



Equity In Global Health Law

A Scottish Council on Global Affairs Insight

Takeaways For The Pandemic Treaty

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Table of Contents

Equity In Global Health Law

About the Scottish Council on Global Affairs	03
Insight Summary	04
Takeaways for the Pandemic Treaty	05-07
The workshop discussions – an overview	08-13
Conclusion	14
Authors & Contributors	15

About Us



The **Scottish Council** on **Global Affairs**

01

The Scottish Council on Global Affairs (SCGA) is the first all-Scotland international relations institute providing a hub for collaborative policy-relevant research and a home for informed, non-partisan debate on all areas of international relations and global politics broadly defined.

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with civil society and academic expertise to encourage dialogue, debate and the dissemination of expertise on issues of global importance.

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Insight Summary

02

Equity has been sorely lacking in pandemic preparedness and response, and COVID-19 is but the latest example. The response to COVID-19 was characterised by nationalism, inequity in access to diagnostics, vaccines, therapeutics and personal protective equipment (PPE) between the Global North and the Global South, as well as discriminatory, and in some instances racist, border closures chiefly impacting low- and middle-income countries.

In response to the widespread inequity witnessed during the COVID-19 pandemic, Member States of the World Health Organisation (WHO) are currently negotiating a new international legal instrument - the [Pandemic Treaty](#) - intended to prevent pandemics and mitigate associated inequalities such as vaccine access, and improve compliance with international law during pandemic events. From the initial proposal for the Treaty, through the many rounds of discussions that have occurred to date, it is clear that the new instrument is intended to be grounded in equity, with equity positioned both as an objective and as an operational output.

However, there is no overarching definition of equity that can inform the negotiations for a Pandemic Treaty. While equity is recognised as a general principle of international law, it does not have a precise and defined meaning applicable in all contexts. From the start of negotiations, it was unclear what an instrument 'grounded' in equity should look like, and how this principle can translate into

meaningful obligations within international law more generally, as well as pandemic preparedness and global health governance specifically.

Clearly, however, equity is key to a successful outcome within the negotiations for a Pandemic Treaty. To assist negotiators, we conceptualise how equity has been tackled in other areas of international law and practice through a workshop - with the assistance of funding from the Scottish Council for Global Affairs and the ESRC IAA Policy Impact Fund - at King's College, London which gathered together experts on equity from different disciplinary backgrounds.

Our aim is to understand and conceptualize equity as a legal concept, charting its history, development and application within both domestic and international law. Our findings are set out below and are aimed at informing the development and negotiation of a more equitable Pandemic Treaty.

Takeaways for the Pandemic Treaty (cont.)



03

The second is that **equity is associated with questions of fairness and justice**. While these are vague words in themselves, we can learn from other international processes in terms of how such fairness and justice may be achieved. This may require, for example, differentiated obligations, recognising different capacities and the need for technical assistance in recognition of this. It also requires a thorough examination of the root causes of the present inequalities that have been exacerbated by previous outbreaks, including (but not limited to) COVID-19.

Until we recognise why there is inequity, there cannot be anything approaching equity. This requires issues of vulnerability and disadvantage as well as their causes to be considered and remedied accordingly. The achievement of equity also requires agency on all sides; equity cannot be achieved via ad hoc charitable donations or 'gifts', whereby the

donor provides aid on their terms, without consideration of the recipient's needs. Equity needs to be defined in a **spirit of true partnership** - underpinned by **agency** - as well as good faith engagement. This means that how we understand equity cannot be determined or defined by one or a small number of dominant parties. This obviously has relevance to the negotiating procedure applicable to the Treaty (and to the future institutions that will be created by the Treaty), as well as the power dynamics applicable to this.

To this end, equity cannot be achieved in the presence of oppressive or overreaching transactional bargaining arising from a difference in power relations and resources between the parties. Indeed, equity cannot be bought, nor can it be traded; to achieve equity, the process must also be equitable.

Takeaways for the Pandemic Treaty (cont.)

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Within international law generally, there is an overt focus on enforcement and compliance, with many assuming that in the absence of enforcement mechanisms, international law is somehow redundant and ineffective. Indeed, as the clouds slowly started to clear during the COVID-19 pandemic, there was a call from several quarters for the introduction of a sanctions regime to be operated by the WHO, as if that would make us all safer (see [Rourke, Eccleston-Turner and Switzer, 2022](#)). During the workshop, there was agreement that equity is important as a principle, even if there is no overt enforcement, because there is something powerful in having equity

as a principle, based on the participatory element. It was also agreed that there are different ways of thinking about this issue in any case, with an alternative being a focus on transparency and accountability, operationalised via global stocktakes, informational provisions and peer review mechanisms. More generally, we must take the opportunity to respond flexibly to real instances of inequity arising in the absence of a perfect functional definition of equity. **We must therefore embrace equity as an experimental and iterative process, with an emphasis upon agency, participation, and learning, to actualize equity in practice.**



The workshop discussions – an overview

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In the following short discussion, **we distill some of the lessons at this workshop. Our discussions found that equity must be more than an abstract buzzword** - simply inserting the word equity into a legal text does not achieve equity. However, international law offers a number of lessons for responding to instances of inequity arising in the absence of a perfect, overarching functional definition of equity.

Equity in International Law

References to equity abound in international law and it is often considered to fall within the "general principles of law". The Permanent Court of International Justice, albeit, via a dissenting opinion, has opined that certain maxims of equity constitute "general principles of law" under the International Court of Justice (ICJ) Statute, with this being the first, but not only, means by which equity may be recognised as a source of international law.¹

¹ *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Dissenting Opinion of M. Anzilotti) [1937], P.C.I.J. (Ser. A/B) No. 70; *Diversion of Water from the Meuse (The Netherlands v Belgium)* (Individual Opinion of Hudson) [1937], P.C.I.J. (Ser. A/B) No. 70

Accordingly, we see equity used across numerous areas of international law. As [Catharine Titi](#) notes, equity can be found in fields "(f)rom international cultural heritage law to environmental law, from judgments on transboundary disputes to procedural decisions on security for costs in investment arbitration" ([Titi, 2021](#)). The incorporation of equity or equitable considerations into treaty law and other international legal texts and instruments indicates the importance of equity for international law but also the **importance of international law as a potential vehicle for the pursuit of equity.**

04. Workshop Overview (cont.)

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To give some examples of the operation of equity within international law, 'fair and equitable treatment' of foreign investors is provided for in most investment treaties. The standard seeks, among other things, to protect **legitimate expectations**, connecting to the notion that investors are entitled to a stable investment environment.

This standard will be deemed to have been violated if there has been denial of justice, there is a lack of **good faith** in the way investors are treated, and/or manifest unfairness in treatment of investors. Here, equity seems to be connected in some way to the prevention or remediation of **substantive unfairness**.

However, our discussions noted the abundant concern regarding the application of this standard by investment arbitration tribunals; that it may serve to limit the right of the state hosting an investment to regulate for public interest, including with regard to concerns such as human rights, public health, environmental protection and food security. Accordingly, many states are in the process of renegotiating their bilateral investment treaties to provide them with greater policy space to regulate in the public interest.

Outside investment law, the principle of equity is also manifest in the international climate change regime. While climate change is recognised as a 'global commons' problem, the causality - that is, the historical responsibility - of countries in respect of climate change, as well as the capability of countries to mitigate and adapt to climate change is not equal.

The climate change regime has recognised this, with Article 3 of the 1992 United Nations Framework Convention of Climate Change ([UNFCCC](#)) outlining that, 'The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but differentiated responsibilities and respective capabilities' (see also Article 2 of the [UNFCCC Paris Agreement](#)).

While there is no additional definitional content provided for the principle of equity in the climate change regime, it is intrinsically connected to the notion of **differentiated obligations**, for which it is necessary to consider countries' different capacities and historical responsibilities.

04. Workshop Overview (cont.)

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While the need for differentiation may at first sight appear rather obvious, it must be underlined that relations within international law are premised upon the notion of sovereign equality. In the words of Cullet, '[t]he principle of sovereign equality has been translated into the sovereign legal equality of all states, which constitutes a cornerstone of international law... One consequence is that treaties were traditionally deemed to be "just" if they provided for reciprocity of obligations among contracting states' (emphasis added, Cullet, 1999).

However, the 'worth' of formal equality was perhaps best summed up by Anatole France who stated that '[t]he majestic equality of the laws ... forbid rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread' (cited in [Stone, 2004](#)).

Differentiated obligations may hence form an integral component of the concept of equity, and we can see this expressed within the international climate change regime which incorporates the principle of "**common but differentiated responsibility**" (CBDR) as a form of equity. CBDR recognizes the "shared" moral responsibility that all states have to address climate change, but nevertheless recognizes that the proportions of such responsibility, and how that responsibility manifests itself under

international law, are differentiated. Accordingly, CBDR operates as an acknowledgment of **past behaviour** as well as **current capabilities** to deal with a complex global commons problem ([Caney, 2012](#)).

CBDR is operationalised within the climate change regime's Paris Agreement via a method of country-based self-differentiation through Nationally Determined Contributions (NDC), creating a bottom-up nationally determined series of commitments, through CBDR, and the additional consideration of such commitments '**in light of different national circumstances**'.

This new approach allows for consideration of a wide array of criteria, including past and current, as well as projected future emissions, financial and technical capabilities, human capacity, population size as well as other demographic criteria, abatement costs, opportunity costs, skills, etc., with the expectation that developed countries will lead the way on implementation ([Rajamani, 2016](#)).

Equity has also been recognised within the climate change regime as relevant to issues such as **technology transfer**, but less detailed obligations exist in this domain, raising concerns as to whether the climate change regime is capable of achieving 'true' equity.

04. Workshop Overview (cont.)

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Issues such as technology transfer, however, raise important questions regarding the link between equity and justice, highlighting the role of intellectual property rights in that regard, particularly since technology transfer may be conceptualized as a form of **distributive justice**. Indeed, equity within international law has been recognised as related to the **concept of justice**.

For example, within the climate change regime, the Paris Agreement mentions **climate justice** in its preamble and emphasises fairness and justice in response to what equity could mean.

Equity is also intricately tied to the question of ‘who gets what’ in international law. Within the law of the sea regime, for example, the concept of an ‘equitable solution’ is prominent in terms of delimiting maritime boundaries between states.

The relevant treaty, UNCLOS, is silent on what ‘equity’ means in this context (Article 74 (1) and Article 83 (1)). However, in its maritime delimitation jurisprudence, the

International Court of Justice has acknowledged that “[w]hatever the legal reasoning of a court of justice, its **decisions must by definition be just, and therefore in that sense equitable**” but that it was “**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, in accordance with the ideas which have always underlain the development of the legal régime...in this field.”²

Accordingly, ‘true’ equity needs to do more than merely apply abstract notions of justice; simply inserting the word ‘equity’ or ‘justice’ into a legal text does not automatically operationalise its content.

Equity is also related to agency; and about “deep ... and cosmopolitan international cooperation” ([Morgera, 2018](#)).

² *North Sea Continental Shelf Cases (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands) [1969] ICJ Reports p.3*

04. Workshop Overview (cont.)

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The fair and equitable sharing of benefits from the utilisation of genetic resources is a key principle of the [Convention on Biological Diversity](#) (CBD) - often identified by the shorthand of benefit-sharing. The international community has since accepted benefit-sharing as the main mechanism for injecting equity and justice in bio-based research and development, and has operationalised it in different ways in the CBD's [Nagoya Protocol](#) on access and benefit-sharing, the [International Treaty on Plant Genetic Resources for Food and Agriculture](#) and, recently, the international agreement on marine biodiversity beyond national jurisdiction ([BBNJ Agreement \(sometimes referred to as the High Seas Treaty\)](#)).

In addition, benefit-sharing has arisen under the CBD and international human rights treaties that contribute to the protection of Indigenous peoples' human rights as a reward and safeguard for biodiversity stewardship to enable their continued contribution to biodiversity conservation ([Morgera, 2018b](#)). Several problems remain regarding its application among and within States, including due to

asymmetries with intellectual property rights. In this context, it has been recognised that the agency of beneficiaries is a key but often absent aspect of the principle of benefit-sharing ([Morgera, 2018](#)). Achieving 'true' equity in this context requires that the **needs of the most vulnerable** must be met in a spirit of partnership (and solidarity) ([Morgera, 2016](#)), recognising that "progress does not [automatically] mean that benefits are shared fairly" (or indeed equitably) ([Tsioumani, 2016](#)).

Simply put, equity is not just an 'outcome' - though fairness in terms of 'who gets what' is certainly an aspect of equity - but is also linked to the process by which decisions are taken. In essence, 'who calls the shots' is about equity and benefits). Again, borrowing from insights from the biodiversity regime, equity requires an "iterative process, rather than a one-off exercise, of **good-faith engagement** among different actors that lays the foundation for a **partnership** among them" ([Morgera, 2016](#)).

04. Workshop Overview (cont.)

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Our discussions also focused on how a transactional approach to international problems may struggle to achieve equitable outcomes, depending upon the context.

The [World Health Organisation's Pandemic Influenza Preparedness Framework \(PIP Framework\)](#) is a transactional regime whereby access to pathogen samples - in this case, samples of influenza virus with human pandemic potential - are exchanged for the promise of receiving benefits such as flu vaccines and antivirals at a later date.

However, connecting access to pathogens in a *quid pro quo* for the provision of 'benefits' is not the solution to the inequities surrounding access to pathogen samples and information or access to medical countermeasures. Tying these two issues together produces

a situation where parties that would otherwise have similar interests (combating a pandemic) become adversaries in a buyer-seller paradigm, with each party trying to maximise their own gains. Providers of pathogen samples will want to maximise the benefits that they may be entitled to while users of pathogenic genetic resources (e.g., pharmaceutical companies) will want to minimise the benefits shared. In such an arrangement, the parties with the greatest power and resources will win out, often at the expense of shortening the public health emergency that the arrangement is supposed to address.

The pursuit of equity - and moreover, the achievement of the right to health - is therefore threatened under such an arrangement.



05. Conclusion

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Equity is multidimensional and contextual, tied to notions of **fairness** when resources or property need to be shared and linked to questions of **justice** as well as **differentiated obligations**; the notion that it is necessary to take into account countries' different capacities/capabilities when transacting between countries.

Equity is therefore closely tied to the idea that there are inequalities in power dynamics and the notion that strict equality - whereby every party owes the same obligations - is not the same as equity.

Equity may demand that those with less capacity, or with less historical responsibility for a problem, should owe less by way of obligations. Equity is further linked to obligations of repair, remedy and remediation, It is also tied to notions of taking account of **vulnerability and disadvantage**, with legal obligations tempered by such concerns. It is further linked to

concerns of agency, process and procedure; the notion that equity requires partnership and good faith engagement between actors.

Equity needs to be defined in a **spirit of true partnership** - underpinned by **agency** - as well as good faith engagement. This means that how we understand equity cannot be determined or defined by one or a small number of dominant parties.

This obviously has relevance to the negotiating procedure applicable to the Treaty (and to the future institutions that will be created by the Treaty), as well as the power dynamics applicable to this. To this end, equity cannot be achieved in the presence of oppressive or overreaching transactional bargaining arising from a difference in power relations and resources between the parties.

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A longer version of this policy brief is available to [download here](#).

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The meeting was conducted under the Chatham House rule.

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