oswald, Book 5 Chapter 10 (New York: Bobbs-Merrill, 1962), pp. 141-142.

# Functions of Equity

- Roman and Civil Law tradition
  - Equity *infra legem*
  - Equity *praeter legem* (Swiss Civil Code Art. 2)
  - Equity *contra legem*
- Common Law Tradition: Equity Courts and Equitable Principles (substantive and procedural) united by Judiciary Acts 1873 and 1875
- Legal fiction, equity and legislation (Maine)
- Humans Rights: The Decline of Equity

- 
- 
- 

# Equity and Common Law

- “Equity is a word with many meanings. ... It is not synonymous with justice in the broad sense.”
- “Developed systems of law have often been assisted by the introduction of a discretionary power to do justice in particular cases where the strict rules of law cause hardship. ... Equity is a body of rules which evolved to mitigate the severity of the common law.”
- “Principles of justice and conscience are the basis of equity jurisdiction, but it must not be thought that the contrast between law and equity is one between strict rules and of broad discretion. Equity has no monopoly in the pursuit of justice. “
- “As Harnan L.J has said, equitable principles are ‘rather too often bandied about in common law courts as though the Chancellor still had only the length of its foot to measure when coming to a conclusion. Since the time of Lord Eldin [1801-1827] the system for good or evil has been a very precise one, and equitable jurisdiction is exercised only on well-known principles”.
- Hanbury & Martin, *Modern Equity*, 15<sup>th</sup> ed. London 1997 p 3 and 4.



# Equity and Common Law

- “ As Holdsworth said: [Lord Eldin] had a thorough grasp of existing rules and principles; be he looked anxiously into all the facts and circumstances of each case ... as if there were no such rules, and as if, therefore, he was under the necessity of determining each as one of first impression.”
- Quoted from Hanbury & Martin, *Modern Equity*, 15<sup>th</sup> ed. London 1997 p 13.





# English Law Maxims of Equity as applied in International Adjudication

1. Equality is equity
  2. He who seeks equity must do equity
  3. He who seeks equity must come with clean hands
  4. Equity follows the law
  5. Where equities are equal the law prevails
  6. Equity looks at the intent rather than the form
  7. Equity aids the vigilant but not the indolent
  8. Equity regards the balance of convenience
  9. Equity acts in personam
  10. Equity looks on that as done which ought be done
  11. Equity imputes an intention to fulfil obligations
  12. Equity will no suffer a wrong to be without a remedy
- C. Wilfried Jenks, *The Prospects of International Adjudication*, London 1964 p. 412-415.

•  
•  
•

# General Principles based upon Equity

- Protection of good faith and legitimate expectations
- The prohibition of abuse of rights
- The principle of proportionality
- The principle of estoppel
- The principle of acquiescence
- 1966 ILA Declaration on watercourses (equitable principles)

# Truman Proclamation 1945

- In cases where the continental shelf extends to the shores of another States or is shared with an adjacent State, the boundary shall be determined by the United States and the state concerned in accordance with equitable principles
- Proclamation No. 2667, Policy of the United States with Respect to the Natural Resources of the Subsoil and the Seabed of the Continental Shelf, 28. October 1945
- Thomas Cottier, Equitable Principles of Maritime Boundary Delimitation: The Quest for Distributive Justice in International Law, Cambridge University Press, 2015 at 207 (handouts)

# 1969 North Sea Continental Shelf

- (1) delimitation is to be effected by agreement in accordance with equitable principles, and taking into account of all the relevant circumstances, in such a way as to leave as much as possible to each Party all those parts of the continental shelf that constitute a natural prolongation of its land territory into and under the sea, without encroachment on the natural prolongation of the land territory of the other;
- (2) if, in the application of the preceding sub-paragraph, the delimitation leaves to the Parties areas that overlap, these are to be divided between them in agreed proportions or, failing agreement, equally unless they decide on a regime of joint jurisdiction, use, or exploitation for the zones of overlap or any part of them.
- ICJ Rep 1969 p. 53, para. 101.

# UNCLOS: Continental Shelf Delimitation

- *Article 83*
- *Delimitation of the continental shelf*
- *between States with opposite or adjacent coasts*
- 1. The delimitation of the continental shelf between States with opposite or adjacent coasts shall be effected by agreement on the basis of international law, as referred to in Article 38 of the Statute of the International Court of Justice, in order to achieve an equitable solution.

•  
•  
•

# Legal Methods to Delimitation

1. The model of juridical vacuum (ex aequo et bono)
2. The model of equity and equitable principles
3. The model of residual rules and exceptions (equidistance or median line)
  1. Strict residual rules
  2. Strict residual rules subject to exceptions
4. The model of equitable solutions based upon international law

# Equitable Principles related to geography

1. The Coast Dominates the Sea (CDS)
2. The Principles of Non-Encroachment and non-cutting-off (NEP, NCP)
3. Equal Division of Marine Space (EDS)
4. The Principle of Fair and Reasonable Proportionality (FRP)
5. The location of deposits and Eco-geographical criteria as relevant circumstances?

•  
•  
•

# Equitable principles related to Human Conduct

1. The Principle of Recent and Contemporary Conduct (RCCP)
  - Conduct of Parties since establishment of pertinent zone not met with protest
2. The Principle of Viability (VP)
  - Consideration of local fisheries interests and cultural and ethnological interests
  - National security beyond NDP and NCP
3. Towards a Principle of Prudent Conservation and Management (PCMP)



# The Proper Methodology of Equity

- Assess the different principles on same footing and draw tentatively vector lines responding to them: visualization of principles (NEP, NCP, EDP; FRPP, RCCP, PCMP)
- Coordination of divergent lines by balancing interests and taking into account relevant corrective circumstances with view to achieve an equitable result
- The current case law of the ICJ (three steps) excessively narrows the process to equidistance-special circumstances
- Transformation of results in technical lines and geometrical constructions
- Topical Jurisprudence (Viehweg): Taking into account all relevant interests and factors in assessing a particular case

# The Equitable Obligation to Negotiate

- [T]he parties are under an obligation to enter into negotiations with a view to arriving at an agreement, and not merely to go through a formal process of negotiation as a sort of prior condition for the automatic application of a certain method of delimitation in the absence of agreement; they are under an obligation so to conduct themselves that the negotiations are meaningful, which will not be the case when either of them insists upon its own position without contemplating any modification of it.
- ICJ Reports 1969, p. 47, para. 85(a).

# Equity in International Trade Law

- Explicit references to equity in WTO Law
  - Equity capital (SCM, GATS)
  - Equity infusion (GPA)
  - GATT Article XVI:3 (equitable share)
  - Note ad Article III:5 GATT (equitable relationship between imported and domestic products)
  - Art. XVII:2 (fair and equitable treatment)
  - Art XX(J) GATT (equitable share of international supply)
  - Art. XXXVI:4 GATT (equitable and remunerable prices)
  - Art. XXXXVII:3(a) (margins at equitable levels)
  - Art. XXXXVIII:2(a) (equitable and remunerative prices for exports)
  - CVA preamble (customs valuations should be based in simple and equitable criteria)

## Art. XVI: 3 GATT

- Agricultural subsidies “shall not be applied in a manner which results in that contracting party having more than an equitable share of world export trade in that product, ...”
- Prohibition of displacement effects (*EC-Refunds on Exports of Sugar (Australia)* (26S/310)[1979])
- *EC-Refunds on Exports of Sugar (Brazil)* (27S/69 [1980])
- Displacement taken up in Article 6(3)(a) and (b) SCM Agreement
- Article 28 Havana Charter entailed a number of relevant economic factors to be taken into account in this context which, however, were not retained in Article XVI:3 GATT

- 
- 
- 

# Trade Remedies

- Implicit references to equity in Art. 3.4 ADA, 4.2(a) SGA, 15.4 SCM Agreement, stating for the purpose of injury determination:
- 15.4 The examination of the impact of the subsidized imports on the domestic industry shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in output, sales, market share, profits, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments and, in the case of agriculture, whether there has been an increased burden on government support programmes. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.
- Factor analysis in causation and non attribution in Article 3.5 ADA and 15.5 SCM, and Art 4(2)(b) SGA
- *EU- Footwear (China)*, WT/DS405R [2011]; *US –Antidumping on Certain Hot-Rolled Steel Products from Japan* (WT/DS184/AB/R [2001]; *Argentina – Safeguard Measures on Imports from Footwear* (WT/DS121/AB/R ) [1999]

# General Principles related to Equity in IEL

- *Et audita altera parte*
- Protection of legitimate expectations as to condition of competition
- Good faith, estoppel, acquiescence
- Non-violation complaints, Art. XXIII: 1(c) GATT
- Necessity, weighing and balancing (Art XX, Art. 2.2 TBT)
- Unfair competition rules (Art. 10bis Paris Convention, TRIPs)

- 
- 
- 

# Investment Protection

- Fair and equitable treatment (FET)
  - Non arbitrariness, legitimate expectations, due process, transparency, non-discrimination and good faith, stability, predictability, consistency, transparency, reasonableness, proportionality
- Efforts at codification, Art. 8.10 CETA
- Equity suggest that these principles are not exhaustive and additional factors can be taken into account in casu



- 
- 
- 

# Conclusions

- Equity is the door of entry addressing new legal challenges, case-by-case
- Equity stands for the proposition of taking into account all pertinent factors and interests (topical jurisprudence)
- References to equity in treaty law should be used to depict the methodology of topical jurisprudence
- Equity eventually develops independent legal principles applied on their own
- Case law of WTO could make recourse to the principle of equity more explicit in treaty interpretation within DSU Art. 3.2





Thank you for your attention!

[thomas.cottier@wti.org](mailto:thomas.cottier@wti.org)

