

Original Paper

Equitable Principles from the Perspective of International Law of the Sea

Walid Fahmy^{1*}

¹ Department of Public International law, Pharos University, Alexandria, Egypt

* Walid Fahmy, Department of Public International law, Pharos University, Alexandria, Egypt

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Abstract

The notion of equitable principles is considered in public international law as a subsidiary source of law. However, it is nevertheless an autonomous concept in the law of the sea, and particularly in the law of maritime delimitations. However, can this notion in international litigation of maritime delimitation be defined both in form and in substance? Thus, can one say precisely in which legal category it is classified, and can its content be defined?

Keywords

equity, United Nations Convention on the Law of the Sea, International Court of justice, The International Tribunal for the Law of the Sea

1. Introduction

The United Nations Convention on the Law of the Sea, signed at Montego Bay on 10 December 1982, provides a global legal system for the universal use of the largest resource including regulation of use, maritime zones and provisions and compulsory dispute settlement procedures. The Convention clarified the different modes of conflict resolution in this area. It proposes several procedures for achieving the objective of a peaceful settlement of disputes. Article 287 of the Convention proposes four procedures, of which only three are concerned with conflicts of maritime delimitation. States signing, ratifying or acceding to the Convention must provide a written declaration explaining the means chosen. They have the following choices:

- The International Tribunal for the Law of the Sea,
- The International Court of Justice,
- And an arbitral tribunal constituted according to Annex VII of the Convention (Note 1).

However, after the entry into force of the Convention, it is clear that only the arbitral tribunals and the

International Court of Justice deal with certain problems relating to the law of the sea, in particular maritime delimitation. From the first cases on maritime delimitation came the notions of equitable principles and above all equity, a concept that crosses time, apprehended first by philosophers and later by lawyers to be a particular meaning in law of the sea.

The doctrine distinguishes between three types of equity: equity *contra legem*, which is used in contradiction with the law; Equity *praeter legem*, which is used beyond the law to fill gaps; and equity *infra legem*, which is used under the existing law. The development of the law of delimitation at sea through international justice will be done through a principle of equity *infra legem*.

If Equitable principles contribute to solve international conflicts, particularly in the field of maritime disputes, the near future implies that they will play a greater role within the many branches of public international law, including international law of the sea. The Developing countries countries are based on the idea of justice in order to rectify the international legal situation, which was established under the domination of European. It remains to mention that despite the role played by justice and equity rules in resolving international disputes, and the role assigned to it to achieve in the future, the justice idea which is surrounded by a dense mystery, given the association with literary values, which in turn is a multi-content and arrangement on the ambiguity of the idea of justice automatically become relative recipe dominate the rules of general international law. These relative requires different solutions used to evaluate international issues only for the formulation or implementation.

2. Equity as a Palliative of Shortcomings of Positive Law

Equity is the way to fix the positive law in cases in which it appears that its application be severe and grave results, so it should achieved by providing the international conventions on justice and equity condition, or that it should judged in the case fairly, and the rules of this work is to allow the judge to grant compensation to the affected State in cases in which this compensation is not considered a legal obligation. Also, equity is a way to complete the positive law and bridging its gaps, but this task remains associated with the agreement of the parties; the judge can resort to equity to complete a law, but only under a general or private conditions satisfies the parties or to remedy the insufficiencies of international law and fill its logical lacunae.

In this sense, the role of equity has been formally recognized by Article 38 paragraph. 2, of the Statute of the International Court of Justice. Here gives a major role to the international judge—or arbitrator—who will then, has an opportunity to choose a considerable margin of maneuver.

Revealed meditation in the provisions of international jurisdiction that the courts and international tribunals, often resort to the principles of justice and equity as a complement to the rules of international law; the public international law is non-codified law and marred shortage for his lack of international legislator and this necessarily reflects on the task of the international judge who finds in the principles of justice and equity haven so as not to stigmatize his conduct as denial of justice.

The Joint reparations French Mexican in the case of George Benson announced in 1928 that the rules

of justice can be considered as a complement to the law element, where the positive law devoid a judgment, and the fact that the international jurisdiction bodies have often to complete the rules of law rules of justice due to insufficient content of the legal rules.

As an example, the special rules of international responsibility are in principle involve clear rules regarding international liability, but are still vague on the determination of the amount of compensation, so the courts and arbitral tribunals lead to seek equitable solutions on the determination of the amount of compensation. The international Court of Justice in its advisory opinion that confirmed this attitude taken by the Administrative Tribunal of the international labor Organization in one of cases brought before it, the Court prescribed that the Court resorting to the rules of justice and equity, is not out of the bounds of the law.

Because of these very broad powers of judge or arbitrator acting *ex aequo et bono*, it is understood the necessity of the express consent of the parties to entrust this mission. Or are extremely rare cases where judges or arbitrators were called to decide *ex aequo et bono*. Never, for example, in the history of the International Court of Justice or, judges have been called to decide *ex aequo et bono* by states that had a case before this Court. The Permanent Court of International Justice in its order of 6 December 1930 in the case of the free zones noted that this option was character “absolutely exceptional” and had to depend on a “clear and explicit” provision from the disputed parts (Note 2).

The exceptional power of its extent was sometimes also given to arbitrators to set rules in case of gaps or silence of international law, and in the new circumstances. It has a particularly example in Trail smelter case between the United States and Canada in 1941 (Note 3). The Court noted, in this case, “It (the State) has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air. ... It is not lightly to be presumed to give up quasi-sovereign rights for pay and If that be its choice, it may insist that an infraction of them shall be stopped. This court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains that it would have in deciding between two subjects of a single political power. Without excluding the considerations that equity always takes into account” (Note 4).

3. Searching for a Clear Concept

The concept of equity is considered in public international law as a subsidiary source of law. It is nevertheless an autonomous concept in the law of the sea. However, can this notion in international litigation concerning the law of the sea be defined? So, can we say precisely what legal category it ranks, and its content can be defined?

It is difficult to classify equity in the hierarchy of standards, but two criteria can help in this task: the legal nature of equity and its function. But both are ambiguous.

3.1 Is Equity a Legal Concept?

In an attempt to understand the place of equity in the hierarchy of norms of international law, it is necessary to grasp its relationship to the law. To that end, there are two elements of the answer given

by the jurisprudence.

But first, it must be understood that the position of the international judge or arbitrator, who commands in international law the practical interest in questions of equity, is fundamentally different from that of the domestic judge. There is no general recourse to the arbitrator or the judge; its competence can only be based on a voluntary basis and the consent of the States in this matter cannot be presumed; there can be no obligation for the judge or arbitrator to settle a dispute outside his specific mandate and with the means he has received. This is an observation which concerns the exercise of the judicial function only within the framework of the general international community. It will be recognized, therefore, that if equity is an interest in international law, it is in fact only in so far that equity can be manifest in the application of the law.

Each judgment of the International Court of Justice explains in the early days that “The legal basis of that rule in the particular case of the delimitation of the continental shelf as between adjoining States has already been stated. It must however be noted that the rule rests also on a broader basis. Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law, what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court’s Statute” (Note 5).

The court made a distinction with the *ex aequo et bono* of the same, then, since the thing seems there is no mention of Article 38 § 2, even though some authors argue that equity is inexorably related to the concept of *ex aequo et bono*. Labrecque Georges defines equity as the application of the principles of justice, and as a way to correct the too strict application of the rule of law, if the parties agree, to complete its content, or even to exclude it.

It is therefore necessary to emphasize the importance in international law of a statement which has just been stated in a summary manner. Equity will play a more significant role in the application of legal rules as these legal rules will be formulated in very general terms.

As early as 1969, in the North Sea Continental Shelf case, the ICJ explained that “it is not a question of applying equity simply as a matter of abstract justice, but of applying a rule of law which itself requires the application of equitable principles” (Note 6). So, justice of whom equity is an emanation is not abstract justice, but justice according to the rule of law. The normative character of equitable principles applied as part of general international law is important. This importance, the court gives it a name “the fundamental norm” (Note 7).

The fundamental norm, according to Hans Kelsen, is “due to the custom founded by the mutual conduct of States, a mode of creation of law”. It is at the roots of any international rule. Thus, a custom is obligatory because it is based on a higher standard which requires it, but this one is supposed and

therefore indemonstrable. Also, Professor Ros sees this fundamental norm as “a judicial invention” which appears “to have realized its fabulous destiny, to incarnate all the law of maritime delimitation, to regulate the delimitation of all maritime spaces, and to unite all the logics of delimitation”.

Ultimately what this standard equity may be the origin of customary law as well as conventional law. And it is enough to assume that a large number of customary or even written rules raise some questions. These questions could be resolved on the basis of equitable principles.

3.2 Equality or Proportionality: What Is the Difference?

Theoretically, it is constant among philosophers and moralists and then theologians that justice is equality not arithmetic but equality in relations and proportions and the distinction between “corrective justice” and “distributive justice” has emphasized this aspect. Other examines specific examples of substantive justice in international law, initially considering its use of equity.

The equivalence was arithmetically speaking a simple notion; the proportionality is more complex and more arbitrary, since it involves the choice of parameters and the quantification of these parameters.

It was the judgment of the International Court of Justice in the North Sea Continental Shelf Cases which revived the problem of equity in public international law in relation to the delimitation of the continental shelf. This judgment, to which reference has already been made, is of a very rich substance and can help us to find an answer.

The Court also found that in order to attribute appropriate meaning to equity, various relevant factors should be considered, as were geological and geographical factors in the present case and a reasonable degree of proportionality among factors should be maintained.

The Court rejected with vigor the idea that, in the event of a dispute between States over the extent of their respective continental shelves, there might be a problem of distribution, which means, a sharing lead necessarily to an equitable result.

The usage of equity is manifested in the reconciliation often effected between equity and equality, imposed, as it were, by the Latin root of the word, *aequus*, equal. This shows an essential meaning of equity: it is a measure. More precisely, the equality to be taken into consideration in relation to the treatment applied to a given situation. Equity requires that equal things be treated equally, which has a corollary: unequal treatment of unequal things. In other words, equity can not be separated from the idea of proportionality. This is perfectly consonant with the preceding observation: the measure must be taken in each particular case; It can not be applied abstractly to concretely different situations.

The International Court rejected the formula of global equity, based entirely on proportionality whose parameters would be uncertain. This is the same concept of the continental shelf, natural extension of the territory assigned by right therefore to states that it is an obstacle to such a conception; It cannot be for a judge to substitute himself for nature. According the court, “Equity does not necessarily imply equality. There can never be any question of completely refashioning nature, and equity does not require that a State without access to the sea should be allotted an area of continental shelf; any more than there could be a question of rendering the situation of a State with an extensive coastline similar to

that of a State with a restricted coastline” (Note 10).

It is therefore clear to the Court that the search for proportionality is not the essential element. It will lay down the general formula that, with regard to the fundamental rules. These principles are that delimitation must be the subject of an agreement between concerned states and that this agreement must be achieved on the basis of equitable principles.

Consequently, Equity is central, but it is normally translated by an equivalence equitably served by the equidistance line; however, this is not always the case and it is then that other considerations can be used. And the Court, when it then proceeds to examine the elements involved, will retain the geological belonging to the continental shelf to the riparian countries, the unit of deposit and finally the reasonable relationship that a delimitation carried out by Equitable principles should be reveal between the extent of the continental shelf of the concerned States and the length of their coasts. Only this latter element implements a genuine principle of proportionality. As Louis Balmon quoted “If equality does not necessarily imply equality and there can be no question of distributive justice, the delimitation adopted must also make it possible to arrive at an equitable result verified by means of a proportionality test, The length of the coasts and the extent of continental shelf areas under the coastal State”.

In fact, as the Court did not carry the delimitation to itself, it had to indicate only the Parties what directives they should negotiate. Incisive and clear in its negative part, the equidistance is not the only method of delimitation and doctrinal, the equity in question is included in the law. So, the judgment retains a necessary indeterminacy in its positive part the essence equity and timidly and partially advances an application of the idea of proportionality.

4. How Did the International Tribunal for the Law of the Sea Apply the Equitable Principles in Its Judgments?

The International Tribunal for the Law of the Sea (ITLOS) has begun its work ranging from the eighteenth of October 1996; after about two years from entering Jamaica agreement on the Law of the Sea came into force. International Tribunal for the Law of the Sea enjoys independent international legal personality, in accordance with the provisions of Article I of the Agreement on 18 December 1997, between the Court and the United Nations. It is clear from the provisions of the Convention on the Law of the Sea in 1982 and the Statute of the Court that they do not represent a judicial organ of the international organization; the opposite of what is happening in relation to the International Court of Justice, being the main judicial organ of the United Nations.

The Tribunal consists of elected judges exercising their business on an ongoing basis for the duration of their term office, as well as a judges *ad hoc* are selected according to certain conditions, as set out in articles 2, 8 and 11 of the Statute, to participate in the case for which they are chosen on terms of complete equality with the other judges and take precedence after the members of the Tribunal and in order of seniority of age.

Through access to the issues before the Court, it has introduced so far 25 cases to adjudicate. After a

deep search, only two cases of them come under the concept of Equity.

4.1 Case Concerning Land Reclamation by Singapore in and around the Straits of Johor

In the case concerning the reclamation of Singapore's land in the Straits of Johor and around (Malaysia against Singapore) dated 5 September, 2003, the International Tribunal issued its Judgment in the case in October 2003, and it considered that it was necessary caution on the part of Malaysia and Singapore on reclamation and assess its effects, and issued a directive to Singapore not to conduct land reclamation activities in a manner that may cause prejudice to the rights of Malaysia or not disproportionately serious harm to the marine environment. On 26 April 2005, Malaysia and Singapore signed an agreement to seek settlement of the dispute by peaceful means of their own choice (Note 11). In September 2005, it issued a final award in the case, according to the provisions specified in the settlement agreement between the two sides.

It is true that the court did not explicitly refer to the equity, but we confirm that "The ITLOS could hear disputes involving the delimitation of adjacent and opposite maritime boundaries, relying on equity. [...] The absence of compulsory jurisdiction over such cases, the experience of the ICJ and arbitral tribunals in handling such disputes, and the desire of some states to have the prestige of the ICJ associated with any delimitation may restrict the number of boundary disputes submitted to the ITLOS. Should the Tribunal hear such disputes, however, it may operate as a court of equity".

4.2 Dispute Concerning Delimitation of the Maritime Boundary between Bangladesh and Myanmar in the Bay of Bengal

The negotiations on maritime delimitation in the Gulf of Bengal have been underway since 1974 and continued until 2010. These discussions resulted in two proceedings signed by the heads of delegation. The intervention of International Tribunal therefore consisted above all of determining the legal scope of the two proceedings and determining whether they were mandatory in nature to exclude the Tribunal's jurisdiction over the question of the delimitation of the territorial sea. To this end, the Parties invoke the nature of the documents, their signatories, and the continuity between the 1974 and 2008 protocols (Note 12).

The ITLOS fully associated itself with the jurisprudence of the ICJ which considered in *Nicaragua v. Honduras* that "Establishing a permanent maritime boundary is a matter of great importance and an agreement cannot be readily assumed" (ICJ, *Nicaragua v. Honduras*). It justifies the rejection of the minutes based on the internal mechanisms and on the incompetence of the members of the delegations to engage the State.

The ITLOS also confirmed the need to exercise great caution in dismissing the contention of tacit or de facto agreements as much as the estoppel invoked by Bangladesh with regard to maritime delimitation on the Saint-Martin. Remembering that estoppel consists in the recognition that a State by its conduct has created the appearance of a particular situation and that another State relied in good faith on that conduct has acted or has abstained, act to his detriment.

In its view, Bangladesh saw that "the Tribunal should apply the angle-bisector method in delimiting the

maritime boundary between Bangladesh and Myanmar in the exclusive economic zone and on the continental shelf. In its point of view, this method would eliminate the inequity associated with equidistance and lead to an equitable result”.

It is worthwhile to say that this problem has been recognized since the decision in the North Sea cases, in which the ICJ explained that “it has been seen in the case of concave or convex coastlines that if the equidistance method is employed, greater than the irregularity and the further from the coastline area to be delimited, the more unreasonable are the results produced. So great an exaggeration of the consequences of a natural geographical feature must be remedied or compensated for as far as possible, being of itself creative of inequity”.

For its part, the Tribunal notes that, “on account of the concavity of the coast in question, the provisional equidistance line it constructed in the present case does produce a cut-off effect on the maritime projection of Bangladesh and that if the line is not adjusted, it would not result in achieving an equitable solution, as required by articles 74 and 83 of the Convention”.

In their view, judges Nelson, Rao and Cot mentioned that “the Considerations of equity come into play only in the second phase of the delimitation, as they necessarily carry an important element of subjectivity. Relevant circumstances may call for an adjustment of the provisional equidistance line so as to ensure an equitable solution”. [...] The test of disproportionality ensures that an equitable solution is the result of the delimitation process. Finally, the Tribunal achieves a solution that is equitable in the circumstances of this case (Note 13). And we can conclude as judge Ndiaye said in his separate opinion, that “Equity as a legal concept is a direct emanation of the idea of justice. The Court whose task is by definition to administer justice is bound to apply it” (Note 14).

5. Conclusion

The fear of the problem of conflicts over marine resources and potential maritime's wars in the future, leads us toward the interest in the subject of equity in order to overcome the sustainable water conflicts and give attention to develop the rules of international law of the sea. Despite the multiplicity of approaches to international jurisprudence cares water cooperation and conflict on marine resources, and judicial efforts to resolve water disputes, the concept of equity remains these days mysterious and vague.

The particularity of the litigation of maritime delimitations has developed a right based on a notion with indefinable contours but with known content. This development followed a two fold evolution. While the delimitation rules of the Conventions were more rigid, judges relied on a concept of equity with strong creative power. The conventional rules became more flexible, and equity has gradually faded back to its original virtue, the correction of the law. The latter, which became very pragmatic, almost does not mention equity, even though it transcends the whole process of delimiting boundaries at sea.

Interesting in the strategic vision for the future of water, we are trying to propose the initial principles

of an approach most utilitarian, we begin to address the issues of equity in international law of the sea, particularly maritime delimitation to emphasize the importance of cooperation and the importance of developing the principles of this branch of international law, and to defend the vital interests of ensuring the survival of humanity in the present and the future, hoping that these theses secrets more utilitarian approach to all the actors in the maritime issue.

Giving priority to the collective interests of justice is the basis of the seas, where it should not be subject to the politicization; they are an important resource featuring to cross-border and should not be influenced by international conflicts. The future is for justice and equity, and not to the balance of power influence in the process of determining the maritime boundary and the division of wealth.

Through the controversy touched this study, we would like to focus on the most important conclusions:

- It is imposed on every law, when positioned and formulated it and its applications, that reflects an approach of equity and a spirit of justice, and that this law combined with achieving a participatory regime between the actors in the maritime affairs, and equitable rules between present and future generations.
- The importance of the application of the international law of the sea primarily is to avoid damage to marine resources and to ensure the fair and equitable distribution of maritime wealth.
- The importance of dealing with the sea as an international and social common resource is not subject to the conflicts, and should not be impeded enjoy it, while ensuring sustainability for present and future generations.
- Swinging the concept of equity between the dynamic of the conflict and international cooperation, requires moving from the defense of sovereign narrow interests to the common and collective interests of humanity.

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Notes

Note 1. The International Court Justice, the “principal judicial organ” of the United Nations under Article 92 of the Charter, had dealt with the majority of maritime delimitation cases until the entry into force of the Convention in 1994. These provisions of Article 287 may have given rise to fears of a scattering of the rules of delimitation. Eighteen States had voted in favor of the court (at least thirteen as their first choice), eighteen others for the International Tribunal for the Law of the Sea in Hamburg. Six of them as a priority choice, and finally eight selected Annex VII arbitration.

Note 2. Case concerning Free Zones of Upper Savoy and the District of Gex, series A, No. 24, order of 6 December 1930, 10.

Note 3. In this case, smoke from a lead factory located in Canada had caused damage to American farmers and had rendered the land unfit for cultivation. Canada was found liable for damages caused by these harmful fumes from its territory even as their spread was due to climatic factors beyond its control. Canada was also requested to take all steps within its power to end this situation undermining the integrity of the United States.

Note 4. Report of international Arbitral Awards, Trail smelter case (United States, Canada), 16 April 1938 and 11 March 1941, Volume III, 1965.

Note 5. Case concerning North sea continental shelf between Germany, Denmark & Netherland, judgment of 20 February, ICJ Report, 1969, 48.

Note 6. Case concerning North sea continental shelf between Germany, Denmark & Netherland, judgment of 20 February, ICJ Report, 1969, 46.

Note 7. Case concerning Continental shelf between Libyan arab Jamahiriya & Malte, judgment of 3 June 1985, 39.

Note 8. Corrective justice is the idea that liability rectifies the injustice inflicted by one person on another. This idea received its classic formulation in Aristotle’s treatment of justice in *Nicomachean Ethics*, Book V. More recently, it has become central to contemporary theories of private law. Corrective justice features the maintenance and restoration of notional equality with which the parties enter the transaction. This equality consists in persons’ having what lawfully belongs to them.

Note 9. Distributive justice is defined, at least initially, as amounting to moral rightness in general. Both values are thought by Franck to promote voluntary compliance with the international legal system insofar as instantiates them, although he appears to suggest, that this is the primary benefit secured by legitimacy, whereas distributive justice is rooted in the moral values of the community.

Note 10. Case concerning North sea continental shelf between Germany, Denmark & Netherland, judgment of 20 February, ICJ Report, 1969, p. 49.

Note 11. Case concerning North sea continental shelf between Germany, Denmark & Netherland, judgment of 20 February, ICJ Report, 1969, p. 49.

Note 12. Case concerning Land Reclamation by Singapore in and around the Straits of Johor, order of October 2003, case No. 12.

Note 13. Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), order of 14 March 2012, 18-25.

Note 14. Joint declaration of Judges Nelson, Chandrasekhara Rao and Cot., 2.

Note 15. Separate opinion of Judge Ndiaye, 26.