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NON-DISCRIMINATION IN INTERNATIONAL ECONOMIC LAW

Michail Risvas

Balliol College & Faculty of Law

University of Oxford

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ABSTRACT

This thesis examines the jurisprudence of the World Trade Organization (WTO) Panels and Appellate Body (AB) and investment tribunals on non-discrimination clauses contained in the WTO agreements and investment agreements respectively. The thesis puts forward an alternative conceptual perspective through which the interpretation of non-discrimination provisions in international economic law could be analysed. It is argued that non-discrimination obligations (as every legal rule to a greater or lesser extent) are inherently indeterminate. This is *a fortiori* the case in regard to non-discrimination provisions due to their link to the concept of equality. The concept of equality is open-ended and value-laden: its content depends on the prioritisation of different values. Thus, equality in the economic sphere can accommodate different conceptions which reflect different ideological approaches in relation to regulation, economic development and the proper role of the State in the economy. International courts and tribunals enjoy broad discretion in selecting which conception of equality to adopt when interpreting non-discrimination clauses. This indeterminacy is a positive characteristic of international economic regimes. Both the WTO and the investment arbitration regime are equipped with institutional characteristics which enable the contestation of different ideological approaches and promote pluralism. In the WTO context, this role is fulfilled by the institutional structure of the organization which facilitates the dialogue between the WTO members and the WTO Dispute Settlement System. In the realm of international investment arbitration, the mechanism of party-appointed arbitrators, despite its shortcomings which can be addressed, ensures value pluralism.

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TABLE OF ABBREVIATIONS

AAA	American Arbitration Association
AB	Appellate Body
ACP	African, Caribbean and Pacific Group of States
AF	Additional Facility
AFDI	Annuaire Français de Droit International
AJCL	American Journal of Comparative Law
AJIL	American Journal of International Law
ALI	American Law Institute
ALOP	Appropriate Level of Protection
ASIL	American Society of International Law
BFSP	British and Foreign State Papers
BIICL	British Institute for International and Comparative Law
BISD	Basic Instruments and Selected Documents
BIT	Bilateral Investment Treaty
BTA	Border Tax Adjustment
BU	Boston University
BYIL	British Yearbook of International Law
CETA	Comprehensive Economic and Trade Agreement
CJEU	Court of Justice of the European Union
CLP	Current Legal Problems
Comp L Rev	Competition Law Review
CUP	Cambridge University Press
DCS	Directly Competitive or Substitutable
DS	Dispute Settlement
DSB	Dispute Settlement Body
DSS	Dispute Settlement System
DSU	Dispute Settlement Understanding
EC	European Communities
ECR	European Court Reports
ECT	Energy Charter Treaty
EJIL	European Journal of International Law
EJLS	European Journal of Legal Studies

ELJ	European Law Journal
EU	European Union
FCN	Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FILJ	Foreign Investment Law Journal
FTA	Free Trade Area
FTC	Free Trade Commission
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
GC	General Council
GLJ	German Law Journal
GPA	Plurilateral Agreement on Government Procurement
GSP	Generalised System of Preferences
HR	Human Rights
HRLR	Human Rights Law Review
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICLQ	International and Comparative Law Quarterly
ICSID	International Centre for Settlement of Investment Disputes
IDI	Institute de Droit International
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Review
Int	International
Int J	International Journal
Int Law J	International Law Journal
IOLR	International Organizations Law Review
ITO	International Trade Organisation
IUSCT	Iran-United States Claims Tribunal
J Int L	Journal of International Law
JIDS	Journal of International Dispute Settlement
JIEL	Journal of International Economic Law

JIL	Journal of International Law
JWIT	Journal of World Investment & Trade
JWT	Journal of World Trade
LA	Los Angeles
LCIA	London Court of International Arbitration
LFN	Least-Favoured-Nation treatment
LR	Law Review
MA	Massachusetts
MAT	Tribunaux Arbitraux Mixtes
MFN	Most Favoured Nation
MIT	Massachusetts Institute of Technology
MPEPIL	Max Planck Encyclopedia of Public International Law
NAFTA	North American Free Trade Agreement
NJ	New Jersey
NT	National Treatment
NY	New York
NYU	New York University
NYULR	New York University Law Review
OECD	Organisation for Economic Co-operation and Development
OJ	Oxford Journal
OJLS	Oxford Journal of Legal Studies
OUP	Oxford University Press
PCA	Permanent Court of Arbitration
PCIJ	Permanent Court of International Justice
PICJ Rep	Permanent Court of International Justice Reports
PTA	Preferential Trade Agreement
RCADI	Recueil des Cours de l'Académie de Droit International
RDP	Revue de Droit Public
RGDIP	Revue Générale de Droit International Public
RIAA	Reports of International Arbitral Awards
RTAA	Reciprocal Trade Agreement Act
SCC	Stockholm Chamber of Commerce
SCM	Subsidies and Countervailing Measures
SPS	Sanitary and Phyto-Sanitary

TBT	Technical Barriers to Trade
TFEU	Treaty on the Functioning of the European Union
TRIMS	Agreement on Trade-Related Investment Measures
TRIPS	Agreement on Trade-Related Aspects of Intellectual Property Rights
UK	United Kingdom
UN GAOR	United Nations General Assembly Official Records
UNCITRAL	United Nations Commission on International Trade
UNCTAD	United Nations Conference on Trade and Development
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNGA	United Nations General Assembly
UNTS	United Nations Treaty Series
UP	University Press
US	United States
USCTR	Iran-US Claims Tribunal Reports
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
WTO	World Trade Organisation
WTR	World Trade Review
YBILC	Yearbook of the International Law Commission

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INTRODUCTION

In March 1872, the United States Congress was called upon to interpret the following clause under the commerce and navigation treaty signed by the United States and the Russian Empire in 1832:

> No higher or other duties shall be imposed on the importations into the United States of any article the produce or manufacture of Russia, and no higher or other duties shall be imposed on the importations into the Empire of Russia of any article the produce or manufacture of the United States, than are of shall be payable on the like article being the production of manufacture of any foreign country.[1]

This is what is known as a most-favoured nation (MFN) clause. Despite the existence of the clause, the United States proceeded to impose a higher duty on Russian hemp than on Manila hemp imported from the Philippines. This led a group of importers from Boston and New York to bring a case before the Committee on Finance of the United States Congress, seeking a refund of the additional duties paid on imported Russian hemp. The issue before the Committee was a simple one: were Russian hemp and Manila hemp 'like articles' under the Treaty?[2] Notwithstanding the simplicity of the problem, the Committee was divided. The majority decided that Russian hemp and Manila hemp were not like articles. Fastening on the words on the page, the majority concluded that the different physical characteristics, origin, and botanical taxonomy of Russian hemp and Manila hemp made the two fundamentally distinct:

> Russian hemp and Manila hemp are quite unlike in appearance, Russia hemp being of a dull yellowish-green color, while Manila hemp is much brighter and lighter, or almost a cream color. The latter is rather sharp and stiff to the touch, and the former comparatively soft and more yielding. Botanically they are distinct, and differ totally. Manila hemp is found only in equatorial regions.

[1] Article VI, Treaty of Commerce and Navigation (United States – Russian Empire) (singed 18 December 1832, entered into force 11 May 1833) 8 Stat 444, TS 299, supplemented by additional article signed at Washington on 27 January 1868 (TS 301) and the declaration of 28 March 1874 (TS 303).

[2] As recognised by the majority of the Committee of Finance '[t]he turning point in the treaty will be found in the meaning of the words, "the like article,"', Senate of the United States, 'Refund of Duties on Certain Exportations', Report No 87, 27 March 1872, 1.

> Russia hemp is cultivated in more northern latitudes. Manila is from the leaves of plants, chiefly the *musa textalis*, a plant allied to the banana, and known by the local name of *abuca*, a shrub or tree, both wild and cultivated, growing abundantly in the Indian Archipelago. The fiber is the petioles of the leaves, and sometimes the inner layers of the smallest fibers are used for very fine fabrics, but only the larger layers for cordage. Russia hemp is a plant of the genus *cannobis sativa*, whose fibrous skin or bark is utilized like that of flax, and is used, not only for cables and cordage, but for common table·cloths, huckaback towels, and especially for sail cloth, though, in some measure, superseded by iron cables and cotton sail cloth. It will be seen that the two articles are no more alike or akin in the vegetable kingdom than are foxes and dogs, or horses and asses, in the animal kingdom, and nothing but some kin of the latter could ever confound them commercially.[3]

The minority saw things differently. Unpersuaded by the majority's strict textualism, the minority instead adopted a teleological approach to the interpretation of the MFN clause:

> The present report of the majority gives a construction to the term "like articles" so restricted that it would, if adopted and acted upon by foreign nations having this kind of treaties with us, reduce such treaties to a practical nullity. Dictionary meanings of terms used in public instruments are not the only or the principal means of determining the sense. The great object of the provision must be regarded as the principal guide to the meaning of the terms.[4]

Treating Russian hemp and Manila hemp as distinct articles would frustrate the purpose of the clause. Indeed, for the minority, the discriminatory treatment of Russian hemp was itself proof of a discriminatory intent in contravention of the MFN clause:

> [i]t is not necessary that the unfavorable discrimination should appear to have been designed, in order to give rise to a complaint of infraction of the treaty. The presumption in furtherance of good faith should be and always is, unless the contrary expressly appear in some reason or reasons of state, or from some express declaration, that the unfavorable discrimination was inadvertent and unintentional.[5]

Tellingly, both the majority and minority accused one other of heresy. According to the majority, '[a]ny other interpretation would unfix the boundaries of every treaty in existence, and throw everything into dispute and confusion'.[6] According to the minority, the majority's

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[4] Senate of the United States, 'Refund of Duties on Certain Exportations, Views of the Minority', Report No 87, Part 2, 27 March 1872, 8.

[5] ibid.

[6] ibid 2.

approach would 'reduce such treaties to a practical nullity'. Therein lies the subject of this thesis.

The world in general and international commerce in particular have changed drastically since 1872, and yet adjudicators continue to be confounded by the problem of interpreting non-discrimination clauses. This is perhaps most readily apparent in the jurisprudence of the World Trade Organisation (WTO) and international investment tribunals regarding non-discrimination. The WTO Dispute Settlement System (DSS) has struggled, and continues to struggle, to choose between alternative interpretations of likeness when interpreting the non-discrimination provisions of the General Agreement on Tariffs and Trade (GATT).[7] The WTO jurisprudence struggles to determine the proper criteria for determining likeness, the weight to be given to each criterion, and the relevance of regulatory purpose in interpretation.[8] The same jurisprudential confusion abounds in the field of investment arbitration, where international tribunals have adopted both very broad and very narrow interpretations of likeness in the context of international investments. For example, tribunals have held that producers of interchangeable fuels (such as ethanol and methanol) are not 'in like circumstances',[9] while other tribunals have concluded that oil exporters, or even exporters of completely different goods such flowers, seafood products, and bananas, are alike.[10]

The jurisprudence on non-discrimination in international economic law is characterised by radical interpretative shifts and major and irreconcilable inconsistencies.

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[7] General Agreement on Tariffs and Trade (adopted 30 October 1947, not yet in force) 55 UNTS 194; General Agreement Tariffs and Trade 1994 (adopted 15 April 1994, entered into force 1 January 1995) 1867 UNTS 187.

[8] Cf eg AB, *Chile – Alcoholic Beverages* [71], AB, *Japan – Alcoholic Beverages* 18, AB, *Philippines – Distilled Spirits* [120], [125] and Panel, *Argentina – Financial Services* [7.235], [7.212].

[9] *Methanex v USA*, Final Award, Part IV, Chapter B [23]-[37].

[10] *Occidental v Ecuador*, Final Award [167]-[179].

Why is this so? The argument of this thesis is a rather modest one and is based on two analytical premises.

First, the thesis suggests an alternative analytical framework for looking at the inconsistencies of the non-discrimination case law in the field of international economic law. In particular it is argued that these inconsistencies are the result of the inherent indeterminacy of legal rules. This is *a fortiori* the case regarding non-discrimination rules because of their conceptual relationship with the idea of equality. The thesis aspires to highlight that what at first seems an ideologically neutral interpretative exercise of a very specialised and technocratic issue (the interpretation of non-discrimination provisions contained in international economic agreements) can be deeply political, reflecting different understandings about development, regulation and the propor role of the State in the economy.[11] While the political role of international courts and tribunals (such as the WTO DSS) in global economic governance has been extensively and insightfully analysed (more recently by Howse),[12] the complex, value-laden and ideologically charged nature of the interpretation of non-discrimination rules is not fully appreciated. In particular Howse views the focus on non-discrimination as the antithesis of the neo-liberalism ideology of the Uruguay Round and a return to the 'embedded liberalism' spirit of the GATT.[13] The thesis departs from this account in two respects: first, it is emphasised that non-discrimination provisions are not monolithic but capable of accommodating conflicting economic and political ideologies,[14] and, second, their interpretation by the WTO DSS has been far from

[11] The thesis is inspired by the analytical approach suggested in A Lang, *World Trade Law after Neoliberalism: Re-imagining the Global Economic Order* (OUP, Oxford 2011).

[12] See R Howse, 'The World Trade Organization 20 Years On: Global Governance by Judiciary' (2016) 27 EJIL 9.

[13] ibid .

[14] See Chapter II, Section III below.

consistent (as shown in Chapter III).[15] This does mean that this theoretical framework is the only corret one or even the best way to understand the relevant jurisprudence. It should be also stressed that it does exclude or diminishe the relevance of the rules of interpretation under the the Vienna Convention on the Law of Treaties (VCLT) but stands as an alternative theoretical explanation of a complex legal and political phenomenon.[16]

Second, this thesis argues that legal indeterminacy and the concomitant inconsistencies in the case law should not viewed negatively. On the contrary it is argued that such indeterminacy is a positive characteristic in light of the architecture of both the WTO and the investment arbitration regimes. In particular, the discussion and adoption of Panels' and AB's Reports by the WTO Members, the functional role of the WTO committees, and even the pleadings of disputing WTO members constitute means of value-contestation and promote value-pluralism. Likewise, the decentralised nature of investment arbitration and the party-appointing system fullfils a similar role. Party-appointed arbitrators ensure that different perspectives are taken into consideration and thus promote value-pluralism. However, this does not mean that the current system is perfect and specific changes are suggested.

The argument of the thesis is presented in five chapters. Chapter I begins with the fundamental premise, which is that law is best understood as a process, and international adjudicators enjoy considerable discretion in choosing between alternative interpretations. Chapter II explains why this is particularly so when it comes to the interpretation of non-discrimination obligations in international economic law. These obligations are premised upon the concept of equality: that is, like things must be treated alike. The notion of equality

[15] A Lang, 'The Judicial Sensibility of the WTO Appellate Body' (2017) 27 EJIL 1095, 1097; see also Chapter III and IV.

[16] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT).

is uncertain and value-laden, with its content depending on the prioritisation of competing values. Chapter III analyses the WTO case law on non-discrimination and the rampant inconsistency in the jurisprudence, illustrating the substantive indeterminacy of legal rules and the discretion afforded to the WTO DSS. The Chapter IV analyses the non-discrimination jurisprudence of international investment tribunals. Chapter V concludes with the argument that the observable discretion in the interpretation and application of non-discrimination provisions is, in fact, a positive characteristic of international dispute settlement, because it promotes value pluralism and thereby enhances the legitimacy of the system. Moreover, the discretion enjoyed by international courts and tribunals is not entirely unfettered. In the WTO context, that discretion is constrained by the institutional structure of the organisation, and the dialogue between the WTO members and the WTO DSS. In the realm of international investment arbitration, the mechanism of party-appointed arbitrators ensures value pluralism.

CHAPTER I.
LAW AS A DECISION-MAKING PROCESS AND THE INHERENT INDETERMINACY OF LEGAL RULES

I. INTRODUCTION

The first chapter of this thesis presents the conceptual perspective which will be used to explore the non-discrimination jurisprudence of the WTO DSS (in Chapter III) and international investment tribunals (in Chapter IV). The theoretical approach adopted herein draws inspiration from the policy-oriented school of international law and is based on two main interrelated propositions. *First*, it is argued that legal rules in general and rules of public international law (and international economic law) in particular are characterised by structural indeterminacy. In other words, their substantive content is inherently indeterminate. This indeterminacy confers broad discretion to the adjudicator and *in casu* investment tribunals and the WTO Panels and the AB and allows them to reach different and sometimes even antithetical interpretative outcomes when interpreting and applying international legal rules.[17] *Second*, it is submitted that it is more constructive to view *law as process* rather than as set of rules. Under this conceptualisation emphasis should be laid on the appropriate institutional constraints and *procedural* safeguards and not on alternative interpretations of *substantive* rules to limit and control the political role of the adjudicators.

[17] For the distinction between interpretation and application of international law see A Gourgourinis, 'The Distinction between Interpretation and Application of Norms in International Adjudication' (2011) 2 Journal of International Dispute Settlement 31; Sir F Berman, 'International Treaties and British Statutes' (2005) 26 Statute Law Review 1. Following that distinction, the focus herein is on the interpretation rather than the application of non-discrimination provisions.

II. SUBSTANTIVE INDETERMINACY OF LEGAL RULES AND JUDICIAL DISCRETION

Ancient Rome was not only the birthplace of legal science (*jurisprudencia*),[18] but also of a more flexible and creative law which emerged from the judicial activity of the *praetores* (*ius praetorium* or *ius honorarium*).[19] *Ius preatorium* had three functions: interpretation (*secundum legem*), gap-filling (*praeter legem*) and correction (*contra legem*) of the law. The fact that Roman *praetores* combined the power of institutional legal interpretation with the power to expand or even correct formal legal rules serves as an early indication of the impossibility of insulating the interpretation of norms from their creation. Nonetheless, the hostility towards judicial activism has a long pedigree. Already in the Justinian Code (*Codex Iustinianus*) of 534 it is stipulated:

> [i]f, however, anything should appear ambiguous, as has been previously stated, it must be referred by the judge to the decision of the sovereign, and it shall be explained by the Imperial Authority to whom alone has been granted the right to enact and interpret legislation.[20]

Many centuries later, Montesquieu, in his seminal work on the spirit of laws, famously called for a strict separation of powers, epitomised the scepticism towards 'judicial activism',[21] and prescribed: 'the national judges are no more than the mouth that pronounces the words of

[18] According to the classic definition of Ulpian (Ulpianus): 'Iustitia est constans et perpetua voluntas ius suum cuique tribuens. Iurisprudentia est divinarum atque humanarum rerum notitia, iusti atque iniusti scientia', Institutiones, 1.1.1. Although, according to Bederman, '[t]he Greeks were the first ancient people to develop rules of interpretation for treaties, in recognition of the fact that any written text was capable of ambiguity and disputed meaning', DJ Bederman, *International Law in Antiquity* (CUP, Cambridge 2001) 177.

[19] According to Papinianus, 'Ius praetorium est, quod praetores introduxerunt adiuvandi vel supplendi vel corrigendi iuris civilis gratia propter utilitatem publicam. Quod et honorarium dicitur ad honorem praetorum sic nominatum', Digesta, 1.1.7.1. The role of the advocates in the development of the *ius preatorium* should not be underestimated, G Mousourakis, *A Legal History of Rome* (Routledge, NY 2007) 221.

[20] 'Si quid vero, ut supra dictum est, ambiguum fuerit visum, hoc ad imperiale culmen per iudices referatur et ex auctoritate Augusta manifestetur, cui soli concessum est leges et condere et interpretari', Codex Iustinianus, 1, 17, 2, 21. At the same, Celsus recognised that 'to know the laws is not to be familiar with their wording, but with their force and effect': 'Scire leges non hoc est, verba earum tenere, sed vim ac potestatem', Digesta 1.3.17.

[21] 'Judicial activism' is of course an anachronism which is used rather loosely herein.

law, mere passive beings, incapable of moderating either its force or rigour'.[22] Montesquieu's ideas, however, were soon translated into action in the late 18th century Europe. On 14 April 1780, King Frederik II of Prussia (also sometimes referred to as Frederik the Great) issued a Decree forbidding the interpretation of the laws.[23] In the midst of the French Revolution, in August 1790, the General Assembly enacted a Decree regarding the organisation of the judiciary. Article XI of the Decree stipulated that 'judges will be required to just simply transcribe in a particular register, and publish within a week the laws which will be sent to them',[24] while Article XII provided that 'judges will not be able to make laws; but they will refer to the Legislature whenever they deem necessary either to interpret a law or to make a new one'.[25] In November 1790 Robespierre summarised before the *Assemblée Nationale* the ideological motivation behind the prohibition of legal interpretation to the judges:

> [i]f the judicial power could rise with impunity against the authority and the decision of the legislators, if they could interpret as they wished all the laws, the judges would themselves be legislators.[26]

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[22] 'Les juges de la nation ne sont que la bouche qui prononce les paroles de la loi, des êtres inanimés, qui n'en peuvent modérer ni la force ni la rigueur', Charles-Louis de Secondat, baron de La Brède et de Montesquieu, *De l'esprit des lois*, (1748) chapter VI, book XI.

[23] King Frederick II, Cabinet order 14 April 1780. This was caused by the general dissatisfaction with the Prussian judiciary, see M Kuhli, 'Power and Law in Enlightened Absolutism: Carl Gottlieb Svarez' Theoretical and Practical Approach' Max Planck Institute for European Legal History Research Paper Series No 2012—2, 8.

[24] Article XI stipulated: '[i]Is [les juges] seront tenus de faire transcrire purement et simplement, dans un registre particulier, et de publier dans la huitaine, les Lois, qui leur seront envoyées', Article XI, Décret sur l'organisation judiciare du 16 Août 1790.

[25] Article XII stipulated: '[i]ls [les juges] ne pourront point faire de Règlements; mais ils s'adresseront au Corps législatif toutes les fois qu'ils croiront necessaire, soit d'interpréter une Loi, soit d'en faire une nouvelle', Article XII, Décret sur l'organisation judiciare du 16 Août 1790. This reflected the idea that the person who promulgates the law must also interpret it (*eius est legem interpretari, cuius est condere*) as it was for example the case with the Roman Emperor; in Bartolus' words (1602), 'Imperator solus potest legem condere et interpretare', R Pound, *Jurisprudence* (Lawbook Exchange Ltd, Union, NJ 2000) 424.

[26] 'Si le pouvoir judiciaire pouvait s'élever impunément contre l'autorité et la décision des Législateurs, s'ils pouvaient interpreter à leur gré toutes les Lois, les Juges seraient eux- eux-mêmes les Legislateurs', translated and quoted in P Legrand, 'Strange Power of Words: Codification Situated' (1994) 9 Tulane European and Civil Law Forum, 1, 17.

Caesar dominus et supra grammaticam:[27] this was the underlying ideology behind the assault on judicial power. As Veznke explains, '[t]he underlying rationale was that the power of words, as any other power, should belong to the (elected representatives of) the People rather than the judges'.[28] During the inter-war years, an intense theoretical legal debate took place in Europe regarding whether, and to what extent, constitutional review is appropriate. Hans Kelsen, one of the leading proponents of constitutional justice in Europe, supported the judicial review of the 'Constitution', while Lambert cautioned against what perceived as the danger of a 'government of judges'.[29]

Today it is uncontroversial that law creates ambiguities and inevitably leaves discretion to its interpreter. However, the discretionary power of the judge still constitutes one of the main arguments for the case against judicial review[30] and the long historical pedigree of hostility can be traced in the cautious approach of courts to their law-making function:

> [i]t is not [the courts'] function deliberately to change the law so as to make it conform with their own views of justice and expediency. This does not mean that they do not in fact shape or even alter the law. *But they do it without admitting it*.[31]

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[27] According to Schmitt '[o]ne of the most important manifestations of humanity's legal and spiritual life is the fact that whoever has true power is able to determine the concept of concepts and words. Caesar dominus et supra grammaticam. Caesar is also lord over grammar', quoted in C Mouffe, *On the Political* (Routledge, NY 2005) 87. See also J Klabbers, 'On Rationalism in Politcs: Interpretation of Treaties and the World Trade Organization' (2005) 74 Nordin J Int L 405, 506-407 ('Whoever controls this process [of interpretation] controls the meaning of the treaty, and therewith controls whether or not the obligations resting upon him are bearable or onerous, and controls whether the acts of States are faithful implementations of a text, or amount to breaches of that same text').

[28] I Venzke, *How Interpretation makes International Law: On Semantic Change and Normative Twists* (OUP, Oxford 2012) 59.

[29] Lambert introduced the term 'government of judges' in constitutional law discourse; *cf.* Édouard Lambert, *Le Gouvernement des Juges et la lute contre la Législation Sociale aux États-Unis* (Marcel Giard, Paris 1921); H Kelsen, 'La gurantie juridictionelle de la Constitution' (1928) 45 RDP197.

[30] J Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 Yale L J 1346.

[31] H Lauterpacht, *The Development of International Law by the International Court* (Stevens and Sons, London 1958) 75 (emphasis in the original). As Eisgruber notes '[u]nfortunately, judges (and scholars, too) often indulge in a kind of fetishism. They pretend that they are not making political judgments themselves, and that their decisions were forced upon them by textual details or historical facts', CL Eisgruber, *Constitutional Self-*

Constitutional law and adjudication is an archetypical case for observing the political role of the judges. A common characteristic of constitutional courts is their political role. Constitutional law and political science scholars have arrived at this conclusion by studying constitutional justice in France, Germany, Italy, Spain and the EU.[32] However, the most famous, archetypical and well-studied example is undoubtedly the US Supreme Court.[33] The field of constitutional law is not only a good example for observing the political function of adjudication within a given domestic legal system but also is structurally very similar to international law and can serve as a source of analogy. This is increasingly the case with the relatively recent proliferation and empowerment of international courts and tribunals.[34] In this thesis, emphasis will be laid on three converging points between the two regimes: the selection of the judges, their functional role, and the relationship between adjudication and

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Government (Harvard UP, Cambridge MA 2001) 135. Not entirely surprisingly, international courts are more reluctant to admit their norm-creating power and function. The ICJ recently the necessity and importance not to 'alter the limits of a [court]'s judicial function', *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013 [46].

[32] A Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (OUP, Oxford 2000); on the political role of the German Constitutional Court in particular see G Vanberg, *The Politics of Constitutional Review in Germany* (CUP, Cambridge 2004) 124-130.The Court of Justice of the European Union, (CJEU) is effectively and acts as a constitutional rather than an international court, E Stein, 'Lawyers, Judges, and the Making of a Transnational Constitution' (1981) 75 AJIL 1; see also JHH Weiler, 'The Reformation of European Constitutionalism' (1997) 35 Journal of Common Market Studies 97. Maduro has insightfully deciphered the CJEU's political approach, M Poiares Maduro, *We the Court* (Hart, Oxford 1998) 78.

[33] See generally M Shapiro, *Law and Politics in the Supreme Court* (The Free Press of Glencoe, NY 1964). Eisgruber offers a theory about constitutional self-government precisely based on the power and duty of US judges to act politically:

> I deny that the Supreme Court's power of judicial review depends upon the Court's legal expertise; I also deny that judicial review interferes with democratic decision-making. Instead, I maintain that the Supreme Court should be understood as a kind of representative institution well-shaped to speak on behalf of the people about questions of moral and political principle. What distinguishes the justices from the people's other representatives is their life tenure and their consequent disinterestedness, not their legal acumen.

Eisgruber (n 31) 3. Even from its first years, the US Supreme Court itself was conscious of the political environment within which it operates and the political role it exercises: '[t]he power of this Court is moral, not physical, it operates by its influence, by public confidence in the soundness and uniformity of the principles on which it acts; not by mere authority as a tribunal, from which there is no appeal', *Holmes v Jennison*, 39 US 540, 618 (1840).

[34] See Y Shany, 'No Longer a Weak Department of Power? Reflections on the Emergence of a New International Judiciary' (2009) 20 EJIL 73.

formal legislative amendments. As Merrills insightfully observes

> [s]ince international law is more controversial than domestic law, the international judge is more like a US Supreme Court justice, deciding a point of constitutional interpretation, than a domestic judge with a routine case.[35]

In constitutional law the 'recognition of the political character of judicial review is reflected both in the manner of appointing the members of the constitutional courts and in the sort of questions entertained by such courts'.[36] The same applies to international courts and tribunals. In a general sense, the selection and role of international judges is not dissimilar from constitutional judges. the politicised process of selection of the judges of the International Court of Justice (ICJ), 'the principal judicial organ of the United Nations',[37] strongly indicates that that applies to international courts and tribunals as well.[38] Further, in both international and constitutional law, judicial 'law-making' constitutes a response or at least it is related to inflexible and rigid processes of formal legislative amendments. Such constitutional documents as the US Constitution and the EU's constituent treaties can only be amended through a long and arduous multi-layered process, and yet there is pressure to adapt their terms to modern realities. Accordingly, a number of constitutional changes have necessarily occurred through judicial interpretation.[39] This is also the case in international law generally and specifically also in the case of the WTO and international investment agreements.[40] 'International courts do not operate as parts of polities that include functioning

[35] JG Merrills, *International Dispute Settlement* (5th edition, CUP, Cambridge 2011) 292; *contra* S Sur, 'La créativité du droit international' (2013) 363 RCADI 9, 308.

[36] M Cappelletti, 'Judicial Review in Comparative Perspective' (1970) 58 California Law Review 1017, 1040.

[37] Article 92, Charter of the United Nations with the Statute of the International Court of Justice annexed thereto (adopted 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

[38] O Schachter, 'International Law in Theory and Practice' (1982) 178 RCADI 9, 70.

[39] See AE Kouroutakis, 'Judges and Policy Making Authority in the United States and the European Union' (2014) 8 ICL 186, 196; D Strauss, 'The Irrelevance of Constitutional Amendments' (2000-2001) 114 Harvard Law Review 1457.

[40] Von Bogdandy observes that '[t]he [CJEU]'s jurisprudence is based on the premise that legislative correction is possible at the supranational level. That possibility does not obtain within the WTO', Armin von Bogdandy,

political legislatures'.[41] This was captured by Lord Balfour who remarked in the context of the creation of the PCIJ after the First World War:

> [t]he decisions of the Permanent Court cannot but have the effect of gradually moulding and modifying international law. This may be good or bad; but I do not think this was contemplated by the Covenant; and in any case there ought to be some provision by which a State can enter a protest, not against any particular decision arrived at by the Court, but against any ulterior conclusions to which the decision may seem to point.[42]

The result is that political disagreements over contested concepts, theories and ideas are catapulted onto the international plane and, potentially, become the subject of litigation before the international courts and tribunals.

'Law and Politics in the WTO – Strategies to Cope with a Deficient Relationship' (2001) 5 Max Planck Yearbook of United Nations Law 609, 657 see also 618 *et seq*. Venzke also notes that 'the asymmetry between judicial lawmaking and politico-legislative processes is one of the decisive elements in the debate surrounding what adjudicators in the WTO can and cannot legitimately do', I Venzke, 'Making General Exceptions: The Spell of Precedents in Developing Article XX GATT into Standards for Domestic Regulatory Policy' (2011) 12 German Law Journal 1112, 1139. A WTO Panel confessed the inherent difficulty it was facing when called to interpret ambiguous legal terms:

> WTO negotiators sometimes praise the political wisdom of resorting to 'constructive ambiguity' as a diplomatic means of enabling consensus on WTO rules. The limited legal task of dispute settlement findings is very different. It is to decide on the legal claims, in a particular dispute, based on the 'ordinary meaning' of the WTO provisions concerned 'in their context' and in light of the 'object and purpose' of the agreement,

Panel, *Mexico – Telecoms* [7.3] (footnotes omitted).

[41] A von Bogdandy and I Venzke, 'In Whose Name? An Investigation of International Courts' Public Authority and Its Democratic Justification' (2012) 23 EJIL 7, 21.

[42] League of Nations, *Documents Concerning the Action Taken by the Council of the League of Nations under Article 14 of the Covenant and the Adoption by the Assembly of the Statute of the Permanent Court* (1921) 38.

III. INTERNATIONAL LAW AS A PROCESS

All major theoretical approaches to public international law (*positivist, policy-oriented* and *critical legal studies*) converge on accepting the inherent discretion of international adjudicator to make choices. However, the approach adopted in this thesis is the policy-oriented (or 'New Haven School') approach. Reisman, Wiessner and Willard offer a brief but comprehensive definition of the New Haven School, capturing its philosophical and methodological essence:

> The New Haven School defines law as a process of decision that is both authoritative and controlling; it places past such decisions in the illuminating light of their conditioning factors, both environmental and predispositional, and appraises decision trends for their compatibility with clarified goals; it forecasts, to the extent possible, alternative future decisions and their consequences; and it provides conceptual tools for those using it to invent and appraise alternative decisions, constitutive arrangements, and courses of action using the guiding light of a preferred future world public order of human dignity.[43]

This approach emphasises a process of deliberation and decision rather than as an amalgam of substantive rules. Conceptualising law as a process highlights the importance of appropriate institutional arrangements and procedural mechanisms. Such safeguards enable the contestation of values that are inherent in a legal process.

Two of the most prominent representatives of the positivist tradition, Kelsen and Hart agree that law is indeterminate and that adjudication is about exercising discretion and making choices. According to Kelsen, 'every law-applying act is only partly determined and partly undetermined'.[44] Likewise, Hart stated:

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[43] Reisman *et al*, 'The New Haven School: A Brief Introduction' (2007) 32 Yale J Int Law 575, 576. 'With respect to particular problems, the School seeks not only to map decision processes, assess the often contradictory trends and the factors conditioning them, predict the range of probable outcomes, and enhance the skills necessary for influencing the decision processes of concern so that preferred outcomes ensue', ibid, 577.

[44] H Kelsen (translated by M Knight), *Pure Theory of Law* (University of California Press, Berkeley LA 1967) 349; 'When a legal body applies the law, the interpretation of the applicable law through a cognitive act combines with an act of will through which the body applying the law makes a choice between the possibilities revealed by cognitive interpretation', H Kelsen, Introduction to the Problems of Legal Theory 460 (Oxford 1992) 460. The power of courts should not be overestimated. Alexander Hamilton, one of the founding fathers of the United States, accurately noted

> In every legal system a large and important field is left open for the exercise of discretion by Courts and other officials in rendering initially vague standards determinate, in resolving the in certainties of statutes, or in developing and qualifying rules only broadly communicated by the authoritative standards.[45]

With the exception of Dworkin, who introduced the 'right answer thesis', [46] consensus exists among modern positivists on the possibility of having multiple correct legal answers to a given interpretative question. It follows that adjudicators enjoy discretion in selecting one of these answers. Laconically put, 'the judicial function is more than an allegedly mere application of rules to facts';[47] it is about making choices.[48] In other words, discretion connotes choice;[49] it is 'a kind of decisional power'.[50]

The positivist world-view of international law came under attack by the policy-oriented, process-based approach.[51] Already in 1953, in his seminal course at the Hague Academy of International Law, Myres McDougal cautioned against 'legalism':

> [t]he most fundamental obscurity in contemporary theory about international law secretes itself in over-emphasis, by most writers and many decision-makers, upon the potentialities of technical 'legal' rules, unrelated to policies, as factors and

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> The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither Force nor Will but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments

Publius [Alexander Hamilton], The Federalist No 78, The Judiciary Department, Independent Journal, Saturday, 14 June 1788.

[45] HLA Hart, *The Concept of Law* (The Clarendon Press, Oxford 1961)132.

[46] Cf Hart ibid 124-131; R Dworkin, *Taking Rights Seriously* (Harvard UP, Cambridge MA 1977) 81 *et seq*, J Raz, 'Legal Principles and the Limits of Law' (1972) 81 Yale L J 823, 843-848.

[47] R Higgins, *Problems and Process, International Law and How We Use It* (OUP, Oxford 1994) 204; *cf Fisheries Jurisdiction (United Kingdom v Iceland)*, Merits, Judgment, [1974] ICJ Rep 3 [40].

[48] ibid.

[49] L Green, 'Three Themes from Raz' (2005) 25 OJLS 503, 507.

[50] ibid, 504; 'discretion is unavoidable in every in the judicial function', MP Maduro, 'Interpreting European Law: Judicial Adjudication in a Context of Constitutional Pluralism' (2007) 1 EJLS 1, 14.

[51] See generally MW Reisman *et al*, 'The New Haven School: A Brief Introduction' (2007) 32 Yale J Int L 575.

instruments in the guiding and shaping of decisions.[52]

In the same lecture, McDougal also proclaimed that '[i]t is, fortunately, becoming increasingly recognized that "law" and "policy" are not distinct and that every application of general rules, customary or conventional or however derived, to specific cases in fact requires the making of policy choices'.[53] While positivism approaches the legal phenomenon from the perspective of the receiver of commands, the policy-oriented approach focuses on the decision-maker and the decision-making process.[54] Despite these critical differences, the representatives of the policy-oriented approach reach similar conclusions regarding judicial discretion.[55] As Koskenniemi observes, McDougal's 'assumptions about the relatedness of law and politics are shared by perhaps a majority of modern international lawyers'[56]. In particular regarding adjudicators' discretion:

> [t]he one thing that unites Kelsen and McDougal, the rule and the policy-approach, is their insistence on the indeterminate, subjective, political character of interpretation. They, as Richard Falk for example, criticize disguising the arbitrariness of interpretation under the fictions of textual clarity or juristic method. They propose that interpretation be conducted openly by reference to important values.[57]

For McDougal international law is much more than a neutral application of legal rules to the facts leading to pre-determined outcome; rather international law is a *process* of deciding

[52] MS McDougal, 'International Law, Power and Policy' (1953) 82 RCADI 133, 143. The ICJ in perhaps the most criticised judgment in its history proclaimed: 'it is necessary not to confuse the moral ideal with the legal rules intended to give it effect,' *South West Africa case (Ethiopia v South Africa, Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 35 [52].

[53] McDougal, ibid, 155.

[54] MW Reisman, 'The View from the New Haven School of International Law' (1992) 86 ASIL Proceedings 118, 119.

[55] McDougal (n 52) 149-157.

[56] M Koskenniemi, *From Apology to Utopia: the structure of the International Legal Argument* (CUP, Cambridge 2005) 201.

[57] ibid, 341 (internal references omitted).

which competing rules should be given priority.[58] He notes that 'law is not a mere body of rules but a whole process of decision, and a process of decision taking place within the context of, and as a response to, a larger community process'.[59] Higgins also highlights that 'the choice between widely different ways in which a term can be applied, is exactly what the judges' function entails' and 'the search for "objective determination" is a chimera'.[60]

A basic tenet of that school of thought is that human dignity and certain shared values associated with human dignity should underpin the legal edifice and the decision-making process.[61] The critical legal studies' approach to international law is methodologically different from *positivist* and *policy-oriented* accounts but in different respects. Critical legal studies share and accentuate the policy-oriented approach's criticism to positivism. For the positivist, as Venzke puts it: '[a]t the moment of its source, law meets politics and politics becomes law. What happens before is a matter of politics. What happens after is a matter of operating the law, not a matter of politics.'[62] However, under the policy-oriented approach and *par excellence* the critical legal studies approach,

> lawyers should admit that if they wish to achieve justifications, they have to take a stand on political issues without assuming that there exists a privileged rationality which solves such issues for them. Before any meaningful attempt at reform may

[58] MS McDougal, 'Law as a Process of Decision: A Policy-Oriented Approach to Legal Study' (1956) 1 Natural Law Forum 53. See also RA Falk, 'Casting the Spell: The New Haven School of International Law' (1995) 104 Yale L J 1991.

[59] ibid 56.

[60] R Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 ICLQ 58, 71. See generally on international judicial law-making, A von Bogdandy and I Venzke, 'Beyond Dispute: International Judicial Institutions as Lawmakers' (2011) 12 GLJ 971; E McWhinney, *Judicial Settlement of International Disputes. Jurisdiction, Justiciability and Law-Making on the Contemporary International Court* (Martinus Nijhoff, Dodrecth 1991); Lauterpacht (n 31) 155-223.

[61] See MS McDougal, 'International Law and the Future' (1979) 50 Mississippi Law Journal 259; see also Higgins (n 47) 97.

[62] I Venzke, 'Post-modern perspectives on orthodox positivism' in J Kammerhofer and J d'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP, Cambridge 2014) 182, 188.

> be attempted, however, the idea of legal objectivity – and with it the conventional distinction between law, politics and morality (justice) needs to be rethought.[63]

Contrary to positivism, recognising the wide discretion that judges enjoy and accepting their deeply political role does not apply only to vague or ambiguous terms (in 'hard cases'). Law's indeterminacy is not marginal, 'relative' (to use Hart's terminology);[64] nor the adjudicators' wide discretion is confined to 'hard cases'. [65] Rather, policy-choices and value-judgments are a central and structural characteristic of the international legal edifice.[66] International law's indeterminacy is *structural*. To a very large extent, such indeterminacy is generated by the fact that within the system of public international law the entities with law-making powers (ie Sovereign States) are at the same time the subjects. In other words, the States are legally bound by the norms they create.[67] At the same time, 'indeterminacy is an absolutely central aspect of international law's acceptability'.[68] The political character of international adjudication is further cemented by the basic international principle that '[i]t is well established in international law that no State can, without its consent, be compelled to submit its disputes with other States either to mediation or to arbitration, or to any other kind of pacific settlement'.[69] Already Montesquieu defined international law as 'the political law

[63] Koskenniemi (n 56) 69.

[64] HLA Hart (n 45) 128.

[65] Dworkin (n 46).

[66] Koskenniemi (n 56) 37-42.

[67] D Kennedy, 'Theses about International Law Discourse' (1980) 23 German Yearbook of International Law 353. One commentator observes that in the WTO context, 'WTO members define rules that they apply to themselves. This situation induces them to look for strong terms for their partners, but loose terms for themselves', PA Messerlin, 'Non-Discrimination, Welfare Balances, and WTO Rules: An Historical Perspective' in E-U Petersmann and J Harrison (eds), *Reforming the World Trading System: Legitimacy, Efficiency, and Democratic Governance* (OUP, Oxford 2005) 292, 303.

[68] Koskenniemi (n 56) 591.

[69] *Status of Eastern Carelia*, PCIJ Rep series B No 5, 27; *Rights of Minorities in Upper Silesia (Minority Schools)*, PCIJ Rep series A No 15, 22; *Corfu Channel case*, Judgment on Preliminary Objection [1948] ICJ Rep 15, 27; *Anglo-Iranian Oil Co case*, Jurisdiction, [1952] ICJ Rep 93, 103; *Case of the monetary gold removed from Rome in 1943*, Preliminary Question, [1954] ICJ Rep 1, 32; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras)*, Application to Intervene, Judgment, [1990] ICJ Rep 92, 133 [95]; *East Timor*

of each country considered in its relation to every other'.[70] Even Sir Hersch Lauterpacht, a devoted positivist,[71] noted that '[t]he short-comings of the international legal organization tend to increase the importance and political character of every controversy'.[72] Koskenniemi explains the implications of international law's structural indeterminacy:

> But the claim of indeterminacy here is not at all that international legal words are semantically ambivalent. It is much stronger (and in a philosophical sense, more "fundamental") and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises and seeks to regulate a future in regard to which even single actors' preferences remain unsettled.[73]

As Koskenniemi aptly epitomised (and was quoted with approval by the tribunal in *Winstershall v Argentina*) '[i]nterpretation creates meaning rather than discovers it'.[74] At the

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(Portugal v Australia), Judgment, [1995] ICJ Rep 90, 101 [26]. *Cf* N Politis, *La justice internationale* (Hachette, Paris 1924) 24; and the criticism by Lauterpacht who stated that 'we are therefore unable to accept the view put forward by Professor Politis that there is in this respect a difference between the judge within the State and an international tribunal', H Lauterpacht, *The Function of Law in the International Community* (Clarendon Press, Oxford 1933) 77.

[70] 'le droit des gens, qui est la loi politique des nations considérées dans le rapport qu'elles ont les unes avec les autres', Charles de Secondat Baron de Montesquieu, *De l'esprit des lois* (1748) Book X, Chapter 1.

[71] For an excellent analysis of the historical context, experiences and values that shaped Lauterpacht's views on international law, see M Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 2 EJIL 215.

[72] H Lauterpacht, 'The Absence of an International Legislature and the Compulsory Jurisdiction of International Tribunals' (1933) 11 BYIL 134, 154. Lauterpacht captured the qualitative difference between adjudication in the domestic and international context:

> [i]n international law, where conscious law-making by legislation is in a rudimentary stage, where the creation of customary law is slow and difficult of ascertainment, where judicial precedent is relatively rare and of controversial authority, and where, in consequence, the field of detailed concrete regulation is small and that of general principles of law wide and elastic, the scope of judicial discretion and judicial law-making is considerable. These factors enable international tribunals, in a large number of cases, to deal with claims on a basis wider than that of formal or rigid.

Lauterpacht, ibid 145. Sir Gerald Fitzmaurice also noted: 'although on the domestic plane there may still remain uncertainty as to what the law is (for statutes, judicial decisions, etc., have to be interpreted and applied) there is never any uncertainty as to what is law. On the international plane there may be uncertainty under both heads', Special Report by Sir Gerald Fitzmaurice, 'The Future of Public International Law and of the International Legal System in the Circumstances of Today' Livre du Centenaire, Institut de droit International 1873– 1973 251.

[73] Koskenniemi (n 56) (internal references omitted).

[74] Koskenniemi (n 56) 531; regaring 'the judicial process of interpretation of treaties', Koskenniemi was quoted with approval by the Tribunal in *Wintershall v Argentina*, Award [91].

end of the day 'law implies an interpretation of what society is like now and what should be done in order to make it better'.[75] This lies in contrast with conventional understandings and critique of international law. For example according to the 2011 Report adopted the European Parliament 'in spite of generally positive experiences, a number of problems became clear because of the use of vague language in agreements being left open for interpretation'.[76]

However, the critical legal studies' approach to international law also differs from the policy-oriented approach of McDougal and others. Contrary to the latter's view that certain values enjoy ecumenical acceptance, public international law and international society are marked by the absence of a universally shared set of values.[77] All 'universal values' that seemed to have emerged after 1945 have been degraded and 'became vulnerable to charges of cultural relativism and hegemonism';[78] 'international society […] remained a constitution-free zone'.[79] The policy-oriented approach adopted herein does endorse such position, which comes close to agnostic nihilism. For the policy-oriented approach law is a political process through which values can and are being contested. However, this does not imply that all

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[75] Koskenniemi, ibid 474.

[76] European Parliament resolution of 6 April 2011 on the future European international investment policy (2010/2203(INI)), [g].The same Report did not fail not note the 'future investment agreements concluded by the EU should be based on the best practices drawn from Member State experiences' including

> non-discrimination (national treatment and most favoured nation), with a more precise wording in the definition mentioning that foreign and national investors must operate 'in like circumstances' and allowing some flexibility in the MFN-clause in order not to obstruct regional integration processes in developing countries

ibid [19]; see also A Reinisch, 'The Future Share of EU Investment Agreements' (2013) 28 ICSID Review 179, 189-190.

[77] Koskenniemi has warned us of the 'danger is that of mistaking one's preferences and interests for one's tradition – and then thinking of these as universal, a mistake we Europeans have often made', M Koskenniemi, 'International Law in Europe: Between Tradition and Renewal' (2005) 16 EJIL 113, 115; *cf* P-M Dupuy, 'Some Reflections on Contemporary International Law and the Appeal to UniversalValues: A Response to Martti Koskenniemi' (2005) 16 EJIL 131.

[78] P Allott, 'The Concept of International Law' (1999) 10 EJIL 31, 47, see also 41-42.

[79] ibid 35.

values are equal. Certain values are universally recognised and should be promoted. Value-pluralism and inclusion is also a value that should be promoted in legal processes and institutional arrangements.

To conclude, the central thesis put forward is that the inherent inderminacy of international law which reflected in inconsistent interpretative outcomes is a virtue rather a vice,[80] and both the WTO and the investment arbitration systems contain appropriate institutional arrangements to enable the contestation of different values.

[80] O Schachter, 'Dag Hammarskjold and the Relation of Law to Politics' (1962) 56 American Journal of International Law 1, 3-8; see also D Kennedy, 'Tom Franck and the Manhattan School' (2002) 35 New York University Journal of International Law and Politics 397, 427.

IV. THE ROLE OF THE VIENNA CONVENTION ON THE LAW OF THE TREATIES

In international law the criteria of interpretation are laid down in VCLT. Articles 31-33 of the VCLT are generally considered as reflective of customary law[81] and guide investment tribunals and the WTO Panels and the AB in their interpretation of investment agreements and the WTO covered agreements respectively.[82] Therefore, when discussing interpretative shifts and inconsistencies the natural reflect of an international lawyer is to have recourse to the interpretative criteria of the VCLT. The purpose of this section is to explain why the focus of this thesis is not on the application of the interpretative criteria of the VCLT to the non-discrimination jurisprudence.

As it will explained in detail in the next chapter (Chapter II) the methodological approach chosen with regard to the interpretation of non-discrimination clauses in international economic law is to focus on the different theories of economic regulation rather than the criteria of interpretation laid down in the VCLT. Under that conceptualization, which is by no means the only plausible or correct, the interpretative criteria of the VCLT constitute the means by which the adjudicator reaches or even justifies its decisions. In other words the VCLT is the grammar and syntax[83] that the adjudicator uses to express its choices which are influenced and reflect different economic theories. Instead of focusing on that grammar, the purpose of the present research is different: it seeks to argue that the different values, conflicting underlying ideas about trade, investment, domestic and international markets, economic development and the proper role of the State that investment tribunals and the

[81] See *LaGrand Case (Germany v US)* [2001] ICJ Rep 466 [99]; *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad),* Judgment [1994] ICJ Rep 6 [41].

[82] AB, *US – Gasoline* 16; AB, *Japan – Alcoholic Beverages* 104; *AAPL v Sri Lanka*, Final Award [38]; *Mytilineos v Serbia*, Jurisdiction [98]; *British Caribbean Bank v Belize*, Award [121].

[83] See Koskenniemi (n 56) 563 *et seq*.

WTO Panels and the AB endorse and promote through the study of their jurisprudence on non-discrimination. According to Koskenniemi:

> it should be possible to read the law "backwards" in order to reveal the interpretation which it carries of the world in which we live. In this chapter I propose to do just that. I shall look at international law in order to see what kind of an understanding it mediates of present international society and what type of world order it aims to achieve.[84]

This is precisely what the present thesis is about, albeit in smaller scale and with a more targeted scope focusing on the interpretation of non-discrimination clauses in international economic law. Two 'competing understandings' of equality – and, by implication, two competing conceptions of equality (*in casu* non-discrimination obligations in international trade and investment agreements) exist. What determines the choice between these competing conceptions is *extra-legal*, political considerations: the different theories about political economy, the perennial debate about the proper role of State in the economy development. In that sense, international adjudication is understood as a part and parcel of what Foucault calls '*gouvernementalité*'.[85] The purpose of the study of the non-discrimination WTO and international investment jurisprudence is to deconstruct a basic tenet of two economic regimes, unearth rivalling understandings, and expose the fundamental choices about fundamental questions on law and politics are made.[86] As a result, the aim of this thesis is not to offer an account or an assessment of the application of the VCLT in the WTO and international investment jurisprudence on non-discrimination. This does not mean

[84] Koskenniemi (n 56) 475. Cf Aristotle, according to whom 'the doctrine of Heraclitus, which says that everything is and is not, seems to make all things true', Aristotle, *Metaphysics* 1012, and, 'Heraclitus' account says that everything is and is not', Aristotle, *Metaphysics* 1062a.

[85] M Foucault, *Sécurité, territoire, population* (éditions du Seuil, Paris 2004) 11-112.

[86] On deconstruction see J Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11 Cardozo Law Review 920. 'If politics were explicitly acknowledged, then doctrinal biases would be disclosed', DZ Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law' (1996) Nordic J Int L 341, 377; see also C-D Ehlermann, 'Tensions between the Dispute Settlement Processes and the Diplomatic and Treaty-Making Activities of the WTO' (2002) 1 WTR 301, 308. Introducing more specific rules is by no means an easy step, nor a panacea, F Smith, *Agriculture and the WTO: Towards A New Theory of International Trade Regulation* (Edward Elgar, Cheltenham 2009) 100

that the VCLT is irrelevant. This could be very well the subject of a different academic exercise; indeed the application of the VCLT criteria by both the WTO DSS and investment tribunals has been the subject of important scholarly analysis.[87] However, the methodological approach followed in this thesis is different for four reasons.

First, the VCLT combines all possible interpretive criteria leaving wide discretion to the interpreter.[88] Pre-VCLT international jurisprudence concluded that 'international law does not sanction any absolute and rigid method of interpretation'.[89] Despite some declarations to the contrary, this has not been changed (and could not be changed) with Articles 31 and 32 of the VCLT. According to Koskenniemi, 'Article 31 of the Vienna Convention is of the nature of a compromise: it refers to virtually all thinkable interpretative methods'.[90] Normal meaning, context, object and purpose, subsequent practice and *travaux préparatoires* could and do lead to inconclusive interpretative outcomes.[91] Essentially, the VCLT confirms rather than contradicts what McNair wrote in 1961:

> for many of the so-called rules of interpretation that one party may invoke before a tribunal the adverse party can often, by the exercise of a little ingenuity, find another rule to serve as an equally attractive antidote.[92]

[87] See I van Damme, *Treaty Interpretation by the WTO Appellate Body* (OUP, Oxford 2009); T Gazzini, *Interpretation of International Investment Treaties* (Hart, Oxford 2016).

[88] As Sur notes each of the different criteria may lead to different results and represent different views of the law, Sur (n 35) 301-302.

[89] 'quand il y a matière à interprétation, celle-ci doit être opérée selon le droit international; celui-ci ne consacre aucun système absolu et rigide d'interprétation', *Lac Lanoux (Spain – France)* (1957) XII RIAA 281, 301.

[90] Koskenniemi (n 56) 334.

[91] Koskenniemi cites the enlightening example of the *Young Loan* Case (Arbitral Tribunal on German External Debts) (16 May 1980), (1980) 59 ILR 529-580 where by 4-3 the majority of arbitral tribunal employed each of the VCLT criteria to reach one conclusion, while the minority used the very same interpretative canons to reach the opposite conclusion, Koskenniemi (n 56) 334-335.

[92] Lord A D McNair, *The Law of Treaties* (Clarendon Press, Oxford, 1961) 365. Cf *Hrvatska Elektroprivreda v Slovenia*, Decision on the Treaty Interpretation Issue and *Hrvatska Elektroprivreda v Slovenia*, Individual Opinion of J Paulsson.

This means that the criteria of interpretation provided for in Articles 31 and 32 VCLT are open-ended and leave considerable discretion to the interpreter.[93] Thus, if a 'treaty is a disagreement reduced to writing',[94] the same is equally (or perhaps even *a fortiori*) true in the case of rules for treaty interpretation laid down in Articles 31 and 32 of the VCLT.[95] The conclusion of the 'treaty is not the end of a process, but the beginning of another process',[96] the process of interpretation which to a non-negligible extent inherently political. This is recognised both in general public international law[97] and more specialised regimes such as the WTO[98] and international investment arbitration.[99] Van Damme in her monograph on treaty interpretation by the WTO AB reached the following conclusion:

> the Appellate Body appears increasingly torn between its formal attachment to Articles 31 to 33 VCLT and the recognition that the VCLT ultimately offers only

[93] Although the VCLT lays emphasis on the text of the treaty to restrict the interpreter's discretions, Merrills convincingly argues that VCLT criteria did not succeed in this regard 'since words have many ordinary meanings focusing attention on the text does not restrict discretion as much as might be supposed, but also on the ground that in practice the focus on the text will not be so sharp as seems to be assumed', J Merrills, 'Two approaches To Treaty Interpretation' (1968-69) 4 Australian Yearbook of International Law 55, 57, and 61-64.

[94] P Allott, *The Health of Nations: Society and Law Beyond the State* (CUP, Cambridge 2002) 305. In international law, 'all international agreements are incomplete and need to be progressively clarified by agreed interpretations', E-U Petersmann, 'Multilevel Trade Governance in the WTO Requires Multilevel Constitutionalism' in C Joerges and E-U Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, Oxford 2011) 31.

[95] M Waibel, 'Demystifying the Art of Interpretation' (2011) 22 EJIL 571, 573.

[96] Allott (n 78) 305.

[97] 'There will be a range of possible decisions or characterizations, none of which can be logically proven to be 'the right answer' or, indeed, to be a wrong answer', V Lowe, 'The Politics of Lawmaking: Are the Method and Character of Norm Creation Changing?' in Michael Byers (ed), *The Role of Law In International Politics: Essays In International Relations and International Law* (OUP, Oxford 2000) 214. Kolb also observes 'nulle part, d'avantage qu'en droit international, tout acte d'application comporte une grande part créative', R Kolb, *Interprétation et création du droit international. Esquisse d'une herméneutique juridique moderne pour le droit international public* (Bruylant, Brussels 2006) 3. Cf *Application of the Interim Accord of 13 September 1995 (the former Yugoslav Republic of Macedonia v Greece)*, Judgment of 5 December 2011, Benouna Separate Opinion [2011] ICJ Rep 695, 711.

[98] See also I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 EJIL 605, 610; on the role of language and culture in determining the VCLT interpretative outcomes see F Smith, 'Law, Language and International Trade Regulation in the WTO' (2010) 63 CLP 448, 461.

[99] Stern further elaborates on the political role of the arbitrators in international investment law by arguing that 'when arbitrating a case, an arbitrator has to make political choices even if—and I underscore this point—the question submitted to his or her judgment is not a political question', B Stern, 'Are Some Issues too Political to Be Arbitrable?' (2009) 24 ICSID Review 90, 93; S Schill, 'System Building in Investment Treaty Arbitration and Lawmaking' (2011) 12 Germal Law Journal 1083, 1093.

> a few basic principles. Incrementally and gradually, the Appellate Body explains its interpretations with less reference to the VCLT.[100]

Mavroidis also concludes: 'the WTO judge is in an unenviable position: it is called on to interpret one incomplete contract (the GATT) through another (the VCLT)'.[101] The WTO AB accepts that it is ultimately 'a holistic exercise that should not be mechanically subdivided into rigid components'.[102] Kurtz rightly speaks about 'fundamentally strategic choices by the Appellate Body, when one considers that the VCLT does not require an interpreter to apply its interpretative methods in the sequential order listed in Article 31 and 32'.[103] Investment tribunals reach the same conclusions. For example, the tribunal in *HICEE v Slovakia* referred to the *travaux preparatoires* of the VCLT and highlitehd that

> the repeated reminders woven into the International Law Commission's Commentaries on its Draft Articles that the provisions on treaty interpretation must not be misread as introducing either a rigid, or still less a hierarchical, set of rules. As the Commission says, there is in truth only one all-encompassing rule, whose elements should be combined in a logical and coherent way.[104]

Therefore tribunals do not undertake

> a separate three-step analysis of each Treaty term – one step focusing on ordinary meaning, another on context, and another on the "light" of the Treaty's object and purpose – because in the Tribunal's view the Vienna Convention posits these as interrelated elements of a holistic approach to treaty interpretation rather than as a set of discrete and sequential steps.[105]

As a result, arbitrators and members of the WTO Panels and the AB have a number of different interpretative methods to choose from.[106]

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[100] Damme (n 87) 273.

[101] PC Mavroidis, 'Free Lunches? WTO as Public Good, and the WTO's View of Public Goods' (2012) 23 EJIL 731, 738 (internal references omitted).

[102] AB, *China –Audiovisuals* [348]; AB, *EC – Chicken Cuts* [176].

[103] J Kurtz, *The WTO and International Investment Law: Converging Systems* (CUP, Cambridge 2015) 242.

[104] *HICEE v Slovakia*, Jurisdiction [135].

[105] *Daimler v Argentina* [254]; see also *Hrvatska Elektroprivreda v Slovenia*, Decision on the Treaty Interpretation Issue [164].

[106] T Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Martinus Nijhoff, Leiden 2013) 35; CH Schreuer, 'Diversity and

The second reason why this thesis does not focus on the criteria laid down in the VCLT is that at least 'in some cases, a tribunal's interpretative method may be little more than an ex post justification or "façade" for an outcome reached on other grounds'.[107]

Third, the use of interpretative criteria of the VCLT is not uniform but varies depending on the forum. As Weiler noted, despite the fact that all international courts and tribunals claim to follow the VCLT interpretative rules, in practice, one can notice 'the emergence of different hermeneutics across the landscape of judicial treaty interpretation'.[108]

Finally, even within a particular legal regime, the application of the interpretative criteria is not consistent and the same court can attribute more or less weight to one or more of them depending on the case.[109] Evolutionary interpretation in the WTO is a case in point.[110] In general, evolutionary interpretation is compatible with the interpretative framework that the VCLT provides.[111] This is the case because, as explained above, the VCLT criteria are 'so broad and flexibile that one can do (almost) whatever one wants with them'.[112] In particular, the use of 'evolutionary interpretation' in the WTO context is

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Harmonization of Treaty Interpretation in Investment Arbitration' in M Fitzmaurice *et al* (eds*), Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years On* (Martinus Nijhoff, Leiden 2010)129.

[107] J Pauwelyn and M Elsig, Manfred 'The politics of treaty interpretation: variations and explanations across international tribunals' in J C Dunoff and M A Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (CUP, Cambridge 2012) 445-473, 449; see also H Lauterpacht, 'Restrictive Interpretation and the Principle of Effectiveness in the Interpretation of Treaties' (1949) 26 BYIL 48.

[108] JHH Weiler, 'The Interpretation of Treaties – a Re-examination, Preface' (2010) 21 EJIL 507; see also Pauwelyn and Elsig ibid, 460.

[109] See C Djeffal, *Static and Evolutive Treaty Interpretation: A Functional Reconstruction* (CUP, Cambridge 2016) 252 *et seq*.

[110] The same applies to the ICJ. As Pauwelyn and Elsig note the ICJ 'falls somewhere in between, at times taking an evolutionary approach', 'while in other cases opting for a static or original interpretation', Pauwelyn and Elsig (n 107) 454.

[111] See generally E Bjorge, *The evolutionary interpretation of treaties* (OUP, Oxford 2014).

[112] M Milanovic, 'Running in Circles: A Comment on Bjorge's *Evolutionary Interpretation of Treaties*' (2014) EJIL: Talk! available at https://www.ejiltalk.org/running-in-circles-a-comment-on-bjorges-evolutionary-interpretation-of-treaties/; see also Djeffal (n 109) 180.

illuminating. The *US – Shrimps* case is perhaps one of the most famous examples of an international court resorting to evolutionary interpretation. [113] The AB concluded that the term 'exhaustible nature recources' under Article XX(g) of the GATT 'is not "static" in its content or reference but is rather 'by definition, evolutionary'".[114] However, the AB's approach was motivated by political considerations and was not consistently followed in subsequent cases. As Howse notes, while the AB could reach the same result by merely relying on the GATT acquis, the AB 'purposely treated the issue of exhaustible natural resources in this way in order to bolster its external legitimacy at a time in which economic globalization was under persistent attack by outsider constituencies, including and especially environmental ones'.[115] In other cases raising similar issues, the WTO Panel reached the same 'evolutionary' outcome by relying on the ordinary meaning of the words, explicitly stating that it did 'not consider it necessary to resort to any form of evolutionary interpretation'.[116]

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[113] AB, *US – Shrimps* [127]-[134]; see B Stern, 'Intepretation in International Trade Law' in M Fitzmaurice, O Elias, P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, Leiden / Boston 2010) 111-128, 119-120. See also P Birnie, A Boyle, and C Redgwell, International Law and the Environment (3rd ed, OUP, Oxford, 2009) 20.

[114] AB, *US – Shrimps* [130].

[115] Howse (n 12) 37-38.

[116] Panel, *EC – IT Products* [7.600]; cf AB, *China – Publications and Audiovisual Products* [47], [396]; see also Bjorge (n 112) 192.

V. INTERIM CONCLUSIONS

This chapter set out the first analytical step of the syllogism of this thesis by putting forward two axioms. The first axiom is that that international law is best understood as a process of judicial decision-making. The second axiom, which is related with and builds on the first, is that international courts and tribunals enjoy a broad discretion and such discretion is a structural, inherent feature of adjudication. In that context, and for the purposes of this thesis, the focus is not so much on the legal tools that international courts and tribunals use to make their interpretative choices, ie the interpretative criteria of the VCLT, but rather on the ability of the adjudicators to make choices, the choices themselves and the implications for the system of international adjudication.

CHAPTER II.
NON-DISCRIMINATION IN INTERNATIONAL ECONOMIC LAW AS A CASE STUDY

I. INTRODUCTION

This chapter will explain why the jurisprudence on non-discrimination in international economic law was chosen as a case study. *First*, it will explain how non-discrimination clauses paradigmatically illustrate that legal rules are indeterminate and open to different interpretations (section II). In particular, it is argued that the conceptual link of non-discrimination clauses in international economic law with the open-ended and value-laden idea of equality renders this area of international law an ideal-case study (subsection 1) The case law of the PCIJ on non-discrimination further confirms that point (subsection 2). This chapter will further explain why the analysis of non-discrimination jurisprudence will be limited to the field of international economic law and other areas of international law, where non-discrimination obligations can also be found (such as international human rights law), lie outside the scope of the present research (subsection 3). *Second*, this chapter will argue that the analytical approaches suggested so far to explain the inconsistent jurisprudence on non-discrimination clauses in international economic agreements are unsatisfactory (section III) and will put forward an alternative exegesis: divergent legal interpretations of these clauses can be explained by the endorsement of different theories in relation to economic development and the appropriate regulatory role to be played by the State (section IV). *Third*, before delving into the analysis of non-discrimination case law in the WTO (in Chapter III) and international investment arbitration (in Chapter IV), a short comparison between the two regimes will be presented.

II. NON-DISCRIMINATION IN INTERNATIONAL ECONOMIC LAW

Non-discrimination clauses in WTO and international investment agreements constitute an ideal case study to apply the theoretical framework developed in Chapter I (section 1). This is due to the conceptual relation between non-discrimination clauses and the idea of *equality* (section 1.1.). Equality is a value-laden concept and can accommodate different conceptions (section 1.2.). This section will explain why the present inquiry is limited to non-discrimination in international *economic* law (section 2.1.) and why other areas of international law, such as international human rights law, are excluded (section 2.2.).

1. The choice of non-discrimination as a case study

Naturally, non-discrimination is not the only open-ended concept,[117] nor the sole field of international (economic) law where the relevant case-law is inconsistent and antithetical decisions have been issued. The case law of investment tribunals on umbrella clauses[118] or

[117] Perhaps the vaguest, abstract and value-laden standard of international investment law is the 'Fair and Equitable Treatment', see A Gourgourinis, 'Fair and Equitable Treatment in International Investment Law: The Art of Watching Out for Both the 'Elephants' and the 'Fleas' in the (Normative) 'Room' of Investment Protection' (2015) 16 JWIT 335; P Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International Deventer 2013); M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, Oxford 2013); R Kläger, *'Fair and Equitable Treatment' in International Investment Law* (CUP, Cambridge 2013); I Tudor, *The Fair and Equitable Treatment Standard in the International Law of Foreign Investment* (OUP, Oxford 2008).

[118] Cf *SGS v Pakistan*, Jurisdiction [167] and *SGS v Philippines*, Jurisdiction [113]-[129]. As the another tribunal noted regarding *SGS v Pakistan* and *SGS v Philippines*, 'the two decisions cannot be reconciled, reflecting different approaches to this issue to the effect of an umbrella clause in the framework of a BIT', *BIVAC v Paraguay*, Jurisdiction [138]; further, the same tribunal observed that 'there is no *jurisprudence constante* on the effect of umbrella clauses' and 'that the subject is one on which legal opinion is divided', ibid [141] and followed the *SGS v Philippines* approach, as did the tribunal in *Eureko v Poland*, Partial Award [257], *SGS Société Générale de Surveillance SA v Republic of Paraguay*, ICSID Case No ARB/07/29, Decision on Jurisdiction, 12 February 2010 (SA Alexandrov (P), DF Donovan, P García Mexía) [170]-[185] and *Noble Ventures v Romania*, Award [53]; *Toto Costruzioni v Lebanon*, Jurisdiction [200]-[201] and *Bosh v Ukraine*, Award [246]-[247]. Other tribunals followed a more restrictive approach, like *SGS v Pakistan*, see *Pan American v Argentina*, Preliminary Objections [112]-[113]: 'the Tribunal, endorsing the interpretation of the so-called "umbrella clause" in the Decision *SGS v. Pakistan*'; *Hamester v Ghana*, Award [348]-[349] and *El Paso v Argentina*, Award [532]. Again, given the controversy, it is hardly surprisingly that some tribunal analyse the case law but did not adopt a position, see *Duke Energy v Ecuador*, Award [321]-[325]. On umbrella clauses see generally ER Gadelshina, 'Hermeneutic Reflections on the Specific Purpose of Umbrella Clauses' (2013) 14 JWIT 804; J Potts, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Relience and Internationalization' (2011) 51 Virginia JIL 1005; OECD, 'Interpretation of the Umbrella Clause in Investment Agreements' (October 2006) Working Papers on International Investment Number 2006/3; J Wong, 'Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason L R

the prospective/retrospective denial of benefits[119] is equally unstable and inconsistent. One can also look at the *amicus curiae* saga[120] or the controversy regarding *zeroing* in the realm of WTO. Why then should one specifically look at the jurisprudence on non-discrimination to test the hypothesis that (international) legal rules are inherentely indeterminate and law is better conceived as a process of decision-making? The following sections will attempt to provide an answer to this question with reference to the concept of *equality*.

1.1. Non-discrimination clauses in international economic law relate to the concept of equality

As a preliminary matter, one could ask why is it appropriate to explore the concept of *equality* for the purpose of evaluating the case law on non-discrimination instead of directly focusing on the concept of *discrimination*.[121] However, a conceptual focus on equality is necessary for two reasons. First, the ICJ, the WTO DSS, international investment tribunals and scholars repeatedly and explicitly link non-discrimination provisions to a concept of equality. Second, as will be shown in the next subsection (section 1.2.), it is the concept of equality rather than the concept of (non-)discrimination that is the predecessor concept

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135 [arguing that 'an umbrella clause enables a BIT tribunal to exercise jurisdiction over claims concerning such breaches of contract, which are also BIT violations under the clause, and further permits the tribunal to do so notwithstanding an exclusive forum selection clause in the contract', ibid 139; TW Wälde, 'The "Umbrella" Clause in Investment Arbitration: a comment on original intentions and recent cases' (2006) 6 JWIT 183; J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arbitration International 351.

[119] Some tribunals recognised that denial of benefits clauses could have prospective effect: *Plama v Bulgaria*, Jurisdiction [157]–[165]; *Hulley Enterprises v Russia*, Interim Award [457]–[458]; *Veteran Petroleum v Russia*, Interim Award [457]–[458]; *Yukos Universal v Russia*, Interim Award [457]–[458]; *Liman Caspian Oil v Kazakhstan*, Award [227]; *Stati v Kazakhstan*, Award [745]; *Khan Resources v Mongolia*, Jurisdiction [412]. Other tribunals ruled that denial of benefits can benefit the State retrospectively, *Empresa v Ecuador*, Award [71]; *Ulysseas v Ecuador*, Interim Award [172]–[174]; *Pac Rim v El Salvador*, Jurisdiction [4.83]-[4.91]; *Rurelec v Bolivia*, Award [376]–[384]. See also L Gastrell and P-J Le Cannu, 'Procedural Requirements of 'Denial-of-Benefits' Clauses in Investment Treaties: A Review of Arbitral Decisions' (2015) 30 ICSID Review 78.

[120] D Sarooshi, 'The Future of the WTO and Its Dispute Settlement System' (2005) 2 IOLR 129, 134-137; C Leng Lim, 'The Amicus Brief Issue at the WTO' (2005) 4 Chinese J Int L 85.

[121] Reference is made to the philosophical concept of equality and not the principle of Sovereign Equality of States. For the relationship between the latter and non-discrimination in international economic law, see M Risvas, 'Non-discrimination in International Economic Law and Sovereign Equality of States: An Historical Perspective' (2017) 39 Houston J Int L 79.

possessing an extremely rich and long-standing presence in philosophical, moral and political discourse.

The ICJ case law on MFN and in particular the *US Nationals in Morocco* case vividly illustrates the relationship between non-discrimination clauses (as conventional obligations) and the concept of equality. A different way of looking at non-discrimination embodied in the MFN principle is to conceive the MFN clause as a mere drafting technique. From this perspective, MFN simply incorporates by reference those rights existing under another treaty and does not relate to or reflect the idea of equality. The ICJ in *US Nationals in Morocco* examined this argument and rejected it, emphasising the nexus between MFN and actual equality of treatment.[122] The multilateral 1880 Madrid Convention contained an MFN clause for all signatories States, including US, Britain and Spain, in Article 17.[123] MFN was also included in the 1836 bilateral treaty between Morocco and the USA.[124] One of the core question before the ICJ was whether the rights of consular jurisdiction granted to British and Spanish nationals in 1856 and 1861, respectively, had to be extended to US nationals, by virtue of the MFN.[125] The additional complication, in this case, arose from the fact that Britain, in 1914, and Spain, in 1937, had both renounced such rights and their nationals no

[122] See also DHN Johnson, 'The Case Concerning Rights of Nationals of the United States of America in Morocco' (1952) 29 BYIL 401.

[123] Article 17 read as follows: 'The right to the treatment of the most favoured nation is recognized by Morocco as belonging to all the powers represented at the Madrid conference.' Article 17, *Convention* relative au exercise du droit de protection au Maroc (signed 3 Ju1y 1880, entered into force 3 July 1880) 71 BFSP 639, English translation in (1912) 9 AJIL supplement 18.

[124] 'The commerce with the United States shall be on the same footing as is the commerce with Spain, or as that with the most favored nation for the time being; and their citizens shall be respected and esteemed, and have full liberty to pass and repass Our country and seaports whenever they please, without interruption', while article 25 provides i.a. that 'whatever indulgence, in trade or otherwise, shall be granted to any of the Christian Powers, the citizens of the United States shall be equally entitled to them', Article 14, Peace Treaty between Morocco and the United States (signed 16 September 1836, entered into force 28 January 1837) 8 Stat. 484, TS 244-2 (the longest unbroken treaty in US history).

[125] *US Nationals in Morocco* 190.

longer enjoyed them in the French Zone of Morocco.[126] One of the US arguments before the ICJ was that the MFN provision was a drafting technique 'permanently incorporating by reference the rights already granted to other States'.[127] France rejected this approach and argued that, *in casu*, the adoption of such an approach to MFN would give US nationals a privileged position, which would run contrary to the purpose of the MFN clause, ie to ensure equality of treatment.[128] The ICJ correctly identified the underlying idea of the function of MFN in the US arguments. These were

> based on the view that the most favoured-nation clauses in treaties made with countries like Morocco should be regarded as a form of drafting by reference rather than as a method for the establishment and maintenance of equality of treatment without discrimination amongst the various countries concerned.[129]

Nevertheless, the ICJ rejected the US argument for the very reason that it would 'run contrary to the principle of equality and it would perpetuate discrimination'.[130] The ICJ also emphatically held that 'the intention of the most-favoured-nation clauses was to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned'[131]. The ICJ's ruling on the matter was positively received by, eg, Bin Cheng.[132] (Although some of the judges dissented, the dissent focused on whether Britain and Spain failed to actually exercise their rights, rather than on the nexus between MFN and

[126] ibid. The US was the last State to denounced the privileges regarding consular jurisdiction under the system of Capitulations, on 8 October 1956, four years after the ICJ's decision, PEJ Bomli, 'Le Maroc et le Régime des Capitulations' in FM van Asbeck *et al* (eds), *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 88, 88.

[127] See *US Nationals in Morocco*, Pleadings. The US also unsuccessfully challenged the very fact of the renunciation on behalf Britain and Spain and the relevancy of the distinction between and the French the Spanish Zone, as, in the latter, Britain still exercised capitulary rights.

[128] *US Nationals in Morocco*, Pleadings 163.

[129] ibid 191.

[130] ibid 192.

[131] ibid.

[132] B Cheng, 'Rights of the United States Nationals in the French Zone of Morocco' (1953) 2 ICLQ 367.

equality).[133] In subsequent litigation before Moroccan courts, the Court of First Instance of Tangiers International Jurisdiction followed the ICJ decision.[134] Yet, on appeal the Moroccan Court of Appeals, in a heavily criticised decision,[135] relied on the dissenting opinion in the ICJ, emphasising the autonomous nature of MFN.[136] In any case, the ICJ's logic has been subsequently endorsed by international courts and tribunals.

Investment tribunals have cited the *US Nationals in Morocco* case and emphasised the link between MFN and equality.[137] In *Telefónica v Argentina* the ICSID tribunal emphasised that '[a]n MFN clause is aimed at ensuring equality of treatment to the beneficiaries in respect of its subject matter at the most advantageous level'.[138] Likewise, in *National Grid v Argentina*, the UNCITRAL tribunal held that the

> MFN clause is an important element to ensure that foreign investors are treated on a basis of parity with other foreign investors and with national investors when they invest abroad.[139]

In *Daimler v Argentina* the ICSID tribunal cited the ILC's work and stated that the point of MFN clauses is to ensure overall equality of treatment in the sense of creating a level playing field between foreign investors from different countries, even if this is sometimes

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[133] *Case Concerning Rights of Nationals of the United States of America in Morocco (France v US) (27 August 1952)* Dissenting Opinion of Judges Hackworth, Badawi, Levi Carneiro and Sir Benegal Rau [1952] ICJ Rep 176, 215 *et seq*.

[134] *Lal-la Fatma Bent Si Mohamed El Khader v Mackay Radio and Telegraph Co.* (9 March 1954), (1954) 6 Revue Marocaine de Droit 228, (1955) 49 AJIL 267.

[135] The decision was not only criticised for not complying with the ICJ ruling but also for not properly understanding the MFN technique, É Sauvignon, *La clause de la nation la plus favorisée* (Grenoble UP, Grenoble 1972) 94.

[136] 'l'extention du privilège est un mode d'acquisition autonome', *Lal-la Fatma Bent Si Mohamed El Khader v Mackay Radio and Telegraph Co.* (13 August 1954), (1955) 1 AFDI 234, 236, (1954), 21 ILR 136, (1955) 49 AJIL 413.

[137] Eg *Tza Yap Shum v Peru*, Jurisdiction [195].

[138] *Telefónica v Argentina*, Jurisdiction [98].

[139] *National Grid v Argentina*, Jurisdiction [92].

accomplished through non-identical means.[140] Todd Weiler in his separate opinion in *Berschader v Russia* stated that 'the MFN standard is a tried-and-true expression of the international economic law principle of non-discrimination'.[141] This has also been the approach adopted in relation to the National Treatment principle or standard. An SCC investment tribunal held that the 'National Treatment standard which is a common protection in many investment treaties, aimed at assuring that foreign investors receive equal treatment with nationals of the host country'.[142] The ICSID tribunal in *Parkerings v Lithuania* stated that 'national treatment, most favoured-nation-treatment or non-discrimination at large, will in effect bar discrimination against foreign nationals investing in the country concerned'.[143] In *Plama* the tribunal observed that

> with regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds.[144] In like manner, WTO Panels also repeatedly ruled that the term 'less favourable treatment' is to be found throughout the General Agreement and later Agreements negotiated in the GATT framework *as an expression of the underlying principle of equality of treatment* of imported products as compared to the treatment given either to other foreign products, under the most favoured nation standard, or to domestic products, under the national treatment standard of Article III.[145]

The AB emphasised in *EC–Bananas*, '[t]he essence of the non-discrimination obligations is that like products should be treated *equally*, irrespective of their origin'.[146] Thus it is

[140] *Daimler v Argentina*, Award [242].

[141] *Berschader v Russia*, Weiler Separate Opinion [4].

[142] *Al-Bahloul v Tajikistan*, Partial Award [271].

[143] *Parkerings v Lithuania*, Award [367].

[144] *Plama v Bulgaria*, Award [184].

[145] GATT Panel, *US – Section 337 Tariff Act* [5.11]; Panel, *Japan – Film* [10.379]; Panel, *US – COOL* [7.232].

[146] AB, *EC – Bananas III* [190] (emphasis added).

generally accepted that '[c]onceptually, discrimination is tied to inequality'.[147] In international legal scholarship, the link between MFN and equality did not go unnoticed. Snyder stated categorically that MFN 'embodies the principle of equality of treatment in international economic relation',[148] while, for Schwarzenberger, its 'main function consists in forming an agency of equality'.[149] Cottier and Oesch also recognise that non-discrimination in the WTO context emanates from the principle of equality.[150] As aptly summarised by Sarooshi, in the WTO framework:

> the two non-discrimination principles of Most Favored Nation Treatment (MFN) and National Treatment are in substance a reflection of the application of the value of equality-that governments should ensure that like cases are treated equally.[151]

1.2. The conceptual nature of equality and its implications

Having established that non-discrimination clauses in international economic agreements bear a direct conceptual relationship with equality, it is appropriate to examine the implications of such relationship. The analysis of the philosophical nature of equality will explain why non-discrimination was selected as a particularly appropriate case study to explore the political function of the international adjudicator.

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[147] K Lippert-Rasmussen, 'Discrimination and Equality' in A Marmor (ed), *Routledge Companion to Philosophy of Law* (Routledge, London 2012) 569, 569. However, this is not uncontroversial; for the different theoretical underpinning of discrimination law in the field of human rights see, T Khaitan, *A Theory of Discrimination Law* (OUP, Oxford 2015) 4-9 and D Hellman and S Moreau (eds), *Philosophical Foundations of Discrimination Law* (OUP, Oxford 2013).

[148] R Snyder, 'The Most Favored Nation Clause and Recent Trade Practices' (1940) 55 Political Science Quarterly 77, 77.

[149] G Schwarzenberger, 'Most Favoured Nation in British State Practice' (1945) 22 BYIL 96, 99.

[150] T Cottier and M Oesch, 'Direct and Indirect Discrimination in WTO Law and EU Law' (2011) Working Paper 2011/16, 3-6.

[151] D Sarooshi, 'The move from institutions: the case of the World Trade Organization' (2006) 100 ASIL Proceeding 298, 299.

Since the time of Aristotle, philosophic thought has struggled with the concept of equality and different plausible conceptions have been proposed.[152] According to the famous Aristotelian definition, equality consists of *treating like cases alike*[153]. In public international law, equality is similarly formulated:

> discrimination may in general be said to arise where those who are in all material respects the same are treated differently, or where those who are in material respects different are treated in the same way[154]

Judge Tanaka in his famous dissenting opinion in *South West Africa* emphatically stated that 'to treat unequal matters differently according to their inequality is not only permitted but required'.[155] However, this understanding of the concept of equality, unfortunately, provides little or no practical guidance. Sharpston, an Advocate General of the EU Court of Justice, has stated that the:

> classic formulation of the principle of equality, such as Aristotle's 'treat like cases alike' leaves open the crucial question of which aspects should be considered relevant to equal treatment and which should not.[156]

As a result, '[t]his formulation of equality requires us to identify those characteristics that are relevant for determining whether actors are "situated equally." Hence, an additional set of

[152] On the concept/conception distinction see Hart (n 45) 155-159; John Rawls, *Theory of Justice* (revised edition, Harvard UP, Cambridge MA 1999) 4-5; Dworkin (n 46) 134-136.

[153] *Aristotle, Nicomachean Ethics*, 1131a10-b15; *Politics*, III 9, 1280 a8-15, III 12, 1282b18-23.

[154] R Jennings and A Watts, *Oppenheim's International Law, Volume 1 Peace* (9th edition, OUP, Oxford 1992) 378.

[155] *Dissenting Opinion of Judge Tanaka, South West Africa case (Ethiopia v South Africa, Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 306. For a definition of discrimination see also EW Vierdag, *The Concept of Discrimination in International Law, with special references to Human Rights* (Martinus Nijhoff, The Hague 1973) 61.

[156] Opinion of AG Sharpston, *Case C-427/06 Birgit Bartsch v Bosch und Siemens Hausgeräte (BSH) Altersfürsorge GmbH* (22 May 2008) [44]. '"Equality" necessarily implies the existence of some extraneous criterion by reference to which the content is to be determined', *Dissenting Opinion by Sir Cecil Hurst, Count Michal Cezary Rostworowski and Demetre Negulesco, Minority Schools in Albania (Advisory Opinion, 6 April 1935)* PCIJ Rep Series A/B, No 64, 25.

value choices and rules would be needed to implement a norm of equal treatment'.[157]

Aristotle himself was aware that multiple conceptions of justice exist:

> All are agreed that justice in distributions must be based on desert of some sort, although they do not all mean the same sort of desert; democrats make the criterion free birth; those of oligarchical sympathies wealth, or in other cases birth; upholders of aristocracy make it virtue.[158]

The choice of the primary value to be used as the criterion to determine relations of equality is a deeply and unavoidably political choice. Such choice relates to the general institutional framework of the community.[159] The choice of the value based on which relationships of equality are determined, is itself value depended. Yet, this is circular, because the answer to the question 'why is such and such the value of value' cannot be a rational one. This is why the value preferred is what Castoriadis calls a 'proto-value'.[160] Dworkin similarly noted that:

> [e]quality is a contested concept. People who praise it or disparage it disagree about what they are praising or disparaging. The correct account of equality is itself a difficult philosophical issue.[161]

It has already been noted in Chapter I that the structural indeterminacy of international law is an essential feature of its acceptability.[162] In like manner (yet at a different level) it is precisely conceptual malleability of equality that (at least partly) explains its dominant

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[157] D Tarullo, 'Logic, Myth, and the International Economic Order' (1985) 26 Harvard International Law Journal 533, 540.

[158] Aristotle, *Nichomachean Ethics*, 1131a8.

[159] P Raynaud, 'Le juge, la loi, le droit: de Platon à Aristote' in Olivier Cayla, Marie-France Renoux-Zagamé (eds), *L'office de juge: part de souveraineté ou puissance nulle* (Bruylant, LGDJ, Paris 2001) 15

[160] C Castoriadis (translated by A Arato) 'From Marx to Aristotle, from Aristotle to Us' (1978) 45 Social Research 667, 708-709.

[161] R Dworkin, *Sovereign Virtue, the Theory and Practice of Equality* (Harvard UP, Cambridge MA 2000) 2. Dworkin also uses the term 'interpretative concept' as a synonym of Gallie's term, R Dworkin, *Justice in Robes* (Harvard UP, Cambridge MA 2006) 221.

[162] See *supra* note 62.

presence in political, philosophical and legal discourse.[163] Amartya Sen, points out that equality is central to every normative theory of social arrangement, because:

> every normative theory of social arrangement that has at all stood the test of time seems to demand equality of something—something that is regarded as particularly important in that theory.[164]

More generally, even though people tend to agree on abstract concepts, they disagree on how values like equality are to be specified and made concrete.[165] This is the case in all levels of governance, domestic and international.[166] This is also the reason why the concept of equality has come under attack. For example, Westen famously criticised equality as being an 'empty concept' and dismissed its conceptual value,[167] focusing on the fact that equality requires equal treatment of those who are equal, i.e. those who are considered equal in relation to a given rule which stipulates that they are entitled to equal treatment.[168] Thus, it is not difficult to see why the concept of equality was accused of being empty, tautological and circular.[169]

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[163] For example Hayek felt the need to clarify: '[w]e do not object to equality as such. It merely happens to be the case that a demand for equality is the professed motive of most of those who desire to impose upon society a preconceived pattern of distribution', FA Hayek, *The Constitution of Liberty* (Routledge Abingdon 2006) 77.

[164] A Sen, *Inequality Reexamined* (OUP, Oxford 1995) 13; According to Aristotle '[e]verywhere inequality is a cause of revolution, but an inequality in which there is no proportion- for instance, a perpetual monarchy among equals; and always it is the desire of equality which rises in rebellion', Aristotle, *Politics*, E 1301 b 26. *cf* J Raz exposed that many principles derived from equality are rather rhetoric than strict egalitarian, J Raz, *The Morality of Freedom* (OUP, Oxford 1986) 219-244. Pashukanis, perhaps the leading Soviet jurist of the interwar years, noted:

> Bourgeois private law assumes that subjects are formally equal yet simultaneously permits real inequality in property, while bourgeois international law in principle recognizes that states have equal rights yet in reality they are unequal in their significance and their power

E Pashukanis, 'International Law' entry in the *Encyclopaedia of State and Law* published by the Communist Academy in 1925-1927 and reproduced in C Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill, Leiden/Boston 2004) 330.

[165] S Besson, *The Morality of Conflict: Reasonable Disagreement and the Law* (Hart, Oxford 2005) 156; T Cottier, 'Towards a Five Storey House' in Christian Joerges, Ernst-Ulrich Petersmann, *Constitutionalism, Multilevel Trade Governance and International Economic Law* (Hart, Oxford 2011) 523.

[166] Cottier ibid 524.

[167] P Westen 'The Empty Idea of Equality' (1982) 95 Harvard Law Review 537; see also L Alexander, 'What Makes Wrongful Discrimination Wrong? Biases, Preferences, Stereotypes, and Proxies' (1992) University of Pennsylvania L R 149, 191.

[168] Westen, ibid 547.

Equality is not only particularly helpful in understanding the inherently indeterminate nature of legal rules, but it also highlights the discretionary power of the adjudicators in interpreting them. Aristotle eloquently elaborates on the intrinsic link between equality and justice:

> Now the judge restores equality: if we represent the matter by a line divided into two unequal parts, he takes away from the greater segment that portion by which it exceeds one-half of the whole line, and adds it to the lesser segment. When the whole has been divided into two halves, people then say that they 'have their own,' having got what is equal. This is indeed the origin of the word dikaion (just): it means dicha (in half), as if one were to pronounce it dichaion; and a dikast (judge) is a dichast (halver).[170]

As stated above, all legal terms necessitate interpretative choices and general legal terms leave significant room for making these choices. However, 'the discretionary zone of a court or tribunal is likely to increase with factors such as the breadth and vagueness of the treaty norms'.[171] When a judge is called to adjudicate on equality, she is precisely called to select one conception of equality over others. In so doing, she inevitably enjoys discretion.[172] As explained above, equality is, by definition, able to accommodate multiple rival conceptions. These numerous and often competing conceptions are equally valid and, thus, there is no way of *a priori* objectively selecting one of them. Basdevant argued that 'la question de la

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[169] ibid; D Locke, 'The Trivializability of Universalizability' (1968) 77 The Philosophical Review 25, 25. Nevertheless, this attack on equality has proved controversial and generated persuasive rebuttals: for a critique of Westen's theory see Jeremy Waldron, 'The Substance of Equality' (1991) 89 Michigan LR 1350; Stephen Guest also casts doubts on whether equality is redundant, given its persistent prominence in political discourse and cites the demand for 'liberty, fraternity, and equality' during the French Revolution as an example, Stephen Guest, 'The role of Moral Equality in Legal Argument' in Francois Du Bois (ed) *The practice of integrity, reflections on Ronald Dworkin and South African Law* (Juta & Co Ltd, Cape Town 2005) 23

[170] Aristole, *Nichomachean Ethics*, 1132a9-10.

[171] A Roberts, 'Power and Persuasion in Investment Treaty Interpretation: the Dual Role of States' (2010) AJIL 179, 187.

[172] 'The ambiguity of concepts like […] discrimination gives them [i.e. arbitrators] a wide authority in virtually any field of public law', Gus Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2006) 93; Cornides makes the same point regarding EU anti-discrimination laws. He accurately states 'anti-discrimination laws' such as EU Directives 2000/78 and 2004/113 are by no means more precise than the (outdated?) principle of *suum cuique* – yet being of more recent making, their exact significance still remains rather unclear, which means that courts and public administrations enjoy an extremely wide margin of interpretation', 'Three case studies on "Anti-Discrimination"' Jacob Cornides (2012) 23 EJIL 517, 542.

méthode d'interprétation des clauses d'égalité ne peut pas être considérée comme tranchée définitivement en droit international positif'.[173] Kelsen noted regarding equality that the use by a constitutional tribunal of general and vague equitable principles, such as justice or *equality*, would encroach upon legislative competence. Such an event would, it can be supposed, have been thought a *government of judges* by Kelsen.[174] In the US context, for example, Sunstein and others have demonstrated through empirical research that 'in areas involving […] discrimination, for example, splits between Democratic and Republican appointees seem to have become especially dramatic'.[175] Farber and Hudec argue that 'in some ultimate sense the problem is unsolvable'.[176] In particular,

> [n]o matter how a legal test is articulated, it cannot satisfactorily resolve the tensions between local autonomy and free trade in all conceivable cases. In the end, the law must have a certain irreducible messiness in dealing with such fundamental tensions.[177]

The open-ended and conceptually malleable nature of equality is perhaps best understood by reference to the rationale of non-discrimination in international economic law. The rationale behind the MFN aspect of non-discrimination is *both* economic and *political*.[178] One of the most important political functions of non-discrimination in international economic relations is reducing international antagonism that discriminatory trade policies tend to generate and,

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[173] J Basdevant, 'L'affaire des pêcheries des côtes septentrionales de l'Atlantique entre *Etats-Unis d'Amerique et Grande-Bretagne*' (1912) RGDIP 421, 540.

[174] M Davis, 'A Government of Judges: An Historical Re-View' (1987) 35 AJCL 559, 565; Kelsen, ibid 241. (emphasis added)

[175] C Sunstein *et alt.*, *Are Judges Political?: An Empirical Analysis of the Federal Judiciary* (Brookings Institution, Wahsington DC 2006) 87.

[176] D Farber and R Hudec, 'GATT Legal Restraints on Domestic Environmental Regulations' in J Bhagwati and R Hudec (eds), *Fair Trade and Harmonization, Prerequisites for Free Trade? Vol 2, Legal Analysis* (MIT Press, Cambridge MA 1996) 84.

[177] ibid.

[178] R Herzstein and J Whitlock, 'Regulating Regional Trade Agreements – A legal analysis' in P Macrory *et al* (eds), *The World Trade Organisation: Legal, Economic and Political Analysis, Volume II* (Springer, New York 2005) 221; M Trebilcock and R Howse, *The Regulations of International Trade* (3rd edition, Routledge, London 2013) 51; J Jackson, *The World Trading System, Law and Policy of International Economic Relations* (2nd edition, Cambridge MA, MIT Press, 1997) 158.

thus, promoting international stability and peace.[179] The European integration project is also a (successful) paradigm of the construction of a market to serve primarily non-economic, political goals.[180]

In his ground-breaking book, Todd Weiler not only highlights the importance of the historical evolution of non-discrimination standards for interpretative purposes, but also

[179] Montesquieu was one of the first to discern the relationship between trade and peace:

> The natural effect of commerce is to bring peace. Two nations that negotiate between themselves become reciprocally dependent, if one has an interest in buying and the other in selling. And all unions are based on mutual needs.

'L'effet naturel du commerce est de porter à la paix. Deux nations qui négocient ensemble se rendent réciproquement dépendantes: si l'une a intérêt d'acheter, l'autre a intérêt de vendre; et toutes les unions sont fondées sur des besoins mutuels', Charles-Louis de Secondat, baron de La Brède et de Montesquieu, *De l'esprit des lois*, (1748), Chapter 2, Book XX; see also R Howse, 'Montesquieu on Commerce, Conquest, War, and Peace' (2006) 31 Brooklyn J Int Law 1. After the First World War one of the Fourteen Points proclaimed by President Wilson and sought as one of the constitutional principles of the post-war world order, was the 'removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all nations consenting to the peace and associating themselves for its maintenance'. Moreover, in the aftermath of the Second World War, the US Secretary of State Hull stated that:

> I have never faltered, and I will never falter, in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade.

C Hull, *The Memoirs of Cordell Hull* (Macmillan, New York 1948) 75. For Hull, 'unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition with war', quoted in R Pastor, *Congress and the Politics of the US Foreign Economic Policy* (University of California Press, LA 1982) 86. That is unsurprising because 'the foremost proponent and practitioner of discriminatory trade restrictions was Nazi Germany, which regarded the principle of the most favoured-nation treatment as a particularly vicious offshoot of a discredited *liberalismus*. It utilised all kinds of trade controls to make the German economy self-sufficient and provide it with the implements for war.' ILC First Report on MFN (1969) II YBILC 157, 163. See also Jackson (n 178) 159; W Davey and J Pauwelyn, 'MFN Unconditionality: A Legal Analysis of the Concept in view of its evolution in the GATT/WTO Jurisprudence with particular reference to the issue of "Like Product"' in T Cottier and P Mavroidis (eds), *Regulatory Barriers and the principle of Non-discrimination in World Trade Law* (Michigan UP, Ann Arbor 2000) 15. Arbitration as a dispute settlement mechanism was also traditionally associated with peace. At the opening of the Fifth League Assembly on 5 September 1924, the French Prime Minister Édouard Herriot coined a new slogan: 'Arbitration, security and disarmament', 'M. Herriot's Speech', *The Times* (London, 6 September 1924) 9; K Sellars, "Delegitimising Aggression, First Steps and False Starts after the First World War " (2012) 10 Journal of International Criminal Justice 7, 22. Promoting peace was also highlighted in article 1 of the Havana Charter, which started with the phrase 'Recognizing the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations', article 1, United Nations Conference on Trade and Employment, Final Act and Related Documents, E/CONF.2/78, (24 March 1948). Arbitration (or international adjudication more generally) could be also seen as connected to, and expressing the idea of equality of States, JH Ralston, *International Arbitration from Athens to Locarno* (Stanford UP, Stanford CA 1929) 31

[180] See the Schumann Declaration of 9 May 1950 highlighting the preservation of international and European peace as the foundation of the European integration.

alludes to the inherent discretion of the adjudicator in interpreting them.[181] In the WTO context, the balance between (impressible) non-discrimination and (permissible) regulation is 'the single most potent underlying source of legal and political tension in all free trade regimes'.[182]

2. The PCIJ jurisprudence on non-discrimination as an example

The jurisprudence of the PCIJ illustrates that non-discrimination clauses are open to different interpretations due to the conceptual malleability of equality and highlights the important political dimension of such cases.

The comparison between the majority and the dissenting opinion in the *Polish Nationals in Danzig* case[183] on whether non-discrimination covers only nationality-based discrimination or not is case in point. The *Polish Nationals in Danzig* case resulted from a Polish request to the League of Nations High Commissioner to decide 'regarding the unfavourable treatment of Polish nationals and other persons of Polish origin or language in the territory of the Free City of Danzig'.[184] The relevant non-discrimination clause was article 104(5) of the Versailles Treaty.[185] As the PCIJ found in *Polish Nationals in Danzig* – 'the

[181] Weiler (n 106) 453-454 (emphasis added).

[182] JHH Weiler, 'Epilogue: Towards a Common Law of International Trade' in JHH Weiler (ed) ,*The EU, the WTO, and the NAFTA. Towards a Common Law of International Trade?* (OUP, Oxford 2000) 201, 205.

[183] For a historical and legal background in relation to the Free City of Danzig, see K Parlett, 'The PCIJ's Opinion in *Jurisdiction of the Courts of Danz*ig. Individual Rights under Treaties' (2008) 10 Journal of History of International Law 119, 123-129 and JK Bleimaier, 'The Legal Status of the Free City of Danzig 1920-1939: Lessons to be Derived from the Experiences of a Non-State Entity in the International Community' (1989) 2 Hague Yearbook of International Law 69.

[184] ibid 8-9.

[185] Article 104(5) of the Treaty of Versailles stipulated:

> The Principal Allied and Associated Powers undertake to negotiate a Treaty between the Polish Government and the Free City of Danzig, which shall come into force at the same time as the establishment of the said Free City, with the following objects:…
>
> 5. To provide against any discrimination within the Free City of Danzig to the detriment of citizens of Poland and other persons of Polish origin or speech;

text does not say between whom no discrimination is to be made'.[186] The starting point for the majority was that '[t]he prohibition against discrimination can best be understood in the light of the circumstances which led to the creation of Danzig as a Free City',[187] thus implicitly but unequivocally indicating that the interpretation of non-discrimination clauses is a political exercise, not to be undertaken in clinical isolation from the general political context. For the majority, only nationality-based discrimination was prohibited: '[i]t is precisely because of their Polish character that discrimination against Polish nationals and other persons of Polish origin or speech is prohibited at Danzig'.[188] On the contrary, the *Dissenting Opinion of Judges Guerrero, Rostworowski, Fromageot and Urrutia* promoted the view that nothing in article 104(5) 'require[ed] proof that the discrimination is based on an intention to cause prejudice to the Poles'[189] and the prohibition of discrimination was not limited 'based upon the Polish character of those against whom it is practiced'.[190] Accepting such interpretation would result in guaranteeing equal treatment of Polish nationals in Danzig only in relation to foreigners residing in Danzig and not Danzig nationals.[191]

The expansive view on non-discrimination adopted in the *German Settlers* and the *Minority Schools in Albania* cases (and also later in the *US Nationals in Morocco* case by the

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Article 104(5), Treaty of Versailles (signed 28 June 1919, entered into force 10 January 1920) 225 CTS 188.

[186] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion, 4 February 1932)*, PCIJ Rep series A/B No 44, 29.

[187] ibid 27.

[188] *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion, 4 February 1932)*, PCIJ Rep series A/B No 44, 28; the majority also highlighted that 'the injunction "to provide against any discrimination to the detriment of" these persons is of general application, in so far as such discrimination is made on account of Polish citizenship, origin or speech', ibid.

[189] *Dissenting Opinion of Judges José Gustavo Guerrero, Count Michał Cezary Rostworowski, Henri Fromageot and Francisco José Urrutia Olano, Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion, 4 February 1932)*, PCIJ Rep series A/B No 44, 47.

[190] ibid.

[191] ibid

ICJ) on the one hand and the formalistic and restrictive approach adopted in the *Oscar Chinn* case are another example highlighting the conceptual nature of equality.[192] In the *Minority Schools in Albania* case, the PCIJ elaborated on the distinction between factual and legal equality and held that 'equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes equilibrium between different situations'.[193] At the same time, the PCIJ in the *Oscar Chinn* case adopted a radically different construction of equality.[194] The legal regime of colonial Congo in the interwar years was regulated by the Convention of Saint-German[195], which revisited the General Act of the Berlin Conference (1884-1885)[196] and the General Act and Declaration of Brussels (1890)[197].[198] Article I of the Saint-German treaty provided that

> [t]he Signatory Powers undertake to maintain between their respective nationals and those of States, Members of the League of Nations, which may adhere to the

[192] 'Whether a measure is or is not in fact directed against these persons is a question to be decided on the merits of each particular case. No hard and fast rule can be laid down', *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion, 4 February 1932)*, PCIJ Rep series A/B No 44, 28.

[193] *Minority Schools in Albania (Advisory Opinion, 6 April 1935)* PCIJ Rep Series A/B, No 64, 20; '[t]here must be equality in fact as well as ostensible legal equality in the sense of the absence of discrimination in the words of the law', *German Settlers in Poland (Advisory Opinion, 10 September 1923)*, PCIJ Rep series B No 6, 24; 'It should be remarked in this connection that the prohibition against discrimination, in order to be effective, must ensure the absence of discrimination in fact as well as in law. A measure which in terms is of general application, but in fact is directed against Polish nationals and other persons of Polish origin or speech, constitutes a violation of the prohibition', *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in the Danzig Territory (Advisory Opinion, 4 February 1932)*, PCIJ Rep series A/B No 44, 28.

[194] *The Oscar Chinn case, (United Kingdom v Belgium), Judgment*, PCIJ Series A/B No 63; The President of the PCIJ wrote to the absent Judge Kellogg that '[t]he Drafting Committee had a good deal of difficulty with the preparation of the Judgment', O Spiermann, *International Legal Argument in the Permanent Court of International Justice* (CUP, Cambridge 2005) 364.

[195] Convention revising the General Act of Berlin, February 26, 1885, and the General Act and Declaration of Brussels, July 2, 1890, signed at Saint-Germain-en-Laye, (singed 10 September 1919, entered into force 31 July 1920) 8 LNTS 25.

[196] General Act of the Conference of Berlin Concerning the Congo (signed 26 February 1885) (1909) 3 AJIL Supplement 7.

[197] General Act of the Brussels Conference Relating to the African Slave Trade (signed 2 July 1890, entered into force 31 August 1891) 173 CTS 293.

[198] See also M Craven, Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade, (2015) 3 London Review of International Law 31.

> present Convention a complete commercial equality in the territories under their authority within the area defined by Article 1 of the General Act of Berlin of February 26, 1885, set out in the Annex hereto but subject to the reservation specified in the final paragraph of that article.[199]

After the global economic crisis of 1929, the Belgian Congo and in particular the sector of fluvial transportation (which was of vital importance for the colony's economy) incurred severe economic difficulties. In 1932 Belgium decided to intervene and provided support to State-controlled companies, including the shipping company *Union National des Transports Fluviaux* (*Unatra*), but not to private (Belgian or foreign) companies, such as the transport enterprise of a British national, Oscar Chinn. Britain exercised diplomatic protection and the case was brought before the PCIJ. One of the key questions before the PCIJ was whether Belgium's support to Unatra was incompatible with the 'complete commercial equality' guaranteed by the Saint-Germain Convention. At least implicitly, the majority did recognise that the economic crisis was to be taken into account: '[f]avourable business conditions and good-will are transient circumstances, subject to inevitable changes; the interests of transport undertakings may well have suffered *as a result of the general trade depression and the measures taken to combat it*'.[200] Paparinskis also notes that 'the more lax approach was possibly influenced by the Great Depression'.[201] The majority concluded that under the equal treatment clause of the Saint-Germain Convention,

> [t]he form of discrimination which is forbidden is therefore discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups.[202]

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[199] General Act of the Conference of Berlin Concerning the Congo (signed 26 February1885) (1909) 3 AJIL Supplement 7; see also article 2, 3, 4, 5, 6, 7, 9 and 11.

[200] *The Oscar Chinn case (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 88 (emphasis added).

[201] Paparinskis (n 1176) 29.

[202] *The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 87.

Unatra was not comparable with the company of Mr Chinn as its privileges 'were bound up with the position of Unatra as a Company under State supervision and not with its character as a Belgian Company'.[203] The decision was adopted with six votes to five. Judges Altamira,[204] Anzilotti,[205] van Eysinga,[206] Schücking,[207] and President Hurst[208] dissented taking issue inter alia with the majority's construction of the equality clause.

Just one year later, the PCIJ adopted a radically different conception of equality in the *Minority Schools in Albania* case. As opposed to the restrictive and formalistic interpretation of non-discrimination in *Oscar Chinn*, the *Minority Schools in Albania* case is a classic reading on the expansive and functional approach to equality.[209] On 2 October 1921, Albania issued a declaration under the auspices of the League of Nations undertaking certain

[203] ibid.

[204] Judge Altamira distinguished the *telos* of non-discrimination clauses aiming at economic and commercial equality and those motivated by the need to protect minority rights and noted:

> it appears to me impossible to agree that acts of discrimination can only be regarded as infractions of the international obligations arising out of the Convention of Saint-Germain if the discrimination affects foreign nationals as compared to Belgian nationals. To demonstrate the fallacy of this view, one needs only to observe that, if that theory were adopted, the result would be to abolish inter- national obligations in a number of cases.

Dissenting Opinion of Judge Rafael Altamira y Crevea, *The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 101-102.

[205] *Individual Opinion of Judge Dionisio Anzilotti, The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 11-114.

[206] *Separate Opinion of Judge Willem Jan Marie van Eysinga, The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 137-139.

[207] *Separate Opinion of Judge Walther Schücking, The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 148-149, agreeing with the Separate Opinion of Judge van Eysinga.

[208] President Hurst categorically stated: '[i]n my opinion it is not necessary to show that the discrimination was based on nationality, in the sense that the differentiation was made because the persons possessed a particular nationality', *Dissenting Opinion of Sir Cecil James Barrington Hurst, The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63,

[209] Spiermann (n 194) 367.

obligation with regards to the protection of minorities,[210] which included an equality clause. Article 5 of the Albanian Declaration stipulated that:

> Albanian nationals who belong to racial, religious or linguistic minorities will enjoy the same treatment and security in law and in fact as other Albanian nationals. In particular they shall have an equal right to maintain, manage and control at their own expense or to establish in the future, charitable, religious and social institutions, schools and other educational establishments, with the right to use their own language and to exercise their religion freely therein.[211]

In 1933 Albania abolished the right to maintain and establish private schools through a constitutional amendment. The opinion of the PCIJ on the matter was adopted by eight votes to three. Judges Altamira, Anzilotti, Schücking, and van Eysinga, who had dissented in *Oscar Chinn* now found themselves in the majority. However four members of the majority in *Oscar Chinn*, Judges Fromageot, Guerrero, Rolin-Jaequemyns and Urrutia endorsed the expansive reading of the equality clause under article 5 of the 1921 Albanian Declaration.[212] For the majority equality 'must be an effective, genuine equality'[213] and

> [e]quality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to attain a result which establishes an equilibrium between different situations.[214]

Conversely, the President of the PCIJ, Sir Cecil Hurst, along with Judges Count Rostworowski and Negulesco (in the majority in *Oscar Chinn*), issued a joint dissenting opinion insisting on a more formalistic and thus more restrictive reading of equality.[215]

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[210] P Eckart, *Promises of States under International Law* (Hart, Oxford 2012) 88-93.

[211] Declaration concerning the Protection of Minorities in Albania (adopted 2 October 1921, ratified on 17 February 1922) 9 LNTS 173.

[212] *Minority Schools in Albania (Advisory Opinion, 6 April 1935)* PCIJ Rep Series A/B, No 64; Spiermann (n 194) 368.

[213] ibid 19.

[214] ibid.

[215] *Dissenting Opinion by Sir Cecil Hurst, Count Michał Cezary Rostworowski and Demetre Negulesco, Minority Schools in Albania (Advisory Opinion, 6 April 1935)* PCIJ Rep Series A/B, No 64, 24-25.

The discrepancy in the PCIJ jurisprudence on non-discrimination did not go unnoticed by scholars.[216] Schwarzenberger pointed to the inconsistency between the formal understanding of equality in *Oscar Chinn* and the functional approach adopted a few years earlier in *Minority Schools*.[217] Further, the *Oscar Chinn* case lies in sharp contrast not only with PCIJ jurisprudence dealing with equality clauses, but also with *US National in Morocco* case, decided twenty years later by the ICJ. The prioritisation of different values by the ICJ and the PCIJ in *US Nationals in Morocco* and *Oscar Chinn* case is aptly summarised by Van Essen. In the former case,

> the International Court refused to take into account the implication of black market dollar transactions for the economic and monetary stability of the then Protectorate. In the Oscar Chinn case it was precisely the serious economic situation in the Belgian Congo that led the Permanent Court to recognise the right of the colonial authorities of taking measures to the detriment of an individual foreign businessman, notwithstanding the conventional regime of complete economic freedom and equality in the Congo Basin.[218]

3. Why limiting the study of non-discrimination to international economic law?

The focus of this thesis on non-discrimination clauses was justified by reference to the open-ended concept of equality. The concept of equality can accommodate different conceptions and thus enable the better understanding of law as a process and the role of the judge in such a decision-making process. However, a valid methodological question is why the scope of this thesis is limited to non-discrimination clauses in the field of international economic relations and does include non-discrimination rules in other areas of international law and

[216] Spiermann (n 194) 364-368.

[217] G Schwarzenberger, 'The principles and standards of international economic law' (1966) 117 RCADI 1, 51.

[218] JLF van Essen, 'A Reappraisal of Oscar Chinn' in FM van Asbeck *et al* (eds), *Symbolae Verzijl* (Martinus Nijhoff, The Hague 1958) 151-152. On the background of the case, see CJ Tams, 'Oscar Chinn case' MPEPIL (2007); on the limited legacy of *Oscar Chinn* in international investment law, see U Kriebaum, 'The PCIJ and the Protection of Foreign Investments' in CJ Tams and M Fitzmaurice (eds), *Legacies of the Permanent Court of International Justice* (Martinus Nijhoff, Leiden 2013) 159-160 and for two rare exceptions see *El Paso v Argentina*, Award [366] and *Merrill & Ring v Canada*, Award [215] emphasising that no enterprise 'can escape from the changes and hazards resulting from general economic conditions' and '[f]avourable business conditions and good-will are transient circumstances, subject to inevitable changes' respectively.

particularly international and European human rights law? However, limiting the scope of the present research to the study of non-discrimination jurisprudence in the field of international economic law as opposed to other field of public international law with equally rich case law (such as international human rights law) can be defended from both a *positive* (section 3.1) and *negative* (section 3.2) perspective.

3.1 Why international economic law?

From the positive perspective, non-discrimination in international economic law was selected as a case study because international economic relations constitute a fertile intellectual ground to explore the law's indeterminacy and the political function of adjudication. International economic relations are of pivotal importance in the contemporary, globalised market society. Whether or not one adopts the classic Marxist approach highlighting the preponderance of the *economic* over the *political*, it seems undeniable that economic relations largely shape social, legal and political behaviours and institutions.[219] In the words of Marx,

> legal relations as well as forms of the state are to be grasped neither from themselves nor from the so-called general development of the human mind, but rather have their roots in the material conditions of life.[220]

While the recent global and European economic and financial crisis have undoubtedly highlighted the importance of economic relations,[221] this is not a recent phenomenon. The

[219] The establishment of the Congo Free State for example by the Berlin Act for the purposes of guaranteeing and promoting free trade led by logical necessity to the imposition of colonial rule. Free trade presupposed and was dependant upon infrastructure, institutions, regulation, all absent from pre-colonial Congo, see M Craven, 'Between law and history: the Berlin Conference of 1884-1885 and the logic of free trade' (2015) 3 London Review of International Law, 31, 54-57.

[220] D McLellan (ed), *Karl Marx: Selected Writings* (2nd edition, OUP, Oxford 2000) 425. According to Marx, '[t]he sum total of these relations of production constitutes the economic structure of society, the real foundation, on which rises a legal and political superstructure and to which correspond definite forms of social consciousness', ibid, 425. Two caveats need to be made. First, 'Karl Marx and Friedrich Engels wrote amazingly little on the subject of international economics', R Gilpin, 'The Politics of Transnational Economic Relations' (1971) 25 International Organization 398, 400. Second, a dogmatic and monolithic endorsement of dialectic materialism could limit the horizons of international legal analysis, AC Cutler, 'Toward a radical political economy critique of transnational economic law' in S Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (CUP, Cambridge 2008) 199, 215. For a criticism of rigid and simplistic readings of the Marxist concepts of structure ('*grundlage*') and superstructure ('überlau') see M Godelier (translated by M Thom, *The Mental and the Material: Thought Economy and Society* (Verso, London 1986) 7-9.

emergence of the 'market economy' coincides with the development of the system of modern public international law.[222] Karl Polanyi in his ground breaking analysis of the causes of the Great Depression and the Second World War explained the economic, social and political mechanisms and historical processes through which the 'market society' was created:

> the development of the market system would be accomplished by a change in the organization of society itself. All along the line, human society had become an accessory of the economic system.[223]

Although it is hard to imagine a society without some form of functional market, the primacy of the market as the organisational and constitutive social institution is a characteristic of the industrial age.[224] According to Polanyi 'instead of economy being embedded in social

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[221] On the impact of the global financial crisis on international economic law see generally C Lim and B Mercurio (eds), *International Economic Law after the Global Crisis* (CUP, Cambridge 2015); G Sacerdoti, 'BIT Protections and Economic Crises: Limits to Their Coverage, the Impact of Multilateral Financial Regulation and the Defence of Necessity' (2013) 28 ICSID Review 351; J Trachtman, 'The International Law of Financial Crisis: Spillovers, Subsidiarity, Fragmentation and Cooperation' (2010) 13 JIEL 719; T Cottier *et al* (eds), International Law in Financial Regulation and Monetary Affairs (OUP, Oxford 2010); B de Meester, 'The Global Financial Crisis and Government Support for Banks : What Role for the GATS?' (2010) 13 JIEL 27; R Naimark, 'The Implications of the Financial Crisis for the Arbitration Community", (2009) 24 ICSID Review 83; E Norton, 'International Investment Arbitration and the European Debt Crisis", (2012) 13 Chicago Journal of International Law 291; A van Aaken and J Kurtz, 'Prudence Or Discrimination? Emergency Measures, The Global Financial Crisis And International Economic Law' (2009) 12 JIEL 859. Unlike the WTO dispute settlement system, the financial crises has generated important investment arbitrations; see eg *Poštová banka v Greece*, Award; *Ping An v Belgium*; *Marfin v Cyprus*; *Al-Warraq v Indonesia*, Award; *Rafat Ali Rizvi v Indonesia*, Jurisdiction.

[222] This of course is not a mere coincidence, A Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, Cambridge 2004) 13-28; J Fisch, *Die europäische Expansion und das Völkerrecht* (Steiner, Stuttgart 1984); M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (CUP, Cambridge 2001) 98-178; M Craven, 'Colonialism and Domination' in B Fassbender and A Peters (eds) *The Oxford Handbook of the History of International Law* (OUP, Oxford 2012) 862-889. On the relationship between military expansion, trade and the development of international law see also the excellent analysis of JT Gathii, *War, Commerce, and International Law* (OUP, Oxford 2010). Polanyi notes that '[f]rom the sixteenth century onward markets were both numerous and important. Under the mercantile system they became, in effect, a main concern of government; yet there was still no sign of the coming control of markets over human society', K Polanyi, *The Great Transformation: the Political and Economic Origins of our Time* (Beacon Press, Boston 2001) 57-58.

[223] Polanyi, ibid, 79. For a modern application of Polanyi's analysis see and C Joerges and J Falke (eds), *Karl Polanyi, Globalisation and the Potential of Law in Transnational Markets* (Hart, Oxford 2011) and A Bugra and K Agartan (eds), *Reading Karl Polanyi for the Twenty-First Century: Market Economy as a Political Project* (Palgrave Macmillan, NY 2007).

[224] For such a non-market society see eg L Baudin, *A Socialist Empire: The Incas of Peru* (D Van Nostrand Company, Inc, NY 1961).

relations, social relations are embedded in the economic system'.[225] Market economy generates intense clashes of values. As a result, very few can disagree with Schropp who argued that '[t]rade deals are inherently political in nature'[226] and Aaron Broches a veteran World Bank official who stated that '[q]uite obviously any agreement dealing with problems of foreign investment is politically sensitive'.[227] Therefore, the choice of the international trading system and the international investment regime to explore the political function of international adjudication needs little further explanation.

3.2 Why not analysing international human rights law?

From a negative perspective, although non-discrimination clauses are present in both the international human rights and the international economic regimes,[228] their ideological underpinnings are fundamentally different. This did not go unnoticed by Judge Tanaka in his Separate Opinion in the *South West Africa* case:

> the protection of human rights is not derived, as in the cases of the law of contracts and commercial and maritime transactions, from considerations of expediency by the legislative organs or from the creative power of the custom of a

[225] The EU experience also confirms Polanyi's thesis and highlights the inevitability of regulations safeguarding non-economic values V Brissimi, *The Interface between Competition and the Internal Market: Market Separation under Article 102 TFEU* (Hart, Oxford 2014) 116-117.

[226] SA Schropp, *Trade Policy Flexibility and Enforcement in the WTO: A Law and Economic Analysis* (CUP, Cambridge 2009) 205.

[227] A Broches, 'Development of International Law by the International Bank for Reconstruction and Development' (1965) 59 ASIL Proceedings 33, 35.

[228] See eg J Gerards, 'The Discrimination Grounds of Article 14 of the European Convention on Human Rights' (2013) 13 HRLR 99. For a comparative analysis see F Baetens, 'Discrimination on the basis of Nationality: Determining Likeness in Human Rights and Investment Law' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 279 *et seq*. Exceptionally investment tribunals have interpreted non-discrimination provisions of human rights law instruments, eg in *Goetz v Burundi I* the tribunal examined article 2(2) of the International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3 (ICESCR). The starting basis for the tribunal was that '[u]ne discrimination suppose un traitement différencié appliqué à des personnes se trouvant dans des situations semblables', however, *in casu* 'il n'est pas allégué par les requérants que les investisseurs belges requérants aient été traités plus mal que d'autres investisseurs se trouvant dans une situation similaire' *Goetz v Burundi [I]*, Award [121].

> community, but it already exists in spite of its more-or- less vague form. This is of nature *jus naturale* in roman law.[229]

Judge Altamira in his dissenting opinion in *Oscar Chinn* also distinguished – for interpretative purposes – treaties giving contractual form to the freedom, equality, and guarantees' and 'affording protection in the Congo to some minority of nationality, language, or religion present therein' on the one hand and treaties with an 'economic object of ensuring for the citizens of certain States in these African territories freedom to engage in al1 economic activities, and protection for their civil rights against the system of monopolies which had long characterized the financial policy of the colonizing countries'.[230] More recently Douglas concluded comparing international investment and human rigths law that

> investment treaty obligations of states are not coterminous with their human rights obligations. Human rights deserve a special status; they are inalienable because their protection is fundamental to the dignity of every human being.[231]

In like manner, in the WTO context the attempt to merge human rights with traditional trade disciplines has incurred considerable intellectual resistance, precisely because of the different ideological underpinnings.[232] Particularly, regarding the WTO, the interpretation of non-discrimination obligations is intrinsically linked to, and reveals the political and constitutional changes of the regime.[233]

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[229] *Dissenting Opinion of Judge Tanaka, South West Africa case (Ethiopia v South Africa, Liberia v South Africa) (Second Phase)* [1966] ICJ Rep 6, 296.

[230] *Dissenting Opinion of Judge Rafael Altamira y Crevea, The Oscar Chinn case, (United Kingdom v Belgium), Judgment,* PCIJ Series A/B No 63, 101.

[231] Z Douglas, *The International Law of Investment Claims* (CUP, Cambridge 2009) 36.

[232] The debate between Petersmann, Alston and Howse is both intense and illuminating: E-U Petersmann, 'Time for a United Nations "Global Compact" for Integrating Human Rights Into the Law of Worldwide Organizations: Lessons from European Integration' (2002) 13 EJIL 621; P Alston, 'Resisting the Merger and Acquisition of Human Rights by Trade Law: A Reply to Petersmann' (2002) 13 EJIL 815; R Howse, 'Human Rights in the WTO: Whose Rights, What Humanity? Comment on Petersmann' (2002) 13 EJIL 651; E-U Petersmann, 'Human Rights, International Economic Law and Constitutional Justice: A Rejoinder' (2008) 19 EJIL 955.

[233] See Howse (n 12).

III. TWO APPROACHES REGARDING THE ROLE OF THE STATE IN THE ECONOMY AND THEIR IMPLICATIONS FOR THE INTERPRETATION OF NON-DISCRIMINATION CLAUSES

In the previous section it was argued that WTO and international investment jurisprudence on non-discrimination constitute the ideal theoretical canvas to explore the nature of legal adjudication. In this section, it will be argued that the interpretation of non-discrimination clauses in international economic law is not an a-political and technocratic process. On the contrary, non-discrimination cases reveal how decision-makers select between different interpretations and effectively make choices which are related to, and influenced by their perceptions of the purpose of the WTO or the international investment regime. These different interpretative approaches of non-discrimination clauses are deeply political choices. Selecting one interpretation over the other presupposes and, at the same time, reveals a coherent theory about the proper role of the State constituting and regulating the market. Non-discrimination (due to its conceptual relation with equality) is able to accommodate different and even conflicting ideas. In the past, the focus has predominantly been placed on the impact that different legal and institutional arrangements regarding State intervention have on increasing or decreasing equality in the domestic[234] and international society[235]. The present research focuses on the *internal* value-pluralism and the different values that a single specialised regime of international law, such as international economic law, contains and expresses; under that prism it seeks to analyse the role of the adjudicator in relation to this value-pluralism. Koskenniemi observes

> The Congo Free State, a mandate or a trusteeship arrangement may, just like a global trading system or a Multilateral Agreement on Investment under a World Trade Organization (WTO), be used for freedom and for constraint.

[234] See generally T Piketty (translated by A Goldhammer), *Capital in the Twenty-First Century* (Harvard UP, Cambridge MA 2014).

[235] FJ Garcia, *Global Justice and International Economic Law: Three Takes* (CUP, Cambridge 2015); FJ Garcia *et al* (eds), *Global Justice and International Economic Law: Opportunities and Prospects* (CUP, Cambridge 2012); FJ Garcia, *Trade, Inequality, and Justice: Toward a Liberal Theory of Just Trade* (Transnational Publishers Ardsley, NY 2003).

> Administrative structures – whether those of sovereignty or internationalization – only marginally determine the policies for which they are used. We recognize their character only by reference to substantive ideals about the political good we wish to pursue. Here lies the difficulty. Institutions do not *replace* politics but *enact* them.[236]

Various conceptual perspectives or analytical themes have been put forward for understanding international trade and investment regimes: Sovereignty; international law fragmentation, 'trade and –' discourses in the WTO, the pro-investor/pro-State binary conceptualisation and public law approaches based on the celebre 'Right to Regulate' in international investment law. These conceptual approaches are different in scope. However, they all systematically fail to explain the sharp inconsistencies and internal contradictions of non-discrimination case law. Such theoretical approaches camouflage rather than reveal the value choices and the policy prescriptions underpinning specific interpretative methodologies and outcomes.

The analysis of international investment treaties and jurisprudence from the perspective of the concept of Sovereignty is sterile. From a strictly positivist perspective, in the first case before the PCIJ,

> [t]he Court decline[d] to see in the conclusion of any Treaty by which a State undertakes to perform or refrain from performing a particular act an abandonment of its sovereignty. No doubt any convention creating an obligation of this kind places a restriction upon the exercise of the sovereign rights of the State, in the sense that it requires them to be exercised in a certain way. But the right of entering into international engagements is an attribute of State sovereignty.[237]

From a more theoreotical perspective, as Sarooshi explained, Sovereignty in international law has no fixed meaning; it is an essentially contested concept. It is the prioritisation of different

[236] Koskenniemi (n 222) 177.

[237] *Case Concerning the SS Wimbledon (UK v Japan) (17 August 1923)*, PCIJ Series A No 1, 15, 25; 'It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the WTO Agreement', AB, *Japan – Alcoholic Beverages* [15].

values that determines Sovereignty's normative content.[238] When States delegate sovereign powers to international organisations, the latter become the *fora* where Sovereignty and different sovereign values are contested. In a similar vein, investment tribunals perform an analogous function. Given the variety of values and the pluralism in the approaches that States adopt regarding the economic, development and regulatory policies, Sovereignty as a concept is not particularly useful to explain diverging approaches to the interpretation of non-discrimination rules. To be more precise, a strict interpretation of National Treatment, based on a purely economic test on likeness, considerably limits the power of the State to intervene in the economy and thus promotes *laissez-faire* in economic policy. As such, a *laissez-faire* approach is not against the idea of State Sovereignty. For certain States, extensive regulation and limitations upon economic freedom is indeed a sovereign value. In the US, a liberal approach, economic liberalism, or, in more sophisticated terms, 'corporate economic autonomy' is a sovereign value; and deviation from 'corporate economic autonomy', rather than adherence to it, would be conceived as a violation of Sovereignty.[239]

The 'trade and –' debates ('trade and the environment',[240] 'trade and human rights',[241] 'trade and labour rights'[242] and, more recently, 'trade and culture'[243]) are another (perhaps not

[238] See D Sarooshi, *International Organisations and the exercise of their sovereign powers* (OUP, Oxford 2005).

[239] D Sarooshi, 'Sovereignty, Economic Autonomy, the United States, and the International Trading System: Representations of a Relationship' (2004) 15 EJIL 651.

[240] See H Horn and PC Mavroidis, 'Environment, Trade, and the WTO Constraint: BoP Till You Drop?' (2009) 62 Revue hellénique de droit international; 1-63; S Charnovitz, 'The WTO's Environmental Progress' (2007) 10 JIEL 685.

[241] T Cottier *et al* (eds), *Human Rights and International Trade* (OUP, Oxford 2005); see also ATF Lang, 'Re-thinking Trade and Human Rights' (2007) 15 Tulane Journal of International and Comparative Law 335.

[242] C Kaufmann, *Globalisation and Labour Rights: The Conflict Between Core Labour Rights and International Economic Law* (Hart, Oxford 2007); R Howse, *et al*, 'The World Trade Organization and Labour Rights: Man Bites Dog' in VA Leary and D Warner (eds), *Social Issues, Globalisation and International Institutions* (Martinus Nijhoff, Leiden 2006) 157-232.

[243] T Voon, 'UNESCO and the WTO: a Clash of Cultures?' (2006) 55 ICLQ 635.

necessarily the most useful)[244] expression of the same conceptual scheme. This tension is reflected and decisively shapes the WTO case law on non-discrimination. As at the level of general public international law, the clash of different values finds expression in fragmentation discourses within the specialised regime of WTO law or international investment arbitration. This is precisely reflected in the evolution of the WTO jurisprudence on non-discrimination. Lang aptly summarises how the WTO case law on non-discrimination reflects two rather different ideological approaches:

> the core choice has been between a school of thought that sees non-discrimination primarily as a norm of anti-protectionism and another school that views non-discrimination as competitive neutrality. While these competing interpretations may in many cases produce similar results, they proceed on the basis of very different visions of the proper role of WTO dispute settlement. To put the contrast most simply, where the former sees the primary purpose of the WTO as disciplining governments that seek to 'cheat' by providing an unfair competitive advantage to home grown products, the latter sees the WTO as engaged in a much broader project of disciplining regulatory design more gen- erally, by ensuring that all competitive disadvantages suffered by imports as a result of regulatory measures are carefully scrutinized and strictly justified.[245]

In the regime of investment-arbitration an additional layer of complexity is added, given the different nature of the parties to a dispute (investor(s) v States). It is often suggested that divergence in interpretation of investment standards can be attributed to arbitrators being *pro-investor* or *pro-state*. Such conceptual framework is often employed by academics, investors, States and even by investment tribunals.[246] The tribunal in *Winstershall v*

[244] The trade linkages discourse can also constitute a distortive analytical prism, see ATF Lang, 'Reflecting on 'Linkage': Cognitive and Institutional Change in the International Trading System' (2007) 70 MLR 523, 530-541.

[245] Lang (n 15).

[246] M Waibel and Y Wu, 'Are Arbitrators Political?' (January 2017) 21, available at http://www-bcf.usc.edu/~yanhuiwu/arbitrator.pdf; A Newcombe and L Paradell, *Law and Practice of Investment Treaties, Standards of Treatment* (Kluwer Law International, AH Alphen aan den Rijn 2009) 113-116; S Montt, *State Liability in Investment Treaty Arbitration, Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing, Oxford 2009) 3-4. 'Argentina also argues against a pro-investor interpretation of the BIT. By protecting investors and investment broadly, the treaties would come to be regarded as guarantees and assurances, eliminating the notion of risk and venture as stated by the tribunal in *Tecmed*', *Azurix v Argentina*, Award [291].

Argentina described the approach followed in *SGS v Pakistan*[247] and *SGS v Philippines*[248] in relation to the interpretation of umbrella clauses as 'avowed pro-State approach' and 'avowedly pro-investor approach' respectively.[249] However, this is a simplistic and ultimately unpersuasive theoretical exegesis.[250] As Paparinskis noted (paraphrasing Crawford) such unbending dichotomies mean that 'something has almost always gone wrong', in particular, 'in the level of analysis'.[251] Drawing on his vast experience, one leading academic and arbitrator recently emphasised that:

> [m]any arbitrators with whom this writer has had the pleasure of working are neither in one camp or the other, having only in mind to find out who is right and who is wrong in the light of the facts of the case, the applicable law and the final attainment of justice in the resolution of the dispute.[252]

In a less nuanced, but certainly more controversial, manner Schultz declares:

> All in all, is it good that investors are granted the protection they have, or should they have less, or perhaps more? To a large extent, at heart this is merely a debate between us, on the left, and them, on the right[253]

Other conceptualisations of the international investment arbitration have also been put forward. For example, Van Harten suggests four possible analytical approaches which can be grouped into two main categories: a reciprocal model and a regulatory conception of international investment arbitration. In the first category, investment arbitration could be seen

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[247] *SGS v Pakistan*, Jurisdiction.

[248] *SGS v Philippines*, Jurisdiction.

[249] *Wintershall v Argentina*, Award [89].

[250] For criticism on the pro-investor/pro-state dichotomy as simplistic see CA Rogers, 'The Politics of International Investment Arbitrators' (2013) 12 Santa Clara Journal of International Law 223, 238-239; FO Vicuña, 'Reports of [*Maffezini's*] demise have been greatly exaggerated' (2012) 3 JIDS 299, 300; F Ortino, 'The investment treaty system as judicial review: Some remarks on its nature, scope and standards' (available at SSRN) 2, 28.

[251] M Paparinskis, 'MFN Clauses and International Dispute Settlement: Moving beyond Maffezini and Plama?' (2011) 26 ICSID Review 14, 15.

[252] Vicuña (n 250) 301.

[253] T Schultz, 'The function of investment arbitration' in Z Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, Oxford 2014) (forthcoming).

as substantially similar to commercial arbitration,[254] or to state-to-state public international law adjudication. In the second category, investment arbitration is analysed through the perspective of human rights or by analogy to domestic public law. Recently, seeing investment arbitration through the prism of public or administrative law became very popular.[255] Despite the fact that all these approaches constitute interesting theoretical insights in international investment law, and leaving aside the question of their validity, one has to admit that they fall sort of explaining the inconsistencies in the jurisprudence of investment tribunals; and, in particular, regarding non-discrimination clauses. The vague formulation of non-discrimination standards and the inherent indeterminacy of the concept of equality allows the arbitrator to reach different results when interpreting the same clause.

Similarly, investment arbitration can be conseptualised as a delicate exercise of balancing public and private interests.[256] However, this conceptualisation is not satisfactory because it simplistically equates the robust protection of investors' rights with the promotion of private interests. This can very well be in the public interest, depending on the ideological views on the role of the State in the economy one endorses. Public interest (and its negative counterpart private interest) is naturally a heavily-contested issue.

[254] According to the US Supreme Court, 'the question before us is who—court or arbitrator—bears primary responsibility for interpreting and applying Article 8's local court litigation provision […] In answering the question, we shall initially treat the document before us as if it were an ordinary contract between private parties. Were that so, we conclude, the matter would be for the arbitrators. We then ask whether the fact that the document in question is a treaty makes a critical difference. We conclude that it does not', *BG Group PLC v Republic of Argentina*, 572 US _ (2014) at p 6.

[255] Eg A Kulick, *Global Public Interest in International Investment Law* (CUP, Cambridge 2012); SW Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010); G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2007).

[256] See eg C Henckels, 'Balancing Investment Protection and the Public Interest: the Role of the Standard of Review and the Importance of Deference in Investor-State Arbitration' (2013) 4 Journal of International Dispute Settlement 197. The public interest discourse is not devoid of analytical perils nor isolated from a hidden agenda, J Paulsson, 'The Public Interest in International Arbitration' (2012) 106 ASIL Proceedings 300, 302.

Finally, the 'right to regulate', although undoubtedly *en vogue*;[257] lacks analytical rigour given that its normative content is – at best – imprecise and its analytical value very limited. Regulation is usually conceived as a synonym of state intervention in support of particular non-economic values such as the protection of the environment and public health in a *particular* way. As explained above, regarding the concept of 'Sovereignty', this is simplistic because it conflates a broader and neutral *concept* with a particular *conception.*[258] At the same time, if regulation is understood as comprising any possible direction that State's policies can take, it is clear that it is too general to be meaningful from a conceptual perspective. As a result, the concept is either too broad to constitute a useful analytical perspective or too narrow to capture the complex and multifaceted phenomenon of governance. This also applies to the balancing exercise under the doctrine of proportionality.[259] Similar conceptions based on the old doctrine of 'police powers' are equally sterile.[260] Finally, if the 'right to regulate' is conceived as a synonym or another reiteration of the classic *Lotus* principle,[261] which is an expression of a 19th- century

[257] See generally A Titi, *The Right to Regulate in International Investment Law* (Nomos, Baden-Baden 2013).

[258] See *supra* section 2.2.1.

[259] S Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 Int J of Constituional Law 468; cf M Khosla, 'Proportionality: An Assault on Human Rights? A Reply' (2010) 8 Int J of Constitutional Law 298; S Tsakyrakis, 'Proportionality: An Assault on Human Rights? A Rejoinder to Madhav Khosla' (2010) 8 Int J Constitutional Law 307; M Klatt and M Meister, 'Proportionality-a benefit to human rights? Remarks on the I I·CON controversy' (2012) 10 Int J Constitutional Law 687.

[260] JE Viñuales, 'Sovereignty in Foreign Investment Law' in Z Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, Oxford 2014) 317, 326 *et seq*. *Sedco Inc. v. National Iranian Oil Company* (1985) 9 Iran–US CTR 248, 275.

[261] According to the PCIJ: 'The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed', *The Case of the SS "Lotus", (France v Turkey)*, Judgment No 9, 1927, PCIJ series A, No 10, 18; 'It has often been argued, not without reason, that the *"Lotus"* test is too liberal', *Dissenting Opinion of Judge ad hoc Van Den Wyngaert, Arrest Warrant of 1 I April 2000 (Democratic Republic of the Congo v Belgium*), Judgment, [2002] ICJ Rep 3, 169 [51]; see also Higgins (n 47) 77.

liberalism projected to the international plane[262] is outdated,[263] tautological and thus of limited value as an analytical perspective. As Flett aptly put it, '[t]he problem, of course, is to distinguish between the exercise of regulatory autonomy that is acceptable, and that which is not'.[264]

The analytical approach adopted herein is centered around two fundamentally different conceptual perspectives regarding the appropriate regulatory role of the State in the economy, which critically influence the interpretation of non-discrimination clauses in international economic law. In short, all the interpretative questions and legal debates regarding the construction of particular non-discrimination obligations in the WTO covered agreements and international investment treaties revolve around the answer given to a fundamental, yet, basic question: what is the appropriate role of the State in the economy for wealth-creation, development and prosperity. This is after all the *telos* of all economic arrangements. A centrally-planned economy under asphyxiating State control and an anarchic market without any State intervention represent the two extreme positions in relation to the role of the State in the economy.[265] However, they occupy the two extreme points of a *continuous* spectrum.[266] Having said that, a binary conceptualisation regarding regulatory role of State in the economy is adopted for analytical purposes. The dialectic, two-side conceptual approach could be traced back to Heraclitus or Protagoras who argued that 'there

[262] On liberalism and the ideological routes of international law see Koskenniemi (n 222) .

[263] Judge Simma described the *Lotus* principle as 'anachronistic, extremely consensualist vision of international law', *Declaration of Judge Simma, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion*,[2010] ICJ Rep 403, 479 [3].

[264] J Flett, 'WTO Space for National Regulation: Requiem for a Diagonal Vector Test' (2013) 16 JIEL 37, 44.

[265] As it has been correctly pointed out even when the State retreats from the economy through privatisation, this it is always present in the market as a regulator, see C Redgwell, 'Privatisation and Environmental Regulation: Some General Observations' (1997) 15 J Energy & Nat Resources L 33

[266] In all economic theories, equality considerations play a major role, see S O'Hanlon, 'Equality, Entitlement, and Efficiency: Dworkin, Nozick, Posner, and Implications for Legal Theory' (2009-2010) 8 Cardozo Public Law, Policy & Ethics Journal 31; DA Desierto, *Public Policy in International Economic Law: The ICESCR in Trade, Finance, and Investment* (OUP, Oxford 2015) 40-67.

are two arguments on every subject'[267] and developed the method of 'two-sided debate' ('*dissoi logo*i').[268] 'Doubling' is a recurring theme and 'distinguishing feature' of critical approaches to international law, 'demonstrat[ing] how legal principles are always subject to re-interpretation because they usually contain contradictory impulses'.[269]

Despite the differences between the WTO and the international investment regime (which will be analysed in the next section), the two regimes share a fundamental – and for the purposes of the present research, more important – characteristic. Both regimes incorporate various values and, ultimately, they are open to different interpretations. While the general consensus (the so-called 'Washington consensus')[270] for a market economy is undeniable (especially after 1990),[271] disagreements about the State's regulatory intervention and market autonomy do exist and are fundamental in contemporary political and economic discourse. As Sarooshi notes

> [t]here is broad acceptance of a general macro-economic position that espouses the importance of the free market in achieving competitiveness and, so the argument runs, generating maximum productivity and economic growth within an economy. Within this general approach, however, there can be said to exist a spectrum of more specific approaches. At one end of the spectrum is a complete laissez-faire approach that dictates little or no government intervention in the market in order to ensure that the government does not answer the basic economic questions – such as what is to be produced, how is it to be produced, how much is produced, and for whom is it to be produced. At the other end of our spectrum is an approach that places considerable emphasis on preventing market externalities (such as corporate scandals and pension scheme difficulties) and as such mandates

[267] WKC Guthrie, *The Sophists* (CUP, Cambridge 1977) 24.

[268] E Schiappa, *Protagoras and Logos: A Study in Greek Philosophy and Rhetoric* (2nd edition, University of South Carolina Press, Columbia SC 2003) 198.

[269] Cass (n 86) 363-364.

[270] The term was coined by John Williamson, see J Williamson, 'A Short History of the Washington Consensus' in N Serra and JE Stiglitz (eds), *The Washington Consensus Reconsidered: Towards a New Global Governance* (OUP, Oxford 2008) 14. Dani Rodrik added ten additional items to Williamson's original list, including 'adherence to the WTO disciplines', D Rodrik, *One Economics, Many recipes: Globalization, Institutions, and Economic Growth* (Princeton UP, Princeton NJ 2007) 17.

[271] See generally TL Friedman, *The Lexus and the Olive Tree* (Farrar Straus and Giroux, NY 2000) and the more controversial, F Fukuyama, *The End of History and the Last Man* (Free Press, NY 1992).

> the importance of the market – and for our purposes corporations – operating within a significant institutional, or at least regulatory, framework.[272]

One approach within this generally accepted framework advocates for a strong and interventionist role of the State;[273] another, different approach, calls for minimum intervention, *laissez-faire* economic liberalism and corporate autonomy.[274] Desierto portrays the conflicting views on the role of the State as a *Hayek v Keynes* debate.[275] It is the perennial debate on how wealth is created, whether development essentially depends on and presupposes state actions or requires the absence of state intervention and private individuals' initiative. It is the answer to that fundamental and ultimately unsolvable question within the strict confines of the legal framework dilemma that shapes the interpretation of the vague and open-ended non-discrimination provisions. In international investment arbitration, the same binary conceptualisation is adopted. The regime of international investment arbitration is based on a few, basic, vaguely worded provisions mainly oriented towards the protection of certain aspects of property rights of foreign investors. The nearly universal acceptance of the same paradigm with the emergence of South-to-South BITs is sufficient to demonstrate that the international legal framework for the protection of foreign investment is able to accommodate different theories and ideologies regarding the role of the State in the economy. On the one hand, the endorsement of the value of *laissez-faire* entails a strict interpretation and rigid application of the non-discrimination rules. On the other hand, the emphasis placed

[272] Sarooshi (n 238) 656-657.

[273] This constituted the 'official' economic ideology of certain States: France and *dirigisme* is a classic example, D Patterson and A Afilalo, *The New Global Trading Order: The Evolving State and the Future of Trade* (CUP. Cambridge 2008) 45-56.

[274] 'The great and chief end, therefore, of men's uniting into commonwealths, and putting themselves under government, is the preservation of their property', J Locke, *Two Treatises of Government: In the Former, The False Principles, and Foundation of Sir Robert Filmer, and His Followers, Are Detected and Overthrown. The Latter Is an Essay Concerning The True Original, Extent, and End of Civil Government)* (1689) [124]; see also F Weis, 'The Principle of Non-Discrimination in International Economic Law: A Conceptual and Historical Sketch' in I Buffard *et al* (eds), *International Law between Universalism and Fragmentation Festschrift in Honour of Gerhard Hafner* (Martinus Nijhoff, Leiden 2008) 269, 275.

[275] Desierto (n 266) 40-60.

on development through state intervention presupposes that a more permissive interpretation of non-discrimination disciplines is adopted.[276]

[276] In human rights parlance one could speak of a certain 'margin of appreciation', see F Fontanelli, 'Whose Margin is it? State Discretion and Judges' Appreciation in the Necessity Quicksand' in F Fontanelli, *et al* (eds), *Shaping Rule of Law through Dialogue: International And Supranational Experiences*, (European Law Publishing, Groenigen, 2009) 377-412; A Legg, *The Margin of Appreciation in International Human Rights Law: Deference and Proportionality* (OUP, Oxford 2012).

IV. DIFFERENCES BETWEEN INTERNATIONAL TRADE AND INVESTMENT REGIMES

Before moving to the application of the theoretical framework to non-discrimination case law in the WTO (Chapter III) and international investment arbitration (Chapter IV), a final caveat must be made. The WTO and international investment arbitration cannot of course simply be equated, and this section explains the following four key differences between the international trading system and the international investment regime: (i) the different philosophy of international trade and investment law; (ii) the broad consensus in favour of free trade, which underpins the international trading system, as opposed to the increasingly controversial idea of international protection of foreign investment; (iii) the right of private, non-state entities to have recourse to international dispute settlement mechanisms (arbitration), as opposed to the more traditional state-centric WTO DSS, and (iv) the plethora of similarly (although not identically) worded non-discrimination clauses in various investment agreements in contrast with a single set of non-discrimination provisions in the WTO covered agreements. These differences are important and justify the separate treatment of WTO jurisprudence on non-discrimination (in Chapter III) and international investment case law (in Chapter IV). Nonetheless, they do not alter the fundamental binary conceptualisation which permeates the international economic regime: the inherent and insolvable tension between *state intervention v free market* approaches in economic governance.

The first fundamental difference between the international trade system and international investment regime is their different ideological foundation. The WTO aims at 'overall welfare, efficiency, liberalization, state-to-state exchanges of market access, and trade opportunities—not individual rights'.[277] International investment agreements are 'about

[277] N DiMascio and J Pauwelyn, 'Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?' (2008) 102 AJIL 48, 54. Although consensus exists that this question regarding the telos of the WTO should be further explored in the scholarship, Lang (n 244) 541; S Cho, 'Linkage of Free Trade and Social Regulation: Moving Beyond the Entropic Dilemma' (2005) 5 Chicago Journal of International

protection, not liberalization, and about individual rights, not state-to-state exchanges of market opportunities'.[278] Todd Weiler points at another ideological difference between the international trade and investment regimes:

> whereas the GATT and failed ITO were largely the product of an international policy consensus in favour of state planning – both in terms of managed domestic economies and a managed global economy – the treaty programmes that bequeathed to us today's bilateral and multilateral investment promotion and protection agreements were the product of officials and entrepreneurs who occupied the last liberal redoubts in the policy-making communities of the Post-War West.[279]

Weiler continues his analysis with specific reference to the principle of non-discrimination.[280] The second major difference is that, unlike international trade, where there is a broad consensus among economists regarding the benefits of free trade – at least *in abstracto*[281] – the conceptualisation of the international investment regime becomes more complicated by the absence of a consensus on whether investment agreements actually increase investment in developing countries or not. Some empirical studies have found little or no impact of international investment agreements on actual investment flows,[282] others have reached the

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Law 625, 627. "economists have excluded from consideration various important non-economic objectives of cooperating in trade affairs, such as ideational, power-oriented, and constitutionalist explanations for trade contracts", S Schropp, *Trade Policy Flexibility and Enforcement in the World Trade Organization* (CUP, Cambridge 2009) 177.

[278] ibid 56.

[279] Weiler (n 106) xliv. On the different versions of regulatory freedom in the WTO and international investment arbitration see also DA Desierto, 'Public Policy in International Investment and Trade Law: Community Expectations and Functional Decision-making'(2014) 26 Florida J Int L 51, 117-133.

[280] Weiler (n 106) 434.

[281] See also the 1975 Helsinki Final Act: 'The participating States… recognize the beneficial effects which can result for the development of trade from the application of most-favoured-nation treatment; will encourage the expansion of trade on as broad a multilateral basis as possible, thereby endeavouring to utilize the various economic and commercial possibilities', 1975 Final Act of the Helsinki Conference; KJ Partsch, 'The Final Act of Helsinki and Non-discrimination in International Economic Relations' (1985) 45 ZaörV 1.

[282] 'The evidence is that BITs have been at least marginally successful in increasing investment flows in some cases', KJ Vandevelde, 'The Economics of Bilateral Investment Treaties' (2000) 41 Harvard International Law Journal 469, 498; B Hoekman and K Saggi, 'Multilateral Disciplines for Investment-related policies?' in P Guerrieri and HE Scharrer (eds), *Global Governance, Regionalism, and the International Economy* (Nomos, Baden-Baden 2000).

opposite conclusion.[283] However, the impact of BITs on foreign direct investment might not be the only parameter to be taken into consideration.[284] The key factor in attracting investments and fostering economic development is 'mature institutions: a tradition of efficient and reliable governance. The rule of law is a part of such an environment, and the network of BITs contributes to the rule of law'.[285] For that reason, the so far inconclusive research on the economic impact of investment agreements provides only a fraction of the whole picture.[286] Investment agreements contain a set of a few fundamental legal standards that guarantee a basic level of protection of private property rights, provide a certain degree of economic freedom, secure a level playing field among different economic actors, and ensure respect for the Rule of Law. These basic substantive guarantees are coupled with access to effective, efficient, neutral and unbiased international *fora*, usually in exclusion of domestic courts. This framework is in line with recent research in political economy suggesting that the key to economic development is the quality of nationality institutions.[287]

[283] E Neumayer and L Spess, 'Do Bilateral Investment Treaties increase Foreign Direct Investment to Developing Countries?' in KP Sauvant and LE Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* (OUP, Oxford 2009) 225, 248; P Egger and M Pfaffermayr, 'The Impact of Bilateral Investment Treaties on Foreign Direct Investment' (2004) 32 Journal of Comparative Economics 788. Another study found that BITs concluded that BITs concluded by the US had a positive effect on investment, but BITs from other OECD countries did not, JW Salacuse and NP Sullivan, 'Do BIT really work? An Evaluation of Bilateral Investment Treaties and Their Grand Bargain' (2005) 46 Harvard International Law Journal 67. Other authors conclude that, although in general BITs increase FDI, States appearing before ICSID tribunals experience substantial loses in FDI, T Allee and C Peinhardt, 'Contingent Credibility: The Impact of Investment Treaty Violations on Foreign Direct Investment' (2011) 65 International Organization 401, 429.

[284] For a critical assessment of the international investment regime see BA Simmons, 'Bargaining over BITs, Arbitrating Awards: The Regime for Protection and Promotion of International Investment' (2014) 66 World Politics 12.

[285] J Paulsson, 'The Power of States to Make Meaningful Promises to Foreigners' (2010) 1 Journal of Int Dispute Settlement 341, 346.

[286] ibid.

[287] See in more detail *infra* Chapter IV, Section II.

Perhaps the main difference between the two regimes lies in their institutional structure.[288] WTO adjudication takes places in a highly institutionalised context of an international organisation. The WTO Panels and the AB strive to strike the 'institutional balance' in order to assert and promote their judicial role.[289] The dispute settlement mechanisms of the WTO and international investment regime are fundamentally different. Irrespective of whether investment arbitration represents a revolutionary *sui generis* depart from established paradigms of public international law,[290] or constitutes a product of traditional international legal techniques,[291] it is undeniable that the principal difference between the WTO DSS and the dispute settlement provisions of investment agreements is that the former is open only to states, whereas the latter is accessible by non-state entities as well.[292] This perhaps reflects the different nature of *substantive* rights under the WTO 'covered agreements' compared to *substantive* rights under international investment agreements. While 'the WTO Agreement is an international agreement, in respect of which only national governments and separate customs territories are directly subject to

[288] There is an important systemic difference between the WTO and international investment arbitration: 'the WTO, unlike the ICSID, is much more than just a dispute settlement system: The WTO possesses an important institutional element that has the capacity to formulate and apply systemic values', D Sarooshi, 'Investment Treaty Arbitration and the World Trade Organization: what role for systemic values in the resolution of International Economic Disputes?' (2014) 49 Texas Int L J 445, 446.

[289] AB, *India – Quantitative Restrictions* [105]; see also AB, *Turkey – Textiles* and Panel, *Turkey – Textiles.*

[290] J Paulsson, 'Arbitration without Privity' (1995) 10 ICSID Review 232, 256; Z Douglas, 'The hybrid foundations of Investment Treaty arbitration' (2003) 73 BYIL 151, 152-153; A Roberts, 'Clash of Paradigms: Actors and Analogies Shaping the Investment Treaty System' (2013) 107 AJIL 45, 94.

[291] M Paparinskis, 'Analogies and Other Regimes of International Law' in Z Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory Into Practice* (OUP, Oxford 2014) 73, 73.

[292] Sarooshi (n 239) 462-463. For example the AB remarked that '[i]t may be well to stress at the outset that access to the dispute settlement process of the WTO is limited to Members of the WTO', AB, *US – Shrimp* [101]. On the 'hybrid nature' of investment arbitration see Douglas (n 290).

obligations',[293] international investment agreements (at least according to one view) create rights for individual investors.[294]

WTO Panels and the AB are called to interpret the non-discrimination provisions of the *same* agreement, usually the GATT. On the contrary, different investment tribunals rarely are called to interpret the same BIT. This poses a difficulty in the context of the present research. Not only the difference in the wording of the clause providing for non-discriminatory treatment could result in different interpretative outcomes by applying the 'ordinary meaning' criteria under article 31 of the VCLT;[295] but also the differences in other provisions of the BIT, such as the preamble or other clauses could decisively affect the determination of the 'object and purpose' of the agreement or change the understanding of the 'context' of the provision – the purpose and context also being important interpretative criteria under the VCLT methodology.[296] However, it has been persuasively suggested that the web of thousands of BITs constitutes a more or less uniform qua-multilateral legal framework, rather than an anarchic and unprincipled chaotic universe.[297] In particular, non-discrimination clauses are with a few exceptions similarly worded and investment tribunals

[293] Panel, *Japan – Film* [10.52].

[294] According to an investment tribunal, '[t]he objective purpose of such treaty provisions, which confer independent third party rights on investors', *RosInvestCo v Russia*, Jurisdiction [153]; claimants 'rights under the BIT, the breach of which is the cause of action in these proceedings', *El Paso v* Argentina, Award [551]; *cf* the tribunal in *Lowen v USA* holding that 'claimants are permitted for convenience to enforce what are in origin the rights of Party states', *Lowen v USA* [233]; *ADM v Mexico* [171]; *Occidental v Ecuador*, Judgment [19]–[22]. See generally A Gourgourinis, 'Investors' Rights Qua Human Rights? Revisiting the 'Direct'/'Derivative' Rights Debate' in M Fitzmaurice and P Merkouris (eds), *The Interpretation and Application of the European Convention of Human Rights: Legal and Practical Implications* (Martinus Nijhoff, Leiden 2013) 147; F González de Cossío, 'Investment Protection Rights: Substantive or Procedural?' (2011) 26(2) ICSID Review 107. On the position of the individual in the international legal system, see the definitive monograph: K Partlett, *The Individual in the International Legal System: Continuity and Change in International Law* (CUP, Cambridge 2011).

[295] *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, [1999] ICJ Rep 1045, 1060 [20]; *Case concerning the Territorial Dispute (Libyan Arab Jamahiriya v Chad)*, Judgment [1994] ICJ Rep 6, 21-22 [41].

[296] See *Reservations to the Convention of Genocide*, Advisory Opinion [1951] ICJ Rep 15, 15-30.

[297] S Schill, *The Multilateralization of International Investment Law* (CUP, Cambridge 2009) 15 *et seq*.

have correctly ruled that minor differences in wording are without any practical effect.[298] Ascertaining the purpose of investment agreements for interpretative purposes has also shown to be elusive, further proving the value of the structural indeterminacy thesis. The different conceptions adopted by investment tribunals is analysis *infra* in Chapter IV, section II. Despite these important differences, it is the main ideological tension between *state intervention* and *free market* approach that critically influences the interpretation of non-discrimination in the WTO and international investment arbitration.

[298] See eg *Parkerings v Lithuania*, Award [227].

V. INTERIM CONCLUSIONS

The second chapter explained the reasons why this thesis focuses on non-discrimination in international economic law. It was shown (also with reference to the jurisprudence of the PCIJ) that non-discrimination clauses contained in international agreements are conceptually linked to equality. As a result, since equality is a particularly open-ended concept, studying the jurisprudence of international courts and tribunals on non-discrimination is appropriate to explore the nature of international adjudication and the role of the adjudicators. At the same time, limiting the scope of the analysis to non-discrimination clauses of international *economic* agreements is not only in line with the pivotal role that economic relations play in shaping social, political and institutional relations, but also with the stark and sharp ideological differences regarding the role of the State in the economy, which highlight the choices made by adjudicators and reveal their discretion.

CHAPTER III.
NON-DISCRIMINATION IN LAW OF THE WORLD TRADE ORGANIZATION

I. INTRODUCTION

The aim of this chapter is to demonstrate that international trade rules on non-discrimination such as the ones contained in the GATT, GATS, TBT and SPS Agreements of the WTO[299] are inherently indeterminate, and open to different interpretations.[300] This will be demonstrated through a detailed analysis of the inconsistencies and shifts in the WTO jurisprudence. As explained in Chapters I and II, the divergent interpretative approaches adopted by the WTO Panels and the AB in relation to key non-discrimination disciplines are determined by and reflect the prioritisation of different values and ideologies. The WTO jurisprudence on non-discrimination illustrates both the structural indeterminacy of substantive non-discrimination WTO rules and the discretion accorded to the WTO DSS. From a methodological perspective this chapter (together with Chapter IV embarking in the same exercise in relation to non-discrimination jurisprudence in international investment arbitration) will serve as a conceptual bridge between the theoretical framework developed in

[299] General Agreement on Trade in Services (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1B, 1869 UNTS 183 (GATS); Agreement on Technical Barriers to Trade (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1868 UNTS 120 (TBT); Agreement on the Application of Sanitary and Phytosanitary Measures (adopted 15 April 1994, entered into force 1 January 1995) Marrakesh Agreement Establishing the World Trade Organization Annex 1A, 1867 UNTS 493 (SPS).

[300] Articles I, III and XX GATT, II, XIV and XVII GATS, article 2.1 TBT and 2.3 and 5.1 TBT do not exhaust the universe of non-discrimination obligations in the WTO covered agreements. Other WTO agreements, such as the Anti-dumping Agreement and the plurilarateral agreement on Government procurement (GPA) also contain non-discrimination obligations, which due to space constraints and the very limited relevant case law will not be examined, see K Dawar, 'The WTO Government Procurement Agreement: The Most-Favoured Nation Principle, the GATS and Regionalism' (2015) 42 Legal Issues of Economic Integration 257; Y Rovnov, 'The Relationship between the MFN Principle and Anti-Dumping Norms of the WTO Law Revisited' (2015) 49 JWT 173; H Mahnche, 'Applying the MFN Principle to WTO Anti-dumping Law: An Opportunity for Curbing the Use of Anti-dumping Measures' (2014) 41 Legal Issues of Economic Integration 169.

Chapters I and II and the role of institutional characteristics and suggested procedural arrangements analysed in the final chapter of this thesis (Chapter V).

II. THE SUBSTANTIVE INDETERMINACY OF WTO NON-DISCRIMINATION RULES AND THE DISCRETION ACCORDED TO THE WTO DISPUTE SETTLEMENT SYSTEM

After the Second World War, and in response to the economic crisis that predated it, the international community put in place a new economic world order. One of the main constitutional features of the new economic world order would be the International Trade Organization (ITO). However, the ITO never came into existence and until the creation of the WTO in 1995, the GATT was applied on a provisional basis. Ruggie convincingly argued that the architecture of the post-war international trading system was based on a compromise between two extremes. The central idea was, according to Ruggie, to

> manoeuvre between these two extremes and to devise a framework which would safeguard and even aid the quest for domestic stability without, at the same time, triggering the mutually destructive external consequences that had plagued the interwar period.[301]

As a result, '[a]mong post-war planners, the dominant ideological orientation was not classical economic liberalism, but *embedded liberalism*, which combined limited and qualified support for free trade and with commitment to large-scale state interventionism'.[302] In that context, Lang highlighted that 'we must not lose sight of the multiple and conflicting ideological traditions which have shaped the trade regime over its history'.[303] The gradual departure from the 'embedded liberalism' paradigm towards neo-liberalism in the 1980s and 1990s demonstrates that the institutional architecture and the legal rules of the world trading

[301] JG Ruggie, 'International regimes, transactions, and change: embedded liberalism in the postwar economic order' (1982) 36 International Organization 379, 393; see also A Lang, 'Reconstructing Embedded Liberalism: John Gerard Ruggie and Constructivist Approaches to the Study of the International Trade Regime' (2006) 9 JIEL 81.

[302] Lang (n 11) 4.

[303] ibid 4.

system are capable of accommodating different conceptions about trade, the global economy and the regulatory role of the State.[304]

The international trading system acquired a robust institutional framework with the creation of the WTO in 1995. The new specialised international organisation cured many of the GATT birth-defects,[305] but failed to establish the system of global-governance as originally imagined after the end of the Second World War. '[T]he creation of institutions that would determine at the global level the appropriate parameters of domestic regulation, especially in areas that appeared to the founders to be closely linked to trade—exchange rate policy, competition policy, and labor practices',[306] never materialised.

Even leaving aside heterodox economic theories about international trade and development,[307] fundamental disagreements about trade policies and the proper role of domestic political and economic institutions do exist within the (dominant) neoclassical school of political economy. For example, Rodrik argues that '[t]here are in fact reasons to be skeptical about the existence of a general, unambiguous relationship between trade openness and growth'.[308] While he concedes that '[n]o country has developed successfully by turning its back on international trade and long-term capital flows',[309] at the same time, 'it is equally

[304] On the neo-liberal turn see A Lang (n 11) 159-189; Venzke (n 28) 156; JHH Weiler, 'Rule of Lawyers and the Ethos of Diplomats Reflections on the Internal and External Legitimacy of WTO Dispute Settlement' (2001) 35 JWT 191, 194-195; R Howse, 'From Politics to Technocracy – and Back Again: the fate of the Multilateral Trading Regime' (2002) 96 AJIL 94, 99.

[305] JH Jackson, *Sovereignty, the WTO, and the Changing Fundamentals of International Law* (CUP, Cambridge 2006) 104.

[306] Howse (n 304) 96.

[307] See for example HJ Chang, *Kicking Away the Ladder: Development Strategy in Historical Perspective* (Anthem Press, London 2003).

[308] Rodrik (n 270) 219.

[309] i*bid*. For example, exporters pay higher wages, Executive Office of the President of the United States, *The Economic Benefits of US Trade* (May 2015) 3, 14-19. According to Krugman's famous aphorism, '[i]f economists ruled the world, there would be no need for a World Trade Organization', P Krugman, 'What Should Trade Negotiators Negotiate About' (1997) 35 Journal of Economic Litterature 113, 113.

true that no country has developed simply by opening itself up to foreign trade and investment'.[310] Recent economic theory suggests, developments depends more on the quality of national *institutions* rather than trade-related measures.[311] The WTO is neither antagonistic nor agnostic towards good governance standards; on the contrary, WTO law contains a basic nucleus of WTO standards regarding the administration of domestic trade regulations. Article X of the GATT; Article VI of the GATS;[312] Articles 41.2, 42 and 63 of the TRIPS and Article 1.3 of the Licensing Agreement are WTO rules that aim at the promotion of good governance standards and practices.[313] The same is true regarding the 'non-arbitrariness' requirement under Articles XX of the GATT, Article of the XIV GATS, and Articles 2.3 and 5.5 of the SPS.[314]

The WTO Members are free to pursue a range of different domestic regulatory policies. In one of the first GATT cases,

> [t]he Panel recognized - and the United Kingdom delegation agreed with this view - that it was not the intention of the General Agreement to limit the right of a contracting party to adopt measures which appeared to it necessary to foster its economic development or to protect a domestic industry, provided that such measures were permitted by the terms of the General Agreement The GATT

[310] *ibid*.

[311] See D Acemoglou and J Robinson, *Why Nations Fail: the Origins of Power, Prosperity, and Poverty* (Crown, NY 2012); D Rodrik *et al*, 'Institutions Rule: The Primacy of Institutions over Geography and Integration in Economic Development' (2004) 9 Journal of Economic Growth 131; D Landes, *The Wealth and Poverty of Nations, Why some are so rich and some so poor* (WW Norton and Company, NY 1998).

[312] P Delimatsis, 'Due Process and 'Good' Regulation Embedded in the GATS – Disciplining Regulatory Behaviour in Services Through Article VI of the GATS' (2007) 10 JIEL 13.

[313] A Gourgourinis, 'Reviewing the Administration of Domestic Regulation in WTO and Investment Protection Law: The International Minimum Standard of Treatment of Aliens as "One Standard To Rule Them All"?' (2011) 8 Transnational Dispute Management Journal 1, 12-21; W Davey, 'GATT Article X: Transparency and Proper Administration' in W Davey, *Enforcing World Trade Rules: Essays on WTO Dispute Settlement and GATT Obligations* (2006) 299, 300-301; F Weiss and S Steiner, 'Transparency as an Element of Good Governance in the Practice of the EU and the WTO: Overview and Comparison' (2006-2007) 30 Fordham International Law Journal 1545. The issue of promoting good governance *within* the WTO is an important but separate issue, see DC Esty, 'Good Governance at the World Trade Organization: Building a Foundation of Administrative Law' (2007) 10 JIEL 509.

[314] Gourgourinis, *ibid.*

> offered a number of possibilities to achieve these purposes through tariff measures or otherwise.[315]

More recently one WTO member state submitted before a Panel that '[r]egulatory diversity, […], to the extent that it is applied in a non-discriminatory manner, is not put into question in the WTO system'.[316] As Mavroidis explains, in the context of the WTO, '*Trade will not harmonize societal preferences*. Trade is not the overarching value in the WTO contract. *Trade comes after respect of regulatory diversity*'.[317] Consequently, there is a constant tension between national regulatory autonomy and the pursuit of trade liberalisation. This binary conceptualisation encapsulates the inherent tension between the promotion of the free trade *theology* of the WTO and other societal values.[318]

In Chapters I and II it was argued that the WTO legal edifice in general and the WTO rules on non-discrimination, in particular, are conceptually broad enough to accommodate different ideological positions regarding the proper regulatory role of the State in the economy.[319] In rejecting objectivism and formalism Lang is right in pointing out that 'GATT/WTO obligations are vastly more ambiguous in their meaning that is typically acknowledged in contemporary literature' and 'tremendous ambiguity remained even after the creation of the WTO'.[320] Thus, as

> [i]n virtually every area of domestic regulation, negotiators have chosen to proceed largely by way of generally worded principles. Such principles are highly indeterminate in their meaning, and their impact on regulatory choices at the

[315] GATT Panel, *Italy – Agricultural Machinery* [16].

[316] AB, *Korea – Various Measures on Beef* [240].

[317] PC Mavroidis, 'Market Access in the GATT' (2008) STALS Research Paper 7/2008 <http://www.stals.sssup.it/site/files/stals_Mavroidis.pdf> 7 (emphasis omitted).

[318] 'The assurance of equal competitive opportunities is not solely the purpose of Article III but of the international trade regime in general', Panel, *China – Publications and Audiovisual Products* [7.1463]; Panel, *Korea – Alcoholic Beverages* [10.81].

[319] The WTO Agreements and its non-discrimination provisions are 'an incomplete contract', PC Mavroidis, *Trade in Goods* (2nd edition, OUP, Oxford 2012) 233.

[320] Lang (n 11) 164; see also A Lang (n 15) 1099.

> national level is governed to a very large extent by the way they are interpreted and reinterpreted over time.[321]

Naturally, as Lang observes 'the ambivalence of the texts no doubt reflects in part the underlying ambivalence and lack of consensus on the part of the membership itself'.[322]

Therefore, broad discretion is vested upon the WTO Panels and the AB precisely because of the conceptual nature of equality and the formulation of non-discrimination clauses. As a result, the interpretation of technical questions regarding the appropriate construction of the various elements of non-discrimination rules is not static but evolves over time. The interpretation of WTO non-discrimination disciplines is a political exercise, critically influenced by the historical, diplomatic and economic context. The analysis in the following sections will focus on the changing interpretation of central elements of non-discrimination rules contained in the WTO covered agreements, in order to demonstrate in practice such indeterminacy. While WTO Panels and the AB enjoy discretion in providing different interpretative answers to key legal questions, such discretion is concealed. Article 3.2 DSU according to which the AB 'cannot add to or diminish the rights and obligations provided in the covered agreements'[323] creates the myth of an unrealistic objectivism,[324] while, at the same time, it does not restrict the discretion of the AB. In like manner, the AB

[321] *ibid*. Lang brings the case law on MFN and National Treatment as an example: 'both the national treatment and most-favoured nation treatment obligations have been interpreted in very different ways at different points during the history of the trade regime, with very different implications for domestic regulation. The same can be said of Article XX of the GATT, which sets out general exceptions to GATT obligations', *ibid*.

[322] A Lang (n 15) 1100.

[323] Article 3.2 DSU.

[324] According to the AB: 'we have difficulty in envisaging circumstances in which a panel could add to the rights and obligations of a Member of the WTO if its conclusions reflected a correct interpretation and application of provisions of the covered agreement', AB, *Chile – Alcoholic Beverages* [79]. Oesch accurately observes that 'Article 3.2 of the DSU is violated not only when panels apply too intrusive a standard of review but also when they grant too much deference to national agencies in interpreting and applying WTO law', M Oesch, *Standards of Review in WTO Dispute Resolution* (OUP, Oxford 2003) 83

adheres to the *de facto* not binding, and, yet, strict doctrine of precedent,[325] declaring that 'absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case'.[326] However, in practice by adopting a case-by-case approach the WTO DSS manoeuvres through established case law and renders inconsistent decisions. The Working Party Report on Border Tax Adjustments (BTA), adopted by the GATT CONTRACTING PARTIES in 1970, provided some criteria for the determination of like products and has been cited in nearly every GATT/WTO case since.[327] The BTA Report confirms that likeness is essentially an open-ended but unitary concept. With regard to 'like products', the Report provided that:

> the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality.[328]

The interpretation of likeness is a case in point. In a famous and oft-quoted dictum the AB stated:

> [t]he concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the

[325] R Bhala, 'The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy) (1999) 9 Florida State University J Transnational L & Policy 1; D Palmeter and PC Mavroidis, 'The WTO Legal System: Sources of Law' (1998) 92 AJIL 398, 401. In public international law the binding force of precedents is factual (*de facto*) rather than legal (*de jure*): 'The decision of the Court has no binding force except between the parties and in respect of that particular case', article 59, Statute of the ICJ.

[326] AB, *US – Stainless Steel (Mexico)* [160] also citing in support *Saipem v Bangladesh*, Jurisdiction [67] (in the only instance so far of the AB referring to investment law jurisprudence); see also Panel, *China – Rare Earths* [7.55].

[327] See eg Panel, *US – Gasoli*ne [6.8]; AB, *Japan–Alcoholic Beverages* 20; AB, *Korea–Alcoholic Beverages* [153]; AB, *EC – Asbestos* [101]-[102]; Panel, *US – Poultry (China)* [7.425].

[328] Border Tax Adjustments, Report of the Working Party on Adjustments, (1970) GATT BISD 18S/97

> term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply.[329]

The analysis of the WTO case law on non-discrimination is structured as follows. The WTO jurisprudence is analysed in different sections per WTO agreement (GATT, GATS, TBT and SPS, SCM, ADA) and per non-discrimination provision.[330] At the same time, three main thematic axes are used: *likeness* and *less favourable treatment*, and the relevance of *regulatory intent*.[331] The different approaches in relation to these three conceptual and legal categories constitute the touchstone of the theoretical hypothesis of the thesis. How likeness is determined, what constitutes less favourable treatment and whether consideration of State intent should form part of the analysis expose the inherent discretion of WTO adjudicators to interpret the indeterminate non-discrimination clauses and bring to light the different approaches regarding the appropriate regulatory role of the State in the economy.

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[329] AB, *Japan – Alcoholic Beverages* 21 (emphasis in the original). *See* also AB, *EC – Asbestos* [89].

[330] Non-discrimination obligations exist under other WTO covered agreements, such as the SCM and ADA, which are not examined therein.

[331] The question regarding whether or not the regulatory intent, the intent behind the adoption of the particular measure in question is relevant for finding a violation of the applicable WTO rules is not limited to non-discrimination but exists in other fields of WTO law as well. For determining whether a subsidy is 'in fact tied to… anticipated exportation' and therefore within the definition of subsidy under article 3 of the SCM Agreement, the AB rejected an investigation into the subjective motivation of the granting government but held that 'objectively reviewable expressions of a government's policy objectives' should be taken into consideration, AB, *EC-Large Civil Aircraft* [1050]-[1051], [1063]. In relation to article 18.1 of the Anti-dumping Agreement (and the nearly identical article 32.1 of the SCM Agreement), the AB agreed

> with the Panel that the intent, stated or otherwise, of the legislators is not conclusive as to whether a measure is "against" dumping or subsidies under Article 18.1 of the Anti-Dumping Agreement or Article 32.1 of the SCM Agreement. Thus, it was not necessary for the Panel to inquire into the intent pursued by United States legislators in enacting the CDSOA and to take this into account in the analysis. The text of the CDSOA provides sufficient information on the structure and design of the CDSOA, that is to say, on the manner in which it operates, to permit an analysis whether the measure is "against" dumping or a subsidy.

AB, *US-Offset Act (Byrd Amendment)* [259]. Also for determining whether a measure is an 'ordinary customs duty" (falling under the scope of application of article II GATT) or an 'internal charge' (which has to be assessed under article III:2 GATT), the AB held – quoting the dictum cited above from *US-Offset Act (Byrd Amendment)* – that 'the intent, stated or otherwise, of the legislators is not conclusive, AB, *China-Auto Parts* [178].

III. NON-DISCRIMINATION UNDER THE GENERAL AGREEMENT ON TARIFFS AND TRADE (GATT)

In light of the theoretical framework developed earlier it becomes clear that the interpretative difficulties in determining likeness in the context of trade in goods are inherent in the conceptual nature of equality, embedded in basic principles of the WTO and relate to the existential disagreement regarding the appropriate role of the international trade regime, the limits of free trade and domestic regulatory approaches. Thus, it is hardly surprising that these difficulties predate both the adoption of GATT (1947) and the creation of the WTO (1995).

1. MFN in Article I

Quite symbolically the first article of the central trade agreement (the GATT) is devoted to the MFN obligation. Article I:1 of the GATT stipulates:

> With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, any advantage, favour, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.[332]

MFN has been time and again affirmed as the cardinal rule of international economic law.[333] However, in reality 'MFN trade becomes more of an illusion',[334] given that most of the

[332] Article I:1 GATT. Article I:1 is not only GATT provision that incorporates an MFN obligation, see also article XIII:1 (MFN in relation to the prohibition or restriction of imports and exports), article IX:1 (MFN in relation to marks of origin) and article V:5 (MFN in relation to traffic in transit), WM Choi, *'Like Products' in International Trade Law: Towards a Consistent GATT/WTO Jurisprudence* (OUP, Oxford 2003) 93.

[333] V Heiskanen, 'The Regulatory Philosophy of International Trade Law' (2004) 38 JWT 1, 2; Schwarzenberger (n 147) 97; the WTO Appellate Body described the Most Favoured Nation under the GATT, art. 1 as the 'cornerstone of GATT', AB, *Canada – Autos* [69], and 'one of the pillars of the WTO trading system', AB, *EC – Tariff Preferences* [101]; see also Panel, *Colombia – Ports of Entry* [7.320]; Panel, *US – Anti-dumping and Countervailing Duties (China)* [14.165]. The WTO Appellate Body also noted that '[f]or more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods', AB, *US – Section 211 Appropriations Act* [297]. This was also true during the (first) period of globalisation in

international trade is conducted on a non-MFN basis.[335] This is often called the 'erosion' of the MFN and it is mainly attributable to the rise of regionalism and the proliferation of Preferential Trade Agreements (PTAs).[336] The other main exception to MFN within the WTO system is preferential treatment granted to developing States under the Enabling Clause. The preferential treatment in favour of developing countries should also be given on a non-discriminatory basis and the issue will be separately analysed below.[337] Bhagwati famously coined the term 'LNF – Least Favoured Nation' treatment to describe the norm in today's international trading system.[338] The WTO legal framework does not outlaw the creation of

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the long 19th century (1815-1914). In the 1870s the Earl of Granville, British Foreign Secretary remarked, in a letter to the British Minister in Washington, that 'the most-favoured-nation clause has now become the most valuable part of our system of commercial treaties and exists between nearly all nations of the earth', K Hyder (Hasan), *Equality of treatment and Trade Discrimination in International Law* (Springer Dordrecht 1968), 23-24.

[334] PC Mavroidis, *Trade in Goods* (OUP, Oxford 2007) 123.

[335] *ibid*.

[336] Since Jacob Viner provided the first comprehensive economic analysis of regional trade agreements in 1950, the debate about the economic consequences of Regionalism never settled. For some PTAs constitute 'building blocs' of a liberal multilateral trading system as 'laboratories' laying the ground for greater trade liberalisation, J Jackson, 'Regional Trade Blocks and the GATT' (1993) 16 World Economy 121, 130. They 'lock in' previous trade liberalisation achievements, S Cho, 'Breaking the Barrier between Regionalism and Multilateralism: A New Perspective on Trade Regionalism', (2011) 42 Harvard Int Law J 419, 434. At the same time, PTAs facilitating the negotiations towards greater liberalisation, by decreasing the number of negotiating players, V Zahmt, 'How Regionalization can be a Pillar of a More Effective World Trade Organization' (2005) 39 JWT 671. Others regard PTAs as 'stumbling blocs' of international trade producing more trade diversion than trade creation, J Viner, *The Customs Unions issue* (Stevens, London 1950). PTAs are more susceptible to lobbies' influence and hegemonic manipulation, Cho, *ibid* 430; Zahrnt, *ibid* 675.; J Bhagwati, *A Stream of Windows Unsettling Reflections on Trade, Immigration, and Democracy* (OUP, Oxford 1999), 308 *et seq*. Ultimately, the question depends on the perspective adopted because even if regionalism does not lead to overall welfare creation globally, Customs Unions (CUs) and Free Trade Areas (FTAs) can be beneficial to their constituent members, PC Mavroidis, 'If I Don't Do It, Somebody Else Will (Or Won't)' (2006) 40 JWT 187, 190. History and the examples of the German *Zollverein* (1834) and, more recently, the European Union, show that PTAs are often coalesced with broader political agendas. On the impact of the proliferation of PTAs on the WTO Dispute Settlement System see PC Mavroidis and A Sapir, 'Dial PTAs for Peace: the Influence of Preferential Trade Agreements on Litigation between Trading Partners' (2015) 49 JWT 351.

[337] See section VII *infra*.

[338] According to Bhagwati, '[w]hat has been termed the "spaghetti bowl" of customs unions, common markets regional and bilateral free trade areas, preferences and an endless assortment of miscellaneous trade deals has almost reached the point where MFN treatment is exceptional treatment. Certainly the term might now be better defined as LFN, Least-Favoured-Nation treatment', J Bhagwati, 'The Erosion of Non-Discrimination' in P Sutherland *et al* (eds), *The Future of the WTO, Addressing institutional challenges in the new millennium, Report of the Consultative Board to the Director-General Supachai Panitchpakdi* (WTO, Geneva 2004) 19 ('The Sutherland Report').

PTAs and the WTO DSS' approach has been deferential to the WTO Membership when examining the consistency of some of these agreements and flexible in the interpretation of article XXIV GATT requirements.[339]

The WTO case law is not settled regarding the purpose of the MFN rule. According to the AB, the 'object and purpose [of the MFN] is to prohibit discrimination among like products originating in or destined for different countries'.[340] This tautological formulation of the purpose of article I GATT is clarified in certain WTO reports as the protection of the 'expectations of equal competitive opportunities for like imported products from all Members'.[341] However in other cases, the AB held that safeguarding the concessions is *another* (but not the only) function of MFN: 'The prohibition of discrimination in Article I:1 *also* serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis'.[342]

Article I GATT prohibits actions and omissions,[343] as well as *de jure* and *de facto* discrimination.[344] It is cases of *de facto* discrimination that expose the conceptual and legal difficulties in determining relationships of equality and highlight the role of WTO Panels and

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[339] AB, *Turkey – Textiles*; Panel, *Turkey – Textiles*; see also AB, *Argentina – Footwear (EC)*; Panel, *Argentina – Footwear (EC)*. Mavroidis offers an insightful and sophisticated explanation of why 'judicialisation' failed, PC Mavroidis, 'Dealing with PTAs in the WTO: Falling through the Cracks between "Judicialization" and "Legalization"' (2015) 14 WTR 107.

[340] AB, *Canada – Autos* [84]; Panel, *EC – Bananas III (Article 21.5 – Ecuador II)* [7.147]; Panel, *EC – Bananas III (Article 21.5 – US)* [7.554]; Panel, *Colombia – Ports of Entry* [7.321]; Panel, *US – Poultry (China)* [7.402]; Panel, *US – Anti-dumping and Countervailing Duties (China)* [14.165]; AB, *EC – Seal Products* [5.87].

[341] AB, *EC – Seal Products* [5.87]; Panel, *US – COOL* [7.571]; Panel, *Colombia – Ports of Entry* [7.236]; Panel, *Argentina – Hides and Leather* [11.20].

[342] AB, *Canada – Autos* [84]; Panel, *EC – Bananas III (Article 21.5 – Ecuador II)* [7.147]; Panel, *EC – Bananas III (Article 21.5 – US)* [7.554]; Panel, *Colombia – Ports of Entry* [7.321]; Panel, *US – Poultry (China)* [7.402]; Panel, *US – Anti-dumping and Countervailing Duties (China)* [14.165]; (emphasis added).

[343] GATT Panel, *US – Customs User Fee* [122]-[123]; this is in line with article 2 of the ILC articles on State Responsibility.

[344] According to the AB 'Article I:1 does not cover only "in law", or *de jure*, discrimination. As several GATT panel reports confirmed, Article I:1 covers also "in fact", or *de facto*, discrimination', AB, *Canada – Autos* [78]. See also GATT Panel, *EEC – Imports of Beef from Canada* [4.2] and [4.3].

the AB in selecting and promoting a competing understanding of the regulatory role of the State in the economy and the construction of the WTO non-discrimination rules.

The test for finding a violation of article I has been broken down by the WTO Panels and the AB into separate elements:

> (i) there must be an "advantage, favour, privilege or immunity" of the type covered by Article I:1; (ii) the advantage is not granted "immediately and unconditionally"; (iii) to like products originating in or destined for all other WTO Members.[345]

The state measure in question also has to fall under the scope of application of article I GATT,[346]and the scope of application is construed broadly.[347] It is in that order that the different approaches adopted by WTO Panels and the AB will be analysed.

1.1.Likeness

The determination of likeness constitutes 'the touchstone for determining the application of the value of equality in a particular case',[348] not only in the context of MFN and article I but also for the purposes of constructing the National Treatment obligation under article III GATT, article XX GATT,[349] the non-discrimination obligation of article 2.1 TBT,[350] articles 2.3 and 5.1 of SPS,[351] and the Enabling Clause[352]. The *ad hoc*, case-by-case methodological

[345] Panel, *EC – Seal Products* [7.593]; Panel, *EU – Footwear (China)* [7.99]; AB, *EC – Bananas III* [206]; GATT Panel, *US – MFN Footwear* [6.8]; Panel, *EC – Bananas III (Article 21.5 – US)* [7.555]; Panel, *US – Certain EC Products* [6.54]; Panel, *Indonesia – Autos* [14.138]; Panel, *US-Poultry (China)* [7.403].

[346] See Panel, *EC – Commercial Vessels* [7.75]-[7.83]; see also the exception for facilitating frontier traffic under article XXIV:3(a) GATT. This is often conceived as an integral part of the test together with the three previous elements, Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.405]; AB, *EC – Seal Products* [5.86].

[347] 'Both panels and the Appellate Body have held that Article I:1 covers a broad range of measures', Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.406].

[348] Sarooshi (n 151) 299.

[349] See Section III.3. *infra*.

[350] See Section V *infra*.

[351] See Section VI *infra*.

[352] See Section VII *infra*.

mantra has been enthusiastically endorsed by the WTO DSS in relation to the construction of likeness in article I GATT.[353] However, very few WTO cases have dealt so far directly with the interpretation of likeness for the purposes of article I GATT.[354] Earlier GATT jurisprudence provides an invaluable source for showing that likeness is an open-ended concept allowing for antithetical interpretations depending on broadly political, rather than strictly legal considerations. The *Spain – Unroasted Coffee* case[355] is an illustrative example of this. In most of the cases dealing with tariff discrimination, determining likeness was based on tariff classifications for determining likeness regardless of whether the issue in question was an alleged discriminatory tariff[356] or an internal measure.[357] As Lang observes this was done precisely because

> [t]ariff classifications here represented the best evidence available to the Working Party of the beliefs and expectations of those within the field of trade policy and diplomacy about whether these two products could legitimately be treated differently.[358]

Likewise, in the *Germany – Sardines* case the Panel turned to the 'expectations of within the diplomatic community for guidance on the question of likeness'.[359] However, in *Spain – Unroasted Coffee*, tariff classification and physical characteristics were considered to be irrelevant by the Panel, which relied on the fact that the different types of coffee were usually

[353] Panel, *US – Poultry (China)* [7.424].

[354] NF Diebold, *Non-Discrimination in International Trade in Services: 'Likeness' in WTO/GATS* (CUP, Cambridge 2010) 131; Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.407].

[355] GATT Panel, *Spain – Unroasted Coffee*.

[356] GATT Panel, *Germany – Sardines* [13]; 'if a claim of likeness was raised by a contracting party in relation to the tariff treatment of its goods on importation by some other contracting party, such a claim should be based on the classification of the latter, i.e. the importing country's tariff', GATT Panel, *Japan – SPF Dimension Lumber* [5.13].

[357] GATT Panel, *Australia – Ammonium Sulphate* [4.2].

[358] Lang (n 11) 215. For an analysis of the GATT case law on likeness under Article I see R Zedalis, 'A Theory of the GATT "Like" Product Common Language Cases' (1994) 27 Vanderbilt J Transnational L 33, 77-86.

[359] ibid; 'it would be sufficient to consider whether in the conduct of the negotiations at Torquay the two parties agreed expressly or tacitly to treat these preparations as if they were "like products" for the purposes of the General Agreement', GATT Panel, *Germany – Sardines* [12].

sold in the form of blends.[360] Hudec attributes the reasoning and the outcome of this case to two political reasons. First, the belief that Spain continued to favour certain developing countries through the tariff discrimination, even after the abolishment of thestate trading monopoly that favoured them through its purchasing policies, was considered pertinent.[361] Second, the decision was related to the campaign led by Brazil but endorsed by other developing countries, to associate the distinction between different types of coffee with discrimination against developing states.[362] As Hudec observes '[t]wenty-two other developing countries rose to speak in favour of the report, most of whom usually have nothing to say about panel reports'.[363]

In the WTO era, there is almost no case law on likeness under Article I GATT,[364] and the relevant interpretative questions remain largely unresolved. The AB made a distinction in *Japan – Alcoholic Beverages* between the uniform classification in tariff nomenclatures based on the Harmonized System which was 'recognized in GATT 1947 practice as providing a useful basis for confirming "likeness" in products', and tariff classification and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994.[365] In the *Philippines – Spirits* case the AB noted that 'tariff classification is only one of the criteria that the Panel reviewed in its analysis of "likeness" under Article III:2 of the GATT 1994'.[366] Consequently, the AB ruled, 'the fact that the Panel overlooked the

[360] GATT Panel, *Spain – Unroasted Coffee* [4.7-4.10].

[361] R Hudec, '"Like products": The Differences in Meaning in GATT Articles I and III' in T Cottier and PC Mavroidis, *Regulatory Barriers and the Principle of Non-Discrimination in World Trade Law* (University of Michigan Press, Ann Arbor 2000) 115.

[362] *ibid*.

[363] *ibid*.

[364] P Van den Bossche and W Zdouc, *The Law and Policy of the World Trade Organization* (3rd edition, CUP, Cambridge 2013) 327; Diebold (n 354) 131.

[365] AB, *Japan – Alcoholic Beverages* 22.

[366] AB, *Philippines – Distilled Spirits* [164].

significance of HS six-digit level classification for brandy and whisky does not, in our view, undermine its overall finding that the products at issue are "like"'.[367] Quintessentially,

> the determination of "likeness" under Article III:2, first sentence, of the GATT 1994 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among imported and domestic products.[368]

However, in the absence of WTO case law on the relevance of tariff classification for determining likeness under article I GATT, the test still remains unclear.[369] In the *Indonesia – Autos* case, the WTO Panel did not proceed to a full analysis of what constitutes like products under article I GATT. The Panel did distinguish however between like product analysis under Article I and Article III:2 first sentence GATT:

> We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car. The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I.[370]

This Panel's dictum is open to different interpretations. One interpretation of the Panel's approach is that the same analysis for determining likeness applies to Articles I and III:2 first sentence GATT.[371] Another means by which to look at the case is to say that the scope of Article I is broader than Article III:2 first sentence, and as a result, if two products were found to be like under Article III:2 first sentence, inevitably they will have to be like products for the purposes of Article I as well.[372] Subsequent Panels reports dealing with article I GATT complaints effectively avoided pronouncing on the appropriate test on the basis that

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[367] *ibid*.

[368] *ibid* [170].

[369] Mavroidis (n 319) 149.

[370] [footnotes omitted]. Panel, *Indonesia – Autos* [14.141]. See also Panel, *EC – Trademarks and Geographical Indications (US)* [7.714]; Panel, *EC – Bananas III (Ecuador)* [7.62].

[371] Diebold (n 354) 132-133; Howse and Trebilcock (n 156) 72.

[372] Trebilcock and Howse (n 178) 72.

the measures in question were origin-based (*de jure* discrimination).[373] Another WTO Panel ruled that 'it is not unreasonable to consider that previous interpretations of the concept of "like products" under Article III of the GATT 1994 should inform our interpretation of the concept of "like products" in the context of Article I:1 of the GATT 1994'.[374]

The indeterminacy regarding the test for determining likeness for the purpose of article I GATT and in particular the inconsistent GATT case-law on the specific question of the relevancy of tariff classification highlights the open-ended nature of the concept of equality and the necessity of choosing between antithetical interpretative approaches.

1.2.Any advantage offered unconditionally

The WTO jurisprudence on the second part of the test under article I GATT is equally scant and, at the same time, inconsistent, further confirming that the universe of permissible interpretations of non-discrimination clauses cannot be *a priori* limited.

In relation to the term 'any advantage', WTO Panels and the AB adopt a categorically broad conception of advantages:

> We note next that Article I:1 requires that '*any advantage*, favour, privilege or immunity granted by any Member to *any product* originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of *all other Members*.' The words of Article I:1 refer not to *some* advantages granted 'with respect to' the subjects that fall within the defined scope of the Article, but to '*any advantage*'; not to *some* products, but to '*any product*'; and not to like products from some other Members, but to like products originating in or destined for '*all other*' Members.[375]

A market-based and commercial approach is also adopted in relation to the interpretation of the term 'advantage'. An advantage creates 'more favourable competitive opportunities' or

[373] Panel, *US – Poultry (China)* [7.431]-[7.432]; Panel, *Colombia – Ports of Entry* [7.357]; Panel, *US – Certain EC Products* [6.53]-[6.54]; Panel, *EC – Trademarks and Geographical Indications (US)* [7.714].

[374] Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.409].

[375] AB, *Canada – Autos* [79]; Panel, *US – Poultry (China)* [7.414].

'affects the commercial relationship between products of different origins'.[376] Article I GATT is silent on whether regulatory intent should be taken into account for determining a violation of the MFN obligation.

The AB in *EC – Seal Products* highlighted the differences between article I (MFN) and III (National Treatment) of GATT,[377] but found that both provisions aim at 'equality of competitive opportunities' and '[i]t is for this reason that neither Article I:1 nor Article III:4 require a demonstration of the *actual* trade effects of a specific measure'.[378] Based on a teleological interpretation the AB concluded that 'an inconsistency with Article I:1 is not contingent upon the actual trade effects of a measure',[379] and that

> [c]onversely, Article I:1 *permits regulatory distinctions* to be drawn between like imported products, *provided that such distinctions do not result in a detrimental impact on the competitive opportunitie*s for like imported products from any Member.[380]

Turning now to the term 'conditionally' it should be first noted that whether MFN clauses should be conditional or (as in article I GATT) unconditional has a long historical pedigree. By the middle of the 19th century, European states abandoned the principle of reciprocity in favour of trade liberalism and endorsed the use of unconditional MFN.[381]

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[376] Panel, *US – Poultry (China)* [7.415]; Panel, *Colombia – Ports of Entry* [7.341]; Panel, *EC – Bananas (Guatemala and Honduras)* [7.239].

[377] See *infra* notes .

[378] AB, *EC – Seal Products* [5.82].

[379] *ibid* [5.87].

[380] *ibid* [5.88] (emphasis added).

[381] The Cobden Chevalier treaty signed between England and France in 1860, which contained in article XIX an unconditional MFN clause, is traditionally considered as the beginning of the trade liberalisation era. An opposite view, challenging its importance and focusing on the role of unilateral liberalising policies, is presented by Olivier Accominotti, Marc Flandreau, 'Bilateral Treaties and the Most-Favored-Nation Clause The Myth of Trade Liberalization in the Nineteenth Century' (2008) 60 World Politics 147. See also B Coutain, 'The Unconditional Most-Favored-Nation Clause and the Maintenance of the Liberal Trade Regime in the Postwar 1870s' (2009) 63 International Organization 139.

However, the US persisted in reciprocity and conditional MFN clauses until the 1930s.[382] Again the motivation for such as an important policy shift was political rather than economic. As explained by the United States Tariff Commission:

> the use by the United States of the conditional interpretation of the most-favoured nation clause has for half a century occasioned, and, if it is persisted in, will continue to occasion frequent controversies between the United States and European countries.[383]

In light of this historical background, it is not surprising that the WTO DSS has taken a robust approach regarding the unconditional nature of the MFN obligation under article I GATT. Less favourable treatment of a certain product cannot be balanced with more favourable treatment of the same product in order for the State to avoid being found in violation of the MFN standard.[384]

The WTO case law is not consistent on what constitutes 'unconditional' MFN treatment either. For the Panel in *Indonesia – Autos* '[t]he GATT case law is clear to the effect that any such advantage (here tax and customs duty benefits) cannot be made conditional on any criteria that are not related to the imported product itself'.[385] Previous GATT panel reports seem to point towards the same direction.[386] The WTO Panel in *EC – Tariff Preferences* was adamant in prohibiting all conditions attached.[387] On the contrary in

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[382] The enactment of the Reciprocal Trade Agreements Act (RTAA) of 1934 marks the policy shift as under the RTAA programme twenty-one trade agreements were concluded by the end of the Second World War with various countries, see Weiler (n 106) 351.

[383] Quoted by the Special Rapporteur of the ILC on MFN E Ustor, ILC, 'The most-favoured-nation clause in the law of treaties: working paper submitted by Mr. Endre Ustor, Special Rapporteur', A/CN.4/L.127 (19 June 1968) [10].

[384] GATT Panel, *US – Section 337* [5.16]; Panel, *EC – Bananas III (Ecuador)* [7.239]; GATT Panel, *US – MFN Footwear* [6.10].

[385] Panel, *Indonesia – Autos* [14.143].

[386] GATT Panel, *Belgian Family Allowances* [3]; GATT Panel, *EEC – Animal Feed Proteins* [3.64], [4.19]. However the GATT case law invoked by the Panel in *Indonesia – Autos*, S Lester et al, *World Trade Law: Texts, Materials and Commentary* (Hart, Oxford 2012) 323. See also GATT, Schedules and Customs Administration, BISD 3S/205 [3].

[387] According to the Panel in *EC – Tariff Preferences* unconditional means 'not limited by or subject to any conditions', Panel, *EC – Tariff Preferences* [7.59]-[7.60]. The EU (the EC at the time) did not appeal this issue,

Canada – Autos and other more recent cases the Panels outlawed only discriminatory conditions.[388] Essentially under the first approach, no conditions unrelated to the product *per se* are allowed, while under the second approach the term 'unconditionally' is part of non-discrimination, *i.e*. only discriminatory conditions are prohibited.[389] As Lang observes:

> [h]ere again we see a shift in the non-discrimination norm, away from a strict equation of the concept with that of a competitive distortion, and towards an approach which focuses more attention on the aims of the measure in question. The result is a less intrusive from a regulatory oversight and a greater degree of deference to domestic regulatory choices.[390]

2. National Treatment in Article III of the GATT

As one WTO scholar recently observed 'even though widely recognised as one of the pillars of the GATT/WTO system, the interpretation of the NT obligation has been long marked by legal indeterminacy'.[391] When the WTO Panels and the AB interpret the National Treatment obligation under article III GATT are able to select different approaches to determining key elements of the National Treatment test. Different approaches are underpinned by and promote different theories regarding the balance between free trade and economic autonomy on the one hand, and state intervention and public purpose regulation on the other. The AB held that the determination of likeness for the purposes of article III GATT should be done on a case-by-case basis,[392] as in the case of MFN under article I GATT. However, as Mavroidis correctly points out

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AB, *EC – Tariff Preferences* [124]. The *EC – Tariff Preferences* case will be analysed *infra* in section VII from a non-discrimination perspective;

[388] Panel, *Canada – Autos* [10.22]-[10.24]; Panel, *Colombia – Ports of Entry* [7.362]-[7.366]; Panel, *US – Poultry (China)* [7.437]-[7.440].

[389] Lester *et al* (n 386) 324.

[390] Lang (n 11) 319-320.

[391] M Ming Du, 'Taking Stock: What Do We Know, and Do not Know, about the National Treatment Obligation in the GATT/WTO Legal System?' (2015) 1 Chinese J of Global Governance 67, 68.

[392] AB, *EC – Asbestos* [102].

> [t]he Appellate Body seems to often confuse a case-by-case analysis with the necessity of methodology. A case-by-case analysis does not make the need for methodology redundant. To the contrary: a case-by-case analysis presupposes a methodology.[393]

Paraphrasing Supreme Court Justice Potter Stewart,[394] the AB 'cannot define what is a like product, but knows like products when it sees them'.[395] The interpretation of National Treatment by the WTO DSS evolved over time. During the initial period (roughly 1995–2000) the construction of National Treatment was strict and textualistic. In the second period, (2000-present), the fact that the AB 'moved from strictly textual to more contextual and teleological interpretation is characteristic of institutions that have gained a basic level of legitimacy'.[396] In light of recent WTO jurisprudence, States have 'a broader scope of national regulatory autonomy than conventionally assumed'.[397] Therefore it is not surprising that National Treatment has been coined as 'the most telling examples of the law of the WTO as reflecting and constituting the deepest ontological issues of the system',[398] and essentially lying at the doctrinal core of the [WTO] system'.[399] As Verhoosel stated '[d]efining National Treatment means determining the constitutional function of the WTO'.[400]

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[393] PC Mavroidis, 'Legal Eagles? The WTO Appellate Body's First Ten Years' in M Janow, *et al* (eds), *The WTO: Governance, Dispute Settlement, and Developing Countries* (Juris Publishing, Huntington NY 2008) 360.

[394] Justice Stewart famously observed in relation to hard-core pornography: 'I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description, and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that', *Jacobellis v Ohio* 378 US 184, 197 (1964) (Justice Stewart, concurring).

[395] AE Appleton, 'National Treatment under the TBT Agreement' in A Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law* (Edward Elgar, Cheltenham 2014) 92-124, 106.

[396] DiMascio and Pauwelyn (n 277) 65.

[397] M Ming Du, 'The Rise of the National Regulatory Autonomy in the GATT/WTO Regime' (2011) 14 JIEL 639, 641.

[398] JHH Weiler, 'Law, Culture, and Values in the WTO-Gazing into the Crystal Ball' in D Bethlehem *et al.* (eds), *The Oxford Handbook of International Trade Law* (OUP, Oxford 2008) .

[399] *ibid* 771.

[400] G Verhoosel, *National Treatment and the WTO Dispute Settlement, Adjudicating the boundaries of Regulatory Autonomy* (Hart, Oxford 2002) 7.

Although National Treatment under article III GATT is complementary to the MFN obligation contained in article I GATT, the differences between the two provisions did not go unnoticed in the WTO jurisprudence.[401] The comparison for MFN purposes is made between like products of different origin, while in relation to National Treatment like imported and domestic products are what is being compared.[402] Also, the scope of application of MFN is broader as it includes 'all maters referred to in paragraphs 2 and 4 of Article III'.[403] Finally, the phrase 'treatment no less favourable' is absent from the wording of article I GATT[404]. Despite these differences, the underlying issue remains the same as both provisions are linked to and reflect the underling concept of equality.

Article III GATT is structurally idiosyncratic; it distinguishes between measures of fiscal character (article III:2) and (non-fiscal) regulations (article III:4). Further, article III:2 contains a two-fold test. Article III:2 GATT stipulates:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.[405]

Article III:4 GATT is formulated as follows:

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are

[401] AB, *EC – Seal Products* [5.78]-[5.82].

[402] AB, *EC – Seal Products* [5.79].

[403] Article I:1 GATT; AB, *EC – Seal Products* [5.80]; Panel, *EC – Bananas III* [7.176]; Panel, *EC – Trademarks and Geographical Indications (US)* [7.713].

[404] AB, *EC – Seal Products* [5.81]. On the contrary, the MFN clause of article II GATS contains the 'treatment no less favourable' formulation, see *infra* section III.1.2.

[405] Article III:2 GATT.

> based exclusively on the economic operation of the means of transport and not on the nationality of the product.[406]

Article III:1 (to which article III:2 second sentence directly refers) sets forth the guiding principle of National Treatment in the WTO:

> The contracting parties recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.[407]

Although article III:1 cannot constitute an autonomous standard forming the basis of a WTO law violation,[408] it should be taken into account as relevant context for the interpretation of article III:2 second sentence as well as article III:4[409] and article III:2 first sentence,[410] despite

[406] Article III:4 GATT.

[407] Article III:1 GATT.

[408] Panel, *Japan – Alcoholic Beverages* [6.17].

[409] The AB in *EC – Asbestos* noted: '[a]s we have previously said, the "general principle" set forth in Article III:1 "informs" the rest of Article III and acts "as a guide to understanding and interpreting the specific obligations contained" in the other paragraphs of Article III, including paragraph 4. Thus, in our view, Article III:1 has particular contextual significance in interpreting Article III:4, as it sets forth the "general principle" pursued by that provision', AB, *EC – Asbestos* [93] (internal references omitted).

[410] The AB in *Japan – Alcoholic Beverages* elevated article III:1 to a general guiding principle informing the interpretation of both article III:2 and III:4 GATT:

> The terms of Article III must be given their ordinary meaning -- in their context and in the light of the overall object and purpose of the *WTO Agreement*. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which "contains general principles", and Article III:2, which "provides for specific obligations regarding internal taxes and internal charges". Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways

the absence of a specific reference. The WTO DSS has stated on more than one occasion that 'the broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures'.[411] Based on the complex legislative matrix of GATT, discriminatory measures of fiscal character will be assessed under article III:2 GATT, while regulatory measures will be examined under article III:4.

2.1 Article III:2, first sentence

In one of the first WTO cases the AB set the test for article III:2 first sentence:

> there are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence.[412]

While what the WTO Panels and the AB constructed is essentially a two-pronged test (likeness and taxation in excess[413]), the analysis will focus only on the determination of like products in light of its archetypical nature. The AB described the process of determining whether two products are like (for the purposes of article III:2 first sentence) as 'particularly

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Panel, *Japan – Alcoholic Beverages* 17-18. However, a Panel subsequently clarified that 'in applying Article III:2, first sentence, recourse to the general principle of Article III:1 is neither necessary nor appropriate', Panel, *Argentina – Hides and Leather* [11.137].

[411] AB, *Japan – Alcoholic Beverages* 16; Panel, *Colombia – Ports of Entry* [7.176].

[412] AB, *Japan – Alcoholic Beverages* 19; AB, *Canada – Periodicals* 20; Panel, *Colombia – Ports of Entry* [7.178]. In *Canada – Periodicals* the AB held that 'Any measure that indirectly affects the conditions of competition between imported and like domestic products would come within the provisions of Article III:2, first sentence', AB, *Canada – Periodicals* 19.

[413] The approach in relation to the interpretation of 'taxation in excess' is generally strict. The AB in Japan – Alcoholic Beverages emphasised that '[e]ven the smallest amount of "excess" is too much. 'The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard', AB, *Japan – Alcoholic Beverages* 23; Panel, *Argentina – Hides and Leather* [11.243]. While the object of examination is actual and not nominal tax burdens, Panel, *Argentina – Hides and Leather* [11.182]-[11.184], No balancing is permitted as 'Article III:2, first sentence, is applicable to each individual import transaction. It does not permit Members to balance more favourable tax treatment of imported products in some instances against less favourable tax treatment of imported products in other instances', Panel, *Argentina – Hides and Leather* [11.260]; Panel, *US – Gasoline* [6.14] citing also GATT Panel Report, *US — Section 337*, BISD 36S/345 [5.14].

delicate, since "likeness" must be construed narrowly and on a case-by-case basis'.[414] In one of the first article III:2 first sentence WTO cases, the AB established the test for likeness:

> the proper test is that a determination of "like products" for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:
>
> (i) the product's end-uses in a given market;
>
> (ii) consumers' tastes and habits; and
>
> (iii) the product's properties, nature and quality.[415]

The AB also had the opportunity to clarify the relationship between like products (article III;2 first sentence) and directly competitive or substitutable products (article III:2 second sentence):

> 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.[416]

The approach adopted by the Panel and the AB in *Japan – Alcoholic Beverages* for determining likeness under article III:2 first sentence marked a radical departure rupture with the 'aim-and-effects' test employed by GATT Panels. GATT Panels introduced the so-called 'aim-and-effects test' in the early 1990s. In *US–Malt Beverages*, the GATT Panel held that:

> in determining whether two products subject to different treatment are like products, it is necessary to consider whether such product differentiation is being made 'so as to afford protection to domestic production'. While the analysis of 'like products' in terms of Article III:2 must take into consideration this objective of Article III, the Panel wished to emphasize that such an analysis would be without prejudice to the 'like product' concepts in other provisions of the General

[414] AB, *Canada – Periodicals* 22.

[415] AB, *Canada – Periodicals* 21. The Working Party Report on Border Tax Adjustments (BTA), adopted by the GATT CONTRACTING PARTIES in 1970, provided some criteria for the determination of like products and has been cited in nearly every GATT/WTO case since, see eg Panel, *US – Gasoline* [6.8]; AB, *Japan – Alcoholic Beverages* 20; AB, *Korea – Alcoholic Beverages* [153]; AB, *EC – Asbestos* [101]-[102].

[416] AB, *Korea – Alcoholic Beverages* [118].

> Agreement, which might have different objectives and which might therefore also require different interpretations.[417]

The 'Aims-and-effects' test was also used in a subsequent (but not adopted) GATT Panel report in *US – Taxes on Automobiles*. 'The Panel examined the object and purpose of paragraphs 2 and 4 of Article III in the context of the article as a whole and the General Agreement'.[418] The introduction of the 'aims-and-effects' test was controversial,[419] but it found support among trade scholars such as Hudec.[420] In one of its first cases, however, the WTO Panel rejected the 'aims-and-effects' test and

> recalled that the basis of the aim-and-effect test is found in the words "so as to afford protection" contained in Article III:1. The Panel further recalled that Article III:2, first sentence, contains no reference to those words.[421]

While finding that the general principle of Article III:1 applies to all paragraphs of Article III, the AB agreed with the Panel that some interpretative value should be given to the fact that Article III:2's first sentence did not mention Article III:1.[422] The Panel held (and

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[417] *United States – Measures Affecting Alcoholic and Malt Beverages* (1992) GATT BISD 39S/206 [5.25].

[418] GATT Panel, *US – Taxes on Automobiles* [5.7], see also [5.10].

[419] F Ortino, *Basic Legal Instruments for the Liberalisation: A Comparative Analysis of EC and WTO Law* (Hart, Oxford 2004) 313; A Mattoo and A Subramanian, 'Regulatory Autonomy and Multilateral Disciplines, The Dilemma and a Possible Solution' (1998) 1 JIEL 303, 310.

[420] Hudec identified two main advantages in favour of the 'aims-and-effects' approach:

> First, the 'aims-and-effects' test consigned the metaphysics of "likeness" to a lesser role in the analysis, and instead made the question of violation depend primarily on the two most important issues that separate bona fide regulation from trade protection — the trade effects of the measure, and the bona fides of the alleged regulatory purpose behind it. Second, by making it possible for the issue of regulatory justification to be considered at the same time the issue of violation itself is being determined, the "aim and effects" approach avoided both the premature dismissal of valid complaints on grounds of "un-likeness" alone, and excessively rigorous treatment given to claims of regulatory justification under Article XX whenever the two products were ruled "like".

R Hudec, 'GATT/WTO Constraints on National Regulation: Requiem for an "Aims and Effects" Test' in R Hudec (ed), *Essays on the Nature of International Trade Law* (Cameron May ltd, London 1999) 369. Howse and Regan also argue 'that "like", whether in article III(2) first sentence, or in article III(4) should be read in light of the anti-protectionist policy of III(1)', R Howse and D Regan, 'The Product/Process Distinction – An Illusionary Basis for Disciplining "Unilateralism" in Trade Policy' (2000) 11 EJIL 249, 268.

[421] Panel, *Japan – Alcoholic Beverages* [6.16]

[422] AB, *Japan – Alcoholic Beverages* 18.

subsequently the AB confirmed) that 'the appropriate test to define whether two products are "like" or "directly competitive or substitutable" is the marketplace'.[423] The more recent *Philippines – Spirits* case is the apotheosis of the competition-based approach in constructing likeness under article III:2 first sentence. The AB downplayed the importance of tariff classification[424] and noted that

> the determination of what are "like products" under Article III:2 is not focused exclusively on the physical characteristics of the products, but is concerned with the nature and the extent of the competitive relationship between and among the products.[425]

The AB held that 'non-protectionist regulatory purpose cannot be considered independently' and in general that the ruling did not give great guidance.[426] Whether the regulatory intent is part of the analysis as well as the manner and the extent that should be taken into account is not merely a technocratic debate over the appropriate legal construction of non-discrimination disciplines in trade. Rather, 'the hermeneutic debate is a proxy for fundamentally different images of the system itself'.[427] The debate *per se* further confirms the substantive indeterminacy of the concept of likeness. Since the first non-discrimination cases, the AB was highly cognizant that determining whether two products are like 'will always

[423] Panel, *Japan – Alcoholic Beverages* [6.22].

[424] According to the AB 'tariff classification is only one of the criteria that the Panel reviewed in its analysis of "likeness" under Article III:2 of the GATT 1994' and, consequently, 'the fact that the Panel overlooked the significance of HS six-digit level classification for brandy and whisky does not, in our view, undermine its overall finding that the products at issue are "like"', AB, *Philippines – Distilled Spirits* [164]. Although the AB overturned the Panel's analysis on the relevance of tariff classification, it ruled that the Panel's error did not rise to a failure to observe article 11 DSU, *ibid* [163].

[425] *ibid* [125], see also [170]. 'We understand that products that have very similar physical characteristics may not be "like", within the meaning of Article III:2, if their competitiveness or substitutability is low, while products that present certain physical differences may still be considered "like" if such physical differences have a limited impact on the competitive relationship between and among the products', *ibid* [120]. However, as Neven and Trachtman note '[p]erhaps if the difference in physical characteristics had a non-protectionist regulatory implication, as the difference between asbestos and fibreglass components of insulation had in the EC–Asbestos case, the Appellate Body would have found a way to distinguish the products', D Neven and JP Trachtman, '*Philippines – Taxes on Distilled Spirits:* Like Products and Market Definition' (2013) 12 WTR 297, 303.

[426] Neven and Trachtman, *ibid*, 305-306.

[427] Weiler (n 398) 767.

involve an *unavoidable element of individual, discretionary judgment*'.[428] In the same case, the AB recognised the regulatory pluralism which the WTO in general and its non-discrimination disciplines in particular permit:

> Members of the WTO *are free to pursue their own domestic goals through internal taxation or regulation* so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the WTO Agreement.[429]

2.2 Article III:2, second sentence

Article III:2 second sentence also concerns measures of fiscal character but the test established by the WTO Panels and the AB is different (and follows the textual differences between the first and the second sentence of article III:2 GATT). Instead of the two-pronged test of article III:2 first sentences, three issues are examined to determine whether a WTO Member has breached or not article III:2 second sentence:

(1) the imported products and the domestic products are 'directly competitive or substitutable products' which are in competition with each other;
(2) the directly competitive or substitutable imported and domestic products are 'not similarly taxed'; and
(3) the dissimilar taxation of the directly competitive or substitutable imported and domestic products is 'applied ... so as to afford protection to domestic production'.[430]

For the purposes of the present research the focus will be on the first and last element of the test, namely Directly Competitive or Substitutable (DCS) products and protectionist intent ('so as to afford protection').

[428] AB, *Japan – Alcoholic Beverages* 20-21 (emphasis added).

[429] *ibid* 16 (emphasis added).

[430] AB, *Japan – Alcoholic Beverages* 116; AB, *Canada – Periodicals* 24–25; AB, *Chile – Alcoholic Beverages* [47]; Panel, *Mexico – Soft Drinks* [8.66] (emphasis in the original); AB, *Philippines – Distilled Spirits* [195].

2.2.1. Directly Competitive or Substitutable (DCS) products

The category of Directly Competitive or Substitutable (DCS) products is broader than the category of like products under article III:2 first sentence.[431] The AB since its first article III:2 second sentence cases adopted a market-based approach for determining whether two products are DCS or not. In *Japan – Alcoholic Beverages* the AB held that

> The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as 'directly competitive or substitutable'.[432]

The market-oriented approach is also reinforced by the insistence of the AB to adopt a dynamic rather than static approach to competitive relationships and include not only present, actual competition but also the future possibility of competition.[433] However, 'cross-price elasticity of demand' is not 'the decisive criterion'.[434] This was endorsed in subsequent cases by the AB, which emphasised on a qualitative rather than a quantitative analysis.[435] At the same time, 'most economists would wonder what other criteria are relevant, while accepting that it would be inappropriate to find products not competitive where the alleged discriminatory measure is the basis for a price differential that suppresses competition'.[436] Further, the AB has not been consistent in relation to the level of information required to determine whether two products are in fact in competition with each other. Reliance on

[431] AB, *Canada – Periodicals* [470]; AB, *Japan – Alcoholic Beverages* 112.

[432] AB, *Japan – Alcoholic Beverages* 25.

[433] 'Competition in the market- place is a dynamic, evolving process. Accordingly, the wording of the term 'directly competitive or substitutable' implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word 'substitutable' indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which are, nonetheless, *capable* of being substituted for one another', AB, *Korea – Alcoholic Beverages* [114].

[434] AB, *Japan – Alcoholic Beverages* 25.

[435] AB, *Philippines – Distilled Spirits* [207]; AB, *Korea – Alcoholic Beverages* [130], [131], [134].

[436] Neven and Trachtman (n 425) 308.

econometric indicators was heavy in *Japan – Alcoholic Beverages*, lower in (the nearly identical) *Korea – Alcoholic Beverages* and minimal in *EC – Asbestos*.[437] Finally, while the AB in *Korea – Alcoholic Beverages* accepted that if the domestic market is distorted due to government intervention it is appropriate to look in other markets as well,[438] it is unclear under which circumstances such comparative exercise should be undertaken. Consequently, it is characteristic that even when the appropriate test is crystallised in the WTO jurisprudence, the application of the test is not consistent.

2.2.2. 'so as to afford protection'

The AB had made clear that finding that the products in question are DCS and not similarly taxes is not sufficient to conclude that a violation of article III:2 second sentence has taken place. The examination of a third element (that of the application 'so as to afford protection to domestic production' is necessary.[439] However, '[t]he injunction against examination of subjective intent has not been followed consistently'.[440] First, as Diebold accurately remarks '[e]ven though the Appellate Body emphasized that the test for the wording "so as to afford protection" is about protective application, not about protective intent, indications of protectionist intent regularly flow into the legal analysis'.[441] In *Japan – Alcoholic Beverages* the AB categorically rejected considerations of subjective intent,[442] and held that

> an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the

[437] Mavroidis (n 319) 303-304.

[438] AB, *Korea – Alcoholic Beverages* [137]; AB, *Philippines – Distilled Spirits* [250]; this was also adopted by the AB in article III:4 cases, see AB, *EC – Asbestos* [123].

[439] AB, *Chile – Alcoholic Beverages* [55].

[440] Neven and Trachtman (n 425) 309.

[441] NF Diebold, 'Standards on Non-discrimination in International Economic Law' (2011) 60 ICLQ 831, 849.

[442] The AB emphasised: 'it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure', AB, *Japan – Alcoholic Beverages* 27-28.

> structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.
>
> Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure.[443]

However, in *Canada – Periodicals* the AB considered both objective and subjective elements including statements made by government ministers in order to determine the 'so as to afford protection' standard.[444] In *Chile – Alcoholic Beverages* the AB did not look into the *subject* intent of the legislators[445] but examined

> a measure's purposes, objectively manifested in the design, architecture and structure of the measure, are intensely pertinent to the task of evaluating whether or not that measure is applied so as to afford protection to domestic production.[446]

In *Mexico – Soft Drinks* the Panel (also referring to AB's ruling in *Canada – Periodicals)* held that 'the declared intention of legislators and regulators of the Member adopting the measure should not be totally disregarded, particularly when the explicit objective of the measure is that of affording protection to domestic production'.[447] In *Philippines – Spirits*

[443] *ibid* 29.

[444] AB, *Canada – Periodicals* 30-32.

[445] 'The *subjective* intentions inhabiting the minds of individual legislators or regulators do not bear upon the inquiry, if only because they are not accessible to treaty interpreters. It does not follow, however, that the statutory purposes or objectives – that is, the purpose or objectives of a Member's legislature and government as a whole – to the extent that they are given *objective* expression in the statute itself, are not pertinent', AB, *Chile – Alcoholic Beverages* [62] (emphasis in the original).

[446] *ibid* [71].

[447] Panel, *Mexico – Soft Drinks* [8.91]. The Mexican Supreme Court had concluded by looking at a report prepared by the Committee of Treasury and Public Credit of the Mexican Chamber of Deputies that the legislator's intent when adopting the measure in question was 'was that of protecting the sugar industry', *ibid*. (The interpretation of article III GATT was not subject to an appeal).

both the Panel and the AB (relying on *Korea – Alcoholic Beverages*)[448] clarified that no trade effect was required.[449] Instead what was conclusive of protectionism was

> the design, architecture, and structure of the measure, including the magnitude of the tax differential applicable to imported and domestic products, reveal the protective nature of the measure.[450]

The WTO Panels and the AB understand the difference between the two sentences of article III:2 to be quantitative rather than qualitative: '[a] case of perfect substitutability would fall within Article III:2, first sentence'.[451] At the same time,

> 'Like' products are a subset of directly competitive or substitutable products: all like products are, by definition, directly competitive or substitutable products, whereas not all 'directly competitive or substitutable' products are 'like'. The notion of like products must be construed narrowly but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.[452]

However, commentators criticise that conceptualisation and argue that article III:2 first sentence (and like products) is concerned with *de jure* discrimination, while article III:2 second sentence (and directly competitive or substitutable products) deals with *de facto* discrimination.[453]

2.3 Article III:4

The AB has established a three-pronged test in relation to article III:4 GATT:

> (i) that the imported and domestic products are "like products"; (ii) that the measure at issue is a "law, regulation, or requirement affecting the internal sale,

[448] AB, *Korea – Alcoholic Beverages* [153].

[449] AB, *Philippines – Distilled Spirits* [256]; Panel, *Philippines –Distilled Spirits* [7.185].

[450] AB, *Philippines –Distilled Spirits* [257]; Panel, *Philippines – Distilled Spirits* [7.187], see also [7.179]-[7.187].

[451] AB, *Canada – Periodicals* 28.

[452] AB, *Korea – Alcoholic Beverages* [118] (internal footnotes omitted).

[453] Flett (n 264) 76-88; Zhou also reaches the same conclusion by exploring inter alia the negotiating history of GATT and article III:2, W Zhou, 'The role of regulatory purpose under Article III:2 and 4 – toward consistency between negotiating history and WTO jurisprudence' (2012) 11 WTR 81, 112.

> offering for sale, purchase, transportation, distribution, or use" of the products at issue; and (iii) that the treatment accorded to imported products is "less favourable" than that accorded to like domestic products.[454]

Each part of the test will be analysed in turn in order to demonstrate the interpretative shifts and inconsistencies of the WTO jurisprudence.

2.3.1. Likeness

The open-ended nature of 'likeness' was explicitly recognised by the AB in *EC – Asbestos* (a landmark, article III:4 case):

> "dictionary meanings leave many interpretive questions open". In particular, this definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity". Third, this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.[455]

Having rejected the 'aim-and-effects' test for determining likeness under article III:2 first sentence in favour of an econometric, competition-centred and market-based approach in *Japan – Alcoholic Beverages*, the AB did the same regarding 'like products' under article III:4 in *EC – Asbestos*.[456] In a very rare occasion in the world of the WTO adjudication, a

[454] Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.470]; AB, *EC – Seal Products* [5.99]; AB, *Thailand – Cigarettes (Philippines)* [127]; AB, *Korea – Various Measures on Beef* [133].

[455] AB, *EC – Asbestos* [92] (emphasis in the original).

[456] AB, *EC – Asbestos* [103].

member of the AB made a concurring statement, taking issue inter alia with the economic, market-based construction of likeness.[457]

For the WTO DSS 'the factors to be taken into account' for determining likeness under article III:4 'are the same as those examined by the Panel when considering whether the two products were "directly competitive or substitutable" under Article III:2, second sentence':[458] '(i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behaviour – in respect of the products; and (iv) the tariff classification of the products'.[459] At the end of the day, also in the context of article III:4 GATT the determination of likeness is 'fundamentally, a determination about the nature and extent of a competitive relationship between and among products'.[460] However, in many cases, the issue of like products remains unexplored because the measure in question explicitly discriminates on the basis of origin. In theses cases '[g]iven the existence of an origin-based distinction ... the [complaining WTO Member State] need only demonstrate that there can or will be domestic and imported products that are like'.[461] In WTO law the existence of actual domestic products

[457] *ibid* [154].

[458] Panel, *Mexico – Soft Drinks* [8.106]. For other cases on 'like products' in Article III:4 GATT see Panel, *Brazil – Retreaded Tyres*, paras 7.414–16; Panel, *EC – Trademarks and Geographical Indications (US)*, paras 7.255–73; Panel, *Dominican Republic – Import and Sale of Cigarettes*, paras. 7.164–66; Panel, *Canada – Wheat Exports and Grain Imports*, paras. 6.260–64; Panel, *India – Autos*, paras. 7.173–76; Panel, *US – FSC*, paras 8.130–135; Panel, *Korea – Various Measures on Beef*, para 618; Panel, *Canada – Autos*, para. 10.74; Panel, *EC – Bananas III*, paras. 7.62–63; Panel, *US – Gasoline*, paras 6.7–9.

[459] Panel, *China – Publications and Audiovisual Products* [7.1445].

[460] *ibid*; AB, *EC – Asbestos* [99]; Panel, *India – Autos* [7.174]-[7.176]; Panel, *China – Autos* [7.126]

[461] Panel, *Argentina – Imports* [6.274]; Panel, *Canada – Wheat Exports and Grain Imports* [6.164], [6.262]; Panel, *China – Publications and Audiovisual Products* [7.1446]; Panel, *Turkey – Rice*, [7.213]–[7.216]; Panel, *China – Auto Parts*, [7.216]; Panel, *US – FSC (Article 21.5 – EC)* [8.132]–[8.134]; Panel, *Thailand – Cigarettes (Philippines)* [7.661]-[7.662].

is not required: 'it is sufficient for the purposes of satisfying the "like product" requirement, to demonstrate that there can or will be domestic and imported products that are like'.[462]

2.3.2. Less Favourable Treatment

The interpretation by the WTO Panels of the term 'less favourable treatment', which is the other major component of non-discrimination, had been also inconsistent.[463] Determining what constitutes 'less favourable treatment' under Article III:4, and which criteria have to be taken into account is contingent upon the approach adopted in relation to the appropriate regulatory role of the State in the economy and the function of the international trade regime.

The conceptual link between the technical term (*terminus technicus*) 'treatment no less favourable' on the one hand and the philosophical concept of equality on the other do not limit the discretion of the decision-makers (*in casu* the WTO Panels and the AB); on the contrary, the WTO DSS can choose different interpretation of what constitutes less favourable treatment and project different regulatory philosophies and economic ideologies. As a GATT Panel noted, '[t]he "no less favourable" treatment requirement set out in article III:4 is unqualified'.[464] In *Canadian Beer*, the GATT Panel held that formal identical treatment might result in discrimination. For example:

> minimum prices applied equally to imported and domestic beer did not necessarily accord equal conditions of competition to imported and domestic beer. Whenever they prevented imported beer from being supplied at a price below that

[462] Panel, *Canada – Wheat Exports and Grain Imports* [6.164];

[463] M Ming Du, '"Treatment No Less Favorable" and the Future of National Treatment Obligation in GATT Article III:4 after *EC–Seal Products*' (2016) 15 WTR 139; 'The Appellate Body's interpretation of the less favourable treatment component of GATT Article III:4 has always seemed incomplete and not completely consistent with its national-treatment case law overall', WJ Davey and KE Maskus, '*Thailand-Cigarettes (Philippines)*: A More Serious Role for the 'Less Favourable Treatment' Standard of Article III:4' (2013) 12 WTR 163, 175.

[464] *US–Section 337* [5.11].

> of domestic beer, they accorded in fact treatment to imported beer less favourable than that accorded to domestic beer.[465]

The Panel in *EC – Bananas* held (citing the AB's report in *Japan – Alcoholic Beverages*) that article III:1 in particular 'the protective application of a measure can most often be discerned from the design, the architecture, and the revealing structure of the measure' should be taken into consideration when interpreting article III:4.[466] The AB reversed the Panel's finding, criticised the Panel for 'misunderstanding' the AB decision in *Japan – Alcoholic Beverages* and stated that 'a determination of whether there has been a violation of Article III:4 does not require a separate consideration of whether a measure "afford[s] protection to domestic production"'.[467] In *Korea – Beef* the AB found that identical treatment that modifies the conditions of competition in favour of domestic producers and against imports was found to be in violation of article III:4,[468] although the AB itself conceded (in the context of article XX GATT analysis) that the purpose of Korean legislation was indeed to protect consumers.[469] In *Japan – Film* it was also confirmed that

> [the] standard of effective equality of competitive conditions on the internal market is the standard of national treatment that is required, not only with regard to Article III generally, but also more particularly with regard to the "no less favourable treatment" standard in Article III:4.[470]

The turning point was *EC – Asbestos*. In the famous and oft-quoted paragraph 100 of EC–Asbestos, the AB held that:

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[465] GATT Panel, *Canada – Provincial Liquor Boards (US)* [5.30].

[466] Panel, *EC – Bananas III (Guatemala and Honduras)* [7.249].

[467] AB, *EC – Bananas III* [216].

[468] 'A formal difference in treatment between imported and like domestic products is thus neither necessary, nor sufficient, to show a violation of Article III:4. Whether or not imported products are treated "less favourably" than like domestic products should be assessed instead by examining whether a measure modifies the conditions of competition in the relevant market to the detriment of imported products', AB, *Korea – Various Measures on Beef*, [137].

[469] *ibid* [152]-[182].

[470] Panel, *Japan – Film* [10.379]; Panel, *Turkey – Rice* [7.232]

> the term "like products" in Article III:4 in this way, we give that provision a relatively broad product scope – although no broader than the product scope of Article III:2. In so doing, we observe that there is a second element that must be established before a measure can be held to be inconsistent with Article III:4. Thus, even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" imported products "less favourable treatment" than it accords to the group of "like" domestic products. The term "less favourable treatment" expresses the general principle, in Article III:1, that internal regulations "should not be applied ... so as to afford protection to domestic production". If there is "less favourable treatment" of the group of "like" imported products, there is, conversely, "protection" of the group of "like" domestic products. However, a Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products.[471]

In *Dominican Republic–Cigarettes*, the AB moved further away from its approach in *Korea–Beef*. The detrimental effect on imports caused by the governmental measure was not adequate to pronounce that the product had received 'less favourable treatment'; the detrimental effect had to be linked to the origin of the products in question as well. The AB essentially reversed its own case-law.[472] In particular, the AB held that

> the existence of a detrimental effect on a given imported product resulting from a measure does not necessarily imply that this measure accords less favourable treatment to imports if the detrimental effect is explained by factors or circumstances unrelated to the foreign origin of the product.[473]

This approach was also endorsed in the *EC–Biotech* case where the Panel held that difference in treatment should be attributed to the different origin of the products in order to determine that they have been granted 'less favourable treatment'.[474] Likewise, the AB, in *Thailand–Cigarettes (Philippines)* confirmed the Panel's finding on less favourable treatment[475]. The

[471] AB, *EC–Asbestos* [100].

[472] Mavroidis (n 319) 288; see also G Grossman *et al*, ALI, 'Principles of the World Trade Law: National Treatment', available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2094286, (28 April 2012) 85.

[473] AB, *Dominican Republic–Cigarettes* [96].

[474] Panel, *EC – Approval and Marketing of Biotech Products* [7.2514].

[475] AB, *Thailand – Cigarettes (Philippines)* [132ff].

AB held, explicitly referring to paragraph 100 of the *EC – Asbestos* case, that

> the mere fact that a Member draws regulatory distinctions between imported and like domestic products is, in itself, not determinative of whether imported products are treated less favourably within the meaning of Article III:4.[476]

However, the AB did not mention *Dominican Republic–Cigarettes*, relied on *Korea–Beef* and held that

> what is relevant is whether such regulatory differences distort the conditions of competition to the detriment of imported products. If so, then the differential treatment will amount to treatment that is "less favourable" within the meaning of Article III:4.[477]

Instead, the AB required that 'there must be in every case a genuine relationship between the measure at issue and its adverse impact on competitive opportunities for imported versus like domestic products to support a finding that imported products are treated less favourably'.[478] However, no empirical evidence as to the actual market effects of the measures is needed;[479] '[t]he implications of the contested measure for the equality of competitive conditions are, first and foremost, those discernible from the design, structure, and expected operation of the measure'.[480] In the more recent *EC – Seal Products* the AB left no doubt that legitimate regulatory concerns are not exonerating and what is 'dispositive' is 'the detrimental impact of a measure on competitive opportunities for like imported products'.[481] Relying on *EC – Seal Products* the AB clarified in its most recent report involving article III:4 that

> for the purposes of an analysis under Article III:4, a panel is not required to examine whether the detrimental impact of a measure on competitive

[476] *ibid* [128].

[477] *ibid*.

[478] *ibid* [134].

[479] AB, *Thailand – Cigarettes (Philippines)* [129]; cited also by the Panel, *Argentina – Import Measures* [6.290]; see also AB, *US – FSC (Article 21.5 – EC)* [215].

[480] *ibid* [130].

[481] AB, *EC – Seal Products* [5.110]. The AB also disagreed with the EU's submission that 'a panel is required to examine whether the detrimental impact of a measure on competitive opportunities for like imported products stems exclusively from a legitimate regulatory distinction', *ibid* [5.117].

> opportunities for like imported products stems exclusively from a legitimate regulatory distinction.[482]

Since the creation of the WTO, the interpretation of a central element of National Treatment under article III:4 GATT (and more broadly of the concept of equality), that of 'less favourable treatment', by the WTO Panels and the AB was in a constant state of flux. The WTO DSS moved from holding that any difference in treatment resulting in a disparate impact upon imported goods amounted to 'less favourable treatment' to requiring the different treatment be associated with the *origin* of the product and back again. It is revealing that the latest strict interpretation of 'less favourable treatment' under article III:4 GATT lies in stark contrast with the construction of very same 'less favourable treatment' term under article 2.1 TBT.[483] This interpretative back and forth from strict to permissive approaches not only did leave many questions in relation to the proper meaning of 'less favourable treatment' but also highlighted the open-ended nature of WTO non-discrimination provisions and the conceptual malleability of equality they encapsulate and express.

3. Non-discrimination under the chapeau of Article XX of the GATT

The chapeau of article XX GATT is of pivotal importance for determining whether a WTO member is in breach of its WTO obligations and thus for ultimately delineating the regulatory freedom of enjoyed by the Members of the WTO. Article XX constitutes an invaluable defence to the WTO members in support of their regulatory choices to protect non-trade and non-economic values.[484] Hence, the WTO Panels and the AB are reluctant to extend the

[482] Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.479]; citing AB, *EC – Seal Products* [5.117].

[483] This might be explained by the absence of a general exception clause (like article XX GATT) in the TBT Agreement, however, it could potentially lead to legal paradoxes, as a measure can be found in violation of the National Treatment obligation contained in GATT but not of the non-discrimination requirement under the TBT, although the latter is *lex specialis* to and more intrusive than the former, Du Ming (n 463) 152. On non-discrimination under article 2.1 TBT see *infra* section IV. This possibility was raised by the EU and considered in *EC – Seal Products*, however, the AB remained unimpressed, AB, *EC – Seal Products* [5.118]-[5.129]. See also W Zhou , '*US – Clove Cigarettes* And *US – Tuna II (Mexico)*: Implications for the role of Regulatory Purpose under Article III:4 of the GATT' (20120 15 JIEL 1075, 1111-1118.

[484] H Andersen, 'Protection of Non-Trade Values in WTO Appellate Body Jurisprudence: Exceptions, Economic Arguments and Eluding Questions' (2015) 18 JIEL 383, 394-399.

scope of application of article XX beyond the GATT (*e.g,* to China's Accession Protocol, which contains WTO-plus obligations)[485],[486] or to turn the exhaustive list of article XX,[487] into an indicative list.[488] The general exception clause of article XX GATT contains a non-discrimination element:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:…[489]

Since the first WTO case, the WTO DSS made clear that the test under article XX GATT is a two-tier one which requires compliance with both the requirements of the chapeau (notably non-discrimination) and the substantive paragraphs of article XX.[490] WTO jurisprudence on article XX GATT has effectively upgraded the *chapeau* as the decisive criterion for determining compliance with WTO rules by the Member States.[491] The AB has repeatedly held that the test under Article XX is a two-tier test: (i) conformity with one of the paragraphs

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[485] Protocol on the Accession of the People's Republic of China, WT/L/432, 10 November 2001.

[486] AB, *China – Rare Earths* [5.52]-[5.87]; Panel, *China – Rare Earths* [7.1016]-[7.1033]; AB, *China – Raw Materials* [270]-[307].

[487] AB, *US – Gasoline* 22; AB, *US – Shrimp* [157].

[488] Diebold argues that the WTO DSS lacks the legitimacy that would allow it to transfer Article XX provisions into an indicative, rather than exhaustive, list of exceptions, as the Court of Justice of the EU did with the similar exceptions of Article 36 (ex-Article 30) of the Treaty on the Functioning of the European Union for origin-neutral measures, Diebold (n 441) 849; Case C-120/78 Rewe-Zentral AG v Bundesmonopolverwaltung für Branntwein [1979] ECR 649. See *Case C-366/04 Georg Schwarz v Bürgermeister der Landeshauptstadt Salzburg* [2006] ECR I-10139 [30]; Case *C-203/96,Chemische Afvalstoffen Dusseldorp BV and Others v Minister van Volkshuisvesting (Dusseldorp)* [1998] ECR 4075; Ortino (n 419) 183 regarding the possibility of extending the application of non-exhaustive public justification to formally discriminatory measures.

[489] Article XX GATT.

[490] AB, *US – Gasoline* 22; AB, *US – Shrimp* [149]; Panel, *EC – Asbestos* [8.167]; AB, *Brazil – Retreaded Tyres* [139] and [213].

[491] See eg AB, *US – Gambling*; AB, *Brazil – Retreaded Tyres*; AB, *EC – Seal Products*; L Bartels, 'The Chapeau of the General Exceptions in the WTO GATT and GATS Agreements: A Reconstruction' (2015) 109 AJIL 95, 96. See also Panel, *US – Shrimp* [7.29].

of Article XX, and (ii) conformity with the chapeau of Article XX.[492] The non-discrimination requirement under the chapeau is the central element for the interpretation of Article XX. At the same time, due to the conceptual nature of equality, the non-discrimination obligation under the chapeau confers wide discretion to the WTO DSS.[493] Its relationship with different approaches in relation to the regulatory role of the State in the economy is less direct and apparent. In general, 'the *travaux préparatoires* of Art. XX is not enlightening'.[494] As it will be further explained below, in the WTO case law non-discrimination under the *chapeau* of article XX GATT is more concerned with equality between different countries rather than equality between products and product's treatment. It highlights the inherently indeterminate nature of equality clauses and the political relationship of the adjudicator, *in casu* the WTO DSS in interpreting them. It will be argued in particular that

> task of interpreting and applying the chapeau is, hence, essentially the delicate one of locating and marking out a line of equilibrium between the right of a Member to invoke an exception under Article XX and the rights of the other Members under varying substantive provisions.[495]

Before proceeding to a critical analysis of the WTO jurisprudence in relation to non-discrimination under the chapeau of article XX, it is appropriate to clarify first its scope of application and its relationship with other non-discrimination clauses in GATT. Earlier cases supported the proposition that the *chapeau* of article XX GATT is only concerned with the *application* of the measure in question as opposed to the 'content' or 'design' of the measure

[492] AB, *US – Gasoline* 22; AB, *US – Shrimp* [118].

[493] S Charnovitz, 'The WTO's Environmental Progress' (2007) 10 JIEL 685, 702. Pauwelyn for example similarly notes that the determination of whether a measure is non-discriminatory under the chapeau of Article XX 'would confer considerable power and discretion on the Appellate Body', J Pauwelyn, 'Squaring Free Trade in Culture with Chinese Censorship: the WTO Appellate Body Report on China - Audiovisuals' (2010) 11 Melbourne J Int L 119, 138.

[494] R Wolfrum *et al* (eds), *Max Planck Commentaries on World Trade Law, Volume 5* (Martinus Nijhoff, Leiden 2011) 455, 465.

[495] AB, *US – Shrimp* [159].

which has to be assessed under the substantive paragraphs of article XX.[496] However, in subsequent cases the distinction between the measures *per se* and its application, a distinction which was always conceptually and legally problematic,[497] seems to fade away.[498] Uncertainty also exists on whether prospective application should be considered or it amounts to speculation.[499] WTO case law is not uniform either regarding the relationship of the discrimination test under the chapeau of article XX and discrimination under other provisions of GATT such as article I (MFN) and National Treatment. In earlier cases, the AB maintained that '[t]he provisions of the chapeau cannot logically refer to the same standard(s) by which a violation of a substantive rule has been determined to have occurred',[500] and that 'the nature and quality of this discrimination [in the chapeau] is different from the discrimination in the treatment of products which was already found to be inconsistent with one of the substantive obligations of the GATT 1994'.[501] In *EC – Seal Products* the AB concluded that 'the causes of the "discrimination" found to exist under Article I:1 of the GATT 1994 are the same as those to be examined under the chapeau'.[502] This view is shared by scholars such as Bartels,[503] while Mavroidis argue that invoking Article XX as a justification for discriminatory measures is logically paradoxical, given that the chapeau of Article XX itself imposes a non-discrimination obligation.[504] In any case, an important

[496] AB, *US–Gasoline* 22; AB, *US – Shrimp* [116], [160].

[497] Bartels (n 491) 100-101.

[498] AB, *China – Rare Earths* [5.113]; AB, *EC – Seal Products* [5.302].

[499] Cf AB, *EC – Seal Products* [5.302] ('actual or expected application') and AB, *US – Shrimp (Article 21.5 – Malaysia)* [148] ('any consideration of whether Malaysia would be certified would be speculation').

[500] AB, *US – Gasoline* 23.

[501] AB, *US – Shrimp* [150]

[502] Bartels (n 491) 110.

[503] AB, *EC – Seal Products* [5.318].

[504] PC Mavroidis, *Trade in Goods* (OUP, Oxford 2007) 255.

textual difference of the non-discrimination clause in article XX is that, contrary to other WTO non-discrimination provisions, the chapeau of article XX prohibits unequal treatment only 'between countries were the same conditions prevail'.[505] The WTO DSS repeatedly emphasised that

> the analysis of whether the application of a measure results in arbitrary or unjustifiable discrimination should focus on the cause of the discrimination, or the rationale put forward to explain its existence.[506]

The *US – Shrimp* is the landmark case for the interpretation of non-discrimination under the chapeau of article XX. In that case the AB made clear that

> [i]t may be quite acceptable for a government, in adopting and implementing a domestic policy, to adopt a single standard applicable to all its citizens throughout that country. However, it is not acceptable, in international trade relations, for one WTO Member to use an economic embargo to require other Members to adopt essentially the same comprehensive regulatory program, to achieve a certain policy goal, as that in force within that Member's territory, without taking into consideration different conditions which may occur in the territories of those other Members.[507]

As a result article XX 'condones and does not suppress regulatory diversity'.[508] The AB provided an Aristotelian definition of non-discrimination by emphasising that

> discrimination results not only when countries in which the same conditions prevail are differently treated, but also when the application of the measure at issue does not allow for any inquiry into the appropriateness of the regulatory program for the conditions prevailing in those exporting countries.[509]

This approach lies in stark contrast not only with the Panel's finding in relation to non-discrimination under the chapeau of article XX in *US – Shrimp* (which the AB reversed), but also with earlier GATT jurisprudence. In *US – Spring Assemblies* the GATT Panel declined

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[505] Article XX GATT.

[506] AB, *Brazil – Retreaded Tyres* [226]; AB, *EC – Seal Products* [5.303]; Panel, *China – Rare Earths* [7.960]; Panel, *Thailand – Cigarettes* [7.291].

[507] AB, *US – Shrimp* [164].

[508] Mavroidis (n 319) 331.

[509] AB, *US – Shrimp* [165].

to see any violation of non-discrimination under the chapeau without engaging in such substantive analysis; for the GATT Panel the fact that the 'exclusion order was directed against imports of certain automotive spring assemblies produced in violation of a valid United States patent from all foreign sources, and not just from Canada'[510] it was sufficient to reject the claim that the non-discrimination obligation under article XX has been breached.[511]

Another example that demonstrates that the case law regarding non-discrimination under the chapeau of article XX is constantly in a state of flux is whether the objective of the measure in question should be taken into account to determine whether discrimination is 'arbitrary or unjustifiable'[512]. In *US – Shrimp* the AB rejected the relevance of the measure's rationale and the 'legitimacy of the declared policy objective of the measure' for interpreting the *chapeau* of article XX.[513] The AB reversed its approach in *Brazil – Retreaded Tyres*.[514] More recently, the AB further refined its approach in *EC – Seal Products*:

> the relationship of the discrimination to the objective of a measure is one of the most important factors, but not the sole test, that is relevant to the assessment of arbitrary or unjustifiable discrimination. In other words, depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to that overall assessment.[515]

[510] Panel, *US – Spring Assemblies* [55].

[511] *ibid* [56].

[512] See the analysis in Bartels (n 491) 116-117.

[513] AB, *US – Shrimp* [149].

[514] AB, *Brazil – Retreaded Tyres* [226].

[515] AB, *EC – Seal Products* [5.321]; *cf ibid* [5.306].

IV. NON-DISCRIMINATION UNDER THE GENERAL AGREEMENT ON TRADE IN SERVICES (GATS)

The GATS is undoubtedly one of the most important agreements of the new world trading system.[516] The GATS was negotiated extensively during the Uruguay Round of Negotiations (1986-1994) and finally came into force with the creation of the WTO in 1995, along with other WTO 'covered agreements'.[517] Pre-GATS, trade in services at the international plane was to a very large extent unregulated.[518] The two most notable exceptions were the regulation of trade in services at the regional level under the EU,[519] and other Free Trade Agreements (FTAs) such as NAFTA, and at the bilateral level, the rules contained in Bilateral Investment Treaties (BITs) and their precursors the Friendship, Commerce and Navigation (FCN) treaties. During the 1970s and 1980s, the US was enthusiastically pushing for the creation of a multilateral convention, regulating and liberalising in trade in services. This is explained partly by the economic and political need to balance the US trade deficit in goods with its surplus in trade in services, and partly by the desire to project the domestically dominant values of a liberal economy based on the concept of 'corporate economic autonomy' at the international plane.[520] The US enthusiasm was followed, albeit less enthusiastically in the beginning, by the EU and other developed countries.[521] However, it

[516] AF Lowenfeld, *International Economic* Law (2nd edition, Oxford: OUP 2008) 141; Jackson (n 178) 305.

[517] See e.g. TRIPS, TRIMS and SPS, TBT and Agreement on Agriculture.

[518] P Delimatsis, *International Trade in Services and Domestic Regulations, Necessity, Transparency, and Regulatory Diversity* (Oxford, OUP 2007) 10.

[519] See Article 49 and 56 of the Treaty on the Functioning of the European Union (TFEU) and Directive 2006/123/EC of the European Parliament and of the Council of 12 December 2006 on services in the internal market, OJ 2006 L376/36; C Barnard, 'Unravelling the Services Directive' (2008) 45 Common Market Law Review 232.

[520] JA Marchetti and PC Mavroidis, 'The Genesis of the GATS (General Agreement on Trade in Services)' (2011) 22 EJIL 689, 692; Sarooshi (n 239). The US Trade Act of 1974, s. 102(g)(3), 19 USC s. 2112(g)(3) described 'international trade' as comprising both trade in goods and trade in services.

[521] Marchetti and Mavroidis, *ibid*, 695-697.

was met with opposition from different groups of developing countries.[522] As a result, the final text of the GATS reflects the compromise achieved during the Uruguay Round in view of the diverging interests of developed and developing countries.[523] Perhaps the best reflection of this comprise is the piecemeal and *ad hoc* approach to liberalization commitments with regard to trade in services and the device of separate schedules of commitments which are different for each WTO Member State. The structure of the legal matrix of non-discrimination disciplines under the GATS is based on a variable geometry squarely fits into the above paradigm.

As it is the case with trade in goods and GATT, GATS contains two main non-discrimination provisions: MFN under article II GATS and National Treatment under article XVII GATS. Contrary to the other WTO covered agreements, there are only a few WTO cases dealing with GATS and, thus, GATS jurisprudence on non-discrimination is not the ideal case study to explore the conceptual malleability of equality or the different understandings of the rationale of the WTO and the appropriate regulatory of the State. Nonetheless, even in the few WTO cases involving the interpretation of the GATS non-discrimination disciplines, the careful read will be able to discern apparent or less obvious inconsistencies and interpretative changes. Finally, it should be noted that in symmetry with GATT, GATS also contains a general exception clause – article XIV GATS – modelled after article XX GATT. However, as there was only one WTO involving the interpretation of article XIV GATS (the *US – Gambling* case), non-discrimination under the chapeau of article XIV GATS will not be examined.

[522] *ibid* 698.

[523] N Munin, 'The GATS: a legal perspective on crossroads of conflicting interests' (2011) 10 World Trade Review 325, 325; Delimatsis (n 518) 12-13.

1. MFN in Article II

The GATS contains an MFN obligation in Article II:1. MFN under article II GATS is a general obligation and (unlike National Treatment under article XVII) its scope of application does not depend on the specific commitments undertaken by the different WTO Members. The application of MFN under GATS is subject only to the exception listed in the Annex on Article II Exemptions the duration of which should not exceed 10 years. Article II:1 GATS stipulates:

> [w]ith respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favourable than that it accords to like services and service suppliers of any other country.[524]

As other WTO non-discrimination obligations, the AB quickly emphasised that MFN under article II:1 GATS covers both *de jure* and *de facto* discrimination.[525]

1.1 Likeness

Leroux observed in 2007 that '[t]he central issue of "likeness" has yet to be fully addressed by WTO adjudicatory bodies';[526] and the same observation holds true today, especially in relation to the MFN obligation contained in article II GATS. Despite the paucity of case law, the systemic issues identified under GATT (open-ended nature of non-discrimination clauses, discretion of the WTO DSS and inconsistencies in their interpretation) are equally present in relation to GATS. The non-discrimination provisions of GATS are as vague as their parallel provisions of GATT. Even within the limited jurisprudence on likeness under GATS

[524] Article II:1 GATS. The MFN obligation under article II GATS is not the only MFN clause under the GATS. Article VII provides MFN in relation to recognition, article VIII regarding monopolies and exclusive service suppliers, article X, regarding emergency safeguard measures, article XII, regarding restrictions to safeguard the balance of payments, article XVI regarding market access, and article XXI regarding the modification of schedules. See also article 5(a) of the GATS Annex on Telecommunications.

[525] AB, *EC – Bananas III* [233].

[526] EH Leroux, 'Eleven Years of GATS case law: what have we learned?' (2007) 10 JIEL 749, 779; Diebold also observed in 2010 'no case law exists for a conceptual interpretation of 'like- ness' in Article II GATS', Diebold (n 354) 128.

important inconsistencies and interpretative shifts demonstrate that non-discrimination clauses are conceptually open-ended.

The uncertainty on whether likeness presupposes likeness of both services and service suppliers (cumulative test) or likeness in the services provided renders service *ipso facto* services providers like (disjunctive test) is a case in point. The Panel in *EC – Bananas II* considered the inseparable nature of services and service suppliers:

> the nature and the characteristics of wholesale transactions as such, as well as of each of the different subordinated services mentioned in the headnote to section 6 of the CPC, are 'like' when supplied in connection with wholesale services, irrespective of whether these services are supplied with respect to bananas of EC and traditional ACP origin, on the one hand, or with respect to bananas of third-country or non-traditional ACP origin, on the other. Indeed, it seems that each of the different service activities taken individually is virtually the same and can only be distinguished by referring to the origin of the bananas in respect of which the service activity is being performed. Similarly, in our view, *to the extent that entities provide these like services, they are like service suppliers*.[527]

Verhoosel aptly captures the intrusive character and deregulation effect of the disjunctive approach:

> [s]aying that the likeness of service suppliers is wholly dependent on, and determined by, the likeness of their services, would go far beyond non-discrimination and impose absurd levels of deregulation on members. The latter would be effectively impeded from making regulatory distinctions between service suppliers offering like services.[528]

The cumulative approach is friendlier to national regulatory autonomy as it poses greater obstacles for the complaining WTO Member to succeed in its article XVII. In *Canada – Autos* the Panel also held that 'to the extent that the service suppliers concerned supply the same services, they should be considered "like" for the purpose of this case.[529] However, it

[527] Panel, *EC – Bananas III* [7.322] (emphasis added).

[528] Verhoosel (n 400) 61.

[529] Panel, *Canada – Autos* [10.248]. As Diebold notes 'in both cases that lead the panels to reject the practical significance of supplier-based distinctions, the measure under scrutiny did in fact not discriminate on the basis of the type of supplier, but on the basis of service-related issues', Diebold (n 354) 196; WJ Davey and J Pauwelyn, 'MFN Unconditionality: A Legal Analysis of the Concept in View of Its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of Like Product' in T Cottier and PC

seems that the cumulative approach has been overturned in *China – Electronic Payment Services,*[530] although it should be noted that the Panel interpreted the National Treatment obligation of article XVII GATS and not the MFN obligation under article II GATS.[531]

1.2 Less Favourable Treatment

As the Panel in *Argentina – Financial Services* recently noted article II:1 GATS does not define the term 'treatment no less favourable' and the jurisprudence on the matter is 'scant'.[532] Therefore, a detailed examination of WTO case law on 'less favourable treatment' under GATS is not possible. Having said that, even within the limited case law inconsistent approaches have been indeed identified, demonstrating the open-ended nature of non-discrimination rules. Two issues are analysed below.

First, it is unclear whether in interpreting less favourable treatment under article II GATS, the construction of less favourable treatment under National Treatment clauses should be taken into account. In *EC – Bananas* the Panel held that the term 'less favourable treatment' under article II GATS is to be given similar content as 'less favourable treatment' in article XVII GATS which is explicitly oriented towards competition relations and conditions.[533] This is the case because, according to the Panel, 'both Articles II and XVII of GATS derives from the "treatment no less favourable" standard of the GATT national treatment provisions in Article III of GATT, which has been consistently interpreted by past

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Mavroidis (eds), *Regulatory Barriers and the principle of Non-discrimination in World Trade Law* (Michigan UP, Ann Arbor 2000) 13, 36.

[530] Panel, *China – Electronic Payment Services* [7.705]. It should be noted that the Panel interpreted the National Treatment obligation of article XVII GATS and not the MFN obligation under article II GATS.

[531] See *infra* section 2.1 of this chapter.

[532] Panel, *Argentina – Financial Services* [7.198].

[533] Panel, *EC – Bananas III (Ecuador)* [7.301].

panel reports to be concerned with conditions of competition between like domestic and imported products on internal markets'.[534] The AB disagreed:

> We find the Panel's reasoning on this issue to be less than fully satisfactory. The Panel interpreted Article II of the GATS in the light of panel reports interpreting the national treatment obligation of Article III of the GATT. The Panel also referred to Article XVII of the GATS, which is also a national treatment obligation. But Article II of the GATS relates to MFN treatment, not to national treatment. Therefore, provisions elsewhere in the GATS relating to national treatment obligations, and previous GATT practice relating to the interpretation of the national treatment obligation of Article III of the GATT 1994 are not necessarily relevant to the interpretation of Article II of the GATS. The Panel would have been on safer ground had it compared the MFN obligation in Article II of the GATS with the MFN and MFN-type obligations in the GATT 1994.[535]

In *Argentina – Financial Services* the Panel adopted a different approach and held that 'likeness finding under Article II:1 of the GATS can be transposed to the scope of Article XVII of the GATS'[536] and 'aspects of the analysis' on less favourable treatment under article II are applicable for determining less favourable treatment under article XVII GATS[537].

Second, it is unclear whether regulatory considerations should be taken into account for determining what constitutes less favourable treatment. As Lang observed,

> [i]t is arguably one of the flaws of the GATS that neither Article II nor Article XVII (and, perhaps to a lesser extent, their GATT counterparts) contain a clear textual basis for a consideration of regulatory purpose.[538]

Earlier Panels have rejected the consideration of 'aims-and-effects' test in determining likeness under article II GATS.[539] However, in *Argentina – Financial Services* regulatory considerations found their way into the analysis under the 'treatment no less favourable' part

[534] *ibid* [7.302].

[535] AB, *EC – Bananas III* [231].

[536] Panel, *Argentina – Financial Services* [7.488].

[537] Panel, *Argentina – Financial Services* [7.500].

[538] A Lang, 'The GATS and Regulatory Autonomy: A case study of social regulation of the water industry' (2004) 7 JIEL 801, 827; see also A Mattoo, 'National Treatment in the GATS: Corner-Stone or Pandora's Box?' (1997) 31 JWT 107, 131-132.

[539] See *infra* section IV.2.

of the test. The Panel held that 'applying to this dispute the statement of the Appellate Body in *Thailand – Cigarettes (Philippines)* and *US – COOL*, we consider that the assessment of the design, structure and operation of the measures at issue also forms part of our examination'.[540] This confirms the hypothesis of the theoretical framework of this thesis – that the Panel emphasised the WTO Members' right to regulate in reaching this interpretative decision:

> [i]t is our understanding that Members' right to regulate in accordance with their national policy objectives, as enshrined in the preamble to the GATS, confirms the relevance of the regulatory framework established to meet these objectives in the area of trade in services.[541]

The AB found the Panel's analysis 'of its legal standard is ambiguous as to what role precisely the "regulatory aspects" play in an analysis of "treatment no less favourable"'.[542] The AB clarified that if the Panel meant that consideration of the regulatory aspects of the measure could render a measure that modifies the conditions of competition to the detriment of like services or service suppliers GATS-consistent, this 'would constitute an erroneous legal standard'.[543]

2. National Treatment in Article XVII

The WTO Panels established a three-pronged test for determining violations of article XVII: 'whether the measures at issue affect the relevant services and whether these measures accord

[540] Panel, *Argentina – Financial Services* [7.235]; see also *ibid* [7.212] ('the regulatory framework in which service suppliers operate may in certain circumstances be relevant in the context of the GATS since it has a direct impact on the service through the natural or legal person supplying the service).

[541] Panel, *Argentina – Financial Services* [7.217].

[542] AB, *Argentina – Financial Services* [6.124].

[543] AB, *Argentina – Financial Services* [6.125].

less favourable treatment to service suppliers of other Members, in comparison to like domestic suppliers'.[544]

2.1 Likeness

As it was the case with likeness under National Treatment in the context of trade in goods,

> [w]hen origin is the only factor on which a measure bases a difference of treatment between domestic service suppliers and foreign suppliers, the "like service suppliers" requirement is met, provided there will, or can, be domestic and foreign suppliers that under the measure are the same in all material respects except for origin.[545]

WTO Panels agree that the determination of likeness in the context of trade in services should be based on 'competitive relationship of the services being compared',[546] and is essentially an *ad hoc*, case-by-case exercise.[547] The WTO Panel in *EC – Bananas III* reiterated in relation to National Treatment its approach regarding likeness in the context of trade in services: 'to the extent that entities provide these like services, they are like service suppliers'.[548] In later cases WTO Panels adopted a less categorical approach toning down the absolute presumption introduced in *EC – Bananas III*:

> the fact that service suppliers provide like services may in some cases raise a presumption that they are "like" service suppliers. However, we consider that, in the specific circumstances of other cases, a separate inquiry into the "likeness" of the suppliers may be called for. For this reason, we consider that "like service suppliers¨ determinations should be made on a case-by-case basis.[549]

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[544] Panel, *China – Publications and Audiovisual Products* [7.956]; Panel, *China – Electronic Payment Services* [7.689]; Panel, *EC – Bananas III* [7.314].

[545] Panel, *China – Publications and Audiovisual Products* [7.975], [7.1284].

[546] Panel, *China – Electronic Payment Services* [7.702].

[547] 'In the light of this complexity, "like services and service suppliers" analyses should in our view take into account the particular circumstances of each case. In other words, we consider that determinations of "like services", and "like service suppliers", should be made on a case-by-case basis', *ibid* [7.701].

[548] Panel, *EC – Bananas III* [7.322].

[549] Panel, *China – Electronic Payment Services* [7.705].

Finally, as in the case of trade in goods, the 'aims and effect' test was rejected in the context GATS:

> We see no specific authority either in Article II or in Article XVII of the GATS for the proposition that the 'aims and effects' of a measure are in any way relevant in determining whether that measure is inconsistent with those provisions. In the GATT context, the 'aims and effects' theory had its origins in the principle of Article III:1 that internal taxes or charges or other regulations 'should not be applied to imported or domestic products so as to afford protection to domestic production'. There is no comparable provision in the GATS. Furthermore, in our Report in Japan — Alcoholic Beverages the Appellate Body rejected the 'aims and effects' theory with respect to Article III:2 of the GATT 1994. The European Communities cites an unadopted panel report dealing with Article III of the GATT 1947, United States — Taxes on Automobiles as authority for its proposition, despite our recent ruling.[550]

2.2 Less Favourable Treatment

The 'less favourable treatment' is the second element of the test. […] Footnote 10 to article XVII GATS provides that

> Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.[551]

While footnote 10 of article XVII GATS appears to require a nexus between the detrimental impact of the measure in question and foreign nationality (as it was also adopted in some GATT cases),[552] the Panel in *Canada – Autos* however limited the importance:

> Footnote 10 to Article XVII only exempts Members from having to compensate for disadvantages due to foreign character in the application of the national treatment provision; it does not provide cover for actions which might modify the conditions of competition against services and service suppliers which are already disadvantaged due to their foreign character.[553]

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[550] AB, *EC – Bananas III* [241].

[551] Article XVII, footnote 10 GATS.

[552] See *supra* Section III.

[553] Panel, *Canada – Autos* [10.300]; see also L Bartels, 'The WTO legality of the application of the EU's emissions trading system to aviation' in C Lim and B Mercurio (eds), *International Economic Law after the Global Crisis* (CUP, Cambridge 2015) 429, 476.

However in *Argentina - Financial Services*, while emphasis was laid on the effect on competitive relationship to determine 'less favourable treatment' under article XVII (with references to article III GATT jurisprudence), the Panel did seem to accept the relevance of regulatory considerations under both MFN and National Treatment obligations, but more.[554]

[554] Panel, *Argentina – Financial Services* [7.500]-[7.521].

V. NON-DISCRIMINATION UNDER THE AGREEMENT ON TECHNICAL BARRIERS TO TRADE (TBT)

The international trade regime was traditionally structured around the logic of *negative* integration focusing on non-discrimination and concerned with border measures.[555] During the Tokyo Round (1973-1979) an agreement on technical regulations, standards and conformity assessment procedures were introduced on a *plurilateral* basis. In 1995, with the creation of the WTO, the TBT Agreement became an integral part of the WTO 'single-undertaking'.[556]

The TBT Agreement applies to 'technical regulations',[557] 'standards',[558] and 'conformity assessment procedures'[559]. WTO Members are obliged to adopt technical

[555] On the difference between positive/negative integration see Ortino (n 419) 17-25.

[556] See R Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' (2009) 12 JIEL 835.

[557] The Annex to the TBT Agreement provides the definition of technical regulation:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Annex 1 TBT.

[558] The Annex to the TBT Agreement also defines what is a 'standard':

> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

Annex 1 TBT.

[559] Conformity assessment procedures are defined as follows:

> Any procedure used, directly or indirectly, to determine that relevant requirements in technical regulations or standards are fulfilled.
>
> Explanatory note
>
> Conformity assessment procedures include, inter alia, procedures for sampling, testing and inspection; evaluation, verification and assurance of conformity; registration, accreditation and approval as well as their combinations.

Annex 1 TBT.

regulations and standards which are not more trade restrictive than necessary and create obstacles to international trade (article 2.2 TBT); at the same time, WTO Members undertake an obligation not to discriminate (article 2.1 TBT) and are encouraged to use international standards (article 2.4 TBT). From an institutional perspective, a TBT Committee has been given the mandate to review specific measures and strengthen the implementation of the TBT Agreement.[560]

The TBT Agreement, together with the SPS Agreement, constituted a paradigm shift in international trade regulation and 'unless interpreted with great caution and sensitivity, TBT could be considerably more intrusive on domestic regulatory choices than the GATT'.[561] The obligation to grant non-discriminatory treatment under article 2.1 TBT Agreement is formulated as follows:

> Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.[562]

With regards to non-discrimination, the single most important difference between the TBT agreement and the GATT is the absence in the former of a provision equivalent to the general exception clause contained in article XX of the latter. Before 2011 only one genuine TBT dispute was adjudicated before the WTO DSS.[563] In *EC – Sardines* the Panel having found

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[560] Article 13 TBT; on the instructive debate on the function of WTO Committees cf A Lang and J Scott, 'The Hidden World of WTO Governance' (2009) 20 EJIL 575; RH Steinberg, 'The Hidden World of WTO Governance: A Reply to Andrew Lang and Joanne Scott' (2009) 20 EJIL 1063; A Lang and J Scott, 'The Hidden World of WTO Governance: A Rejoinder to Richard H. Steinberg' (2009) 20 EJIL 1073.

[561] R Howse and PI Levy, 'The TBT Panels: *US-Cloves, US-Tuna, US-COOL*' (2013) 12 WTR 327, 350. For Horn and Weiler, '[c]learly the paradigm shift from local discretion to an internationally determined standard and, even more importantly from a regime of discrimination to one of non- justified obstacles is the most germane factor establishing the object and purpose and the context of the TBT (and SPS)';H Horn and JHH Weiler, 'European Communities – Trade Description of Sardines: Textualism and its Discontent' in H Horn and PC Mavroidis (eds), *The WTO Case Law of 2002* (CUP, Cambridge 2005) 248, 252.

[562] Article 2.1 TBT.

[563] AB, *EC – Sardines*; Panel, *EC – Sardines*.

that the EC measure in question was inconsistent with article 2.4 TBT exercised judicial economy and avoided pronouncing on the other claims including article 2.1 TBT.[564] However, since 2011 a triad of TBT disputes brought against the US (*US – Clove Cigarettes*, *US – Tuna II (Mexico)* and *US – COOL*) moved TBT interpretative questions to the epicentre of WTO analysis.[565]

Despite the recent and rich case law on non-discrimination under the TBT Agreement central interpretative questions have been resolved by the WTO DSS in a less than uniform manner. The inconsistencies in the approach adopted by the WTO Panels and the AB in interpreting key elements of the non-discrimination test under article 2.1 TBT (such as likeness and less favourable treatment) have often been attributed to an erroneous analogy with, and misguided transplant of the GATT case law on non-discrimination in a TBT context.[566] As it will be shown in the next chapter, significant inconsistencies in international investment jurisprudence in relation to National Treatment have been also explained by reference to abuse of the WTO case law.[567] Nonetheless, ill-drawn analogies (between different WTO agreements or even across regimes) constitute the *symptom* rather than the *cause* of the inconsistencies. The first two chapters of the thesis demonstrated how the preambles of the WTO agreement and many investment treaties are open to antithetical conceptions regarding the appropriate regulatory role of the State. As a result, the WTO DSS and international investment tribunals are equipped with considerable discretion in determining the relationship of equality. It is thus unsurprising that different ideological

[564] Panel, *EC – Sardines* [7.147]-[7.152].

[565] Although the Panel in *US – Tuna Mexico II* held that article III GATT and article 2.1 TBT have substantially the same normative content, the AB disagreed and criticised the Panel's exercise of judicial economy, AB, *US – Tuna Mexico II* [402]-[406].

[566] PC Mavroidis, 'Driftin' too far from shore – Why the test for compliance with the TBT Agreement developed by the WTO Appellate Body is wrong, and what should the AB have done instead' (2013) 12 WTR 509, 516-518.

[567] See *infra* Chapter IV, section III.

approaches in relation to the appropriate role of the State in regulating the economic activity and fostering development led to antithetical and sometimes diametrically opposed interpretations of key non-discrimination disciplines. The preamble of the TBT agreement. in particular, is equally ambiguous and sends confusing signals. The fifth recital of the TBT preamble which stresses the trade liberalisation objective[568] is counterbalanced by the sixth recital which emphasises WTO Members' 'right to regulate'[569].[570] As suggested by Wagner in relation to the triad of the recent TBT disputes, '[t]he findings in these cases involved a balancing between the dual goals of liberalizing trade and preserving a member's right to pursue legitimate policy objectives'.[571] At the same time, article 2.2 of the TBT Agreement safeguards the right of the WTO Members to pursue 'legitimate objectives':

> Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create. Such legitimate objectives are, inter alia: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical information related processing technology or intended end-uses of products.[572]

[568] '*Desiring* however to ensure that technical regulations and standards, including packaging, marking and labelling requirements, and procedures for assessment of conformity with technical regulations and standards do not create unnecessary obstacles to international trade', Preamble, TBT (emphasis in the original).

[569] '*Recognizing* that no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate, subject to the requirement that they are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade, and are otherwise in accordance with the provisions of this Agreement', Preamble, TBT (emphasis in the original).

[570] AB, *US – Clove Cigarettes* [95].

[571] M Wagner, 'Regulatory Space in International Trade Law and International Investment Law' (2014) 36 University of Pennsylvania J Int Law 1, 61-62.

[572] Article 2.2 TBT. The list of legitimate objective under article 2.2 TBT is indicative and not exhaustive, AB, *US – Tuna (Mexico) II* [313]; Panel, *EC – Sardines* [7.113]; AB, *US – COOL* [445], [462].

The two different approaches in relation to the appropriate regulatory role of the State in the economy shape and, at the same time, are reflected in the WTO case law on the non-discrimination clause of the TBT Agreement. On the one hand, an interventionist State requires a permissive interpretation of article 2.1 TBT, which takes into serious consideration legitimate regulatory objectives and non-trade values, thus creating and preserving adequate regulatory space for WTO Members. On the other hand, an economic *laissez-faire* approach presupposes a robust interpretation of article 2.1 TBT-based on strict adherence to econometric criteria, emphasis on market-based analyses and no or, in any case, limited role for the measures' objectives and legislative intent.

In order to find a violation of article 2.1 TBT, a three-step test is followed. First, the measure challenged must qualify as 'technical regulation' within the meaning of Annex 1.1 TBT; second, the products in question must be 'like' and, third, the treatment accorded to imported products must be 'less favourable' than that accorded to like domestic products and products for third countries.[573] Although what constitutes technical regulation is a complex question,[574] it is the first and the second element of the test that bear a conceptual relationship with equality and thus the analysis will focus on (1) likeness and (2) less favourable treatment under article 2.1 TBT.

1. Likeness

In earlier TBT cases the WTO DSS exercised judicial economy and avoided identifying the precise legal text for likeness under article 2.1 TBT.[575] The first TBT case where the question of products' likeness was fully explored was *US – Clove Cigarettes*. For the Panel in *US –*

[573] AB, *US – Tuna (Mexico) II* [229]; AB, *US – Clove Cigarettes* [87].

[574] See A Davies, 'Technical Regulations and Standards under the WTO Agreement on Technical Barriers to Trade' (2014) 41 Legal Issues of Economic Integration 37.

[575] Panel, *EC – Trademarks and Geographical Indications (Australia)* [7.463].

Clove Cigarettes the determination of likeness should not be approached 'primarily from a competition perspective',[576] and consideration of regulatory objective(s) is decisive:

> the weighing of the evidence relating to the likeness criteria should be influenced by the fact that Section 907(a)(1)(A) is a technical regulation having the immediate purpose of regulating cigarettes with a characterizing flavour for public health reasons. As explained above, we must pay special notice to the significance of the public health objective of a technical regulation and how certain features of the relevant products, their end-uses as well as the perception consumers have about them, must be evaluated in light of that objective.[577]

The AB overturned the Panel's approach by holding that likeness should be determined on the basis of 'the competitive relationship between and among the products' in question rather than the 'legitimate objectives and purposes of the technical regulation'.[578] For the AB the multiplicity of regulatory objectives rendered impossible or impractical the consideration of regulatory intent for determining likeness under article 2.1 TBT.[579] Following the *EC – Asbestos* ruling,[580] the AB held that regulatory considerations are relevant 'to the extent they have an impact on the competitive relationship between and among the products concerned'.[581]

The Panel in *US – Tuna (Mexico) II* confirmed the competition-based approach in relation to like products under article 2.1 TBT. The Panel first summarised the recent WTO jurisprudence regarding likeness under article III GATT:

> 'As products that are in a competitive relationship in the marketplace could be affected through treatment of imports "less favourable" than the treatment accorded to domestic products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a

[576] Panel, *US – Clove Cigarettes* [7.119].

[577] *ibid*.

[578] AB, *US – Clove Cigarettes* [112].

[579] *ibid* [113]-[115].

[580] AB, *EC – Asbestos* [113]-[114].

[581] AB, *US – Clove Cigarettes* [119].

> determination about the nature and extent of a competitive relationship between and among products'.[582]

The Panel continued by noting that

> Although this statement was made in the context of Article III:4 of the GATT 1994, we find it pertinent also to an interpretation of the term 'like products' in Article 2.1 of the TBT Agreement.[583]

The Panel's findings regarding likeness in *US – Tuna (Mexico) II* were not subject to an appeal by the US,[584] and the parties agreed that foreign and domestic tuna and tuna products were like also before the implementation Panel.[585]

2. Less Favourable Treatment

The 'less favourable treatment' part of the article 2.1 TBT test has shown to be even more controversial. As it was the case with 'less favourable treatment' under article III:4 GATT, the clause itself (because of the conceptual relationship with equality) is open to antithetical interpretations. In particular, the central question with which the WTO case law struggled is whether mere detrimental impact is sufficient or this impact must be caused by an impermissible regulatory distinction. According to an earlier WTO report:

> Article 2.1 of the TBT Agreement refers to "treatment no less favourable". An essential element of a claim under Article 2.1 is that, in respect of technical regulations, the treatment accorded to imported products is "less favourable" than that accorded to like products of national origin. The Panel notes the similarity in the terms used in Article 2.1 of the TBT Agreement and Article III:4 of GATT 1994, which also refers to "treatment no less favourable". The preamble to the TBT Agreement expressly sets out the desire "to further the objectives of GATT 1994". However, in view of its findings below, the Panel considers it sufficient for the purposes of this dispute simply to observe that the starting point for this analysis must be whether the measure at issue accords any difference in treatment.[586]

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[582] Panel, *US – Tuna II (Mexico)* [7.223]

[583] *ibid* (quoting AB, *Japan – Alcoholic Beverages*; internal references omitted).

[584] AB, *US – Tuna (Mexico) II* [230].

[585] Panel, *US – Tuna (Mexico) II (Article 21.5 – Mexico)* [7.71].

[586] Panel, *EC – Trademarks and Geographical Indications (Australia)* [7.464].

The WTO Panel held that

> it is unnecessary for the Panel to consider whether an assessment of conformity with Article 2.1 of the TBT Agreement requires reference to be had to the regulatory objective pursued by a measure as referred to in Article 2.2 of the TBT agreement, or the absence in the text of the TBT Agreement of a general exceptions provision such as Article XX of GATT 1994.[587]

However, for subsequent Panels and the AB, mere detrimental impact on the group of imported products was not conclusive for determining that they received less favourable treatment; the detrimental impact must also emanate from a regulatory distinction, which cannot be justified.[588] The introduction of this additional (and crucial) element of 'legitimate regulatory distinction' for the interpretation of 'less favourable treatment' under article 2.1 TBT was attributed to the lack of a general exception clause like article XX GATT in the TBT Agreement.[589]

As it was the case with article III GATT jurisprudence (per *Chile – Alcoholic Beverages*),[590] an inquiry into 'the design, architecture, revealing structure, operation, and application' of the measure is necessary for determining whether the measure in question is discriminatory or not.[591] In other words, in order for a measure to be in compliance with article 2.1 TBT the 'detrimental impact' of the former must 'stem from a legitimate

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[587] Panel, *EC – Trademarks and Geographical Indications (Australia)* [7.476].

[588] Panel, *EC – Seal Products* [7.585]; AB, *US – Clove Cigarettes* [180]-[182], [215]; AB, *US – Tuna II (Mexico)* [215].

[589] Panel, *EC – Seal Products* [7.585].

[590] See *supra* Section I.2.3.

[591] AB, *US – COOL* [271]; AB, *US – Clove Cigarettes* [224]. It is indicative that no reference was made to the *Japan – Alcoholic Beverages* report and the explicit rejection therein of the relevancy of regulatory intent.

regulatory distinction'.[592] However, it is impossible to assess the 'design' of a measure without reference to legislative intent.[593]

Attributing the disparate impact upon imported products (compared to domestic products) to the measure in question, and establishing a causal relationship between the measure and less favourable treatment requires complex econometric studies and robust evidence. However, the Panel and the AB in *US – COOL* failed to take seriously this heavy informational burden.[594] The relationship between the chapeau of article XX GATT and article 2.1 TBT is not clear either. There is room for different interpretations and the WTO Panels and the AB have adopted divergent approaches. In determining whether 'detrimental impact stems exclusively from a legitimate regulatory distinction' in the context of article 2.1 TBT, the WTO Panels and the AB emphasised that a decisive criterion should be whether the technical regulation in question was

> applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail or a disguised restriction on international trade.[595]

The language used mirrors the wording of the chapeau of article XX GATT.[596] The *Panel* in *EC – Seal Products* relied on its analysis under article 2.1 TBT to interpret the chapeau of article XX GATT. The AB reversed the Panel's findings and held that the differences in the legal standard applicable and the main function of article 2.1 TBT and the chapeau of article

[592] AB, *US – Clove Cigarettes* [225].

[593] S Hartmann, 'Comparing the National Treatment Obligations of the GATT and the TBT: Lessons Learned from the EC–Seal Products Dispute' (2015) 40 North Carolina J Int Law and Commercial Regulation 629, 667.

[594] For a criticism see PC Mavroidis and K Saggi, 'What is not so Cool about *US-COOL Regulations? A critical analysis of the Appellate Body's ruling on US-COOL*' (2014) 13 WTR 299; for example in *US – COOL* '[i]t was undisputed by the parties that the Panel did not need to verify the actual trade effects of the COOL measure and the Panel itself considered that findings in this respect were "not indispensable" for its analysis under Article 2.1.', AB, *US – COOL* [316].

[595] AB, *US – Tuna Mexico II* [213]; AB, *US – Clove Cigarettes* [94]. The wording is from the the sixth recital of the preamble of the TBT Agreement.

[596] See *supra* Section III.3.

XX GATT do not permit the application of the same legal test.[597] At the same time, 'arbitrary or unjustified discrimination' under the chapeau of article XX GATT cannot constitute a 'legitimate regulatory distinction' under article 2.1 TBT.[598] More recently, the compliance Panel in *US – Tuna (Mexico) II (Article 21.5 – Mexico)* left the door open for consideration of the 'relevant aspects of its reasoning developed in the context of Article 2.1 of the TBT Agreement to its analysis under the chapeau of Article XX of the GATT 1994'.[599]

VI. NON-DISCRIMINATION UNDER THE AGREEMENT ON SANITARY AND PHYTO-SANITARY MEASURES (SPS)

The SPS Agreement (as its twin agreement, the TBT Agreement), moved the centre of gravity of the world trade regime in health-related measures from *non-discrimination* to *harmonization*.[600] Under the SPS Agreement, WTO Members are required to use international standards (article 3) and base their relevant regulations on scientific principles and risk assessment (articles 2.2 and 5). These 'requirements of a risk assessment[601] as well as of 'sufficient scientific evidence'[602] are essential for maintaining the delicate and carefully negotiated balance between promoting international trade and protecting the life and health of human beings'.[603] Article 2.3 and 5.5 are the two provisions of the SPS Agreement that relate to non-discrimination.[604]Article 2.3 SPS provides:

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[597] AB, *EC – Seal Products* [5.310]-[5.313].

[598] AB, *US – COOL* [271].

[599] Panel, *US – Tuna (Mexico) II (Article 21.5)* [7.558].

[600] DJ Neven and JHH Weiler, 'Japan – Measures Affecting the Importation of Apples: One Bad Apple', in H Horn and PC Mavroidis (eds), *The WTO Case Law of 2003* (CUP, Cambridge 2006) 280, 280.

[601] Article 5.1 SPS.

[602] Article 2.2 SPS.

[603] AB, *EC – Hormones* [177].

[604] G Marceau and JP Trachtman, 'The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade: A Map of the World Trade Organization Law of Domestic Regulation of Goods' (2002) 36 JWT 811, 823.

> *Members shall ensure that their sanitary and phytosanitary measures do not arbitrarily or unjustifiably discriminate between Members where identical or similar conditions prevail*, including between their own territory and that of other Members. Sanitary and phytosanitary measures shall not be applied in a manner which would constitute a disguised restriction on international trade.[605]

Article 5.5 SPS stipulates:

> With the objective of achieving consistency in the application of the concept of appropriate level of sanitary or phytosanitary protection against risks to human life or health, or to animal and plant life or health, *each Member shall avoid arbitrary or unjustifiable distinctions in the levels it considers to be appropriate in different situations, if such distinctions result in discrimination or a disguised restriction on international trad*e. Members shall cooperate in the Committee, in accordance with paragraphs 1, 2 and 3 of Article 12, to develop guidelines to further the practical implementation of this provision. In developing the guidelines, the Committee shall take into account all relevant factors, including the exceptional character of human health risks to which people voluntarily expose themselves.[606]

Given that the SPS Agreement is *lex specialis* to GATT,[607] the WTO Panels upon finding a violation of the non-discrimination obligations under the SPS Agreement (article 2.3 or 5.5 SPS) exercise judicial economy in relation to non-discrimination claims under GATT.[608]

Despite proposals made by the US, and the Cairns Group of agricultural exporting countries[609] for including a strict national treatment provisions *à la* GATT in the SPS Agreement, a prohibition of 'arbitrary or unjustifiable discrimination' like the one included in the chapeau of article XX GATT was deemed more appropriate for preserving 'the delicate balance between trade and health objectives'.[610] At the same time, many WTO commentators

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[605] Article 2.3 SPS (emphasis added).

[606] Article 5.5 SPS (emphasis added).

[607] Panel, *EC – Hormones* [8.39].

[608] Panel, *US – Animals* [7.732]; Panel, *EC – Approval and Marketing of Biotech Products* [7.3422]; Panel, *EC – Hormones (US)* [8.272]; Panel, *EC – Hormones (Canada)* [8.275].

[609] During the Uruguay Round the Group comprised Argentina, Australia, Brazil, Canada, Chile, Colombia. Hungary, Indonesia, Malaysia, New Zealand, the Philippines, Thailand and Uruguay.

[610] D Prévost, 'National Treatment in the SPS Agreement: A *sui generis* obligation' in A Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property* (Edward Elgar, Cheltenham 2014) 125, 131.

conclude that the non-discrimination disciplines under the SPS Agreement such as the requirement of consistency in determining and applying the appropriate level of protection,[611] constitute the 'real bite' of the agreement.[612] The interpretative openness associated with traditional non-discrimination provisions in other WTO agreements (and the science-requirement provisions of the SPS Agreement),[613] are also present in relation to the non-discrimination obligations under the SPS Agreement.

During the SPS negotiations in the Uruguay Round (conducted in the shadow of the US-EC trade dispute regarding hormones-treated beef),[614] two main conceptualisations of the role of the SPS Agreement were put forward. On the one hand, the SPS Agreement served the need to harmonise SPS regulations by recourse to international standards. This is why the SPS Agreement has been often criticised as lying outside of the orthodox rationale of the international trading system.[615] On the other hand, a science-based SPS approach constitutes

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[611] According to the AB, '[t]he determination of the appropriate level of protection, a notion defined in paragraph 5 of Annex A, as "the level of protection deemed appropriate by the Member establishing a sanitary ... measure", is a prerogative of the Member concerned and not of a panel or of the Appellate Body' AB, *Australia – Salmon* [199].

[612] M Ming Du, 'Autonomy in Setting Appropriate Level of Protection under the WTO Law: Rhetoric or Reality?' (2010) 13 JIEL 1077, 1087; J Pauwelyn, 'Does the WTO Stand for "Deference to" or "Interference with" National Health Authorities When Applying the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement)?' in T Cottier and PC Mavroidis (eds), *The Role of Judge in International Trade Regulation* (Michigan UP, Ann Arbor 2003) 175, 190; S Charnovitz, 'Comment on the WTO Response', in T Cottier and PC Mavroidis (eds), *The Role of Judge in International Trade Regulation* (Michigan UP, Ann Arbor 2003) 215.

[613] Science and science-based approaches should not be conceived as neutral and apolitical processes. 'Science is the continuation of politics by other means', see generally B Latour, *Science in Action: How to Follow Scientists and Engineers through Society* (Harvard UP, Cambridge 1988); see also Vandenberghe, who argues that 'For Foucaldians, Latourians and other Deleuzians, knowledge and power are the same thing, viewed from a different perspective. When the scientists speak in the name of nature or society, it is to enrol them in an expanding actor-network, which grows in size and eventually becomes a powerful macro-social actor that extends its empire over the world. From this strategic perspective, science is the continuation of politics by other means', F Vandenberghe, *What's Critical About Critical Realism? Essays in reconstructive social theory* (Routledge, London 2014) 185.

[614] The dispute culminated in the *EC – Hormones* case before the WTO Panels and the AB in the late 1990s.

[615] RE Hudec, 'Science and Post-Discriminatory WTO Law', (2003) 26 Boston College Int & Comp L Rev 185, 187–188.

a safeguard against protectionism.[616] In that regard, the economic rationale of the SPS Agreement is no different than that of any other WTO covered agreement (with the exception of TRIPS): protecting market access commitments against protectionism.[617] Not only is the rationale of the SPS Agreement undetermined, but also

> the science provisions of the SPS Agreement can be understood as being compatible with a range of different views about the appropriate means of integrating scientific evidence into domestic regulatory decision-making'.[618]

Reflecting the tension between the two different conceptualisations of the role of the SPS Agreement, WTO jurisprudence gradually shifted from an earlier strict approach in cases like *EC – Hormones* to a more deferential stance in *US – Continuous Suspension* regarding the interpretation of risk assessment and the science-based requirements.[619]

1. Article 2.3 SPS

According to the WTO Panels and the AB, article 2.3 SPS is a provision of 'fundamental importance' for the SPS Agreement.[620] The test under article 2.3 SPS is a three-pronged one and in part incorporates part of the chapeau to article XX GATT:[621]

> [T]hree elements, cumulative in nature, are required for a violation of this provision:

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[616] J Peel, *Science and Risk Regulation in International Law* (CUP, Cambridge 2010) 177.

[617] B Rigod, 'The Purpose of the WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS)' (2013) 24 EJIL 503, 525-532.

[618] Lang (n 11) 331-332; see also E Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart, Oxford 2007) 173-206.

[619] J Peel, 'Of Apples and Oranges (and Hormones in beef): Science and the Standard of Review in WTO disputes under the SPS Agreement' (2012) 61 ICLQ 427, 446-448; see also Y Fukunaga, 'Standard of Review and "Scientific Truths" in the WTO Dispute Settlement System and Investment Arbitration' (2012) 3 JIDS 559, 562-568; see also L Gruszczynksi and V Vadi, 'Standard of Review and Scientific Evidence in WTO Law and International Investment Arbitration: Converging Parallels?' in L Gruszczynski and W Werner (eds), *Deference in International Courts and Tribunals: Standard of Review and Margin of Appreciation* (OUP, Oxford 2014) 152-174.

[620] AB, *Australia – Salmon* [251]; Panel, *US – Animals* [7.568].

[621] As the AB recognised '[t]his provisions takes up obligations similar to those arising under Article I:1 and Article III:4 of the GATT 1994 and incorporates part of the "*chapeau*" to Article XX of the GATT 1994' AB, *Australia – Salmon* [251]; Panel, *US – Poultry (China)* [7.260]; Panel, *US – Animals* [7.569].

(1) the measure discriminates between the territories of Members other than the Member imposing the measure, or between the territory of the Member imposing the measure and that of another Member;
(2) the discrimination is arbitrary or unjustifiable; and
(3) identical or similar conditions prevail in the territory of the Members compared.[622]

Because of the relationship between article 2.3 and 5.5 SPS,[623] and the exercise of judicial economy by the WTO Panels, 'there is little jurisprudence to guide our understanding of Article 2.3, specifically with regard to the meaning of "discrimination"',[624] and 'the interpretation of the words "arbitrarily or unjustifiably"'.[625] The scope of discrimination under article 2.3 SPS is rather broad as it encompasses not only 'substantive SPS measures' but also 'procedural and information requirements'.[626] Further, the likeness element of the non-discrimination obligation under article 2.3 SPS, inherent in any provision incorporating the concept of equality, does not concern a comparison between like products as in various non-discrimination provisions of GATT, but between different risks.[627] The test for 'arbitrary or unjustifiable discrimination' rests on whether the regulatory distinction 'bears a rational connection to the stated objective of the measures'.[628] In light of the relative few cases dealing with discrimination in the context of article 2.3 SPS it is unclear how the case law will evolve. However, for the time being, comparison under article 2.3 SPS is a

[622] Panel, *Australia – Salmon (Article 21.5 – Canada)* [7.111]; Panel, *US – Animals* [7.571].

[623] Article 5.5 'may be seen to be marking out and elaborating a particular route leading to the same destination' as article 2.3, AB, *EC – Hormones* [212]. Panel, *Australia – Salmon (Article 21.5 - Canada)* [7.112]-[7.114]; Panel, *EC – EC – Approval and Marketing of Biotech Products* [7.1446]-[7.1448], [7.1765]-[7.1766], [7.3405]-[7.3406]; Panel, *US – Poultry (China)* [7.318]-[7.319]; Panel, *Australia – Apples* [7.1095]; Panel, *US – Animals* [7.568]; however, article 2.3 'is of a more general character' compared to the non-discrimination obligation under article 5.5 which concern only differentiations in relation to the appropriate level of protection, Panel, *US – Animals* [7.568]; Panel, *India – Agricultural Products*, [7.344]-[7.355].

[624] Panel, *India – Agricultural Products* [7.396].

[625] *ibid* [7.427].

[626] Panel, *US – Animals* [7.620]; Panel, *US – Poultry (China)* [7.147].

[627] Panel, EC – Hormones [8.176]

[628] Panel, *US – Animals* [7.589]-[7.589]; Panel, *India – Agricultural Products* [7.429]; Panel, *US – Poultry (China)* [7.261].

subjective and based on the regulatory context rather than competitive relationships.[629] For example the Panel in *India – Agricultural Products* noted that

> the meaning of "arbitrary or unjustifiable discrimination" within the context of Article 2.3 of the SPS Agreement involves a consideration of the "cause" or "rationale" put forward to explain the discrimination in question, and whether there is a "rational connection" between the reasons given for the discriminatory treatment and the objective of the measure.[630]

2. Article 5.5 SPS

The non-discrimination obligation under article 5.5 SPS is also an autonomous standard, complementary to other obligations under the SPS Agreement such the risk assessment requirement.[631] Article 5.5 SPS is a specific application of the non-discrimination principle set in article 2.3 SPS.[632] A violation of article 5.5 SPS leads to a violation of the more general obligation under article 2.3 SPS,[633] (but not *vice-versa*):

> the more specific Article 5.5 is violated, such finding can be presumed to imply a violation of the more general Article 2.3. We do recognize, at the same time, that, given the more general character of Article 2.3, not all violations of Article 2.3 are covered by Article 5.5.[634]

The AB in *EC – Hormones* set the three elements of the test under article 5.5:

> (a) The Member imposing the measure complained of has adopted its own appropriate levels of sanitary protection against risks to human life or health in several different situations.

[629] Prévost (n 610) 157; Diebold (n 354) 143.

[630] Panel, *India – Agricultural Products* [7.429].

[631] Panel, *Australia – Salmon* [8.126].

[632] A Seibert-Fohr, 'Article 2 SPS' in R Wolfrum *et al* (eds), *WTO – Technical Barriers and SPS Measures* (Brill, Leiden 2007) 392, 408.

[633] However, when article 2.3 and article 5.5 claims are presented in the alternative, as the US did in *India – Agricultural Products*, finding a violation of article 2.3 may preclude the Panel from examining the measure(s) in question under article 5.5, see Panel, *India – Agricultural Products* [7.480].

[634] AB, *Australia – Salmon* [178]; Panel, *Australia – Salmon* [8.109]. In *EC – Hormones* the AB noted that 'When read together with Article 2.3, Article 5.5 may be seen to be marking out and elaborating a particular route leading to the same destination set out in Article 2.3', AB, *EC – Hormones* [212].

(b) Those levels of protection exhibit arbitrary or unjustifiable differences ("distinctions" in the language of Article 5.5) in their treatment of different situations.

(c) The arbitrary or unjustifiable differences result in discrimination or a disguised restriction on international trade.[635]

These elements are cumulative and a WTO Members must be found in breach of all three of them for a violation of article 5.5 SPS to take place.[636] This not only contradicts the WTO jurisprudence under the similarly-worded provision of the chapeau of article XX GATT, but also 'if it must be determined in each case whether an "arbitrary or unjustifiable distinction" rises to the level of a violation, the decision, it would seem, is quite uncertain guide to other cases in which environmental or safety regulations come into conflict with international trade'.[637] At the end of the day, whether distinctions amount to unjustifiable discrimination is assessed on a case-by-case basis and using both qualitative and quantitative factors.[638]

> the statement of that goal [consistency] does not establish a legal obligation of consistency of appropriate levels of protection. We think, too, that the goal set is not absolute or perfect consistency, since governments establish their appropriate levels of protection frequently on an *ad hoc* basis and over time, as different risks present themselves at different times. It is only arbitrary or unjustifiable inconsistencies that are to be avoided.[639]

[635] AB, *EC – Hormones* [214]; see also WTO Committee on Sanitary and Phytosanitary Measures, Guidelines to further the practical implementation of article 5.5, G/SPS/15, 18 July 2000 ('the Consistency Decision') [A.2.]; on the SPS Committee Guidelines in general and the Consistency Decision in particular see Lang and Scott (n 560) 599.

[636] *ibid* [215]; Panel, *EC – Approval and Marketing of Biotech Products* [7.1415]; Panel, *Australia – Salmon (Article 21.5 – Canada)* [7.86]-[7.108].

[637] AF Lowenfeld, *International Economic Law* (2nd edition, OUP, Oxford 2008) 407.

[638] M Matsushita, 'Some Issues of the SPS Agreement' in T Cottier and PC Mavroidis (eds), *The Role of the Judge in International Trade Regulation: Experience and Lessons for the WTO* (Michigan UP, Ann Arbor 2003) 193, 199-200.

[639] AB, *EC – Hormones* [213].

The first part of the test can be broken down into two aspects: 'different situations' and 'differences in levels of protection'.[640] The test for 'different situations' is so tautological as to allow any possible interpretative outcome:

> [t]he situations exhibiting differing levels of protection cannot, of course, be compared unless they are comparable, that is, unless they present some common element or elements sufficient to render them comparable. If the situations proposed to be examined are *totally* different from one another, they would not be rationally comparable and the differences in levels of protection cannot be examined for arbitrariness.[641]

However, determining whether a WTO Member has adopted *de facto* different ALOPs under the first element of the test is merged with the second element (*i.e.* 'those levels of protection exhibit arbitrary or unjustifiable differences').[642] In relation to that second element, WTO Panels have first emphasised that

> this requires a very delicate balancing act between carrying out a meaningful and objective analysis of the Parties' arguments and evidence, and refraining from a *de novo* review of the risks involved in the different situations[643]

Second, the requirement for consistency in relation to the ALOP is not equivalent to 'a legal obligation of absolute or perfect consistency between ALPs in different situations'.[644] Regarding the third element of the test, *i.e.* whether '[t]he arbitrary or unjustifiable differences result in discrimination or a disguised restriction of international trade', which is the 'most controversial' of the three,[645] the WTO jurisprudence has shown signs of inconsistency. While in *Australia – Salmon* the AB focused on objective considerations and not on the subjective intent of the measure, in *EC – Hormones* the genuine health concerns

[640] Panel, *Australia – Apples* [7.937]; Panel, *Australia – Salmon (Article 21.5 – Canada)* [7.89]; Panel, *Australia – Salmon* [8.112], [8.123].

[641] Panel, *Australia – Apples* [7.938]; AB, *EC – Hormones* [216] (emphasis in the original).

[642] Panel, *Australia – Apples* [7.962]-[7.987]; Panel, *Australia – Salmon (Article 21.5 – Canada)* [7.89].

[643] Panel, *Australia – Apples* [7.989]; Panel, *Australia – Salmon* [8.126].

[644] Panel, *Australia – Apples* [7.1045]; AB, *EC – Hormones* [213].

[645] J Pauwelyn, 'The WTO Agreement on Sanitary and Phytosanitary (SPS) Measures as applied in the first three SPS disputes, *EC – Hormones, Australia – Salmon and Japan - Varietals*' (1999) 2 JIEL 641, 653.

rather than protectionist intent.[646]

VII. NON-DISCRIMINATION UNDER THE ENABLING CLAUSE

The non-discrimination provision under the Enabling Clause and the *EC – Tariff Preferences* case (the only WTO dispute to date dealing with the issue of preferential treatment granted to developing countries) constitute an ideal case study to observe how the concept of equality and by implication non-discrimination clauses in international economic law are able to accommodate radically different interpretations by the WTO DSS on what constitutes discrimination. Such antithetical interpretations demonstrate the open-ended nature of non-discrimination clauses and reflect divergent politico-economic approaches to development.

The vast inequality between the developed and the developing States is undoubtedly one of the most important characteristics of the modern world; yet this dramatic disparity is a relatively recent phenomenon.[647] Pursuant to the doctrine of comparative advantage, all countries would be better off by endorsing Free Trade. However, this postulate is increasingly coming under scrutiny.[648] Free Trade is seen to perpetuate and even increase global inequality, as set against a canvas of extreme and unprecedented inequality. Free Trade is considered to simply make the richer nations richer, and the poor poorer.[649] As a response to this problem of inequality, developing states sought – and to a large extent achieved – the inclusion of preferential treatment for developing purposes in an international trade regime, which is otherwise structured around the principles of non-discrimination and

[646]AB, *Australia – Salmon* [76]; AB, *EC – Hormones* [240] reversing the Panels' finding, Panel, *EC – Hormones (US)* [8.203], [8.216], [8.241] and Panel, *EC – Hormones (Canada)* [8.206], [8.219], [8.244]; Ming Du (n 612) 1086-1087; Pauwelyn (n 645) 653-655; L Gruszczynski, *Regulating Health and Environmental Risks under WTO Law: A Critical Analysis of the SPS Agreement* (OUP, Oxford 2010) 239-240; J Scott, *The WTO Agreement on Sanitary and Phytosanitary Measures: A Commentary* (OUP, Oxford 2007) 154.

[647] Acemoglou and Robinson (n 311); Landes (n 311) xx.

[648] See eg J Stiglitz, *Globalization and Its Discontents* (WW Norton and Company, NY 2003).

[649] 'Life is not fair, and neither is the MFN principle', R Hudec, 'Tiger, Tiger in the House: a Critical Appraisal of the Case Against Discriminatory Trade Measures' in E-U Petersman and M Hilf (eds), *The new GATT round of multilateral trade negotiations: legal and economic problems* (2nd edition, Kluwer Law and Taxation, Deventer 1991) 205.

trade liberalisation.

The charter of the abortive ITO contained provisions for exceptions from trade rules for development.[650] The central proponent of differential trade treatment in favour of developing countries was the United Nations Conference on Trade and Development (UNCTAD) established in 1964.

> In 1968, the participants in the Second UNCTAD Conference reached 'unanimous agreement in favour of the early establishment of a mutually acceptable system of generalized, non-reciprocal and non-discriminatory preferences which would be beneficial to the developing countries'.[651]

In 1971, a waiver from MFN was granted for an initial period of ten years.[652] In 1979, during the Tokyo Round of Negotiations,[653] the GATT CONTRACTING PARTIES adopted the 'Decision on Differential and More Favourable Treatment, Reciprocity and Fuller Participation of Developing Countries' –best known as the *Enabling Clause*[654] – which introduced one major exception to MFN in favour of developing countries. Mavroidis, however, suggests that '[i]t would, probably have made better sense for the AB to go all the way and construct the Enabling Clause, not as an exception to Art.I GATT, but as self-standing obligation'.[655] Paragraph 2(a) of the 1979 Decision stipulates that '[p]referential tariff treatment accorded by developed contracting parties to products originating in

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[650] C Michalopoulos, *Developing Countries in the WTO* (Palgrave Macmillan, NY 2001) 23-24; N Breda dos Santos *et al*, 'Generalized System of Preferences in General Agreement on Tariffs and Trade/World Trade Organization: History and Current Issues' (2005) 39 JWT 637, 640-641.

[651] L Bartels and C Häberli, 'Binding Tariff Preferences for Developing Countries under article II GATT' (2010) 13 JIEL 969, 972.

[652] *ibid* 27-28; L/3545 (25 June 1971) GATT BISD 18S/24.

[653] See D MacRae and JC Thomas, 'The GATT and Multilateral Treaty-Making: the Tokyo Round' (1983) 77 AJIL 51.

[654] L/4903 (28 November 1979) GATT BISD 26S/203. Given that the Enabling Clause was originally envisaged and formulated in relation to trade in goods it is unclear whether its scope of application can be extended to cover trade in services as well, AH Qureshi and C Wittayawarakul, 'International development law and Preferential Trade Agreements involving developing countries' in Y Ngangjoh-Hodu and FAST Matambalya (eds), *Trade Relations Between the EU and Africa* (Routledge, London 2010) 130-131.

[655] Mavroidis (n 319) 158.

developing countries in accordance with the Generalized System of Preferences'. As Hudec inimitably put it, if 'the Kennedy and Tokyo Round were the two halves of a GATT-UNCTAD soccer match, one could say that the score was UNCTAD 2, GATT 0; the second goal being an own-goal'.[656] According to the 2004 Sutherland Report, Special and Differential treatment in favour of developing countries is now part of the 'WTO's legal "*acquis*"';[657] the Enabling Clause being the '"most concrete, comprehensive and important application" of the principle of special and differential treatment'.[658] It is also one of the key issues in the Doha Development Round of negotiations in the WTO.[659]

While the WTO regime permits the preferential treatment of developing States, the granting of preferences should be done on a non-discriminatory basis under the Enabling Clause. In footnote 3, which accompanies paragraph 2(a), it is clearly provided that:

> [a]s described in the Decision of the CONTRACTING PARTIES of 25 June 1971, relating to the establishment of "generalized, non-reciprocal and *non-discriminatory* preferences beneficial to the developing countries" (BISD 18S/24).[660]

The very question of what constitutes discrimination within the context of granting tariff preferences under the Enabling Clause lies at the heart of the *EC – Tariff Preferences* case between the EU and India.[661] The array of measures that the Enabling Clause can

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[656] R Hudec, *Developing Countries in the GATT Legal System* (CUP, Cambridge 2011) 9.

[657] Sutherland Report [89].

[658] EC submission, AB, *EC–Tariff Preferences* [14].

[659] WTO Doha Ministerial Declaration, (14 November 2011) WT/MIN(01)/DEC/1, [44]; WTO Hong Kong Ministerial Declaration (18 December 2005) WT/MIN(05)/DEC [35-38].

[660] (emphasis added), L/4903 (28 November 1979) GATT BISD 26S/203.

[661] For an economic analysis see G Grossman and A Sykes, 'A Preference for Development: The Law and Economics of GSP' in G Bermann and PC Mavroidis (eds), *WTO Law and Developing Countries* (CUP, Cambridge 2007) 255 *et seq*. See also consultations between Brazil and the EC concerning *European Communities – Measures Affecting Soluble Coffee*, WT/DS209/1 (19 October 2000).

accommodate is vast: from traditional development aid to 'microtrade'.[662] Unlike the chapeau of Article XX GATT, there is no textual guidance for interpreting non-discrimination.[663] The text of the Enabling Clause does not provide clear guidance,[664] and the AB ruling in *EC – Tariff Preferences*, although seminal, did not provide any guidance either.[665] The EU (the EC at the time) had in place a scheme for granting tariff preferences for Developing Countries and economies in transition under the European Council Regulation 2501/2001.[666] Amongst other categories, the Regulation provided for special treatment of 12 developing countries that had drug production and trafficking programmes in place.[667] India, contrary to its neighbour Pakistan, was not included in the EC programme, although it ran a drug-combating programme. On that basis, it challenged the Regulation as discriminatory and violating footnote 3 of the Enabling Clause.

One import preliminary question with regard to the Enabling Clause is whether it is legally binding, intended to create legal obligations, or hortatory. There is theoretical disagreement concerning the matter,[668] and the EC argued that the term 'non-discriminatory'

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[662] Y-S Lee, 'Law and Development for Least Developed Countries: Theoretical Basis and Regulatory Framework for Microtrade' in Y-S Lee *et al* (eds), *Law and Development Perspective on International Trade Law* (CUP, Cambridge 2011) 7-28, 24.

[663] JY Qin, 'Defining Nondiscrimination under the law of the World Trade Organization' (2005) 23 BU Int L J 215, 284.

[664] A Tomazos, 'The GSP Fallacy: A Critique of the Appellate Body's Ruling in the GSP Case on Legal, Economic, and Political/Systemic Grounds' in G Bermann and PC Mavroidis (eds), *WTO Law and Developing Countries* (CUP, Cambridge 2007) 306, 311.

[665] J Gathii, *African Regional Trade Agreements as Legal Regimes* (CUP, Cambridge 2011) 131-132.

[666] Council Regulation (EC) No 2501/2001 of 10 December 2001, [2001] OJ L346/1. At the moment 13 GSP schemes have been notified to the UNCTAD Secretariat: Australia, Belarus, Bulgaria, Canada, Estonia, the European Union, Japan, New Zealand, Norway, the Russian Federation, Switzerland, Turkey and the United States of America, UNCTAD, http://unctad.org/en/Pages/DITC/GSP/About-GSP.aspx

[667] Bolivia, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Nicaragua, Pakistan, Panama, Peru and Venezuela.

[668] E Kessie, 'The legal status of Special and Differential Treatment Provisions under the WTO Agreements' in G Bermann and PC Mavroidis (eds), *WTO Law and Developing Countries* (CUP, Cambridge 2007) 12-35. Dunoff observes that 'developed states have virtually unlimited discretion to add or subtract countries and goods from their preference programs', J Dunoff, 'Dysfunction, Diversion, and the Debate Over Preferences' in J

in footnote 3 merely described the GSP rather than imposing binding legal obligations.[669] The AB, however, rejected that argument and held that non-discrimination is indeed a binding legal requirement.[670]

On the substantive issue of what constitutes discrimination between developing countries under the Enabling Clause, the Panel held that:

> the term "non-discriminatory" in footnote 3 requires that *identical* tariff preferences under GSP schemes be provided to *all* developing countries without differentiation, except for the implementation of a priori limitations.[671]

Based on that understanding of non-discrimination as a flat formal equality between developing States, the Panel concluded that the EC drug programme in question, is a violation of footnote 3 of the Enabling Clause because it failed to provide identical treatment to all developing States.[672] The AB reversed the Panel's decision:

> the term "non-discriminatory" in footnote 3 does not prohibit developed-country Members from granting different tariffs to products originating in different GSP beneficiaries, provided that such differential tariff treatment meets the remaining conditions in the Enabling Clause. In granting such differential tariff treatment, however, preference-granting countries are required, by virtue of the term "non-discriminatory", to ensure that identical treatment is available to all similarly-situated GSP beneficiaries, that is, to all GSP beneficiaries that have the "development, financial and trade needs" to which the treatment in question is intended to respond.[673]

Quintessentially, the Panel adopted a formal and absolute conception of equality among developing States within the Enabling Clause context. By contrast, the AB adopted a

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Trachtman and C Thomas (eds), *Developing Countries in the WTO Legal System* (OUP, Oxford 2009) 64; On the other hand Howse emphatically denies that the Enabling Clause is legally binding R Howse, 'India's WTO Challenge to Drug Enforcement Conditions in the European Community Generalized System of Preferences: A Little Known Case with Major Repercussions for "Political" Conditionality in US Trade Policy' (2003) 4 Chicago J Int L 393.

669 AB, *EC–Tariff Preferences* [31].

670 *ibid* [143-147].

671 Panel, *EC–Tariff Preferences* [7.161].

672 *ibid* [7.177].

673 AB, *EC–Tariff Preferences* [173].

substantive conception of equality based on a 'similarly situated' criterion, provided that 'objective criteria' are used.[674]

A criticism against trade preferences schemata is that '[i]t as at best debatable, nonetheless, whether donors have (any) incentives to adopt criteria that will promote development of the recipients and not simply their own social preferences'.[675] But it is not only donor countries, domestic interests and preferences that shape conditionality; it is also (and predominantly) their views and preferences in relation to what is the appropriate recipe for development. Empowered by the conceptual malleability of the non-discrimination standard (also of the Enabling clause), the WTO DSS – when a measure is challenged before it – will impose its own preferences regarding the institutional design and policy mix of a development policy by sanctioning or striking down the conditions set by the donors country. The Panel seems to focus on the promotion of free trade and non-discrimination, while the AB appears to be more sensitive towards development goals and implicitly recognises the positive role of GSP programmes.[676] The Panel adopted a purely economic approach which is based on a number of premises. The objective of the WTO covered agreements in general, and MFN in particular, is to limit negative international externalities,[677] and, thus, GSP exceptions too should be limited to avoid concession erosion[678] or bilateral opportunism[679]. The effectiveness of preferential treatment in general and the Enabling Clause in particular to

[674] For a criticism of the AB's decision on both legal and economic grounds see Tomazos (n 638) 306-323.

[675] Mavroidis (n 319) 171.

[676] Qin (n 663) 290.

[677] Grossman and Sykes, (n 661) 277; K Bagwell and R Staiger, *The economics of the World Trading System* (MIT Press, Cambridge MA 2002).

[678] W Schwartz and A Sykes, 'The economics of the most favored nation clause' in J Bhandari and Sykes (eds), *Economic dimensions in international law, comparative and empirical perspectives* (CUP, Cambridge 1997).

[679] Bagwell and Staiger (n 677); Grossman and Sykes (n 661) 277-278.

foster economic development is seriously questioned.[680] Trade preferences in favour of developing countries are controversial in economic theory,[681] while

> the available empirical studies, limited as they are, point to the conclusion that special and differential treatment has had only a marginal effect on country economic performance, especially through GSP. And in the more rapidly growing economies, such as Korea; Chinese, Tapei; Turkey and others, there is little evidence that special and differential treatment has played much of a role in their strong performance.[682]

Özden and Reinhardt's research shows that trade preferences are detrimental for free trade as they delay trade liberalisation.[683] If, as recent economic theory suggests, development depends more on the national institutions rather than trade-related measures,[684] then preferences are of secondary importance to development goals.[685] The Sutherland Report has been also critical towards the GSP concept: 'by enabling discriminating conditions among GSP-eligible countries, non-trade conditions introduce clout for advancing what are principally developed country lobbying agendas'.[686] The AB seems to endorse another conception of the development aim of the Enabling Clause.[687] Recent literature on development economics emphasises the pivotal importance of sound and sophisticated

[680] Y-S Lee, *Reclaiming Development in the World Trading System* (CUP, Cambridge 2006) 37-38.

[681] B Hoekman and M Kostecki, *The Political Economy of the World Trading System. The WTO and beyond* (3rd edition, OUP, Oxford 2009) 556-562.

[682] J Whalley, 'Non-discriminatory Discrimination: Special and Differential Treatment under the GATT for Developing Countries' (1990) 100 The Economic Journal 1318, 1328 also cited also by Sutherland Report [99]. In general 'the overall impact of the last thirty years of preferential treatment for developing countries has been meager', K Moss, 'The Consequences of the WTO Appellate Body Decision in *EC—Tariff Preferences* for the African Growth Opportunity Act And Sub-Saharan Africa' (2006) 38 International Law & Politics 665, 671.

[683] Ç Özden and E Reinhardt, 'The Perversity of Preferences: GSP and Development Country Trade Policies, 1976-2000' 2955 (2003) World Bank Working Paper.

[684] See, generally, Acemoglou and Robinson (n 311); D Rodrik *et al* (n 311) 131.

[685] Dunoff (n 668) 68.

[686] Sutherland Report [94].

[687] A purely economic interpretation of the Enabling Clause is arguably not consistent with the historical understanding of the GSPs, see C Leng Lim, 'The Conventional Morality of Trade' in C Carmody *et al* (eds), *Global Justice and International Economic Law, Opportunities and* Prospects (CUP, Cambridge 2012) 150

institutions.[688] If that line of thought is correct, then the door for conditionality related to, and promoting, the restructuring of policies and institutions in developing States should be left open.[689]

The number of the WTO Members and the extent of their comments in the DSB on the adoption of the AB Report in *EC – Tariff Preferences* was not only highly indicative of the importance and the complexity of the non-discrimination issues but also demonstrates that WTO Members are deeply divided on the matter.[690] In the same DSB meeting India also specifically observed that 'the findings of the Appellate Body had effectively transferred the prerogatives and powers of WTO Members to panels and the Appellate Body'.[691] However, it is not the finding of the AB that took away from the WTO Membership and conferred a broad discretion to the WTO DSS; this was due to the choice of the drafters of the Enabling Clause to use the language of non-discrimination and equality which is open – by its very conceptual nature – to different interpretations.

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[688] J Dunoff, 'When - and why - do Hard Cases make Bad Law?: the GSP Dispute' in G Bermann and PC Mavroidis (eds), *The WTO and Developing Nations* (CUP, Cambridge 2009) 290-291.

[689] *ibid* 291.

[690] India heavily criticised a number of aspects of the AB ruling in an exceptionally long statement, Dispute Settlement Body, Minutes of Meeting Held on 20 April 2004, WT/DSB/M/167 [34]-[52]. The Philippines also disagreed with the AB's reason regarding non-discrimination (and further confirming the complex and open-ended nature of the concept of equality) stated: 'all GSP beneficiaries were from an economic standpoint similarly situated. This was precisely why they were all included as beneficiaries, regardless of the probably divergent causes underlying their economic situation', *ibid* [62]. Other countries also disagreed with the AB's interpretation of non-discrimination under the Enabling Clause, Paraguay, *ibid* [66]-[70], Thailand, *ibid* [76], and Brazil, *ibid* [71]-[75], Malaysia, *ibid* [77] Mexico, *ibid* [78]. Contrariwise the EC welcomed the fact that 'the Appellate Body had rejected the rigid interpretation given by the Panel to the term "non-discriminatory" under the Enabling Clause under which strictly identical preferences would have to be given to all developing countries without any differentiation', *ibid* [53]. Equally supportive of the AB's interpretation of non-discrimination under the Enabling Clause was Ecuador speaking on behalf of the whole Andean Community (Bolivia, Colombia, Ecuador, Peru, Venezuela) *ibid* [54], El Salvador speaking also on behalf of Guatemala, Honduras and Nicaragua, *ibid* [56], Costa Rica [57] and the United States [58]. India also criticised the AB's reading of non-discrimination in the DSB meeting: 'the Appellate Body in this case had disregarded the ordinary meaning of the term "non-discriminatory", as well as the relevant WTO jurisprudence, and had also failed to conduct an analysis of this term in the context of Article I.1 of the GATT 1994', Dispute Settlement Body, Minutes of Meeting Held on 20 July 2005, WT/DSB/M/194 [32].

[691] Dispute Settlement Body, Minutes of Meeting Held on 20 April 2004, WT/DSB/M/167 [52].

VIII. INTERIM CONCLUSIONS

The detailed examination of the jurisprudence of WTO Panels and the AB in relation to non-discrimination obligations contained in the key WTO agreements (GATT, GATS, TBT and SPS) confirmed the theoretical hypothesis developed in Chapter I. Law is best conceptualised as a process of decision-making rather than as a system of rules with a fixed normative content. In the WTO context, Panels and the AB adopted radically different interpretations of WTO non-discrimination provisions. Such divergence emanates from different understandings of the role of the international trade regime and the regulatory role of the State. A pro-state's intervention is reflected in a liberal assessment of economic evidence, emphasis on non-economic values and consideration of regulatory intent. Likewise, a strict, economics-based approach, restricts States' regulatory space and reflects an endorsement of the free-trade and *laissez-faire* theology.

CHAPTER IV.
NON-DISCRIMINATION IN INTERNATIONAL INVESTMENT ARBITRATION

I. INTRODUCTION

The origins of the international investment regime can be traced back to the 10th century and the *chrysobula* of Byzantine Emperors granting Venetian merchants rights and privileges in Constantinople.[692] Recently international investment law ceased to be an obscure and technical area of international law which was of interest only to a handful of academics and practitioners. At present, the international investment regime faces a legitimacy crisis. Quite commonly the highly inconsistent case law in international investment law is considered as the main source of the legitimacy crisis[693]. However – as preliminary observation – the discourse of legitimacy[694] (or the lack thereof) in international investment law should be approached with a degree of caution.[695] One can hardly think of any international court or tribunal that did not face a legitimacy crisis at some point in its life. The ICJ in the 1960s and

[692] JW Salacuse, *The Law of Investment Treaties* (OUP, Oxford 2010) 80; as with modern BITs, concessions to Venice on behalf of Byzantium were explicitly to address economic concerns, P Fankopan, 'Byzantine trade privileges to Venice in the eleventh century: the chrysobull of 1092' (2004) 30 Journal of Medieval History 135, 152; for the history of international investment treaties see KJ Vandevelde, 'A Brief History of International Investment Agreements' (2005) 12 University of California Davis Journal of International Law and Policy 157.

[693] Franck notes that 'conflicting awards based upon identical facts and/or identically worded investment treaty provisions will be a threat to the international legal order and the continued existence of investment treaties', SD Franck, 'The Legitimacy Crisis in International Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions' (2005) 73 Fordham LR 1521, 1583; CN Brower and M Ottolenghi, 'The Saga of CMS: Res Judicata, Precedent and the legitimacy of ICSID arbitration' in Christina Binder *et al* (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009) 854. *Cf* SA Alexandrov, 'On the perceived Inconsistency in Investor-State Jurisprudence' in JE Alvarez and KP Sauvant (eds), *The Evolving Investment Regime: Expectations, Realities, Options* (OUP, Oxford 2011) 60-69, who argues that criticism regarding inconsistency is exaggerated and fails to take into account variations in facts and treaty language.

[694] See also Chapter I.

[695] See the excellent analysis in D Krishan, 'Thinking about BITs and BIT Arbitration: the legitimacy crisis that never was' in T Weiler and F Baetens (eds), *New Directions in International Economic Law: In Memoriam Thomas Wälde* (Martinus Nijhoff, Leiden 2011) 107-150.

1970s,[696] the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR), the World Trade Organization (WTO) DSS in the 1990s, the European Court of Human Rights (ECtHR) and the International Criminal Court (ICC) are perhaps the most prominent examples. Nonetheless, the fact that several Latin American countries denounced the ICSID Convention,[697] coupled with criticism coming from different academic and policy quarters,[698] clearly highlights a legitimacy issue. This crisis is sometimes fuelled by the peculiarities of international adjudication.[699] The interpretation of non-discrimination clauses such MFN and dispute settlement clauses or national treatment are often found to be at the epicentre of the legitimacy debates. Different investment tribunals adopt diverging, even antithetical conceptions of the international investment regime.[700] These conceptions largely determine the interpretation of open-ended provisions prohibiting discrimination. Therefore, it is imperative to delve into the antithetical

[696] In particular due to the decision of the ICJ in *South West Africa (Ethiopia v South Africa, Liberia v South Africa) (Second Phase, Judgment)* [1966] ICJ 6.

[697] Bolivia withdrew from ICSID in 2007, Ecuador in 2010 and Venezuela in January 2012, pursuant to Articles 71 and 72 of the ICSID Convention, see J C Hamilton *et al*, 'Latin American Arbitration and Investment Protections' in Jonathan C Hamilton *et al* (eds), *Latin American Investment Protections* (Martinus Nijhoff, Leiden 2012) 2. On the legal effect of the denunciation of the ICSID Convention see E Gaillard, 'The denunciation of the ICSID Convention' (2007) 237 New York Law Journal; C Schreuer, 'Denunciation of the ICSID Convention and Consent to Arbitration' in M Waibel *et al* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, Alphen aan den Rijn 2010) 353-368; Oscar M Garibaldi, 'On the denunciation of the ICSID Convention, Consent to ICSID Jurisdiction, and the limits of contract analogy' in in Christina Binder *et al* (eds) *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* (OUP, Oxford 2009); LE Trakman, 'ICSID Under Siege' (2013) 45 Cornell International Law Journal 603.

[698] M Waibel *et al* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, Alphen aan den Rijn 2010). See also P Eberhardt and C Olivet, *Profiting from injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom*, Corporate Europe Observatory and the Transnational Institute (Nouvelles Imprimeries Havaux, Amsterdam/Brussels 2012); Osgood School of Law, York University, 'Public Statement on the International Investment Regime', (31 August 2010), http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_ (final) _ (Dec_2013).pdf.

[699] For Van Harten argues that '[c]onsensual arbitration is broadly suitable as a means to settle disputes between companies or between states, but it is fundamentally inadequate as a substitute for the public courts in the regulatory domain', G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2006) 11.

[700] See Section II *infra*.

understandings of different tribunals about what is the proper role of the international investment regime.

The aim of this fourth chapter of the thesis is to demonstrate the substantive indeterminacy of legal rules in general and non-discrimination clauses in international investment law in particular with extensive references to the jurisprudence of investment tribunals. The jurisprudence will be analysed in light of the theoretical framework developed earlier.[701] The main argument is presented in symmetry to the preceding analysis of the WTO jurisprudence on non-discrimination.[702]

Strict adherence to the text, though dictated by the Vienna Convention on the Law of Treaties (VCLT),[703] has inherent limits, which in the case of non-discrimination clauses are significant. This is due to laconic and highly abstract formulation of non-discrimination clauses in international investment agreements and particularly their conceptual relationship with equality, a particularly open-ended, highly contested and value-laden concept. As a result, non-discrimination clauses contained in investment agreements allow a broad spectrum of different and, often conflicting, interpretations. Investment tribunals enjoy broad discretion in interpreting non-discrimination provisions. This inherent discretion, coupled with the existence of different approaches regarding the appropriate regulatory role of the State in the economy and different understandings of the rationale of the international investment regime has led to inconsistent or antithetical decisions, even in case of identical or similarly worded provisions.

[701] See Chapters I and II.

[702] See Chapter III.

[703] VCLT (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

Non-discrimination obligations occupy a central place in international investment law.[704] Their analysis however is complex due to two factors. First, one can speak of a '*spaghetti bowl*'[705] of non-discrimination provisions contained in investment agreements (MFN, National Treatment, the prohibition against arbitrary and discriminatory measures as well as the non-discrimination requirement under FET, Full Protection and Security, and Expropriation).[706] Second, discrimination is a broad concept, which 'can take many forms', with 'discrimination on the basis of nationality' being one of these forms but not the only one.[707] The investment tribunals' approach in relation to non-discrimination clauses further adds to the complexity. Investment tribunals do not interpret the different non-discrimination standards in a systematic or uniform way, nor do they employ a strict methodology. Tribunals interpreting a particular non-discrimination clause often rely on other tribunals' decisions interpreting other non-discrimination obligations in order to support their interpretative approach.[708] For example, the tribunal in *El Paso v Argentina* interpreted the prohibition

[704] The EU also recently confirmed that 'a key ingredient of EU investment negotiations', European Commission, Communication, Towards a Comprehensive European International Investment Policy, COM (2010)343 final, Brussels 7 July 2010 (Commission White Paper) 8.

[705] To borrow the phrase from J Bhagwati, D Greenaway and A Panagariya, 'Trading Preferentially: Theory and Policy' (1998) 108 Economic Journal 1128, 1138. According to Weiler, '[f]ive core standards underpin the guarantees of non-discrimination and equality undergirding IIL: "fair and equitable treatment", "protection and security", "national treatment", "most favoured nation treatment", and the compensation for expropriation standard', Weiler (n 106) 14.

[706] Usually these standards can be found in different articles of BITs, however see Article 3(1) of the Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Federative Republic of Brazil (adopted 25 November 1998, not yet in force) where the obligation to provide FET, abstain from arbitrary and discriminatory measures and full protection and security are listed in a single article.

[707] *Bogdanov v Moldova*, Final Award [215]; *Plama v Bulgaria*, Award [184]; *Al-Bahloul v Tajikistan*, Partial Award [248].

[708] There is no *stare decisis* in international arbitration (and in public international law more generally), echoing the Justinian principle '*non exemplis, sed legibus iudicandum est*', Digest of Justinian, C 7.45.13. However, precedents are highly persuasive, F Spoorenberg and JE Viñuales, 'Conflicting Decisions in International Arbitration' (2009) 8 The Law and Practice of International Courts and Tribunals 91, 102-103. The tribunal in *Saipem v Bangladesh* summarised the status quo:

> The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series

against 'arbitrary or discriminatory measures' contained in article II(2)(b) of the Argentina-USA BIT,[709] by relying on a *dictum* in *Goetz v Burundi I*,[710] which concerned article 2(2) of the International Covenant on Economic, Social and Cultural Rights.[711] Another example is *Total v Argentina* where the tribunal relied on the interpretation of an MFN clause in *Parkerings v Lithuania*[712] to rule on a National Treatment claim.[713] The lack of methodological rigidity in drawing interpretative analogies from different non-discrimination rules was criticised by the WTO AB, when, for the purpose of interpreting the MFN obligation contained in article II GATS, a Panel examined National Treatment case law under article III GATT (and not MFN jurisprudence under article I GATT).[714] However, investment tribunals adopt a more liberal and flexible approach. Such approach, while not methodologically rigorous, does demonstrate the conceptual link between different non-discrimination standards in international economic law and the overarching idea of equality. Finally, while the investment tribunal's jurisprudence on non-discrimination is vast, certain

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> of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.

Saipem v Bangladesh, Jurisdiction [67] (internal references omitted). Rather exceptionally for the WTO practice this was also quoted in Panel, *US – Stainless Steel (Mexico)* [160]. See also, G Guillaume, 'The Use of Precedent by International Judges and Arbitrators' (2011) 2 JIDS 5; G Sacerdoti, 'Precedent in the Settlement of International Economic Disputes: the WTO and Investment Arbitration Models' in AW Rovine (ed), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers* (Martinus Nijhoff, Leiden 2010) 225-246.

[709] Treaty between United States of America and the Republic of Argentina concerning the Reciprocal Encouragement and Protection of Investment (signed 14 November 1991, entered into force on 20 October 1994).

[710] *Goetz v Burundi [I]*, Award [121].

[711] *El Paso v Argentina*, Award [305]; International Covenant on Economic, Social and Cultural Rights (adopted 16 December 1966, entered into force 3 January 1976) 993 UNTS 3. It is precisely what the tribunal did also in *Ulysseas, Inc v Ecuador*, Final Award [293]. Another tribunal relied on *Geotz v Burundi I* to interpret a National Treatment, *Champion Trading v Egypt*, Award [130].

[712] *Parkerings v Lithuania*, Award [369].

[713] *Total v Argentina*, Liability [213].

[714] AB, *EC – Bananas III* [231]; see also Panel, *China – Electronic Payment Services* [7.698].

investment tribunals avoid important (and controversial) interpretative questions in relation to non-discrimination clauses by exercising judicial economy.[715]

[715] This is often described as 'minimalism', Landau observes that 'very little is often given away as to the tribunal's thinking. The flavour of such awards is one of minimalism', T Landau, 'Reasons for Reasons: The Tribunal's Duty in Investor-State Arbitration' in AJ van den Berg (ed), *50 Years of the New York Convention: ICCA Congress Series No 14, Dublin Conference 2008* (Kluwer Law International, Alphen aan den Rijn 2009) 202; Ortino criticizes the strong trend towards 'minimalism', F Ortino, 'Legal Reasoning of International Investment Tribunals: A Typology of Egregious Failures' (2012) 3 JIDS 25, 41-45.

II. TWO DIVERGENT PERSPECTIVES ON INTERNATIONAL INVESTMENT LAW

Based on the theoretical framework developed earlier, the jurisprudence of investment tribunals can usefully be analysed by reference to two different understandings of the regulatory role of the State in economic affairs. At the one end of the spectrum, development is seen as presupposing and depending on limited regulation, economic liberty (*laissez-faire*) and robust protection of property rights. For investment tribunals, which endorse such a view, international investment law is exclusively or at least primarily about the protection of foreign investors and their investments.[716] At the other end of the spectrum, economic development is considered to be mainly achieved through targeted State actions, directing the course of the economy and correcting inherent externalities, inefficiencies and ultimately the unfairness of the free market. For tribunals that share this view, the commitments undertaken for the protection of investments by State are interpreted through the lens of the Host States' development needs and their economic and social interests.[717] (This binary conceptualisation of the international investment regime, its purpose and function is not irrelevant to the debate concerning the nature of investors' rights.[718]) For the former conceptualisation the decision in *Lemire v Ukraine* serves as an example. The tribunal quite adamantly stated that 'the object

[716] This is also usually the investors' perspective, as one tribunal noted investors often contend that, as a BIT's purpose is to protect them, the interpretation of their treaties for the promotion and the protection of investments, viewed in their context and according to their object and purpose, leads to an interpretation in favour of the investors', *Pan American v Argentina*, Preliminary Objections [97].

[717] This underlying philosophy is usually emphasised by States acting as Respondents in investment claims. For example one tribunal noted that '[t]he USA contends that a doctrine of restrictive interpretation should be applied in investor-state disputes. In other words, wherever there is any ambiguity in clauses granting jurisdiction over disputes between states and private persons, such ambiguity is always to be resolved in favour of maintaining state sovereignty', *Methanex v USA*, Partial Award [103]; *Pan American v Argentina*, Preliminary Objections [97]. Kläger's analysis in his monograph on FET alludes to the same conclusion. He first accurately observes that concerning the different approaches to FET, 'investors almost stereotypically argued in line with the expansive view of the *Pope & Talbot* tribunal, while host states with a similar insistence favoured the restrictive approach taken in NAFTA FTC note of interpretation', Kläger (n 117) 85. See also Interpretation of Article 11 of the Bilateral Investment Treaty between Switzerland and Pakistan in the light of the decision of the Tribunal on Objections to Jurisdiction of ICSID in Case No ARB/01/12 SGS Société Générale de Surveillance SA versus Islamic Republic of Pakistan.

[718] See *supra* note 270.

and purpose of the Treaty is not to protect foreign investments per se, but as an aid to the development of the domestic economy',[719] and '[e]conomic development is an objective which must benefit all, primarily national citizens and national companies, and secondarily foreign investors'.[720] In like manner, referring to the title and preamble of the Netherland – Czech Republic BIT,[721] the tribunal in *Saluka* stated:

> *This is a more subtle and balanced statement of the Treaty's aims than is sometimes appreciated. The protection of foreign investments is not the sole aim of the Treaty, but rather a necessary element alongside the overall aim of encouraging foreign investment and extending and intensifying the parties' economic relations. That in turn calls for a balanced approach to the interpretation of the Treaty's substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations.*[722]

The Tribunal in *Amco v Indonesia* was more explicit: the ICSID

> Convention is aimed to protect, to the same extent and with same vigour the investor and the host-state, not forgetting that to protect investments is to protect the general interest of development and of developing countries.[723]

For the opposite conceptualisation, the *SGS v Philippines* case serves as a good illustration. In this case the tribunal adopted a different conception of international investment law, laid

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[719] *Lemire v Ukraine*, Jurisdiction and Liability [273]. Fatouros commented in 1963, 'from this point of view, the security of private foreign investment is not a value in itself, but is valuable to the extent that it is necessary for development', AA Fatouros (1963) 57 ASIL Proceedings 117, 118, who nevertheless advocated a balanced approach reconciling the interest of the investors and the host countries, Fatouros, ibid.

[720] *Lemire v Ukraine*, Jurisdiction and Liability [273]

[721] 'Agreement on encouragement and reciprocal protection of investments between the Kingdom of the Netherlands and the Czech and Slovak Federal Republic The Government of the Kingdom of the Netherlands And The Government of the Czech and Slovak Federal Republic, hereinafter referred to as the Contracting Parties,
Desiring to extend and intensify the economic relations between them particularly with respect to investments by the investor of one Contracting Party in the territory of the other Contracting Party,
Recognizing that agreement upon the treatment to be accorded to such investments will stimulate the flow of capital and technology and the economic development of the Contracting Parties and that fair and equitable treatment is desirable.
Taking note of the Final Act of the Conference on Security and Cooperation in Europe, signed on August, 1st 1975 in Helsinki.'

[722] *Saluka v Czech Republic*, Partial Award [300]. 'While it is not *permissible, as is* too often done regarding BITs, to interpret clauses exclusively in favour of investors, here such an interpretation is justified', *Noble Ventures v Romania*, Award [52] (emphasis in the original).

[723] *Amco v Indonesia*, Jurisdiction [23].

particular emphasis on the promotion and protection of investment as the object and purpose of the Switzerland-Philippines BIT and held that it is 'legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments'.[724] Other tribunals, like *Solomon*, opt for the middle ground.[725] The tribunal in *Metal-Tech v Uzbekistan* when faced with the question of whether the definition of investment under the Israel-Uzbekistan BIT could be expanded through an MFN clause,[726] stated that

> The object and purpose of the Treaty is neutral for present purposes. The Preamble emphasizes, on the one hand, "economic cooperation to the mutual benefit of both countries" as well as an "increase [of] prosperity in both states", and, on the other, an intention to create "favourable conditions for greater investments by investors" as well as "the promotion and reciprocal protection of investments" and "the stimulation of individual business initiative". In other words, the Preamble refers to both the private interests of the investor as well as the public interests of the state. It is thus of little assistance in the present context.[727]

The tribunal in *Daimler v Argentina* vividly described the inherent tension between the protection of investors and the existence of a mutually acceptable framework for doing so by reference to the concepts of *ying* and *yang*.[728]

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[724] *SGS v Philippines*, Jurisdiction [116]. See also International Thunderbird Gaming Corporation v United Mexican States, UNCITRAL, Separate Opinion of TW Wälde, 1 December 2005 [4] (internal references omitted). See also the point made by Paulsson: '[w]hatever the rosy rhetoric about the equality of treatment of nationals and foreigners, the very fact of being foreign creates an inequality. The foreigner's obvious handicap – his lack of citizenship – is usually compounded by vulnerabilities with respect to many types of influence: political, social, cultural', J Paulsson, Denial of Justice in International Law (CUP, Cambridge 2005) 149

[725] See generally B Stern, 'The Future of International Investment Law: A Balance Between the Protection of Investors and the States' Capacity to Regulate' in JE Alvarez and KP Sauvant (eds), *The Evolving Investment Regime: Expectations, Realities, Options* (OUP, Oxford 2011) 174-192. Kläger offers an interesting explanation for the adoption of such approach: 'to be acceptable to both parties, the tribunals usually aspired to create the impression of taking a pragmatic and fact-specific middle path', Kläger (n 117) 85.

[726] On that question see Section IV *infra*.

[727] *Metal-Tech v Uzbekistan*, Award [158]. Another tribunal held 'that a balanced interpretation is needed, taking into account both State sovereignty and the State's responsibility to create an adapted and evolutionary framework for the development of economic activities, and the necessity to protect foreign investment and its continuing flow', *El Paso v Argentina*, Jurisdiction [70].

[728] *Daimler v Argentina*, Award [161]. Certain academics also call for a more balanced approach. Certain academics also call for a more balanced approach. Having this *problématique* in mind Professor Muchlinski suggests that

> a rebalancing of rights and obligations in IIAs so as to include investor and home country duties. In particular, it has shown that an extension of obligations to these two groups of actors can be

III. THE RELATIONSHIP BETWEEN WTO LAW AND INTERNATIONAL INVESTMENT LAW ON NON-DISCRIMINATION

Before moving to the specific non-discrimination standards, it is imperative to examine what has shown to be a controversial question dividing commentators and investment tribunals: the relevance of WTO jurisprudence on non-discrimination for the interpretation of non-discrimination provisions in international investment agreements. The purpose of this section is to demonstrate that the inconsistent case law on non-discrimination in international investment law is not attributable to the influence or misinterpretation of the WTO jurisprudence on non-discrimination.[729]

International trade law and international investment law have followed largely divergent paths in terms of substantive rules but also dispute settlement structures.[730] Nonetheless, the *Softwood lumber*,[731] the *Corn syrup*[732] and the *Feed-in tariffs for renewable energy* dispute[733] serve as an illustration of such overlaps. However, investment tribunals did

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> justified philosophically on the basis of a wide-ranging conception of development, which accepts not only economic growth through increased investment but also the creation of sustainable development based on community freedoms that can be furthered by way of a greater balance of rights and obligations between host and home countries as well as investors.

P Muchlinski, 'Holistic approaches to development and international investment law: the role of international investment agreements' in J Faundez and C Tan (eds), *International Economic Law, Globalization and Developing Countries* (Edward Elgar, Cheltenham 2010) 203-204

[729] Naturally, this question is separate from whether investment arbitration can be used to secure compliance with WTO law, which will not be dealt with in this thesis, G Verhoosel, 'The Use of Investor-State Arbitration under Bilateral Investment Treaties to seek relief for breaches of WTO law' (2003) 6 JIEL 493

[730] BE Allen and T Soave, 'Jurisdictional Overlap in WTO Dispute Settlement and Investment Arbitration' (2014) 30 Arbitration International 1, 4.

[731] For an overview of all the cases see L Dunoff, 'The Many Dimensions of Softwood Lumber' (2007) 45 Alberta L Rev 319–356 (2007).

[732] Panel, *Mexico – Taxes on Soft Drinks*; AB, *Mexico – Taxes on Soft Drinks*; Panel, *Mexico – Corn Syrup*; AB, *Mexico – Corn Syrup (Article 21.5 – US)*; Panel, *Mexico – Corn Syrup (Article 21.5 – US)*; *Cargill v Mexico*, Award; *Corn Products v Mexico*, Decision on Responsibility; *ADM v Mexico*, Award.

[733] Panel, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*; AB, *Canada – Renewable Energy / Canada – Feed-in Tariff Program*; *Mesa v Canada*, Award.

not understand the WTO case law in uniform manner, nor agreed on whether WTO is relevant.

Certain tribunals have ruled – in principle – that the WTO case law on non-discrimination cannot be in principle transposed to investment arbitration.[734] At the same time,

> international regulation in both areas is inspired by the same approach in favour of liberalization and non-discrimination between domestic and foreign actors of cross-border business activity, while preserving the competence of importing or host States to regulate the economy and safeguard paramount general interest.[735]

The analysis in *Corn Products* seems more balanced. The WTO Panel and the Appellate Body had already found that (HFCS), i.e. corn syrup and sugar were like products.[736] In that context,

> the Tribunal does not accept that the fact that HFCS and sugar are like products for the purposes of GATT is irrelevant to the application of the Article 1102 test. On the contrary, it considers that this fact is highly relevant to the application of that test. While the Tribunal would not suggest that the fact that a foreign investor and a domestic investor are producing like products will necessarily mean that they are to be considered as being in like circumstances for the purposes of Article 1102, or that differential treatment will necessarily entail a violation of that provision, where the measure said to constitute the violation of Article 1102 is directly concerned with the products and designed to discriminate in favour of one and against the other then that is a very strong indication that there has been a breach of Article 1102.[737]

The inconsistency in the jurisprudence, in particular the cases of *Occidental* and *Methanex*,[738] led some commentators such as *Kurtz to* attribute to a misuse or abuse of WTO law by

[734] *Cargill v Mexico*, Award [193]; *Bayindir v Pakistan*, Award [389]; *Thunderbird v Mexico*, Award [176]-[178]; *Occidental v Ecuador*, Award [174]-[176]; *Methanex v USA*, Final Award [35], [37].

[735] G Sacerdoti, 'Trade and Investment Law: Institutional Differences and Substantive Similarities' (2014) 9 Jerusalem Review of Legal Studies 1, 10.

[736] AB, *Mexico – Taxes on Soft Drinks*; Panel, *Mexico – Taxes on Soft Drinks*.

[737] *Corn Products Decision on Responsibility* [122].

[738] It is noteworthy that both tribunals rejected the application of WTO methodology. According to *Methanex v USA*, Final Award [34]-[35] and *Occidental v Ecuador*, Award [174]-[175]. Likewise, *Cargill v Mexico*, Award [193] and *Merrill v Canada*, Award [86]-[88]. However, see *Corn Products v Mexico*, Award [122].

investment tribunals.[739] In particular regarding the role of WTO law in international investment arbitration, two observations must be made. First, it should be noted that leaving non-discrimination aside, arbitral tribunals drew inspiration from WTO law in other areas of investment law.[740] The interpretation of the concept of necessity is a case in point in *Continental Casualty*. [741]As clarified by the *ad hoc* Committee in the context of (unsuccessful) annulment proceedings, the Tribunal was clearly not purporting to apply that body of law, but merely took it into account as *relevant* to determining the correct interpretation and application of Article XI of the BIT'.[742] Second, Howse and Chalamish rebut Kurtz's argument by observing that 'the manner in which these tribunals viewed WTO law is more the symptom than the disease – the disease being the shortcomings in the interpretative method of the tribunals in addressing the treaties that they have the jurisdiction to apply, namely the investment treaties that are the basis of the claims in the disputes'.[743] However, relying on WTO law is not the cause of the inconsistency in international

[739] J Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents, 20 (2009) *EJIL* 749.

[740] WTO can be considered as 'other relevant rules' under Article 31(3) (c) of the VCLT, see Verhoosel (n 729) 503. On Article 31(3) (c) see P Merkouris, *Article 31(3) (c) of the VCLT and the Principle of Systemic Integration* (PhD Thesis, Queen Mary, University of London 2010) (on file with the author). Article 31(3)(c) of the VCLT reflects customary law, *Certain Questions of Mutual Assistance in Criminal Matters, (Djibouti v France) (Judgment)* [2008] ICJ Rep 177, 219 [112]; *Kasikili/Sedudu Island (Botswana/Namibia), Judgment* [1999] ICJ Rep 1045, 1075 [18].

[741] *Continental Casualty v Argentina*, Award; appraised by Alec Stone Sweet, 'Investor-State Arbitration: Proportionality's New Frontier' (2010) 4 Law and Ethics of Human Rights 47; *cf* the strong criticism in José E. Alvarez and Tegan Brink, 'Revisiting the necessity defence: Continental Casualty v. Argentina' (2010-2011) Yearbook of International Investment Law & Policy 319; see also A Stone Sweet and G Della Cananea, 'Proportionality, General Principles of Law, and Investor-State Arbitration: A Response to Jose Alvarez' (2014) 46 NYU Journal of International Law and Politics 911.

[742] *Continental Casualty v Argentina*, Decision on Annulment [133]. Another area of investment law where WTO could play a role is the interpretation of MFN and in particular whether MFN applies to dispute settlement provisions in addition to the substantive standards of investment agreements. The WTO AB when interpreting the MFN obligation contained in Article I:1 of the GATT was adamant that '[t]he words of Article I:1 refer not to some advantages granted "with respect to" the subjects that fall within the defined scope of the Article, but to "any advantage", AB, *Canada – Autos* [79] (emphasis in the original).

[743] R Howse and E Chalamish, 'The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to *Jürgen Kurtz*' (2010) 20 EJIL 1087, 1089. In *Paushok v Mongolia* distinguished *Occidental v Ecuador* and the reliance on WTO jurisprudence for determining likeness on the basis of 'in like situation' phrase contained in the Ecuador-US BIT, *Paushok v Mongolia*, Award [313].

investment jurisprudence on non-discrimination. As it is argued in this thesis, divergent outcomes are attributable to the substantive indeterminacy of legal rules and the conceptual malleability of equality (which non-discrimination clauses incorporate and express).

IV. THE MFN CONTROVERSY

This section will highlight the antithetical interpretative outcomes regarding the relationship between to MFN clauses and substantive and, particularly, dispute settlement provisions of investment agreements. The purpose is to demonstrate the central theoretical premise of this thesis (the substantive indeterminacy of international legal rules in general and the conceptual malleability of equality) by extensive reference to international investment case law on MFN.

1. The MFN controversy paradigm

The sharp divide between investment tribunals on the proper interpretation of MFN clauses (in particular regarding the applicability to dispute settlement provisions) is well-known. Thus, the MFN jurisprudence illustrates the substantive indeterminacy of legal rules and the concomitant discretion to the adjudicators. The MFN controversy cannot be attributed to or explained by the difference in the wording of MFN clauses or the different reasons and interpretative methodologies adopted by investment tribunals. Maupin, after analysing the case law on the application of MFN to jurisdictional matters, concluded that

> [o]verall, it seems that those tribunals finding in favour of MFN-based jurisdiction and those finding against tended to reach opposite conclusions based upon largely the same set of reasons. The set of reasons chosen for consideration, therefore, does not appear to have played a role in the final outcome of the awards. The data in no way suggests that tribunals on either side of the debate have engaged in a selective consideration of the relevant reasons. Rather, *they have reached different conclusions concerning the same considerations*.[744]

An investment tribunal also reached the same conclusion:

> *This lack of a jurisprudence constante cannot be explained simply on the basis of differences between the terms of the BITs involved (although such differences can prove to be significant)*. Of the four tribunals to have ruled on the effect of the MFN clause on the requirement in the arbitration clause in the Argentina-Germany BIT that disputes could be submitted to arbitration only after a period of eighteen months had elapsed from their submission to the local courts, those in

[744] J Maupin, 'MFN-Based jurisdiction in Investor–State Arbitration: is there any hope for a consistent approach?' (2011) 14 JIEL 157, 175 (emphasis added).

> Wintershall and Daimler rejected the MFN argument, while those in Siemens and Hochtief accepted it. Moreover, *even where tribunals have come to the same conclusion, they have often done so for radically different reasons*, as a comparison between the awards in Plama and Renta 4 demonstrates.[745]

The wording of the clause, as is the case with other non-discrimination provisions, is also inconclusive.[746] For example, as the tribunal in *Plama v Bulgaria* noted

> [i]t is not clear whether the ordinary meaning of the term "treatment" in the MFN provision of the BIT includes or excludes dispute settlement provisions contained in other BITs to which Bulgaria is a Contracting Party.[747]

Certain investment agreements explicitly exclude dispute settlement from the scope of the application of the MFN clause.[748] In the aftermath of the *Siemens v Argentina* decision, adopting an expansive interpretation of MFN, Panama and Argentina exchanged diplomatic notes with an "interpretative declaration" of the MFN clause contained in the Argentina-Panama BIT,[749] stipulating that MFN clause does not extend to dispute resolution clauses, and that this has always been their intention.[750] On the other hand, other states refused to change their policy and introduce more specific rules despite the conceptual ambiguity of the MFN clause. For example, in the MFN provision of the 2012 US Model BIT not an iota was

[745] *ST-AD GmbH v The Republic of Bulgaria*, UNCITRAL, PCA Case No 2011-06, Award on Jurisdiction, 18 July 2013 (B Stern (P), B Klein, JC Thomas) [387] (emphasis added).

[746] Y Radi, 'The Application of the Most-Favoured-Nation Clause to the Dispute Settlement Provisions of Bilateral Investment Treaties: Domesticating the "Trojan Horse"' (2007)18 EJIL 757, 768; Newcombe and Paradell argue that 'uncertainty is likely to continue until states clarify the scope of MFN clauses', Newcombe and Paradell (n 246) 218.

[747] *Plama v Bulgaria*, Jurisdiction [189].

[748] Agreement on Investment of the Framework Agreement on Comprehensive Economic Co-operation between China and ASEAN (adopted 15 August 2009, entered into force 1 January 2010); see W Shen, 'Is this a Great Leap Forward? A Comparative Review of the Investor-State Arbitration Clause in the ASEAN-China Investment Treaty: From BIT Jurisprudential and Practical Perspectives' (2010) 27 Journal of International Arbitration 379; see also Article 139(2) of the China-New Zealand Free Trade Agreement (signed 7 April 2008, entered into force 1 October 2008); Article X.7(4) CETA.

[749] Convenio entre la República Argentina y la República de Panamá para la promoción y la protección recíproca de inversiones (signed 10 May 1996, entered into force 22 June 1998).

[750] *National Grid v Argentina*, Jurisdiction [85].

changed compared to the 2004 version.[751] One can also look at the famous vanishing footnote in Article 10.4(2) of the 28 January 2004 CAFTA draft,[752] which did not find its way in the final version of the agreement.[753] Likewise, the Japan-Uzbekistan BIT contains a lengthy list of measures and areas that are exempted from the application of MFN (and/or National Treatment), but it does not qualify the MFN clause with respect to dispute settlement provisions.[754] Other BITs, such as UK BITs explicitly provide that MFN applies also to dispute settlement provisions. The recent Canada–China BIT provides explicitly does MFN does not apply to the provisions regarding dispute settlement.[755] However, even the explicit language is not enough to end the controversy. 'Like in the Lowen tribunal' Rubins critically observes, 'the arbitrators in *Maffezini, Plama, Gas Natural, Telenor* and *Berschader* have allowed themselves to be guided more by their view of "the interests of the international investing community" than by the particular treaty text they were charged with interpreting

[751] Cf 2012 US Model BIT <http://www.state.gov/documents/organization/188371.pdf> and 2004 US Model BIT <http://www.state.gov/documents/organization/117601.pdf>.

[752] 'The Parties agree that the following footnote is to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favoured-Nation Treatment Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement. The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most-favoured-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction ¶¶ 38-64 (Jan. 25, 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the Most-Favoured-Nation Treatment Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case', <http://www.sice.oas.org/TPD/USA_CAFTA/Jan28draft/Chap10_e.pdf>.

[753] Dominican Republic–Central America–United States Free Trade Agreement (adopted 5 August 2004, entered into force 1 March 2006) <http://www.ustr.gov/trade-agreements/free-trade-agreements/cafta-dr-dominican-republic-central-america-fta>.

[754] Article 2(3), Annexes I and II, Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment (Japan-Uzbekistan) (signed 15 August 2008, entered into force)

[755] 'The concept of "expansion" in this Article applies only with respect to sectors not subject to a prior approval process under the relevant sectoral guidelines and applicable laws, regulations and rules in force at the time of expansion. The expansion may be subject to prescribed formalities and other information requirements', Article 6(3), Agreement Between the Government of Canada and the Government of the People's Republic of China for the Promotion and Reciprocal Protection of Investments (Canada-China) (signed 9 September 2012, not yet in force).

and applying'.[756]As a result, the interpretation of the existence or relevance of state practice on that matter is itself a source of contestation.[757] Despite the fact that the UK-Turkmenistan BIT explicitly provided that MFN covers dispute settlement provisions the tribunal was divided on the interpretation of the MFN clause.[758] Tribunals that are called to interpreted the MFN provision of the same BIT, as it happened in *Siemens v Argentina* and *Wintershall v Argentina* (*in casu* article 3 of the Argentina-Germany BIT),[759] adopted diametrically opposing interpretations.[760] Investment tribunals, like the WTO Panels and the AB, have time and again emphasised the importance of Articles 31-33 of the VCLT for interpretative purposes, [761] and have also specifically emphasised that MFN clauses are to be interpreted in accordance with the VCLT interpretative criteria.[762] However, the VCLT does not provide the answer to the question.[763] As noted by the tribunal in *Kiliç v Turkmenistan,*

[756] N Rubins, 'MFN Clauses, Procedural Rights, and a Return to the Treaty Text' in T Weiler (ed), *Investment Treaty Arbitration and International Law, Volume 2* (JurisNet LLC, Huntington NY 2008) 229.

[757] Cf *Daimler v Argentina*, Award [261]-[278] and *Daimler v Argentina*, Brower Dissenting Opinion [27]-[32].

[758] Cf *Garanti Koza v Turkmenistan*, Decision on Jurisdiction and L Boisson de Chazournes Dissenting Opinion.

[759] Article 3, Treaty between the Federal Republic of Germany and the Argentine Republic concerning the Reciprocal Encouragement and Protection of Investments, (signed 9 April 1991, entered into force 8 November 1993).

[760] Cf *Siemens v Argentina*, Jurisdiction and *Wintershall v Argentina*, Award.

[761] 'The Tribunal shall proceed to the interpretation of this Article in conformity with Articles 31 to 33 of the Vienna Convention on the Law of Treaties which reflect customary international law', *Salini v Jordan*, Jurisdiction [75]; see also *e.g. KT Asia v Kazakhstan*, Award [119], [122]; *Omer Dede v Romania*, Award [197]; *AAPL v Sri Lanka*, Award [38].

[762] *Austrian Airlines v Slovakia*, Award [121]; 'The exact meaning of the MFN clause in the BIT must indeed be analyzed in accordance with the principles of Art. 31 of the Vienna Convention (which codifies the customary principles of international law on the matter)', *Telefónica v Argentina*, Jurisdiction [96]; *National Grid v Argentina*, Award [80] .

[763] In relation to the application of MFN clauses to dispute settlement provisions, 'such lack of specificity in a broadly stated provision does not, in my view, equate with "ambiguity" in the sense of Article 32(a) of the Vienna Convention' and thus recourse to the *travaux préparatoires, Austrian Airlines v Slovakia*, Brower Separate Opinion [4]. As Sir Franck Berman noted *travaux préparatoires* are not usually available for BITs, Sir F Berman, 'The Interpretation and Application of Fair and Equitable Treatment: An Arbitrator's Perspective', (13 August 2013) http://www.ejiltalk.org/the-interpretation-and-application-of-fair-and-equitable-treatment-an-arbitrators-perspective/

> [t]he relevant provisions of the VCLT which concern the interpretation of treaties do not indicate that there is to be a presumption one way or the other as to the reach of an MFN clause.[764]

According to Article 31(3) of the VCLT any 'subsequent agreement' or 'subsequent practice' could assist in the interpretation of MFN; however state practice on the matter is divided and therefore equally inconclusive.[765]

In line with, and in application of the theoretical framework developed earlier the diverging interpretation can be attributed to different conceptualisation of the role and rationale of the international investment regime. Arbitrators prioritising different values and emphasise different aspects of the rules contained in investment agreements, reach more often than not opposite interpretative conclusions. The question of the application of MFN in dispute settlement provisions of investment agreements is one of the thorniest issues in international investment law.[766] The Annulment Committee in *Impregilo v Argentina* very recently summarised the crux of the issue:

> there are two extreme positions on this issue: one supports the application of the MFN clause to dispute resolution mechanisms as a means of access to ICSID jurisdiction, the other considers that the MFN clause cannot be given effect for jurisdictional purposes.[767]

It is often stated in academic commentaries and the case law of investment tribunals that the two 'extreme positions' are reflected in, and represented by, the interpretative outcome, and perhaps more importantly the reasoning in *Maffezini v Spain*[768] and *Plama v Bulgaria*[769].[770] For Sureda the role of values or more accurately the lack of common set of values is crucial

[764] *Kiliç v Turkmenistan*, Award [7.6.5.].

[765] *Telefónica v Argentina*, Jurisdiction [109]-[114].

[766] 'The cases after 2007 are less easily read as reflecting an even implicit consensus', Paparinskis (n 251) 30.

[767] *Impregilo v Argentina*, Decision on Annulment [136].

[768] *Maffezini v Spain*, Jurisdiction.

[769] *Plama v Bulgaria*, Jurisdiction.

[770] See Paparinskis (n 251) 28-29.

in understanding the divide of investment tribunal on MFN. He insightfully observes that the arguments in the case law

> show both the limits of logic in the interpretation of a clause which does not specifically cover the situation at hand and the lack of common values adhered to by tribunals in deciding the matter.[771]

One scholar and arbitrator justified his position that MFN does apply to dispute settlement provisions by invoking a particular conception about the role and rule of law in a society and his preference for a particular model of economic development:

> [t]he reason why I support the 'yes school' in interpreting neutrally worded MFN clauses is therefore not driven by a pro-investor approach to international investment law, but by the conviction that *broader compliance with international law, adherence to international dispute settlement procedures, and ultimately observance of the rule of law are values worth pursuing in investment treaty arbitration.*[772]

It is illustrative that in a case, the claimant, supporting the application to dispute settlement provisions of MFN invoked unsuccessfully 'the "recognised principle of the investor-friendly interpretation of the most favourable treatment clause"'.[773] As Sureda accurately notes 'Tribunals have been divided ever since the first two tribunals which considered the issue took opposing views'.[774] Investment tribunals themselves recognise that the case law in this

[771] A Rigo Sureda, *Investment Treaty Arbitration, Judging Under Uncertainty* (CUP, Cambridge 2012) 31 (emphasis added); Kurtz reaches the same conclusion with regard to the MFN question: 'States parties thus are offered deeply diverging legal interpretations that are largely dependent on the underlying values prioritized by the members of any given tribunal and community', J Kurtz, 'Normative Interactions' in Z Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, Oxford 2014) 257, 274. According to other commentators, '[t]he debate about whether MFN clauses apply to jurisdictional requirements of BITs implicates competing policy concerns', TH Cheng and R Trisotto 'Urbaser SA and others v Argentine Republic and Teinver SA and others v Argentine Republic, A Workaround to the Most-Favoured-Nation Clause Dispute' (2014) 29 ICSID Review 289, 290.

[772] SW Schill, 'Allocating Adjudicatory Authority: Most-Favoured-Nation Clauses as a Basis of Jurisdiction—A Reply to Zachary Douglas' (2011) 2 Journal of International Dispute Settlement 353, 37l (emphasis added). Maupin also reports a 'growing perception' with regard to the MFN question that 'the approach adopted by individual tribunals may be more closely linked to the personal predispositions of select arbitrators than to an objective appreciation of the proper interpretive approach to be applied under international law', Maupin (n 744) 178.

[773] *ST-AD v Bulgaria*, Jurisdiction, [381]

[774] Sureda (n 771) 29.

area is remarkably inconsistent. The situation is aptly summarised by the tribunal in *Wintershall v Argentina*:

> In a wide variety of cases, arbitral tribunals (ICSID and other) have been called upon to interpret an MFN Clause in a BIT to determine whether or not it extends to dispute-resolution, (a jurisdiction clause). Their decisions have been neither uniform nor consistent; different tribunals faced with differently worded treaties (sometimes even similarly worded treaties) have reached different, if not conflicting, conclusions. In the sphere of MFN Clauses (in BITs) and their reach, adjudications by *ad hoc* tribunals have proved to be an obstacle to the development of a ***jurisprudence constante***.[775]

In light of the indeterminacy of the MFN clause regarding its applicability on dispute settlement provision and the respective divide in academic opinion and case law, the Annulment Committee in *Impregilo v Argentina* held that either interpretative could not constitute a ground for annulment.[776]

The crucial role of the arbitrator in the interpretation of MFN in relation to their application to dispute settlement provisions did not go unnoticed by the arbitrators themselves. For example, the tribunal in *Daimler v Argentina* noted

> It will be noted that portions of the analysis contained in this section overlap with the recently issued decision in *ICS Inspection and Control Services Limited (United Kingdom) v. the Argentine Republic*, PCA Case No. 2010-9 (UNCITRAL Rules), Award on Jurisdiction (10 February 2012) [hereinafter *ICS v. Argentina*]. This is because the two tribunals shared the same President [Professor Pierre-Marie Dupuy], who presided over the drafting of the two awards during the same time period and elected not to burden the parties with duplicative drafting costs in respect of certain general points of law common to both cases.[777]

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[775] *Wintershall v* Argentina, Award [178] (emphasis in the original); many subsequent tribunals have not departed from that observation, see *e.g.* 'these issues remain controversial and that the predominating jurisprudence which has developed is in no way universally accepted', *Maffezini v Spain*, Award [107]; 'What can be said with confidence is that a jurisprudence constante of general applicability is not yet firmly established', *Renta 4 v Russia*, Jurisdiction [94]; 'a fiercely contested no-man's land in international law', *Garanti Koza v Turkmenistan*, Jurisdiction [40]; see also *Gas Natural v Argentina*, Jurisdiction [49].

[776] 'Neither applying an MFN clause to jurisdictional issues nor refusing to apply it to assume jurisdiction may be considered, *per se*, as a manifest excess of powers', *Impregilo v Argentina*, Decision on Annulment [140].

[777] *Daimler v Argentina*, Award [160].

Some tribunals also emphasised the importance of dispute settlement mechanisms and rejecting restrictive readings of MFN regarding its application to such mechanisms is natural.[778] This was recognised even by tribunals that did not accept that MFN clause applied to dispute settlement provisions.[779] The tribunal in *Telenor v Hungary* observed that '[t]hose who advocate a wide interpretation of the MFN clause have almost always examined the issue from the perspective of the investor'.[780] The tribunal continued by stating what it considered to be the correct approach:

> what has to be applied is not some abstract principle of investment protection in favour of a putative investor who is not a party to the BIT and who at the time of its conclusion is not even known, but the intention of the States who are the contracting parties. The importance to investors of independent international arbitration cannot be denied, but in the view of this Tribunal its task is to interpret the BIT and for that purpose to apply ordinary canons of interpretation, not to displace, by reference to general policy considerations concerning investor protection, the dispute resolution mechanism specifically negotiated by the parties.[781]

The tribunal in *Gas Natural v Argentina* saw the investment arbitration as serving the interests of *both* the investors and the host states: it offers to the former the possibility of recourse to an international and independent from the host state *forum* and to the latter

[778] 'Assuring a prospective investor that neither he nor his investment will be subjected to treatment less favourable than the treatment accorded to investors from third countries and their investments, insofar as the process available to resolve any disputes with the host country that may arise under the BIT is concerned, certainly seems to create a favourable condition for investment by the investor so protected', *Garanti Koza v Turkmenistan*, Jurisdiction [63]; 'the submission to arbitration forms a highly relevant part of the corresponding protection for the investor by granting him', *RosInvestCo v Russia*, Jurisdiction [130]; 'an arbitration clause, at least in the context of expropriation, is of the same protective value as any substantive protection afforded by applicable provisions', ibid [132]. Note that the 2010 award on the merits in *RosInvest* was annulled by the SVEA Court of Appeal, Case No T 10060-1012, September 2013 on the ground that the arbitral tribunal lacked jurisdiction); 'the right to enforcement is an essential component of the property rights themselves, and not a wholly distinct right', *Hochtief v Argentina*, Jurisdiction [67].

[779] *E.g*. 'access to international arbitration has been a fundamental and constant desideratum for investment protection and therefore a weighty factor in considering the object and purpose of BITs' *Renta 4 v Russia*, Jurisdiction [100].

[780] *Telenor v Hungary*, Award [95]

[781] ibid.

'freedom from political pressures by governments of the state of which the investor is a national'.[782] Schill observes that by stating whether one is

> seen as siding with even bigger ideational alliances in international investment law, which are heavily influenced by the system of party-appointment of arbitrators, that is being either pro-State or pro-investor. Middle grounds—the in-betweens, the 'it depends'—are more difficult to find.[783]

In light of the contradictory case law described above it is hardly surprising that investment tribunal exercise judicial economy in an attempt to avoid the issue altogether whenever they can.[784] There also cases where tribunals without deciding the issue seem to support indirectly and implicitly one or another approach:

> In view of the fact that the parties have discussed in detail the meaning of *Maffezini* in this context, the Tribunal believes it appropriate to clarify that that case is not really pertinent to the present dispute as it dealt with the most favoured-nation treatment insofar as procedural rights of the claimant were involved, not substantive treatment as is the case here.[785]

In like manner, other tribunals devote only a few paragraphs to the issue.[786]

2. Basic elements of the MFN rule

Before analysis what effectively constitutes the elephant in the room (*i.e.* the application of MFN clause to dispute settlement provisions) the basic elements of the test for MFN clauses

[782] *Gas Natural v Argentina*, Jurisdiction [29].

[783] Schill (n 772) 354.

[784] 'In light of the foregoing conclusion, there is no need to examine whether the Most Favoured Nation Clause (MFN clause) contained in Article IV(2) of the BIT is here applicable. As Claimants were not required to comply with the 18 month rule under the facts presented to this Tribunal, the question of the applicability of the MFN clause is moot', *Urbaser v Argentina*, Jurisdiction [203]. In another case the tribunal was relieved that it did not have to pronounce on the issue given that the BIT in question explicitly provided for the application of MFN to dispute settlement provisions: '*Fortunately*, perhaps, the present case does not require this Tribunal to take a position on the policy issues implicated in deciding whether an MFN clause ought to be applied to the investor-state arbitration article of a BIT' (emphasis added) *Garanti Koza v Turkmenistan*, Jurisdiction [42]; the 'issue need not be addressed in the present case, the question relating simply to the import of substantive rights', *Paushok v Mongolia*, Award [565]; *Occidental v Ecuador*, Award [178].

[785] *Occidental v Ecuador*, Award [178].

[786] *Gas Natural v Argentina*, Jurisdiction [29]-[31].

will be explored. This test is essentially is comprised of two elements: likeness (section 2.1.) and less favourable treatment (section 2.2.).

2.1 Likeness and the 'ejusdem generis' principle

Regardless of whether MFN clauses contain the phrase 'in like circumstances' or similar wording, an inquiry into the likeness of the foreign investors is inherent in the logic of the clause,[787] and imposed by the conceptual link between MFN and equality.[788] The tribunal in *Parkerings v Lithuania* established a three-pronged test to determine likeness for MFN purposes: first, the other investor must be a foreign investor, second, the investors must be in the same economic or business sector and, finally

> [t]he two investors must be treated differently. The difference of treatment must be due to a measure taken by the State. No policy or purpose behind the said measure must apply to the investment that justifies the different treatments accorded. *A contrario*, a less favourable treatment is acceptable if a State's legitimate objective justifies such different treatment in relation to the specificity of the investment.[789]

With regards to the same economic or business sector requirement, it is not easy to identify what is the decisive factor in the tribunal's analysis. The tribunal found that the two investors 'are engaged in similar activities', are 'acting in the construction and management of parking garages' and further both were competitors for the same project.[790] It is thus unclear how narrow likeness is construed.

Perhaps more importantly, the tribunal in *Parkerings v Lithuania* found that the Norwegian investor, who participated in a bid regarding the construction of a parking system

[787] Diebold notes that 'a comparative element is inherent to the logic and structure of the non-discrimination principle in international economic law' Diebold (n 441) 841; 'the grantor will need to decide whether its TNLF obligation should include an explicit reference to the 'similar circum- stances' caveat, or just leave it as implied. While this choice might change the aesthetic of a TNLF-inspired clause, the functionality would likely unaffected', Weiler (n 106) 334; see also *RFCC v Morocco*, Award [53].

[788] See Chapter I.

[789] *Parkerings v Lithuania*, Award [371].

[790] *ibid.* [373].

in the city centre of Vilnius, was not *in like circumstances* with its Dutch competitor. Although the site proposed by the Claimant was indeed bigger, the tribunal did not consider that (on itself) to be a decisive factor.[791] However, the tribunal emphasised that the fact that the site 'extended significantly more into the Old Town as defined by the UNESCO, is decisive'.[792] The tribunal took into account the proximity of the project with 'the culturally sensitive area of the Cathedral',[793] and held that 'historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project'.[794] The tribunal also held that there were *legitimate* grounds for the different treatments, justified by various concerns, 'especially in terms of historical and archaeological preservation and environmental protection'.[795] This is a clear case where the tribunal adopted a deferential approach towards the state and was influenced by non-economic values, and in particular the protection of cultural heritage.[796] While there are other cases where tribunals adopted an environmental-friendly and deferential approach,[797] *Parkerings v Lithuania* can be contrasted with the other

[791] *ibid.* [391].

[792] *ibid*. [392].

[793] *ibid.*

[794] ibid.

[795] *Parkerings v Lithuania*, Award [396].

[796] Vadi argues that the tribunal engaged in a balancing exercise, V Vadi, *Cultural Heritage in International Investment Law and Arbitration* (CUP, Cambridge 2014) 128. Viñuales sees the case as an application of the principle of systemic integration, JE Viñuales, 'Foreign Investment and the Environment in International Law: an ambiguous relationship' (2009) 80 BYIL 244, 301. On the interplay between cultural heritage law and international economic law from the perspective of law-making see M Risvas, 'Multilateral and Bilateral Approaches to Underwater Cultural Heritage Protection', special issue (2013) Transnational Dispute Management 1-10.

[797] Cf 'we find no principle stating that regulatory administrative actions are per se excluded from the scope of the Agreement, even if they are beneficial to society as a whole —*such as environmental protection*', *Tecmed v Mexico*, Award [121]; 'Expropriatory environmental measures – no matter how laudable and beneficial to society as a whole – are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies', *Santa Elena v Costa Rica*, Award [72]; *Unglaube v Costa Rica*, Award [217]; see Sarooshi (n 288).

> ICSID Tribunals which have had great difficulty in recognising the regulatory role of government in the area of the environment as a justification for what are otherwise breaches of treaties or more general international law.[798]

In *SM Myers v Canada* and *Parkerings v Lithuania* the interpretation of "like circumstances" was informed by environmental considerations.[799]

As 'like circumstances', the *ejusdem generis* principle is closely connected to and reflects the idea of equality, which, as it has already been shown, it is what MFN incarnates and express in legal terms. Ziegler by defining the principle of *ejusdem generis* hinds at that link: *ejusdem generis*

> is normally understood to mean that the third-party treaty must, in principle, regulate the same subject matter as the basic treaty, otherwise the specific treatment standard would be taken out of its context and thus not be accorded in 'like circumstances' or in 'like situations'.[800]

According to UNCTAD,

> the MFN treatment obligation does not mean that foreign investors have to be treated equally irrespective of their concrete activity or circumstance. Different treatment is justified if the would-be comparators are in different objective situations. This requires comparing what is reasonably comparable.[801]

The most controversial issue with regard to the *ejusdem generis* principle in the context of MFN is whether the principle allows or prohibits importing more favourable dispute settlement provisions.[802] The divided case law on whether the *ejusdem generis* principle

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[798] Sarooshi, ibid; see also *Maffezini v Spain*, Award [65]-[71]; see also *SPP v Egypt*, Award; Kulick (n 255) 233-268.

[799] JE Viñuales, *Foreign Investment and the Environment in International Law* (CUP, Cambridge 2012) 329. Viñuales also interprets the treatment of likeness in *Methanex v USA*, and in particular the identification of the appropriate comparator, as integrating environmental considerations, ibid 329-330.

[800] AR Ziegler, 'Is the MFN principle in international investment law ripe for multilateralization or codification?' in (eds), *International Investment Law and Soft Law* (Edward Elgar Cheltenham 2012) 250; 'the most-favoured nation clause can only attract matters belonging to the same category of subject as that to which the clause itself relates', *The Ambatielos Claim (Greece v United Kingdom of Great Britain and Northern Ireland)*, Award 6 March 1956 (1956) XII RIAA 91, 107.

[801] UNCTAD, *Most-Favoured-Treatment, UNCTAD Series on Issues in International Investment Agreements II* (UN, NY and Geneva 2010) 53.

[802] Outside the controversial area of *ejusdem generis* and dispute settlement provisions, the tribunal in *CMS v Argentina* rejected in an *obiter dictum* the attempt by the Claimant to rely on the absence of a non-precluded

allows or prohibits the use of MFN clauses to expand on dispute settlement provisions is indicative of the open-ended nature of equality and, by implication, non-discrimination clauses such as MFN. Investment tribunals have reached different conclusions and describe the basic parameters of this disagreement. In *Maffezini v Spain* the tribunal stated that if a third party treaty contains provisions for the settlement of disputes that are more favourable to the protection of the investor's rights and interests than those in the basic treaty, such provisions may be extended to the beneficiary of the most favoured nation clause as they are fully compatible with the *ejusdem generis* principle. Of course, the third-party treaty has to relate to the same subject matter as the basic treaty, be it the protection of foreign investments or the promotion of trade; otherwise there would be a contravention of that principle.[803] Likewise, the tribunal in *Telefónica v Argentina* found that excluding the 18th month requirement through the use of MFN 'fully respects the requirement of the *ejusdem generis* rule'.[804] The tribunal in *Daimler v Argentina* (although rejecting on other grounds that MFN could apply to dispute settlement provisions) held that "the outer limits set by the *ejusdem generis* rule are broad enough to encompass international dispute resolution within the meaning of the Treaty's MFN clauses".[805] Conversely, the tribunal in *Wintershall v Argentina* rejected the argument that the existence of dispute settlement provisions in the two treaties under comparison satisfied the *ejusdem generis* requirement as "specious".[806] Boisson de Chazournes in her Separate Opinion in *Garanti Koza v Turkmenistan* stated that the

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measures clause in third party BITs also on the basis that this would contradict the *ejusdem generis* principle, *CMS v Argenina*, Award [377].

[803] *Maffezini v Spain*, Jurisdiction [56].

[804] *Telefónica v Argentina*, Jurisdiction [104].

[805] *Daimler v Argentina*, Award [216].

[806] *Winstershall v Argentina*, Award [191]; see also *Berschader v Russia*, Award [194]-[200].

ejusdem generis 'is considered a general principle of international law'[807] and, more importantly, 'dictates such a cautious attitude'.[808]

2.2 The meaning of 'less favourable treatment'

The construction of what elements account for "treatment" in the context of MFN reveals the open-ended character of equality and constitutes the touchstone for discerning different approaches. This is vividly reflected in the divided jurisprudence on the matter. Linking 'less favourable treatment' under MFN and the concept of equality, 'the concepts of "equality" and "discrimination" do not preclude differences *per se* but only unjustifiable differences between comparable matters, bringing the analysis back to favourability dictated by the text of the MFN clause'.[809]

One question is whether the concept of "treatment" refers only to particular measures adopted by the Host State or it also includes legal rules contained in other treaties.[810] The latter view seems widely shared by investment tribunals,[811] and the ILC.[812] For example, the tribunal in *Bayindir v Pakistan* emphasised that being subject to exactly the same legal and

[807] *Garanti Koza v Turkmenistan*, Boisson de Chazournes Dissenting Opinion [65] (internal footnotes omitted). She further explained that '[i]n accordance with the *ejusdem generis* rule, the MFN clause under Article 3(3) of the U.K.-Turkmenistan BIT cannot be interpreted as allowing to "attract rights [to ICSID arbitration] conferred by other treaties" (i.e., the automatic right to resort to ICSID arbitration) when the subject-matter – not to say the very object and purpose – of the U.K.-Turkmenistan BIT is exactly to deny such rights to ICSID arbitration in the absence of mutual agreement', *ibid* [66].

[808] *ibid.*

[809] Paparinskis (n 117) 49.

[810] M Paparinskis, 'International Investment Law and the European Union: A Reply to Catharine Titi' (2015) 26 EJIL 663, 669.

[811] *White Industries v India*, Award, [11.2]; *MTD v Chile*, Award [64]; *Rumeli v Kazakhstan*, Award [575]; *EDF v Argentina*, Award, [921]–[937]; *Arif v Moldova*, Award [396]; *Apotex v USA* Award, [9.66]–[9.71]; *Al-Warraq v Indonesia*, Award [540]–[555].

[812] The ILC in its first report on MFN stated that "[t]he rule is important and its validity is not dependent on whether the treatment extended by the granting State to a third State, or to persons or things in a determined relationship with the latter, is based upon a treaty, another agreement or a unilateral, legislative, or other act, or mere practice", ILC, "Draft Articles on most-favoured-nation clauses with commentaries" (1978) II(2) Yearbook of ILC 16, 25.

regulatory framework as everybody else in Pakistan does not necessarily mean that it was actually treated in the same way as local (or third countries) investors. In other words, as is evident from the broad wording of Article II (2) of the BIT, the treatment the investor is offered under the MFN clause is not limited to "regulatory treatment".[813] However, the recent EU-Canada Comprehensive Economic and Trade Agreement (CETA) demonstrates that this is by no means obvious. Article X.7 (4) of CETA stipulates:

> [s]ubstantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article, absent measures adopted by a Party pursuant to such obligations.[814]

Tribunals are divided mainly regarding the interpretation of 'treatment' in relation to matters related to jurisdiction and admissibility. On the one hand, certain tribunals recognise that having the option to resort to arbitration constitutes more favourable treatment. Among the tribunals that adopt the view that 'less favourable treatment' includes dispute settlement provisions, there are two different understandings. For certain tribunals, arbitration *per se* is more favourable compared to litigation before domestic courts. For these tribunals, 'assurance of independent international arbitration is an important – perhaps the most important – element in investor protection'.[815] As Judge Brower stated in his dissenting opinion in *Daimler v Argentina* '[i]t is difficult to imagine a more fundamental aspect of an investor's "treatment" by a host Government than that investor's ability to exercise and defend its legal rights by prompt access to dispute settlement mechanisms, and fair and efficient administration of justice'.[816] For other tribunal arbitration and litigation are not

[813] *Bayindir v Pakistan*, Jurisdiction [206].

[814] Article X.7(4) CETA.

[815] *Gas Natural v Argentina*, Jurisdiction [49]; see also *Siemens v Argentina*, Jurisdiction [102]; *Suez v Argentina*, Jurisdiction [57]; *Hochtief v Argentina*, Jurisdiction [68], [72]. Also according to *Maffezini*, 'inextricably related to the protection of foreign investors', *Maffezini v Spain*, Jurisdiction [54].

[816] *Daimler v Argentina*, Brower Dissenting Opinion [20] (internal footnotes omitted).

comparable but having the *option* between the two is more favourable than not having that option. As the tribunal in *Hochtief* put it, 'whatever the substantive merits of litigation and of arbitration, it is always more favourable to have the choice as to which to employ than it is not to have that choice'.[817] On the other hand, other tribunals reject the proposition that dispute settlement provisions could constitute 'favourable treatment' in any event. For example, in *ICS v Argentina*, the tribunal refused to accept that the requirement to submit the dispute first to the local courts for an 18-month period before commencing international arbitration, constituted 'less favourable treatment'.[818] The tribunal held that such requirement

> gives an investor two bites at the apple: once before the domestic courts of the host State, and again before an international arbitral tribunal. Although there are costs and delay involved in litigating before the Argentine courts if this fails to achieve a resolution, in many circumstances, this may be more favourable than direct access to international arbitration after only six months of amicable negotiations.[819]

3. MFN and procedural matters

Investment tribunal are famously divided on the question of whether investors could rely on MFN clauses to import more favourable provisions in other treaties relating not only to substantive rights but also to dispute settlement provisions and recourse to arbitration. Out of 25 tribunals that dealt with this question until 2015 (some deciding to exercise judicial economy and strategically avoid the issue), 13 ruled in favour of the applicability of MFN to dispute settlement provisions, while 12 against.[820] The question of the applicability of MFN clauses to dispute settlement provisions can be broken down depending on the nature of the procedural rule which investors want to 'modify' by relying on a more favourable provision

[817] *Hochtief v Argentina*, Jurisdiction [100]. This is also consistent with the ruling by the WTO Panel in *Turkey – Rice*, Panel, *Turkey – Rice* [7.238]; *Garanti Koza v Turkmenistan*, Jurisdiction [91]-[97]; *Berschader v Russia*, CN Brower Dissenting Opinion [20].

[818] *ICS v Argentina*, Jurisdiction [318]-[325].

[819] *ibid* [323]; see also *Siemens v Argentina*, Jurisdiction [85].

[820] I Uchkunova and O Temnikov, 'Toss out the Baby and Put the Water to Bed: On MFN Clauses and the Significance of Treaty Interpretation' (2015) 30 ICSID Review 414, 434.

through the MFN clause on another treaty. The analysis of the relevant jurisprudence further demonstrates the substantive indeterminacy of (international) legal rules and the conceptual malleability of equality and non-discrimination clauses. Investment tribunals have not adopted a uniform approach within each category of procedural requirements in relation to MFN clauses: procedural preconditions to arbitration (section 2.1.), jurisdiction *ratione materiae* (section 2.2.), jurisdiction *ratione temporis* (section 2.3.) and specific arbitration forum (section 2.4.).

3.1. MFN and procedural preconditions to arbitration

In many BITs the right of the investor to commence arbitration is conditional upon fulfilment of certain procedural requirements. Commonly, as in Argentine BITs this can be an 18 month waiting period,[821] or the requirement of negotiations. No consensus exist among investment tribunal on whether investors could by-pass such procedural requirements by relying on treaties concluded between the Host State and third States which do not contain such procedural requirements.[822] In *Maffezini v Spain* the basic treaty (Argentina-Spain BIT) provided for arbitration

> at the request of one of the parties to the dispute, if no decision has been rendered on the merits of the claim after the expiration of a period of eighteen months from the date on which the proceedings referred to in paragraph 2 of this Article [domestic courts] have been initiated, or, if such decision has been rendered, but the dispute between the parties continues[823]

The investor initiated arbitration without having first recourse to Argentine courts as required by Article X (3) of the BIT. By virtue of the MFN clause contained in article VI of the

[821] See *e.g.* article 8(2) (a), Argentina-UK BIT and article X (3) (a), Argentina-Spain BIT.

[822] Some tribunal decline to address the question at all. In *Camuzzi v Argentina* the claimant invoked through the MFN clause the more favourable provisions of another treaty in order to bypass procedural requirements of a six-month negotiation period and 18-month submission of the dispute to local courts. The second requirement has been fulfilled, but with regard to the first one it was deemed 'unnecessary for the Tribunal to decide on the relevance of that [MFN] clause in this context', *Camuzzi v Argentina*, Jurisdiction [121].

[823] Article X (3) (a), Argentina-Spain BIT.

Argentina-Spain BIT, and by relying on the Chile-Spain BIT which did not contain an analogous procedural precondition, the investor argued 'that that the most favoured nation clause in the Argentine-Spain BIT gives him the option to submit the dispute to arbitration without prior referral to domestic courts'.[824] The tribunal agreed with the claimant and held that

> the most favoured nation clause included in the Argentine-Spain BIT embraces the dispute settlement provisions of this treaty. Therefore, relying on the more favourable arrangements contained in the Chile-Spain BIT and the legal policy adopted by Spain with regard to the treatment of its own investors abroad, the Tribunal concludes that Claimant had the right to submit the instant dispute to arbitration without first accessing the Spanish courts.[825]

The *Maffezini* approach was subsequently followed by many tribunals.[826] At the same time, the *Maffezini* decision provoked fierce criticism and opposition.[827] In *Wintershall v Argentina* the issue was precisely the same as in *Maffezini v Spain*. The basic treaty (Argentina-Germany BIT) provided for mandatory prior recourse to domestic courts. However, the investor relied on another treaty which did contain any such procedural requirements. The

[824] *Maffezini v Spain*, Jurisdiction [40].

[825] *ibid* [64].

[826] In *Gas Natural v Argentina* the tribunal held that

> [u]nless it appears clearly that the state parties to a BIT or the parties to a particular investment agreement settled on a different method for resolution of disputes that may arise, most-favoured-nation provisions in BITs should be understood to be applicable to dispute settlement.

Gas Natural v Argentina, Jurisdiction [49]. *Suez v Argentina*, Jurisdiction [64]; *Berschader v Russia*, Award [177]; *National Grid v Argentina*, Jurisdiction [82], see more generally ibid [79]-[94].; At least implicitly and, the tribunal in *Hochtief v Argentina* held that 'the MFN provision is in principle applicable to the pursuit of dispute settlement procedures', *Hochtief v Argentina*, Jurisdiction [72] (emphasis added). However, the tribunal limited that on the basis of the distinction it introduced between conditions for the exercise of a right, where MFN is applicable, as opposed to rights *per se*, where MFN does not apply: 'the MFN clause would not give Hochtief a right to reach a position that it could not reach under the Argentina-Germany BIT: it would enable it only to reach the same position as it could reach, by its own unilateral choice and actions, under the Argentina-Germany BIT, but to do so more quickly and more cheaply, without first pursuing litigation in the courts of Argentina for 18 months', ibid [85].

[827] The tribunal in *Plama v Bulgaria* stated that 'the *Siemens* decision illustrates the danger caused by the manner in which the *Maffezini* decision has approached the question', *Plama v Bulgaria*, Jurisdiction [226]; In another case '[t]he current Tribunal shares the concerns that have been expressed in numerous quarters with regard to the solution adopted in the *Maffezini* case', *Salini v Jordan*, Jurisdiction [115]; 'Since 1992 arbitral practice has changed, initiated by the award in Maffezini, which has been followed in some subsequent cases but also criticised in others, and in academic and other authorities', *Kiliç v Turkmenistan*, Award [7.8.4.].

tribunal discussed previous cases, including *Maffezini v Spain*, but held that 'the Claimant cannot rely on the most-favoured-nation clause in Article 3 of the Argentine-Germany BIT in order to avoid compliance with the requirements set forth in Article 10(2) of the BIT'.[828] Likewise, in *ICS v Argentina* the tribunal refused to allow the investor to by-pass the 18-month litigation prerequisite by relying on MFN on the basis that it does not apply to dispute settlement provisions,[829] and that, in any case, the 18-month litigation prerequisite does not constitute 'less favourable treatment'[830] The *Daimler v Argentina* tribunal adopted the same approach.[831] Judge Brower disagreed in strong terms.[832] In like manner, in *Kiliç v Turkmenistan* the tribunal declined to dispense the investor from the one-year requirement for prior recourse to the courts of Turkmenistan and ruled that such requirements constituted a condition of Turkmenistan's consent to ICSID arbitration.[833]

3.2 MFN and jurisdiction ratione materiae

Another question that arose in relation to MFN and the material scope of application of BIT was that of the definition of 'investment'.[834] In *Vanessa Ventures v Venezuela* the tribunal held that MFN treatment promised under the basic treaty could only be offered to

[828] *Wintershall v Argentina*, Award [197].

[829] *ICS v Argentina*, Jurisdiction [274]-[317].

[830] *ibid* [318]-[325]; see also *supra* .

[831] *Daimler v Argentina*, Award [205]-[281].

[832] Judge Brower did not spare criticism of the majority's decision: '[i]n all, the Award's discussion of the manner in which the BIT's MFN clause affects the Treaty's 18-month clause is not simply unconvincing; it is profoundly wrong', *Daimler v Argentina*, Brower Dissenting Opinion [38].

[833] *Kiliç v Turkmenistan*, Award [7.9.1.]. The tribunal cited with approval Douglas' thesis according to which a BIT 'does not incorporate by reference provisions relating to the jurisdiction of the arbitral tribunal, in whole or in part, set forth in a third investment treaty, unless there is an unequivocal provision to that effect in the basic investment treaty', Douglas (n 772) 344, *Kiliç v Turkmenistan*, Award [7.8.10.].

[834] The notion of 'investment' is both central and controversial in international investment law. Cf *Salini v Morocco*, Jurisdiction [51]; see also M Dekastros, 'Portfolio Investment: Reconceptualising the Notion of Investment under the ICSID Convention' (2013) 14 JWIT 286.

'investments' that fall under the scope of application of that treaty.[835] In other words, for a claimant to benefit from MFN, the investment must first be covered by the BIT providing for MFN treatment. The tribunals in *HICEE v Slovakia* (including the dissenting arbitrator Judge Brower) and *SGS v Dominican Republic* also confirmed that MFN could not be used to expand the definition of 'investment' provided for in the basic treaty. [836] However, Newcomber and Paradell argue that

> whether the MFN clause applies to investments, investors or both might be decisive because an investor might argue that it receives less favourable treatment where 'investment,' in the basic treaty, is defined more narrowly than 'investment' in the third-part treaty. Thus, if the MFN clause applies to investors, the investor might argue that it is entitled to the more favourable treatment in the third-party treaty – the wider definition of investment.[837]

On the other hand, as Banifatemi argues, that 'the temporal application of the treaty must be met in order for the claimant to be in a position to benefit from the treaty, including its most-favoured-nation clause'.[838]

Another question that arose was whether MFN could expand the jurisdiction *ratione materiae* of an investment tribunal by extending consent to contract claims in addition to treaty claims. In *Salini v Jordan* the Claimant invoked the MFN contained in article 3 of the applicable Jordan-Italy BIT and argued that it 'establish[ed] a subsidiary or alternative ground for ICSID jurisdiction over contractual claims'.[839] The investor argued that the

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[835] *Vanessa Ventures v Venezuela*, Award [133].

[836] MFN can 'broaden the scope of the substantive protection granted to the eligible investments of eligible investors; it cannot legitimately be used to broaden the definition of the investors or the investments themselves', *HICEE v Slovak Republic*, Partial Award, [149] (emphasis in the original); 'the MFN clause, cannot be used to alter the scope of the definition of "investments" in the Treaty', *HICEE v Slovakia*, Brower Dissenting Opinion [43]; 'Each treaty defines what it considers a protected investment and who is entitled to that protection, and definitions can change from treaty to treaty. In this situation, resort to the specific text of the MFN Clause is unnecessary because it applies only to the treatment accorded to such defined investment, but not to the definition of "investment" itself', *Société Générale v Dominican Republic*, Jurisdiction [41].

[837] Newcombe and Paradell (n 246) 222.

[838] Y Banifatemi, 'The Emerging Jurisprudence on the Most-Favoured-Nation Treatment in Investment Arbitration' in A Bjorklund, I Laird and S Ripinsky (eds), *Investment Treaty Law: Current Issues III* (BIICL, London 2009) 250.

dispute settlement clauses of the Jordan-USA BIT and the Jordan-UK BIT were broader, providing for ICSID arbitration for contractual disputes, and thus, more favourable.[840] The tribunal concluded on the basis of that the MFN clause 'does not apply insofar as dispute settlement clauses are concerned'.[841] Another example is the use of MFN to expand the *ratione materiae* scope of a treaty in cases where the treaty provides only for arbitration in relation to expropriation claims. This will be treated in the section 4.2. *infra*.

3.3 MFN and jurisdiction ratione temporis

In some cases, the claimants sought to expand the scope *ratione temporis* of the treaty in question by relying on a MFN clause.[842] In *Tecmed v Mexico* the claimant attempted to expand the jurisdictional ambit of the tribunal in order to cover acts that occurred prior of the entry in force of the applicably basic BIT between Mexico and Spain. The Mexico-Spain BIT did not cover disputes arising prior to its entry into force. The investor invoked the more favourable temporal clause of the Austria-Mexico BIT by virtue of the MFN clause contained in Article 4(2) of the Mexico-Spain BIT. The tribunal rejected the claimant's arguments on the basis that

> matters relating to the application over time of the Agreement, which involve more the time dimension of application of its substantive provisions rather than matters of procedure or jurisdiction, due to their significance and importance, go to the core of matters that must be deemed to be specifically negotiated by the Contracting Parties. These are determining factors for their acceptance of the Agreement, as they are directly linked to the identification of the substantive protection regime applicable to the foreign investor and, particularly, to the general (national or international) legal context within which such regime operates, as well as to the access of the foreign investor to the substantive

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[839] *Salini v Jordan*, Jurisdiction [102].

[840] *ibid.*

[841] *ibid* [119].

[842] In some cases tribunal exercise judicial economy on whether the jurisdiction *ratione temporis* could be expanded by virtue of MFN and do not rule on the matter. *Nordzucker v Poland*, Jurisdiction [125].

> provisions of such regime. Their application cannot therefore be impaired by the principle contained in the most favoured nation clause.[843]

The interpretation adopted in *Tecmed v Mexico* however, is neither unquestioned, nor free from serious difficulties. As the tribunal in *Siemens v Argentina* pointed out 'the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions unless they have been excepted.'[844] Stern in her dissenting opinion in *Impregilo v Argentina* stated that

> It is also more than evident that an MFN clause cannot change the condition *ratione temporis*, which is a condition for the enjoyment of all treaty rights, whether substantial or jurisdictional.[845]

At the same time, she admitted in relation to the reasoning in *Tecmed v Mexico* that 'the argument that the MFN clause does apply to "the core of matters that must be deemed to be specifically negotiated by the Contracting Parties" – is a sufficiently explanatory analysis.'[846] However the distinction between matters that are considered to be 'specifically negotiated' and those which are not, is not a valid one under the law of the treaties. [847] Article 28 of the VCLT also stipulates that

> [u]nless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party.[848]

MCI Power v Ecuador was another case where the tribunal was called to decide on a similar argument.[849] The claimant investment's were not covered the Ecuador-US BIT. The investor

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[843] *Tecmed v Mexico*, Award [69].

[844] *Siemens v* Argentina, Jurisdiction [106].

[845] *Impregilo v Argentina, Concurring and Dissenting Opinion of Professor Brigitte Stern* [70] (emphasis in the original).

[846] *Tecmed v Mexico*, Award [71]; see also [77].

[847] Newcombe and Paradell (n 246) 223.

[848] Article 28 VCLT.

[849] *MCI v Ecuador*, Award [118]-[128]. 'But in order that the United Kingdom may enjoy the benefit of any treaty concluded by Iran with a third party by virtue of a most-favoured-nation clause contained in a treaty concluded by the United Kingdom with Iran, the United Kingdom must be in a position to invoke the latter

sought to expand the temporal scope of application of that BIT by invoking the Argentina-Ecuador BIT through an MFN clause contained in the basic treaty. The tribunal did not approach the question from the perspective of the MFN clause in the basic treaty. Rather it examined the allegedly more favourable clause invoked by the claimant in the Argentina-Ecuador treaty, i.e. Article VII of the Argentina-Ecuador BIT:

> Application of other rules
>
> If the provisions of the law of either Contracting Party or obligations under international law existing at present or that are established in the future between the Contracting Parties in addition to this Treaty or if any Agreement between an investor of one Contracting Party and the other Contracting Party contain rules, whether general or specific entitling investments by investors of the other Contracting Party to treatment more favourable than is provided for in this Treaty, such rules shall, to the extent that they are more favourable, prevail over this Treaty. (Tribunal's Translation).[850]

The tribunal paradoxically held that

> From the wording of Article VII of the Argentina-Ecuador BIT, the Tribunal concludes that, in accordance with the interpretation rules of Article 31 of the Vienna Convention, the references made in the text of that Article to "either Contracting Party," "between the Contracting Parties," "an investor of one Contracting Party and the other Contracting Party," and "the other Contracting Party" unquestionably refer to the Contracting Parties of the Argentina-Ecuador BIT.[851]

On that basis, the tribunal declined to consider the question of MFN. One can only wonder how the Argentina-Ecuador BIT could refer to parties other than Argentina and Ecuador! The comparator treaty will always refer to other contracting parties but this is the essence of the

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treaty. The treaty containing the most-favoured-nation clause is the basic treaty upon which the United Kingdom must rely. It is this treaty which establishes the juridical link between the United Kingdom and a third-party treaty and confers upon that State the rights enjoyed by the third party. A third-party treaty, independent of and isolated from the basic treaty, cannot produce any legal effect as between the United Kingdom and Iran: it is *res inter alios acta.*', *Anglo-Iranian Oil Co case (jurisdiction)*, [1952] ICJ Rep 93, 109. For the opposite situation, i.e. when the third-party treaties invoked using an MFN contained in the basic treaty see *US Nationals in Morocco*. 'Even if it could be assumed that Article 17 operated as a general grant of most-favoured-nation rights to the United States and was not confined to the matters dealt with in the Madrid Convention, it would not follow that the United States is entitled to continue to invoke the provisions of the British and Spanish Treaties, after they have ceased to be operative as between Morocco and the two countries in question', *Case concerning rights of nationals of the United States of America in Morocco*, Judgment [1952] ICJ Rep 176, 191.

[850] *MCI v Ecuador*, Award [121].

[851] *MCI v Ecuador*, Award [127].

MFN comparative mechanism. Again, the (relative) indeterminacy of the specific aspect of the non-discrimination rule leaves significant space for different interpretative approaches.

3.4 MFN and consent to specific arbitral forum

In *Yaung Chi Oo Trading v Myanmar*, the first investment award in the context ASEAN Investment Agreement, the tribunal, which was constituted under the ICSID AF Rules, rejected the attempt to rely on the dispute settlement clause of Myanmar-Philippines BIT which provided for UNCITRAL arbitration (and a different appointing authority).[852] The tribunal held that the claimant had to rely on 'the jurisdictional possibility affirmed by' the *Maffezini* tribunal when instituting arbitral proceedings, which the claimant failed to do in the present case.[853] A careful reading of the relevant paragraph seems to suggest that the tribunal implicitly accepted that in principle and absent the difficulties of the present case, an MFN clause could replace one dispute settlement mechanism of the basic treaty with another. The tribunal in *Plama v Bulgaria* established the opposite presumption:

> an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions in whole or in part set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[854]

In other words, 'the intention to incorporate dispute settlement provisions must be clearly and unambiguously expressed'.[855] However, as Judge Brower observed (possibly exaggerating) the *Plama* approach is 'discredited',[856] citing the criticism contained in *Suez v Argentina*,[857]

[852] *Yaung Chi Oo Trading v Myanmar*, Award [83].

[853] *ibid*.

[854] *Plama v Bulgaria*, Jurisdiction [223].

[855] *ibid* [204].

[856] *Daimler v* Argentina, Brower Dissenting Opinion [2].

[857] *Suez v Argentina*, Jurisdiction [64].

Berschader v Russia,[858] and *Renta 4 v Russia*.[859] However, tribunals in other cases endorsed the presumption in favour of the application of MFN to dispute settlement provisions, usually by relying on the Latin maxim *expressio unius est exclusio alterius*.[860]

4. MFN and substantive protection of investments and investors

The application of MFN to substantive clauses has not generated the level of controversy that MFN and procedural matters have sparked.[861] Nonetheless, the answers given to questions regarding the application of MFN to substantive investors' rights are not immune from controversy and inconsistencies. The following emerge as focal points in the jurisprudence: MFN and liability (section 4.1.), MFN and expropriation (section 4.2.), MFN and umbrella clauses (section 4.3.), and MFN and fair and equitable treatment (section 4.4.), which will be analysed in turn.

4.1 MFN and liability

The link between MFN, and in particular, the interpretation of what constitutes a 'more favourable treatment' on the one hand and the concept of equality (along with the difficulties it entails) on the other hand was made apparent in one of the first ICSID cases. In *AAPL v Sri Lanka*, the claimant tried to bypass the 'war clause/civil disturbance' clause of the basic treaty, by relying, through the MFN clause, on the Sri Lanka-Switzerland BIT which did not contain such a clause. However, in *AAPL v Sri Lanka* the tribunal was not ultimately convinced that the BIT did provide for 'more favourable treatment' given that it was not clear

[858] *Berschader v Russia*, Award [177].

[859] *Renta 4 v Russia*, Jurisdiction [95]-[101].

[860] *National Grid v Argentina*, Jurisdiction [82], see more generally *ibid* [79]-[94].

[861] CF Dugan et al, *Investor-State Arbitration, Volume 1* (OUP, Oxford 2008) 417.

whether 'the Sri Lanka/Switzerland Treaty provides equally for a "strict liability" standard of protection in case of losses suffered due to property destruction'.[862]

In *White Industries v India* the tribunal accepted that the 'effective means standard', absent from the basic treaty, could be imported through the use of MFN.[863] The tribunal rejected India's arguments that incorporating article 4(5) of the India-Kuwait BIT,[864] by virtue of MFN would '(a) fundamentally subvert the carefully negotiated balance of the BIT; and (b) be contrary to the emphasis in the BIT on domestic law'.[865] Of particular interest is that the tribunal seemed to partly base its reasoning on the distinction between dispute settlement provisions and substantive rights invoked through MFN:

> Here, White is not seeking to put in issue the dispute resolution provisions of the BIT, but is instead availing itself of the right to rely on more favourable substantive provisions in the third-party treaty.[866]

Finally, while the claimants were allowed to import more favourable substantive provisions of other treaties by virtue of MFN, the mere absence of a provision could not be relied on. In *CMS Gas v Argentina* the claimant creatively argued that the fact that other BITs did not contain a provision similar to article XI of the basic BIT regarding 'non-precluded measures' constitute more favourable treatment. The tribunal remained unconvinced and held that 'had other Article XI type clauses envisioned in those treaties a treatment more favourable to the

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[862] *AAPL v Sri Lanka*, Award [54].

[863] *White Industries v India*, Award [11.2.1]-[11.2.9].

[864] 'Each Contracting State shall maintain a favourable environment for investments in its territory by investors of the other Contracting State. Each Contracting State shall in accordance with its applicable laws and regulations provide effective means of asserting claims and enforcing rights with respect to investments and ensure to investors of the other Contracting State. the right of access to its courts of justice. administrative tribunals and agencies. and all other bodies exercising adjudicatory authority, and the right to employ persons of their choice, for the purpose of the assertion of claims and the enforcement of rights with respect to their investments', article 4(5), Agreement Between the State of Kuwait and the Republic of India for the Encouragement and Reciprocal Protection of Investment (signed 26 February 1999, entered into force 4 May 2000).

[865] *White Industries v India*, Award [11.2.1].

[866] *ibid* [11.2.3]; on the controversial question of MFN and dispute settlement provisions see *supra*.

investor, the argument about the operation of the MFNC might have been made'.[867] However, the mere absence of a provision could not be relied on through MFN.[868] By virtue of MFN the tribunal in *CME v Czech Republic* held that compensation on the basis of 'fair market value' meant 'fair market value of the expropriated investment immediately before the expropriatory action was taken' in light of more detailed and favourable respective provision US-Czech Republic BIT.[869] On the contrary, Brownlie in his Separate Opinion was of the opinion that '[t]he application of the most-favoured nation clause (see Article 3(5) of the Dutch Treaty) to the compensation provisions of the Dutch Treaty in order to incorporate the substantially different formulation in the U.S. Treaty is an unattractive hypothesis'.[870] First, Brownlie observed that it would render the intention of the parties 'nugatory'.[871] Second, Brownlie made the more general point that ignoring the choice of parties regarding compensation through the use of MFN.[872]

4.2 MFN and Expropriation

The non-discrimination requirement of the international rule on expropriation will be extensively analysed in section VIII *infra*. It suffices to say herein that the tribunals are divided on whether the MFN clause can be used to expand the scope of the tribunal's jurisdiction, when the BIT is limited provides for arbitration only in relation to expropriation. In *Tza Yap Shum v Peru* the claim unsuccessfully invoked through the MFN the broader

[867] *CMS Gas v Argentina*, Award [377].

[868] *ibid.*

[869] *CME v Czech Republic*, Final Award, [500]. The relevant part of the US-Czech Republic stipulated that '[c]ompensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known, whichever earlier', article III(1) of the Treaty with the Czech and Slovak Federal Republic concerning the Reciprocal Encouragement and Protection of Investment (signed 22 October 1991, entered into force 19 December 1992).

[870] *CME v Czech Republic*, Browlie Separate Opinion [11].

[871] *ibid.*

[872] *ibid.*

dispute settlement provisions of the Columbia-Peru BIT, as the basic treaty, the China-Peru BIT, which provided for arbitration only for disputes related to expropriation.[873] The tribunal in *Accession Mezzanine v Hungary* held in case that 'the arbitrable scope of the basic treaty is expropriation, including fact and law questions related thereto', the 'Claimants are entitled to rely on the MFN provisions of the BIT, but only insofar as such provisions relate to expropriation'.[874] Similarly, in another case the tribunal held that the MFN does 'not expand arbitral competence in the present proceedings, with the consequence that BIT Article 8(2) applies to restrict the Tribunal's jurisdiction to disputes relating to alleged divestment under Article 5(2), to the exclusion of the Claimants' Non-Expropriation Claims'.[875] However, the Tribunal in *RosInvest v Russia* though reached the opposite conclusion on the same interpretative question.[876]

4.3 MFN and Fair and Equitable Treatment

Judge Higgins noted in her Separate Opinion in the *Oil Platforms* case that the FET is one of the key 'legal terms of art well known in the field of overseas investment protection'.[877] Although FET has attracted significant attention in practice and scholarship,[878] its

[873] *Tza Yap Shum v Peru*, Jurisdiction [220]; see also *Austrian Airlines v Slovakia*, Award [132]-[140].

[874] *Accession Mezzanine and Danubius v Hungary*, Decision on Respondent's Objection under Arbitration Rule 41(5*)* [74].

[875] *Les Laboratoires Servier v Poland*, Award [511].

[876] *RosInvest v Russia*, Jurisdiction [124]-[156].

[877] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Preliminary Objection, Separate Opinion of Judge Higgins [1996] ICJ Rep 847, 858 [39]. Slight variations of wording in BITs seem to be immaterial: '[t]he standard of "fair and equitable treatment" has been interpreted broadly by Tribunals and, as a result, a difference of interpretation between the terms "fair" and "reasonable" is insignificant', *Parkerings v Lithuania*, Award [227].

[878] See; Paparinskis (n 117); Dumberry (n 117); A Diehl, *The Core Standard of International Investment Protection: Fair and Equitable Treatment* (Kluwer Law International, The Hague 2012); Kläger (n 117); Tudor (n 117); S Vasciannie, The Fair and Equitable Treatment Standard in International Investment Law and Practice (1999) 70 BYIL 104.

relationship with MFN has shown to be relatively uncontroversial.[879] The central question is whether an investor can invoke a FET provision contained in a third treaty through MFN when the basic treaty does not contain such a clause.[880] Many investment tribunals have answered this question affirmatively.[881] However, other tribunals rejected the proposition that the FET standard can be imported by virtue of an MFN clause.[882] Tribunals require that the claimant must demonstrate that the FET clauses contained in the third treaty which is invoked through MFN indeed grants additional measure of protection.[883] Divergent views are expressed regarding certain specific aspects of the relationship between MFN and FET. In *Pope & Talbot v Canada* the tribunal held that FET provided for under article 1105 of the NAFTA went beyond the customary international minimum standard and it is 'additive to the requirements of international law. That is, investors under NAFTA are entitled to the international law minimum, plus the fairness elements'.[884] MFN was a crucial element in the reasoning of the tribunal:

[879] On the relationship between MFN and FET from a historical perspective, see Paparinksis (n 117) 88-93. E.g. see article 29 of the Havana Charter for an International Trade Organization (adopted 24 March 1948, not in force) Un Doc E/Conf.2/78. Some treaties combine FET and MFN in a single provision, see Article 4(1), India-Thailand BIT, Article 4(1), Swiss-Ghana BIT and Article 10 of the ECT.

[880] See Dumberry (n 117) 282; Paparinskis (n 117) 92; Kläger (n 117) 288; Tudor (n 117) 90.

[881] *ATA v Jordan*, Award [127]; *Rumeli v Kazakhstan*, Award [575]; 'the Tribunal notes that the basis for importing an FET obligation into the Treaty is provided by its MFN clause, from which it follows that the applicable FET standard is a self-standing treaty obligation as opposed to the customary international minimum standard to which the Respondent referred', *Bayindir v Pakistan*, Award [164]; *MTD v Chile*, Award [104] and *MTD v Chile*, Decision on Annulment [64] with the caveat that 'is not limited to attracting more favourable levels of treatment accorded to investments from third States only where they can be considered to fall within the scope of the fair and equitable treatment standard'. Further, given that the formulation of FET clauses may differ from BIT to BIT, another effect of MFN is to deprive these differentiations in wording of practical effect, Dumberry (n 96) 284; Newcombe and Paradell (n 246) 261.

[882] *Chemtura v Canada*, Award [235].

[883] *UPS v Canada*, Award [184]; *Chemtura v Canada*, Award [236] (this was noted as obiter dictum as the tribunal rejected the possibility of importing FET through an MFN clause). The tribunal in ADF v USA rejected the MFN argument on the basis that article 1108(7) of NAFTA excludes government procurement from the scope of application of article 1103, *ADF v USA*, Award [197].

[884] *Pope & Talbot v Canada*, Award Phase 2 [110], see also [110]-[118].

> the contrary view of that provision would provide to NAFTA investors a more limited right to object to laws, regulation and administration than accorded to host country investors and investments as well as to those from countries that have concluded BITs with a NAFTA party. This state of affairs would surely run afoul of Articles 1102 and 1103, which give every NAFTA investor and investment the right to national and most favoured nation treatment.[885]

For Tudor this interpretation 'is supported by the object of the NAFTA, which is to encourage foreign investment'.[886] In 2001 the famous NAFTA Free Trade Commission (FTC) adopted an Interpretative Note ending the controversy regarding the relationship of FET to customary international law.[887] The binding interpretation by the FTC provided that

> 1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
> 2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.[888]

In contradistinction, the tribunal in *UPS v Canada* held that the approach followed in *Pope & Talbot v Canada* was 'inconsistent with the Interpretation, in particular insofar as it says that the obligation to accord fair and equitable treatment is not in addition to or beyond the customary international law standard of minimum treatment'.[889] Dumberry also argues that because FET in the context of NAFTA is equated with, and reflects the International Minimum Standard, which basically provides for the same and uniform level of protection, no recourse to MFN in article 1103 is necessary.[890] The tribunal in *Parkerings v Lithuania* reminds that the relationship between MFN and FET is both ways 'in certain situations where

[885] *ibid*, [117].

[886] Tudor (n 117) 192.

[887] Paparinskis (n 117) 94. See also *Neer case* (1926) 4 RIAA 60; J Paulsson and G Petrochilos, 'Neer-ly Misled?' (2007) 22 ICSID Review 242;

[888] NAFTA Free Trade Commission, Notes of Interpretation of Certain Chapter 11 Provisions, Section B (31 July 2001); see also CH Brower, 'Why the FTC Notes of Interpretation Constitute a Partial Amendment of NAFTA Article 1105' (2005-2006) 46 VJIL 347.

[889] *UPS v Canada*, Jurisdiction [95], see also, ibid [97]; *Loewen v USA*, Final Award [128].

[890] Dumberry (n 117) 289.

an MFN clause has been incorporated within a BIT, establishing a discrimination under the standard of fair and equitable/reasonable treatment is not necessary'.[891] Finally, in other cases, the tribunal ended up not pronouncing on the issue because the claimant dropped the relevant claim.[892]

4.4 MFN and umbrella clauses

Leaving aside non-discrimination, few other interpretative issues have divided more investment tribunals than the question of the so-called 'umbrella clauses'.[893] In 2006 nearly half of the BITs in force contained an umbrella clause.[894] However, when the BIT does not contain an umbrella clause, it is of paramount practical importance to determine whether, such clause can be imported through MFN. Certain tribunal exercised judicial economy and

[891] *Parkerings v Lithuania*, Award [291].

[892] See *Pope & Talbot v Canada*, Procedural Order No 2.

[893] Cf *SGS v Pakistan*, Jurisdiction [167] and *SGS v Philippines*, Jurisdiction [113]-[129]. As the another tribunal noted regarding *SGS v Pakistan* and *SGS v Philippines*, 'the two decisions cannot be reconciled, reflecting different approaches to this issue to the effect of an umbrella clause in the framework of a BIT', *BIVAC v Paraguay*, Jurisdiction [138]; further, the same tribunal observed that 'there is no *jurisprudence constante* on the effect of umbrella clauses' and 'that the subject is one on which legal opinion is divided', ibid [141] and followed the *SGS v Philippines* approach, as did the tribunal in *Eureko v Poland*, Partial Award [257], *SGS v Paraguay*, Jurisdiction [170]-[185] and *Noble Ventures v Romania*, Award [53]; *Toto Costruzioni v Lebanon*, Jurisdiction [200]-[201] and *Bosh v Ukraine*, Award [246]-[247]. Other tribunals followed a more restrictive approach, like *SGS v Pakistan*, see *Pan American v Argentina*, Preliminary Objections [112]-[113]: 'the Tribunal, endorsing the interpretation of the so-called "umbrella clause" in the Decision *SGS v. Pakistan*'; *Hamester v Ghana*, Award [348]-[349] and *El Paso v Argentina*, Award [532]. Again, given the controversy, it is hardly surprisingly that some tribunal analyse the case law but did not adopt a position, see *Duke Energy v Ecuador*, Award [321]-[325]. On umbrella clauses see generally ER Gadelshina, 'Hermeneutic Reflections on the Specific Purpose of Umbrella Clauses' (2013) 14 JWIT 804; J Potts, 'Stabilizing the Role of Umbrella Clauses in Bilateral Investment Treaties: Intent, Reliance and Internationalization' (2011) 51 Virginia J Int L 1005; OECD, 'Interpretation of the Umbrella Clause in Investment Agreements' (October 2006) Working Papers on International Investment Number 2006/3; J Wong, 'Umbrella Clauses in Bilateral Investment Treaties: of Breaches of Contract, Treaty Violations, and the Divide Between Developing and Developed Countries in Foreign Investment Disputes' (2006) 14 George Mason LR 135 [arguing that 'an umbrella clause enables a BIT tribunal to exercise jurisdiction over claims concerning such breaches of contract, which are also BIT violations under the clause, and further permits the tribunal to do so notwithstanding an exclusive forum selection clause in the contract', ibid 139; TW Wälde, 'The "Umbrella" Clause in Investment Arbitration: a comment on original intentions and recent cases' (2006) 6 JWIT 183; J Crawford, 'Treaty and Contract in Investment Arbitration' (2008) 24 Arbitration International 351.

[894] K Yannaca-Small, 'Interpretation of the Umbrella Clause in Investment Agreements' (October 2006) OECD Working paper Number 2006/3, 5.

did not pronounce on the issue.[895] However, among the tribunals that decided on the matter no consensus exists. The tribunal in *Paushok v Mongolia* held that the MFN clause of the applicable Mongolia-Russia BIT is limited to FET and thus an 'investor cannot use that MFN clause to introduce into the Treaty completely new substantive rights, such as those granted under an umbrella clause'.[896] Similarly, the tribunal in *Impregilo v Argentina* implied that MFN does not extend to contractual breaches.[897] In like manner, the *Institute de Droit International* (IDI) adopted in the 2013 Tokyo session, a Resolution on Investment Arbitration. According to article 13 of this Resolution stipulated that

> MFN treatment required by an investment treaty which does not contain an umbrella clause does not apply to an umbrella clause included in a treaty concluded by the host State with a third country.[898]

Other tribunals took a decidedly different approach. In *EDF v Argentina* the tribunal concluded without much analysis that 'the MFN clause does in fact permit recourse to the ―umbrella clauses of third-country treaties',[899] considering that '[t]o ignore the MFN clause in this case would permit more favourable treatment to investors protected under third countries, which is exactly what the MFN Clause is intended to prevent'.[900] The tribunal in *Arif v Moldova* adopted the same approach holding that the 'the umbrella clause' was a

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[895] 'Under these circumstances, the Tribunal considers that it is not necessary anymore to examine Issue No. 6, i.e., whether the Tribunal may also have jurisdiction based on the Umbrella Clause of the Argentina-Chile BIT in connection with the MFN Clause of the Argentina-Italy BIT. To the extent that the Tribunal's jurisdiction already derives from the treaty nature of the claims at stake, the question of the interaction between the Umbrella Clause of the Argentina-Chile BIT and the MFN Clause of the Argentina-Italy BIT becomes moot', *Abaclat v Argentina*, Jurisdiction [332].

[896] *Paushok Mongolia*, Award [570].

[897] 'The substantive protection of the MFN clause is very wide in so far as it relates to all matters regulated by the BIT. Nevertheless, the reference to matters regulated by the BIT sets an outer limit, and it is debatable whether contractual breaches are matters regulated by the BIT', *Impregilo v Argentina*, Award [184].

[898] Article 13, IDI, Session of Tokyo 'Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties', 13 September 2013, available at http://www.idi-iil.org/idiE/resolutionsE/2013_tokyo_en.pdf

[899] *EDF v Argentina*, Award [929].

[900] *ibid* [932]. However, the tribunal was cautious enough to emphasise that it took 'no position on this debate about the interaction of MFN clauses with jurisdictional and procedural provisions', ibid [936].

substantive right (which can be imported through an MFN) clause and not a jurisdictional right (which cannot).[901]

[901] *Arif v Moldova*, Award [395]-[396].

V. INTERPRETING NATIONAL TREATMENT

The origins of National Treatment can be traced back, albeit in an embryonic form, to a procedural National Treatment contained in an agreement between Charlemagne and the King Offa of Mercia in 796[902] and the 12th and 13th century's treaty practice of the Hanseatic League,[903] if not earlier. Today, National Treatment is not only a cardinal principle of international economic law,[904] but also a sensitive indicator of the mutations in the broader international economic environment.[905] In contemporary practice, a stereotypical National Treatment clause can be found in Article 1102 of the North American Free Trade Agreement ('NAFTA').[906] As is the case with MFN, National Treatment, whilst omnipresent in

[902] Weiler (n 106) 415-16.

[903] AK Bjorklund, 'National Treatment' in August Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 29, 31.

[904] *Corn Products v Mexico*, Decision on Responsibility [109].

[905] See W Shan *et al*, 'National Treatment for Foreign Investment in China: A Changing Landscape' (2012) 27 ICSID Rev—FILJ 120; see also D Collins, 'National Treatment in Emerging Market Investment Treaties' in A Kamperman Sanders (ed), *The Principle of National Treatment in International Economic Law* (Edward Elgar, Cheltenham 2014) 161-182.

[906] NAFTA (adopted 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289, Article 1102. Article 1102 of NAFTA stipulates:

> 1. Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 2. Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
>
> 3. The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.
>
> 4. For greater certainty, no Party may:
>
> (a) impose on an investor of another Party a requirement that a minimum level of equity in an enterprise in the territory of the Party be held by its nationals, other than nominal qualifying shares for directors or incorporators of corporations; or
> (b) require an investor of another Party, by reason of its nationality, to sell or otherwise dispose of an investment in the territory of the Party.

international investment treaties, has led to a number of inconsistent decisions. Divergences are not limited to the interpretative outcome but extend to the reasoning of investment tribunals as well. How narrowly or broadly likeness and less favourable treatment are construed, and how relevant is the regulatory purpose or States' intent to discriminate largely depends on the idea that the adjudicator has about the purpose of the international investment regime. A 1999 UNCTAD Report alludes to multifaceted concept of equality and aptly captures the inherent tension of different objectives with regard to National Treatment:

> access to foreign markets under non-discriminatory conditions is necessary for the effective functioning of an increasingly integrated world economy. On the other hand, there may be no substitute for the promotion by host countries of domestic industries to ensure economic development and, in a world marked by stark inequalities in economic power, technical capabilities and financial strength, a certain differentiation between national and non-national firms may be necessary precisely in order to bring about a degree of operative equality.[907]

The two basic components of a National Treatment analysis is likeness and less favourable treatment.[908] As the tribunal in *Feldman v Mexico* noted, '[d]espite its deceptively simple language, the interpretative hurdles for Article 1102 are several'.[909] Chapter A of the thesis demonstrated that the interpretative difficulties arise not despite the 'simple language', but precisely *because of it*.

1. Likeness

In *Occidental v Ecuador*, the investor argued that absence of specific wording regarding 'in like circumstances' in National Treatment clauses results in a less restrictive test, and being thus more favourable to the investor can be imported through an MFN.[910] The tribunal did

[907] UNCTAD, *National Treatment: UNCTAD Series on issues in international investment agreements* (UN, Geneva and NY 1999) 3

[908] See *Bayindir v Pakistan*, Award [389]-[390]; *Champion Trading v Egypt*, Award [128]; *ADM v Mexico*, Award [196]; *Cargill v Mexico*, Award [228]; *Feldman v Mexico*, Award [181].

[909] ibid [166]; Thus Bjorklund, '[n]otwithstanding the apparent simplicity of the concept, however, it can be difficult to apply', Bjorklund (n 903) 58.

[910] *Occidental v Ecuador*, Award [170]; Newcombe and Paradell (n 246) 160.

not address the issue. However, as noted earlier in the context of MFN, even in cases where likeness does not appear in the wording of the National Treatment clause, it is inherently part of the test.[911] Investment tribunal have not reached a consensus regarding the basic criterion to determine likeness in the context of National Treatment. Commentators recently observed that 'the analysis of whether investors or investments are in like circumstances for purposes of the national treatment standard remains highly fact and context-specific'.[912] This seems to be fully confirmed by the case law of investment tribunals.[913] However, as Bjorklund rightly points out this 'fact-specific inquiry' depends on the 'analytical approach of the tribunal'.[914] In this context, the way in which tribunal exercises their discretion in interpreting the vague and open-ended concept of likeness is revealing different values and often conflicting understandings of the mission of international investment regime.

Three main criteria have been used by tribunals to determine likeness: producing competing products or providing competing services ('competition criterion'), operating within the same economic sector ('same sector criterion'), or being subject to the same legal and regulatory framework ('same regulatory framework criterion'). More often than not, these criteria have been used cumulatively and without a clear methodology. All three criteria could be interpreted narrowly or broadly. Thus what really matters is the tribunals' approach in interpreting and applying them, rather which criterion is selected. Some tribunals adopt a very broad understanding of likeness, while others opt for a very narrow

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[911] See *supra* Section IV.

[912] S Sacco and MC Fernández-Fonseca, 'National Treatment in Investment Arbitration' in JA Huerta-Goldman *et al* (eds), *WTO Litigation, Investment Arbitration and Commercial Arbitration* (Wolters Kluwer, AH Alphen aan den Rijn 2013) 256;

[913] As one tribunal observed that 'the inquiry into the similar situation is fact specific', *Bayindir v Pakistan*, Award [389]; *Pope & Talbot v Canada*, Award Phase 2 [75]; *SD Myers v Canada*, First Partial Award [244]; 'discrimination only exists between groups or categories of persons who are in a similar situation, after having assessed, on case-by-case basis, the relevant circumstances', *Levy v Peru*, Award [396].

[914] Bjorklund (n 903) 48.

interpretation. How broadly or narrowly likeness is construed in the context of National Treatment is interpreted is critical for (ultimately) finding a violation by the State. Further, it demonstrates how investment tribunals see their role, where they strike the balance between protecting investors and preserving the national regulatory autonomy.

Certain tribunal focus on the existence of a competitive relationship between domestic and foreign investors. In *Paushok v Mongolia* the tribunal emphasised that 'the sectors covered should relate to competitive and substitutable products'[915] and explicitly adopted a deferential approach by stating that '[i]t is not the role of the Tribunal to weigh the wisdom of legislation, but merely to assess whether such legislation breaches the Treaty'.[916] Likewise, in *Corn Products v Mexico* 'the Tribunal [could not] escape the conclusion that the producers of like products which were directly competitive were in like circumstances as regards a measure designed expressly for the purpose of affecting that competition'.[917]

Even when the tribunal applies the same criterion (*e.g.* same economic sector criterion), the case law is still split. Certain tribunals adopt a narrow understanding and others opt for a broader construction of what constitutes 'same economic sector'. For example, in *Champion Trading v Egypt* operating in the same sector it was not *per se* sufficient to find that the companies were like:

> Although both kinds of companies operate in the same industry and are subject to same kind of rules, there is a significant difference between a company which opts to buy cotton from the Collection Centres at fixed prices and a company which opts to trade on the free market, whether or not the company is privately-owned or State-owned or whether the company is national or foreign.[918]

Likewise, in *RDC v Guatemala*, the first arbitral award under the CAFTA, the tribunal held

[915] *Paushok v Mongolia*, Award [315]; however, the tribunal decided not to rely on WTO case law, see n .

[916] *ibid* [316].

[917] *Corn Products v Mexico*, Decision on Responsibility [137], [120].

[918] *Champion Trading v Egypt*, Award [154].

that

> Respondent has failed to show that Claimant and Mr. Campollo are foreign and domestic investors in "like circumstances." According to Claimant, both are competitors in the same economic sector since they have been competing to invest and operate the railroad and in leasing and developing the railroad's assets. Claimant supports this statement by citing the fact that Mr. Campollo has certain interests in the sugar industry in the Dominican Republic, and operates a railroad there purely for the transportation of the produce of his estate. In the Tribunal's view, the obvious difference in scale between the railroad for the exclusive exploitation of the sugar plantation of Mr. Campollo in the Dominican Republic and the railway operation of Claimant in Guatemala defeats the "like circumstances" argument.[919]

In *Levy v Peru*, the tribunal first observed that 'the banking sector is a sensitive area for any country, there are marked differences between the various banks operating in it';[920] it found 'it impossible to determine the position of BNM in the Peruvian banking system';[921] however, the tribunal in rejecting the Claimant's submission with regard to likeness made a number of interesting findings.[922] It characterized that belonging to the same financial sector and developing their activities in mutual competition,[923] is not sufficient to determine likeness given that the benchmarks used were 'very general'.[924] The tribunal also noted a certain inconsistency in the Claimant's statement classifying the bank in question sometimes as a 'small bank' and sometimes as a systemic bank.[925] The dissenting arbitrator took issue with the majority's analysis, and, by relying on other investment cases,[926] emphasised that 'a

[919] *RDC v Guatemala*, Award [153]

[920] *Levy v Peru*, Award [396].

[921] *ibid* [401].

[922] *ibid* [393]-[405].

[923] *ibid* [399].

[924] *ibid* [400].

[925] *ibid*.

[926] *Thunderbird v Mexico*, Award [175]-[183]; *Corn Products v Mexico*, Decision on Responsibility; *Tza Yap Shum v Peru*, Award [267].

higher or lower market share is irrelevant to set the relevant benchmark for comparison'.[927] In contradistinction, in one of the first NAFTA cases the tribunal held that:

> [t]he concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector".[928]

Other tribunals confirmed this interpretation.[929] In *Merrill v Canada* the tribunal held that

> it is not enough on occasions to undertake the comparison solely in the same sector of economic activity and it might be necessary, as in Occidental, *to consider whole sectors of the economy and business*.[930]

Finally, other tribunal focus on whether the domestic and foreign investors fall under the same regulatory scheme. According to the tribunal, 'the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority'.[931] More recently, in *Grand River v USA* the tribunal noted that the case law 'shows the identity of the legal regime(s) applicable to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103'.[932] *Methanex v USA* is the most famous example of a very narrow approach. The case concerned a ban imposed by the State of California on the methanol-based fuel-additive MTBE. The Claimant failed to convince the tribunal that

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[927] *Levy v Peru*, Morales Godoy Dissenting Opinion [185].

[928] *SD Myers v Canada*, First Partial Award [250]. In 1993 OECD declared that '[a]s regards the expression "in like situations", the comparison between foreign- controlled enterprises established in a Member country and domestic enterprises in that Member country is valid only if it is made between firms operating in the same sector', OECD, *National Treatment for Foreign-Controlled Enterprises* (OECD Publications, Paris 1993) 22.

[929] 'as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector', *Pope & Talbot v Canada*, Award Phase 2 [78]; 'the domestic entities "in like circumstances" whose treatment should be compared are those firms operating in the same sector, which should be interpreted broadly to include the concepts of "economic sector" and "business sector"', *ADM v Mexico*, Award [198].

[930] *Merrill v Canada*, Award [88] (emphasis added).

[931] *ibid* [89].

[932] *Grand River v USA*, Award [167]. See also *Merrill v Canada*, Award [94].

domestic ethanol producers and foreign methanol producers were in like circumstances.[933] Competitive relationship was found to be insufficient and the WTO jurisprudence on likeness was deemed to be inapplicable.[934] The interpretation of likeness that was adopted in *Occidental v Ecuador* was remarkably broad.[935] The tribunal compared Occidental not only to other oil exporters but also to exporters in general with regard to VAT refunds. The tribunal noted that

> "in like situations" cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken.[936]

The same regulatory framework criterion should be used with caution, as it might be too deferential to the Respondent State. The host State has always the prerogative to subject investors to the same or different regulatory regime.

Tribunals have also dismissed National Treatment claims because the appropriate comparator could not be identified. Such approach appears to be a mixture of the judicial economy method and the restrictive approach. In *Loewen v USA* where the issue was investor's treatment by a Mississippi Court, the tribunal dismissed the claims as 'their circumstances as litigants were very different' and there were no materials 'which enable such a comparison to be made'.[937]

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[933] *Methanex v USA*, Final Award, Part IV, Chapter B [23]-[37].

[934] *ibid*.

[935] See criticism in SD Franck, 'Occidental Exploration &Production Co. v. Republic of Ecuador. Final Award. London Court of International Arbitration Administered Case No. UN 3467' (2005) 99 AJIL 675, 679-680.

[936] *Occidental v Ecuador*, Award [173].

[937] *Loewen v USA*, Final Award [140]; See also Paulsson (n 724) 192 *et seq.*

2. Less Favourable Treatment

After determining likeness, the next step in the analysis is to determine whether the investor has been accorded 'less favourable treatment'.[938] As Pauwelyn and DiMascio observe in their seminal article on National Treatment, '[i]nvestment tribunals have not discussed what constitutes "less favourable treatment" of a foreign investor as extensively as the "in like circumstances" requirement'.[939]

The meaning of 'treatment' is not limited to *de jure* differentiation but it includes *de facto* treatment as well.[940] Another tribunal emphasised the broad meaning of treatment

> as it includes almost any conceivable measure that can be with respect to the beginning, development, management and end of an investor's business activity. The treatment is no different than the aggregate of all the regulatory measures applied to that business.[941]

In an inter-state NAFTA arbitration between Mexico and US the tribunal emphasised

> Because the United States expressly prohibits the above mentioned investment, this Panel finds such prohibitions as inconsistent with NAFTA, *even if Mexico cannot identify a particular Mexican national or nationals that have been rejected*. A blanket refusal to permit a person of Mexico to establish an enterprise in the United States to provide truck services for the transportation of international cargo between points in the United States is, on its face, less favourable than the treatment accorded to U.S. truck service providers in like circumstances, and is contrary to Article 1102.[942]

A fundamental and controversial question with regards to the more favourable treatment part of the National Treatment standard is whether the comparison should be made

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[938] Other treaties provide for the 'same treatment' or 'as favourable treatment'. However, the difference in formulation, although discussed in some decisions, were not important, Bjorklund (n 903) 54.

[939] DiMascio and Pauwelyn (n 277) 76.

[940] *Feldman v Mexico*, Award [169]; *Alpha v Ukraine*, Award [426]; *ADM v Mexico*, Award [193]. See similar conclusion with regard to 'treatment' in the context of an MFN analysis *supra* .

[941] *Merrill & Ring v Canada*, Award [79].

[942] *Cross-Border Trucking Services v USA*, Final Report [292] (emphasis added). In the context of the same dispute, an investor state claim has been subsequently filed pursuant to Chapter 11 of the NAFTA, see *CANACAR v United States*, UNCITRAL, Notice of Arbitration, 2 April 2009.

between domestic investors and foreign investors *as a group* [943] or between domestic investors and a *single* foreign investor. In the WTO context, the two different approaches are often described as the 'asymmetrical' and 'diagonal' test respectively.[944] As in the case of WTO law, which of the two approaches is selected has profound repercussions on States' regulatory autonomy and is highly indicative of the broader system of values endorsed and promoted by the arbitrators. The first gives more regulatory space to States, while the second is more 'intrusive'[945]. Thus, it comes as no surprise that tribunals are split on this question.

In *ADF v Canada*, Claimant's submissions were 'an invitation to the tribunal to apply a diagonal test for "less favourable treatment"'.[946] The tribunal rejected this approach and offered a 'reading of the test of "less favourable treatment" which is similar to elements of the group approach adopted in WTO jurisprudence'.[947] However, a strong preference exists in investment jurisprudence in favour of the asymmetrical test.[948] In *Pope & Talbot v* Canada, Canada argued that the tribunal should

> apply the disproportionate disadvantage test in this case, the Tribunal must determine whether there are any Canadian owned investments18 that are accorded the same treatment as the Investor. Then, the size of that group of Canadian investments must be compared to the size of the group of Canadian investments receiving more favourable treatment than the Investment. Unless the disadvantaged *Canadian* group (receiving the same treatment as the Investor) is

[943] What is the critical range of differentiation 'remains in the discretion of the adjudicators', Diebold (n 441) 844.

[944] See the analysis in Part B of the thesis.

[945] Diebold (n 441) 844.

[946] J Kurtz, 'The Merits and Limits of Comparativism: National Treatment in International Investment Law and the WTO' in S Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2009) 270.

[947] ibid; *ADF v USA*, Award [157].

[948] According to DiMascio and Pauwelyn, this is probably due to the rationale of investment agreements which, contrary to trade law, is the protection of *individual* rights, DiMascio and Pauwelyn (n 277) 78. However, Kurtz maintains that 'there is no real textual basis', Kurtz (n 946) 272.

> smaller19 than the advantaged group, no discrimination cognizable under Article 1102 would exist.[949]

The tribunal rejected Canada's arguments by noting that adopting this approach would render extremely difficult for investors to make a case for violation of National Treatment and '[o]nly in the simplest and most obvious cases of denial of national treatment could the complainant hope to make a case for recovery'.[950] Likewise, the tribunal in *Methanex v USA* held that the foreign investors 'is entitled to the most favourable treatment accorded to some members of the domestic class'.[951] In *ADM v Mexico* the tribunal confirmed that approach.[952] Wälde in his Separate Opinion in *Thunderbird v Mexico* also noted that the case law suggested the comparison is between the treatment which the best-placed domestic competitor receives and not the average or the worst treatment accorded to domestic investors.[953]

Due to its controversial character of *diagonal v asymmetrical test*, some tribunal attempt to avoid the question. The tribunal in *Feldman v Mexico* refused to take position.[954] The tribunal in *UPS v Canada* did the same,[955] but the dissenting arbitrator noted that the NT

[949] *Pope & Talbot v Canada*, Award Phase 2 [44] (emphasis in the original, internal references omitted). However, Canada conceded that the asymmetrical test is inapplicable in cases of *de jure* discrimination, ibid [43].

[950] *ibid* [72]; see also [79]

[951] *Methanex v USA*, Final Award, Part IV, Chapter B [21].

[952] 'Claimants and their investment are entitled to the *best level of treatment available to any other domestic investor or investment* operating in like circumstances, including the domestic cane sugar producers'. *ADM v Mexico*, Award [205] (emphasis added).

[953] *Thunderbird v Mexico*, Wälde Separate Opinion [105].

[954] *Feldman v Mexico*, Award [166], [185]-[187]. Also in *Grand River v USA*, the investor submitted that 'it would not matter if, hypothetically, a U.S. measure might result in all other Canadian investors receiving advantageous treatment, or even treatment better than the U.S. comparators. In their view, only the situation of the Grand River claimants is legally relevant', but the tribunal rejected the claim on the fact without saying anything on the applicable test, see *Grand River v USA*, Award [168]-[169].

[955] *UPS v Canada*, Award.

'commands an effective parity of foreign and domestic investors and investments',[956] and '[s]uch parity does not exist where a NAFTA Party favours a national champion over other investors and investments. The violation is not mitigated by [the] existence of discrimination against other domestic investors or investments as well as against foreign investors and investments'.[957]

Another interesting question relates to the application of National Treatment in sub-units of states. It is well accepted in general public international law that a State bears international responsibility for any breach of international law by any unit or sub-unit of a the State, such as federal states or provinces.[958] The case law of GATT panels point towards the same direction,[959] although discussions in the WTO Council of Trade in Services regarding the US schedules under GATS in relation to differences in tax across various states is inconclusive.[960] In *Merrill & Ring v Canada* the Respondent argued that when interpreting the meaning of treatment a distinction should be made between the treatment by the national government (*in casu* Canada) and the federal state or province (*in casu* British Columbia).

[956] *UPS v Canada*, Cass Separate Statement [59].

[957] *ibid* [60].

[958] 'The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and *whatever its character as an organ of the central Government or of a territorial unit of the State*', article 4(1) of the Articles on State Responsibility (emphasis added); *LaGrand (Germany v United States of America)*, Provisional Measures, Order of 3 March 1999, [1999] ICJ Rep 9, 16 [28]. See also Article 27 of the VCLT.

[959] Panels have interpreted Article XXIV:12 restrictively, see GATT Panel, *Canada – Gold Coins* [63]-[65]. The relevant article stipulates that '[e]ach contracting party shall take such reasonable measures as may be available to it to ensure observance of the provisions of this Agreement by the regional and local governments and authorities within its territories', article XXIV:12 of the GATT. See also GATT Panel, *Canada – Gold Coins* [5.79]-[5.80], according to which 'GATT law is part of federal law in the United States and as such is superior to GATT-inconsistent state law', ibid [5.80].

[960] See for the relevant discussion A Lang, 'The GATS and Regulatory Autonomy: A case study of social regulation of the water industry' (2004) 7 JIEL 801, 829.

The tribunal accepted the argument and noted that 'the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments'.[961]

3. The question of Regulatory Intent

According to certain authors, in the context of National Treatment and more precisely 'on whether and how to construct a test for identification of State purpose as a condition of breach' investment case law is 'superior' to WTO law on the matter.[962] Absent of a general exceptions clause, like article XX of the GATT,[963] investment tribunal can take into account regulatory intent in the context of National Treatment, in two steps: either when determining likeness or when interpreting what constitutes 'less favourable treatment'. Many tribunals, in a way reminiscent of the 'aim-and-effects test' of the last GATT years,[964] held that regulatory intent is relevant for determining likeness. The tribunal in *SD Myers v Canada* emphasized that '[t]he assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest'.[965] This was justified on the basis that, contrary to the WTO law, investment treaties lack a clause, like article XX of the GATT, containing general exceptions that could justify violations of NT.[966] Other tribunals adopted that approach which led to a resurrection

[961] *Merrill & Ring v Canada*, Award [82].

[962] J Kurtz, 'On the evolution and slow convergence of international trade and investment law' in G Sacerdoti *et al* (eds), *General Interests of Host States in International Investment Law* (CUP, Cambridge 2014) 127.

[963] We saw in Chapter B that the WTO Dispute Settlement System lacked the legitimacy to transform the exhaustive list in article XX of the GATT into an indicative one, as the CJEU did with regard to the public policy exceptions provided for in article 36 of the TFEU. *A fortiori*, investment tribunal cannot create *ex nihilo* a list of exceptions (exhaustive or not) in the image and likeness of article XX.

[964] See *supra* note 937.

[965] *SD Myers v Canada*, Award [250].

[966] *ibid* [246]. Dimopoulos considers that reading into the analysis of like circumstances public policy justifications because a general exception clauses such as article XX of the GATT or article 52 of the TFEU, 'entails greater dangers as it does not offer any guidance to arbitral tribunals as to the degree of deference they should grant national legislators for adopting measures serving public policy goals, while it dilutes the distinction between the stages for the assessment of non-discrimination' A Dimopoulos, *EU Foreign Investment Law* (OUP, Oxford 2011) 157 (emphasis added).

of 'the aim-and-effects test', this time in the context of NAFTA. The tribunal in *Pope & Talbot v Canada* cited an 1993 OECD document on National Treatment which provided that

> More general considerations, such as the policy objectives of Member countries, could be taken into account to define the circumstances in which comparison between foreign-controlled and domestic enterprises is permissible inasmuch as those objectives are not contrary to the principle of National Treatment. In any case, the key to determining whether a discriminatory measure applied to foreign-controlled enterprises constitutes an exception to National Treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control.[967]

The tribunal further clarified that its approach on non-discrimination which requires 'addressing *any* difference in treatment, demanding that it be justified by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments'.[968] In *Cargill v Mexico* based on the specific facts of the case, the tribunal differentiated the previous case law, by emphasising that 'unlike the GAMI and Pope & Talbot cases, there is no link here between the alleged difference -a difference in economic circumstances- and the rationale and objective of the measure in question'.[969] *In casu*, 'a difference in economic circumstances is simply not relevant to determining whether the suppliers of HFCS and the suppliers of cane sugar are in "like circumstances" in relation to a measure designed to put pressure on the United States government.[970] Trebilcock, Howse and Eliason argue that the tribunal in *Cargill v Mexico* adopted a 'holistic and intuitive approach', basically a 'sniff test' for non-discrimination, which is close to the 'aim-and-

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[967] OECD (n 928) 22. However, Sabahi limits the applicability of the OECD documents as 'soft law' only in cases where both the Host State and Home State of the investor are OECD countries, B Sabahi, 'National Treatment – Is Discriminatory Intent Relevant' in T Weiler (ed), *Investment Treaty Arbitration and International Law, Volume 2* (JurisNet LLC, Huntington NY 2008) 287-288. See also *Différend Société Anonyme de Filatures de Schappe — Décision No 174* (6 July 1954), (1954) XIII RIAA 598, 607.

[968] *Pope & Talbot v Canada*, Award Phase 2 [79] (emphasis in the original).

[969] *Cargill v Mexico*, Award [209].

[970] *ibid*.

effects test' under GATT case law.[971] Another example of a tribunal demonstrating deference in favour of the regulating State for the purposes of determining likeness can be found in *GAMI v Mexico*

> The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cut-off line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.[972]

In *UPS v Canada* arbitrator Cass strongly opposed taking into account public policy considerations when determining likeness.[973]

With regard to the relevance of regulatory intent in the context of less favourable treatment, the tribunal in *Siemens v Argentina* framed the issue and identified the basic parameters of the question:

> [w]hether intent to discriminate is necessary and only the discriminatory effect matters, is a matter of dispute. In *S.D. Myers*, the tribunal considered intent "important" but not "decisive on its own." On the other hand, the tribunal in *Occidental Exploration and Production Company v. Republic of Ecuador* found intent not essential and that what mattered was the result of the policy in question. The concern with the result of the discriminatory measure is shared in *S.D. Myers*: "The word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent." The discriminatory results appear determinative in *Marvin Roy Feldman Karpa v. United Mexican States*,

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[971] M Trebilcock, R Howse and A Eliason, *The Regulations of International Trade* (4th edition, Routledge, London 2013) 599.

[972] *GAMI v Mexico*, Final Award [114].

[973] *UPS v* Canada, Cass Separate Statement, [9]-[15]. He further added that

> Canada separates the Article 1102 inquiry into two discrete components. It asks "are the circumstances unlike"? And only if the answer is "no" does it ask whether there is a violation of national treatment because the treatment is less favorable.
>
> 51. That approach would allow Canada (and other NAFTA Parties) broad opportunity to defeat any claim under Article 1102, no matter how improper or how discriminatory the government's action.

ibid, [50]-[51].

> where the tribunal considered different treatment on a de facto basis to be contrary to the national treatment obligation under Article 1102 of NAFTA.[974]

In *RDC v Guatemala* the tribunal also seemed to imply that regulatory intent to discriminate was necessary for a National Treatment violation.[975] In *Methanex v USA* the tribunal held that

> In order to sustain its claim under Article 1102(3), Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors and that Methanex and the domestic investor supposedly being favoured by California are in like circumstances.[976]

In *Cargill v Mexico* the tribunal concluded

> that the discrimination was based on nationality both in intent and effect. The IEPS Tax was taken avowedly to bring pressure on the United States government. By its very design, then, it was directed at United States producers of HFCS because only in that way would pressure be brought to bear on the United States government.[977]

In the same case the Respondent argued on an alternative basis that

> it is not sufficient under Article 1102 just to show different treatment for there to be a violation of Article 1102. Rather, any discrimination shown between the Claimant and domestically owned cigarette seller/exporters must be shown to be a result of the fact that the Claimant is a foreign national.[978]

The tribunal disagreed on the basis that

> it is not self-evident, as the Respondent argues, that any departure from national treatment must be *explicitly* shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favourable treatment for the foreign investor than for domestic investors in like circumstances.[979]

The tribunal held that 'evidence of a nexus between the discrimination and the Claimant's status as a foreign investor' coupled with an absence of 'any rational justification' is

[974] *Siemens v Argentina*, Award [320] (internal references omitted).

[975] *RDC v Guatemala*, Award [153].

[976] *Methanex v USA*, Final Award, Part IV, Chapter B [12].

[977] *ibid* [220].

[978] *Feldman v Mexico*, Award [163].

[979] *ibid* [181] (emphasis in the original).

sufficient.[980]

In contradistinction, for other tribunals discriminatory intent was deemed irrelevant. Intent is important, but protectionist intent is not necessarily decisive on its own.[981] In *SD Myers v Canada* the tribunal held that

> [t]he existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produced no adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11.[982]

The tribunal in *Alpha v Ukraine* confirmed that although its analysis of National Treatment was limited and the relevant claim was summarily dismissed.[983] Likewise, in *Thunderbird v Mexico*, the tribunal held '[i]t is not expected from Thunderbird that it show separately that the less favourable treatment was motivated because of nationality. The text of Article 1102 of the NAFTA does not require such showing'.[984] Other tribunals also followed essentially the same approach.[985]

Finally, some tribunals refuse to take sides. The tribunal in *Merrill & Ring v Canada* laid out the two different approaches but avoided the issue.[986] In *Grand River v USA* also the

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[980] *Feldman v Mexico*, Award [182]. See also *RFCC v Morocco*, Award [75].

[981] According to Tabet even tribunal that explicitly rejected the relevance of regulatory intent did in fact take it into account, giving as an example *SD Myers v Canada*, First Partial Award [116], [162], [171] and [182], S Tabet, 'Beyond the Smoking Gun – Is Discriminatory Objective Necessary to Find a Breach of National Treatment' in T Weiler (ed), *Investment Treaty Arbitration and International Law*, Volume 2 (JurisNet LLC, Huntington NY 2008) 303-304.

[982] *SD Myers v Canada*, First Partial Award [254].

[983] *Alpha v Ukraine*, Award [427]; this was because in that case 'Claimant has not proven a national treatment violation of any sort, whether limited to investors in "like circumstances" or not so limited', ibid [428].

[984] *Thunderbird v Mexico*, Award [177].

[985] *Feldman v Mexico*, Award [181]; *Bayindir v Pakistan*, Award [309]; *Corn Products v Mexico*, Award [138], [142]. Although in the last case, the tribunal added that '[w]hile the existence of an intention to discriminate is not a requirement for a breach of Article 1102 (and both parties seemed to accept that it was not a requirement), where such an intention is shown, that is sufficient to satisfy the third requirement', *Corn Products v Mexico*, Award [138].

[986] *Merrill v Canada*, Award [94].

tribunal also exercised judicial economy and did not decide on whether the different treatment was due to the (foreign) nationality of the investor.[987]

[987] *Grand River v USA*, Award [171].

VI. Arbitrary or Discriminatory measures (the Non-Impairment Standard)

In some national Model BITs one can find stand-alone provisions prohibiting 'arbitrary or discriminatory measures'. Some treaties contain only a non-impairment clause,[988] while others both a National Treatment clause, and a clause prohibiting arbitrary and discriminatory measures.[989] The prohibition against arbitrary and/or discriminatory measures was stereotypically featured in FCN treaties, the progenitor of modern BITs. In a very rare occasion the ICJ had the opportunity to interpret article of the Article 1 of the Supplementary Agreement to the FCN Treaty between Italy and the US in *ELSI*.[990]

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[988] See Article 2(3) of the 2008 German Model BIT: 'Neither Contracting State shall in its territory impair by arbitrary or discriminatory measures the activity of investors of the other Contracting State with regard to investments, such as in particular the management, maintenance, use, enjoyment or disposal of such investments' with MFN and NT provided for in Article 3; Article 2(2) Italy-Egypt BIT 'Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory and maritime zones of investors of the other Contracting Party shall not in any way be subjected to, or impaired by, unreasonable or discriminatory measures' with MFN and NT provided for in Article 3.

[989] See United States-Czech and Slovak Federal Republic BIT. The BIT was amended on 1 May 2004 prior to the accession of the Czech Republic to the EU so as to reduce possible conflict with EU law. Article II(1) of the BIT provided that

> Each Party shall permit and treat investment, and activities associated therewith, on a nondiscriminatory basis, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty.

Article II(2)(b) stipulated that

> Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investment. For the purpose of dispute resolution under Articles VI and VII, a measure may be arbitrary and discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.

[990] *Elettronica Sicula SpA (ELSI)*, Judgment, [1989] ICJ Reports 15. Article I of the Supplementary Agreement stipulated:

> The nationals, corporations and associations of either High Contracting Party shall not be subjected to arbitrary or discriminatory measures within the territories of the other High Contracting Party resulting particularly in: (a) preventing their effective control and management of enterprises which they have been permitted to establish or acquire therein; or, (b)impairing their other legally acquired rights and interests in such enterprises or in the investments which they have made, whether in the form of funds (loans, shares or other- wise), materials, equipment, services, processes, patents, techniques or otherwise. Each High Contracting Party undertakes not to discriminate against nationals, corporations and associations of the other High Contracting Party as to their obtaining under normal terms the capital, manufacturing processes, skills and technology which may be needed for economic development.

It appears that there is an overlap between non-impairment, National Treatment and FET.[991] Thus, the newer US Model BITs of 2004 and 2012 do not contain a prohibition against arbitrary and discriminatory measures.[992] Although not explicitly provided for as part of the rule (as in the case of National Treatment or MFN) the prohibition against arbitrary or discriminatory measures does not extend to discrimination among investors of the *same* nationality.[993] However, the prohibition against arbitrary and/or discriminatory covers both *de jure* and *de facto* discrimination.[994] In *AES v Hungary* the tribunal dismissed the MFN claim on the grounds that it has previously rejected a claim for violation of the prohibition against discriminatory measures under Article 10(1) ECT and the factual basis was the same.[995] Likewise, in *BG v Argentina*, the tribunal accepted 'for the sake of its analysis, [...] a measure in breach of the national treatment or MFN standards of Article 3 of the BIT would unavoidably also be "discriminatory" in the sense of the second sentence of Article 2.2 of the BIT'.[996] Another thorny question relates to the relationship between the non-impairment standard and the FET. This will be analysed in the next section, together with the overlap of other non-discrimination standards and FET.

Lauder v Czech Republic was not only one of the first cases to extensively deal with the non-impairment standard but also it seems that it is so far the only case where the tribunal

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ibid, 72.

[991] At least in relation to US practice, Sabahi (n 967) 276; More generally, 'it is unclear whether arbitrary/discriminatory impairment clause adds anything to what is already available under the national treatment or the fair and equitable treatment standards', Dugan *et al* (n 861) 427.

[992] Sabahi (n 967) 276.

[993] *Italy v Cuba*, Final Award [238]. Cf R Dolzer and C Schreuer, *Principles of International Investment Law* (2nd edition, OUP, Oxford 2012) 195.

[994] *El Paso v Argentina*, Award [308]-[309].

[995] *AES v Hungary*, Award [12.3.2]-[12.3.3].

[996] *BG v Argentina*, Award [355].

found that only the prohibition against arbitrary and discriminatory measures was breached.[997] The tribunal held that

> a violation of Article II (2) (b) of the Treaty requires both an arbitrary and a discriminatory measure by the State. It first results from the plain wording of the provision, which uses the word "and" instead of the word "or". It then results from the existence of Article II (1) of the Treaty, which sets forth the prohibition of any discriminatory treatment of investment, except in the sectors or matters expressly listed in the Annex to the Treaty. If Article II (2) (b) prohibited only arbitrary or discriminatory measures, it would be partially redundant to the prohibition of discriminatory measure set forth in Article II (1).[998]

The tribunal emphasised that '[f]or a measure to be discriminatory, it does not need to violate domestic law, since domestic law can contain a provision that is discriminatory towards foreign investment, or can lack a provision prohibiting the discrimination of foreign investment.'[999]

The scope of the prohibition is unclear absent of specific guidance in the treaties.[1000] When confronted with the interpretation of the non-impairment standard, the approach of investment tribunals is not different compared to the interpretation of other non-discrimination clauses. The pendulum swings between two extremes positions: one

[997] Heiskanen (n 1001) 90.

[998] *Lauder v Czech Republic*, Final Award [219].

[999] ibid [220]. This is in line with the basic and well established principle of public international law that a State cannot invoke its law to justify violations of international law: 'the government of Her Britannic Majesty cannot justify itself for a failure in due diligence on the plea of insufficiency of the legal means of action which it possessed', *Alabama claims of the United States of America against Great Britain, Award rendered on 14 September 1872 by the tribunal of arbitration established by Article I of the Treaty of Washington of 8 May 1871*, XXIX RIAA 125, 131; (1898) 1 JB Moore 653, 656. See also *Case Concerning the SS Wimbledon (UK v Japan) (17 August 1923)*, PCIJ Series A No 1, 29-30; *Chorzow Factory*, PCIJ Ser. A No. 17 (1928) at p. 33-34; *Advisory Opinion, Greco-Bulgarian Communities*, 1930 PCIJ Ser. B No. 17 (31 July 1930) at p. 32; *Case of Free Zones of Upper Savoy and the District of Gex (Second Phase)*, 1930 PCIJ Ser. A No. 24 (6 December 1930) at 12, and PCIJ Ser. A/B No. 46 (1932) at p. 167; *Advisory Opinion, Treatment of Polish Nationals and other Persons of Polish origin or speech in the Danzig territory*, 1932 PCIJ Ser. A/B No. 44 (4 February 1932), at p. 24; *Reparation for Injuries case*, [1949] ICJ Rep 174, 180; *Fisheries case (UK v Norway)*, [1951] ICJ Rep. 116, 132; *Nottebohm case (Second Phase) (Lichtenstein v Guatemala)* [1955] ICJ Rep 4, 20-21; *Application of the Convention of 1902 Governing the Guardianship of Infants (Netherlands v Sweden)*, [1958] ICJ Rep 55, 67; *Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947*, [1988] ICJ Rep 12, 34. Articles 3 and 32 ILC Draft Articles on State Responsibility; Article 27 Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331.

[1000] Newcombe and Paradell (n 246) 304.

permissive and favourable toward national regulatory autonomy and the other restrictive and intrusive, limiting the regulatory space of government to do things their way. Also, given the controversial nature of the question that arises, tribunal attempted to avoid the issue exercising judicial economy.[1001] In general, the analysis on tribunals on arbitrary and discriminatory measures is usually short,[1002] and some tribunals, exercising judicial economy, even avoid altogether the analysis.[1003] In line with the other standards of non-discrimination in international investment law, the test for finding a violation is three-prong: identifying whether the entities are in like circumstances, comparing their treatment, and considering any justification for different treatment.[1004] However, from an analysis of the jurisprudence on the matter two main interpretative issues arise: likeness and the relevance of regulatory intent,[1005] which will be dealt with in turn.

As it is the case with other non-discrimination clause in investment agreements, the requirement of likeness even when no formally part of the rule, is inherent in the standard. When interpreting article 10(1) of the ECT,[1006] the tribunal in 'that in evaluating whether there is discrimination in the sense of the Treaty one should only "compare like with like"'.[1007] As Newcombe and Paradell correctly observe this *dictum* applies to MFN and

[1001] Heiskanen takes issue with this economical approach, not least because of its repercussions on potential annulment (ICSID arbitrations) or setting aside (*ad hoc* arbitrations) proceedings, V Heiskanen, 'Arbitrary and Unreasonable Measures' in A Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 92-23.

[1002] See eg *PSEG v Turkey*, Award [262]; *LG&E v Argentina*, Liability [146]-[148].

[1003] See *EDF v Argentina*, Award [1107].

[1004] See *BG v Argentina*, Award [356].

[1005] Some tribunals focus on the differential treatment, *PSEG v Turkey*, Award [262].

[1006] 'Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal', Article 10(1), Energy Charter Treaty (adopted 17 December 1994, entered into force 1 March 2006) 2080 UNTS 95.

[1007] *Nykomb v Latvia*, Award 34.

National Treatment,[1008] in light of article 10(3) of the ECT, which clarifies that article 10(1) refers to MFN and National Treatment.[1009] Many of the cases where tribunal interpreted likeness under the prohibition against arbitrary and discriminatory measures arose out of measures adopted by Argentina regarding gas-distributing companies during the 1998-2002 Argentine Crisis in general and the different impact of the *pesification* across different economic sectors. Again, although the context was common, the case law of investment tribunal can be grouped into two main and largely antithetical readings of likeness: a broader one and a strict one. In *BG v Argentina*, the tribunal held that '[i]t may well be that the measures adopted by Argentina did differentiate gas-distribution companies from other public service providers. However, there is no discussion on the record as to why BG was "in like circumstances" to companies operating, for instance, in the transmission and distribution of electricity.[1010] Likewise, in *LG&E v Argentina* the tribunal adopted a very strict approach on non-discrimination. Likeness was construed broadly as gas-distributions companies were (implicitly) considered like companies with electricity and water distribution companies. Other tribunals refused to consider that companies in gas production, transportation, and distribution were like other public utilities companies. In *CMS v Argentina* the tribunal after admitting that 'it is quite difficult to establish whether that similarity exists only in the context of the gas transportation and distribution industry or extends to other utilities as well',[1011] decided to deal with the measures from the perspective of FET rather than the

[1008] Newcombe and Paradell (n 246) 160.

[1009] 'For the purposes of this Article, "Treatment" means treatment accorded by a Contracting Party which is no less favourable than that which it accords to its own Investors or to Investors of any other Contracting Party or any third state, whichever is the most favourable', article 10(3) ECT; Newcombe and Paradell (n 246) 160.

[1010] *BG v Argentina*, Award [357].

[1011] *CMS Gas v Argentina*, Award [293].

prohibition against arbitrary and discriminatory measures.[1012] In *Sempra v Argentina*, the tribunal concluded

> There are quite naturally important differences between the various affected sectors, so it is not surprising that different solutions might have been or are being sought for each. It could not be said, however, that any such sector has been particularly singled out either to have applied to it measures harsher than in respect of others, or conversely to be provided with a more beneficial remedy to the detriment of another. The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimant as compared to other entities or sectors.[1013]

Regarding the relevance of regulatory purpose for determining a breach prohibiting (arbitrary and/or) discriminatory measurers, the tribunal in *Siemens v Argentina* was categorical:

> The Tribunal concurs that intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining factor to ascertain whether it had resulted in non-discriminatory treatment.[1014]

Likewise, in *Electrabel v Hungary* the tribunal interpreting the prohibition against unreasonable and discriminatory measures under Article 10(1) of the ECT rejected that either intent was relevant (quoting *Siemens v Argentina*) or 'that evidence of discrimination based on nationality is required' (quoting *Thunderbird v Mexico*).[1015] In *Eastern Sugar v Czech Republic*, the tribunal adopted a largely deferential approach towards State's measures;[1016] however, it did specify that '[e]ven if the intent was not punish Eastern Sugar specifically but more generally to favor newcomers and to preserve the jobs of sugar beet growers, the result

[1012] See *infra*. However, the tribunal noted that 'The longer the differentiation is kept the more evident the issue becomes', ibid [294].

[1013] *Sempra v Argentina*, Award [319]. The 'singling out' criterion can be also found in *PSEG v Turkey*, Award [262].

[1014] *Siemens v Argentina*, Award [321].

[1015] *Electrabel v Hungary*, Jurisdiction, Applicable Law and Liability [7.152].

[1016] 'Some attempt to balance the interests of the various constituents within a country, some measure of inefficiency, a degree of trial and error, a modicum of human imperfection must be overstepped before a party may complain of a violation of a BIT. Otherwise, every aspect must of any legislation of a host state or its implementation could be brought before an international arbitral tribunal under the guise of a violation of the BIT' *Eastern Sugar v Czech Republic*, Partial Award [272]; *cf Eastern Sugar v Czech Republic*, Volterra Partial Dissent Opinion.

is still that a violation of the BIT occurred. Accordingly, the Arbitral Tribunal is of the view that the effect of the Third Sugar Decree was a discriminatory and unreasonable measure in the sense of Art. 3 (1) of the BIT'.[1017] Robert Volterra in his partial dissenting opinion further clarified:

> Measures that are politically established and deliberately implemented in favour of domestic investors to the detriment of a foreign investor, such as the Award describes the First Sugar Decree and the measures taken in relation to it, are discriminatory. As the Award notes, the First Sugar Decree favoured newcomers (local investors) to the detriment of the Claimant. That activity by the Respondent was discriminatory. There was no legitimate justification for it; the Award describes it as "illogical" and making "no sense".[1018]

The tribunal's analysis in *LG&E v Argentina* on discriminatory measures is remarkably short but points to the same direction. The tribunal held that 'a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect'.[1019]

> Argentina suspended PPI adjustments for the gas industry two years before enacting the Emergency Law. It did not take the same action with respect to the public-utility companies such as the electricity and water distribution companies, in which case it continued to adjust their tariffs until enactment of the Emergency Law. Instead, the gas-distribution companies were subjected to unfavourable regimes devised for the conversion of dollar obligations and tariffs into pesos. *Even though it was not proved that these measures had been adopted with the purpose of causing Claimants' foreign investments damage*, discrimination against gas distribution companies *vis-à-vis* other companies, such as water supply and electricity companies, is evident.[1020]

LG&E v Argentina was quoted with approval in the twin cases of *Unglaube v Costa Rica*[1021]

[1017] *ibid* [338].

[1018] *Easter Sugar v Czech Republic*, Volterra Partial Dissent Opinion [18].

[1019] *LG&E v Argentina*, Liability [146] (emphasis added). In that case the tribunal relied on ELSI case, ibid [146]; however, in ELSI the ICJ held that for a violation of the prohibition against discriminatory measures to be established intent is necessary: 'there is no sufficient evidence before the Chamber to support the suggestion that there was *a plan to favour IRI at the expense of ELSI*, and the claim of "discriminatory measures" in the sense of Article 1 of the Supplementary Agreement must therefore be rejected', *Elettronica Sicula S.p.A. (ELSI) (US v Italy)* [1989] ICJ Rep 15 [122] (emphasis added). As a result the tribunal's analysis is 'somewhat contradictory', Sabahi (n) 294.

[1020] *ibid* [148] (emphasis added).

[1021] *Unglaube v Costa Rica*, Award [262]

where the tribunal held that '[w]hile evidence of discriminatory intent may be relevant, and may reinforce such a finding, it is the fact of unequal treatment which is key'.[1022]

On the contrary in *Noble Ventures v Romania* the tribunal emphasised that intent is relevant.[1023] In *Enron v Argentina* the tribunal held

> There are quite naturally important differences between the various sectors that have been affected, so it is not surprising either that different solutions might have been or are being sought for each, but it could not be said that any such sector has been singled out, in particular either to apply to it measures harsher than in respect of others, or conversely to provide a more beneficial remedy to one sector to the detriment of another. *The Tribunal does not find that there has been any capricious, irrational or absurd differentiation in the treatment accorded to the Claimants as compared to other entities or sector*s.[1024]

The tribunal in *El Paso v Argentina* explicitly referred to *Enron v Argentina* and laid emphasis on the State's rationale in adopting the different regulatory frameworks.[1025] It also stated that '[f]ar from being discriminatory, this measure aimed at equalising the playground of the different economic actors, by distributing more equitably the burden of the country's economic crisis among all those affected'.[1026] The tribunal in *Genin v Estonia* also focused on the intent and concluded that *in casu* such discriminatory was absent.[1027]

Finally, regarding the burden of proof, although the question is not subjected to extensive analysis, tribunals seem to allocate it to the Claimant. In other words, it is the Claimant that has to prove that the differentiation was improper, in the sense that it could not

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[1022] *ibid* [263].

[1023] *Noble Ventures v Romania*, Award [180].

[1024] *Enron v Argentina*, Award [282] (emphasis added).

[1025] *El Paso v Argentina*, Award [315].

[1026] *ibid* [314].

[1027] 'In any event, in the opinion of the Tribunal, there is no indication that the Bank of Estonia *specifically targeted EIB in a discriminatory way*, or treated it less favourably than banks owned by Estonian nationals', *Genin v Estonia*, Award [369] (emphasis added). However, the tribunal is not entirely clear on how the overlap between NT and discriminatory measures under Article II(1) and III(3)(b) of the US-Estonia BIT respectively, ibid [368].

be rationally justified on the basis of a valid regulatory purpose.[1028] The tribunal in *Noble Ventures v Romania* concluded that

> the Claimant failed to prove that other investors with debt problems not being subjected to judicial proceedings were in fact in a situation as grave as that of CSR. Equally the Claimant did not demonstrate that other investors were left unaffected by judicial proceedings although they were in similar situations.[1029]

According to Schreuer 'the investor does not bear the burden of proof that the differential treatment was motivated by its foreign nationality. The fact of discrimination and the existence of the foreign nationality are enough'.[1030] Sabahi concludes that

> when a claimant can show a differential treatment on a *prima facie* basis, the proof of intent could become irrelevant. But, of course, in a three-step national treatment analysis, at this stage the burden shifts to the government to prove that its measures had a reasonable connection to a rational policy, and this could require showing that the government's motives or intentions were something other than harming foreign investors or investments.[1031]

The first bilateral investment treaty signed between Germany and Pakistan stated with reference to Article 2 on protection against discriminatory treatment, that: 'Measures taken for reasons of public security and order, public health or morality shall not be deemed as discrimination within the meaning of Article 2.

[1028] See *El Paso v Argentina*, Award [315]; *LG&E v Argentina*, Liability [147], however, *in casu*, Claimants failure to discharge its burden of proof was not fatal for finding discrimination, *ibid* [148].

[1029] *Noble Ventures v Romania*, Award [180].

[1030] CH Schreuer, 'Protection Against Arbitrary or Discriminatory Measures' in CA Rogers and RP Alford (eds), *The Future of Investment Arbitration* (OUP, Oxford 2009) 198.

[1031] Sabahi (n 967) 296.

VII. NON-DISCRIMINATION AND FAIR AND EQUITABLE TREATMENT

In this section, two issues regarding non-discrimination and FET will be explored using as an analytical perspective set out earlier: first, the relationship between non-discrimination obligations and the FET standard and second, and the interpretation of non-discrimination for the purposes of interpreting FET clauses. In both cases investment tribunals' jurisprudence is not consistent, thus confirming the substantive indeterminacy of legal rules and the conceptual malleability of non-discrimination clauses. Quite often the case law on the matter brings to mind Lenin's aphorism that 'everything is connected with everything else'.[1032]

The relationship between non-discrimination as expressed by relative standards of protection such as MFN and National Treatment, on the one hand, and the FET standard on the other, is one of the most complicated questions in international investment law. One view is that FET does not include non-discrimination. Given that general non-discriminatory standards such as MFN and National Treatment are not customary law but conventional obligations, reading them into the FET, at least for those equating FET with International Minimum Standard, MFN and National Treatment would become customary law.[1033] One commentator also argued that

> although some instances of practice support the notion that the fair and equitable standard encompasses the other treatment standards in most investment instruments, this is a minority position. In most cases, fair and equitable treatment stands independently of the most-favoured-nation and national treatment standards, and *vice versa*. Also, following the plain meaning of the words, the better view is that while the standards may overlap in particular instances, the national and most-favoured-nation standards will not always be a part of the fair and equitable standard. Accordingly, it is submitted that where a treaty makes provision for fair and equitable treatment, but does not expressly incorporate the national standard, it cannot be assumed that the treaty automatically includes the national standard. This approach

[1032] Quoted in AB Ulam, *The Bolsheviks: The Intellectual and Political History of the Triumph of Communism in Russia* (Harvard UP, Cambridge MA 1998) 473.

[1033] Newcombe and Paradell (n 246) 290.

> would also be true with respect to fair and equitable treatment and the most-favoured-nation standard.[1034]

However, the same commentator alludes to the opposite view that discriminatory treatment is a violation of the FET obligation by admitting that

> if there is discrimination on arbitrary grounds, or if the investment has been subject to arbitrary or capricious treatment by the host State, then the fair and equitable standard has been violated. This follows from the idea that fair and equitable treatment inherently precludes arbitrary and capricious actions against investors.[1035]

According to Kläger non-discrimination could be classified as one of the five *topoi* of the argumentation regarding FET (the other *topoi* being legitimate expectations, fair procedure, transparency, and proportionality).[1036] Paparinskis also concludes that '[t]he better view therefore is that discrimination is still a part of the international standard, requiring reasonable justification for different treatment of similar cases'.[1037] There is also case law supporting this position. The finding of discrimination is often considered to be crucial in the case law for the determination of breach of FET. In *Parkerings v Lithuania* the tribunal stated that

> [t]]he principle of fair and equitable treatment is violated where a host State's conduct is grossly unfair or discriminatory. Discrimination is a significant element in determining whether the standard of fair and equitable treatment has been breached.[1038]

[1034] S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 BYIL 99, 133.

[1035] *ibid*.

[1036] Kläger (n 117) 117-118.

[1037] Paparinskis (n 117) 247.

[1038] *Parkerings v Lithuania* [280].

The tribunal went on to equate MFN and the non-discrimination requirement under FET when the investment treaty in question contains an MFN clause.[1039] The inverse however was found to not to be the case in *Arif v Moldova*:

> the Tribunal notes that even though discrimination may also be considered an element of FET, the actions and omissions in breach of FET will not necessarily imply a breach with respect to non-discrimination. Therefore, Claimant's general argument that all of Moldova's acts and omissions in breach of FET also constitute breaches of Moldova's obligation not to discriminate is dismissed.[1040]

Likewise in *CMS v Argentina* the tribunal adopted an even more absolute approach linking discrimination and FET:

> [t]he standard of protection against arbitrariness and discrimination is related to that of fair and equitable treatment. Any measure that might involve arbitrariness or discrimination is in itself contrary to fair and equitable treatment.[1041]

The tribunal in *Pey Casado v Chile* held that irrespective of whether the BIT in question contains a specific clause prohibiting arbitrary or discriminatory measures, discrimination is a violation of FET obligation.[1042] Early cases decided by investment tribunals in the NAFTA context were also ambivalent on the relationship between National Treatment and FET.[1043] However, following the 'Note of Interpretation' issued in 2001 by the NAFTA Free Trade Commission,[1044] which separated the interpretation of Article 1105 and other provisions of

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[1039] 'In certain situations where an MFN clause has been incorporated within a BIT, establishing a discrimination under the standard of fair and equitable/reasonable treatment is not necessary', *Parkerings v Lithuania*, Award [291].

[1040] *Arif v Moldova*, Award [515].

[1041] *CMS Gas v Argentina*, Award [290]; see also *Siag v Egypt*, Award [450]; see also *Saluka v Czech Republic* [311]-[347], where the tribunal found that the discriminatory response of Czech Republic to the 'bad debt' problem banks were facing amounted to a violation of the FET standard.

[1042] *Pey Casado v Chile*, Award [670], [672].

[1043] *SD Myers v Canada*, First Partial Award [266]-[267]; Paparinskis (n 117) 245.

[1044] NAFTA Free Trade Commission, 'Note of Interpretation of Certain Chapter 11 Provisions' (adopted 31 July 2001), <http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/nafta-interpr.aspx?lang=eng&view=d>.

the NAFTA,[1045] tribunals disassociated non-discrimination and FET.[1046] Even outside the NAFTA context, tribunal disassociate FET and discrimination:

> [w]hile, in certain cases, discriminatory treatment may give rise to a violation of fair and equitable treatment, in most cases discriminatory government actions are more properly judged against the requirements of national treatment and most-favoured nation treatment.[1047]

In sum, no consensus exists among arbitral tribunals on the relationship between discrimination and fair and equitable treatment, thus further confirming the substantive indeterminacy of the rules of international investment law.

[1045] 'A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1)', ibid [3]. The same provision can be found in the investment chapter proposed by the EU Commission in the context of the TTIP: "[f]or greater certainty, a breach of another provision of this Agreement, or of any other international agreement, does not constitute a breach of this Article", EU proposal of 12 November 2015, Transatlantic Trade and Investment Partnership, Trade in Services, Investment and E-commerce, Chapter II – Investment, Article 3(6).

[1046] *Methanex v USA*, Final Award, Part IV, Chapter C [14]-[26]; *Grand River v USA*, Award [208]-[209].

[1047] *Alpha v Ukraine*, Award [419].

VIII. NON-DISCRIMINATION AND EXPROPRIATION

This section examines the case law on the non-discrimination element of the expropriation standard. The analysis is divided into two parts: first, pre-investment case law and principles are presented; second, the jurisprudence of investment tribunals is analysed. The two-pronged approach is chosen not only in light of the long history of the standard but also because cases where tribunals ruled specifically on the non-discrimination element of expropriation are relatively few.[1048]

Non-discrimination is particularly important for the determination of *indirect* or *regulatory* expropriation.[1049] In the case of direct expropriation, the absence of discrimination does not preclude State's liability and its obligation to give compensation. At the same time, in regulatory expropriation a finding of discrimination is crucial.[1050] The NAFTA tribunal in *ADM v Mexico* enumerated a list of factors to be taken into consideration for determining whether an expropriation has occurred and discrimination is one of them.[1051] The US-Iran

[1048] A Reinisch, 'Is Expropriation ripe for codification? The example of the non-discrimination requirement for lawful expropriations' in AK Bjorklund and A Reinisch (eds), *International Investment Law and Soft Law* (Edward Elgar, Cheltenham 2012) 301.

[1049] See generally J Paulsson, 'Indirect Expropriation in Investment treaty Arbitrations' in J Paulsson and Z Douglas (eds), *Arbitrating Foreign Investment Disputes* (Kluwer Law International, The Hague 2004) 145-158; L Yves Fortier and Stephen L Drymer, 'Indirect Expropriation in the Law of International Investment: I know It When I See it, or *Caveat Investor*' (2004) 19 ICSID Review - FILJ 293; R Higgins, 'The Taking of Property by the State: Recent Developments in International Law' (1982) 176 RCADI 259, 322-354.

[1050] *Saluka v Czech Republic*, Partial Award [255]; *Methanex v USA*, Final Award, Part IV, Chapter D [7]. The tribunal cited in support of this absolute proposition the tribunal cited *Waste Management v Mexico* [98], and *Revere Copper v OPIC*, 56 ILR 258, 271, 17 ILM 1321, 1331; V Heiskanen, 'The Doctrine of Indirect Expropriation in Light of the Practice of the Iran-United States Claims Tribunal' (2007) 8 JWIT 215, 228. Reinisch also observes "[i]n this context, discriminatory intent or effect only serves as a subsidiary or additional element evidencing indirect expropriation. As such it must be distinguished from other discriminatory state measures contrary to investment standards, such as most-favoured-nation or national treatment, which are usually contained in BITs and other investment agreements", A Reinisch, 'Expropriation' in Peter Muchlinski, Federico Ortino, Cristoph Schreuer (eds), *The Oxford Handbook of International Investment Law* (OUP, Oxford 2008) 451

[1051] *ADM v Mexico*, Award [250] (emphasis added); *RosInvest v Russia* [449]–[454], [556], [621]; *Civilian Claims—Eritrea's Claims* 15, 16, 23 and 27–32, Partial Award (2004) 26 RIAA 195; *Feldman v Mexico*, Award [105] *et seq*; *EnCana v Ecuador*, Award [173]; *Link-Trading v Moldova*, Award [69]–[71]; *Brewer, Moller & Co Case* (1903) X RIAA 423, 423; cf *Burlington Resources v Ecuador*, Decision on Liability [350].

Claims Tribunal also held that 'State cannot guarantee the safety of an alien or of alien property. Responsibility is incurred only when police protection falls below a minimum standard of reasonableness'.[1052] And that minimum standard of reasonableness is intrinsically linked to National Treatment.[1053]

In 1964 the US Supreme Court noted in the famous *Sabbatino* case that '[t]here are few if any issues of international law today on which the opinion seems to be so divided as the limitations on a state's power to expropriate the property of aliens'.[1054] The difficulty in determining what constitutes discriminatory expropriation reveals the open-ended, value-laden and political sensitive nature of the concept of equality. It also highlights the indeterminacy of international legal rules prohibiting discrimination.

By way of example, in Medieval Europe the taking of property by the monarch was usually carried out without compensation, unless the property in question belonged to the Church.[1055] This practice, which today most probably would be classified as discrimination, demonstrates the link between non-discrimination in expropriation and the concept of equality. As the Church enjoyed uniquely powerful and privileged position in medieval times, it was not considered to be 'like' with the Crown's subjects. This explains why the latter did not receive any compensation for expropriated property. Centuries later, in the Cold War context, discriminatory takings of foreign property motivated by ideological considerations also highlight how politically charged the non-discrimination requirement of rules relevant to expropriation is. The protests by the US against Romania in 1948 (which

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[1052] *Emanuel Too v United States of America*, Award No 460-880-2 (29 December 1989) 23 IRAN-US CTR 378, 385-386.

[1053] *ibid*.

[1054] *Banco Nacional de Cuba v Sabbatino*, 376 US 398, 428 (1964).

[1055] S Reynolds, *Before Eminent Domain, Towards a History of Expropriation of Land and for the Common Good* (University of North Carolina Press, Chapel Hill 2010) 30-32.

excluded from expropriatory measures Russian enterprises) and Cuba in 1960 (which targeted only companies of US interests) are another case in point.[1056]

Non-discrimination is a necessary but not sufficient condition of a lawful expropriation. In other words, the absence of non-discrimination does not render an unlawful expropriatory act lawful.[1057] The requirement that an expropriation or nationalisation must be non-discriminatory is entrenched in customary international law.[1058] In discussing the *Emeric*

[1056] 'While the United States' Government recognized the right of a sovereign power to expropriate property… belonging to American nationals, the United States has likewise refused to recognize the validity of such expropriations in case where they are discriminatory by nature and effect', quoted in G White, *Nationalisation of Foreign Property* (Stevens and Sons Ltd, London 1961) 120.

[1057] *Certain German Interests in Polish Upper Silesia (Germany v Poland) (Merits)* PCIJ Series A, No 7, 4, 32-33; *Peter Pázmány University v the State of Czechoslovakia, Appeal from a Judgment of the Hungaro-Czechoslovak Mixed Arbitral Tribunal (Czechoslovakia v Hungary)*, PCIJ Series A/B, No 61, 208, 243.

[1058] *Affaire des biens britanniques au Maroc espagnol (Espagne c Royaume-Uni)* (1 May 1925) (1925) 2 RIAA 615, 647; *Norwegian shipowners' claims (Norway v United States)* (13 October 1922) (1922) 1 RIAA 307, 339; The sole arbitrator in LIAMCO emphasised that '[i]t is clear and undisputed that non-discrimination is a requisite for the validity of a lawful nationalisation. This is a rule well established in international theory and practice [reference omitted]. Therefore, a purely discriminatory nationalisation is illegal and wrongful', *Libyan American Oil Company (LIAMCO) v The Government of the Libyan Arab Republic* (12 April 1977) (1981) 20 ILM 1, 58-59; (1977) 62 ILR 140, 194. In the *Claim of the Standard Oil Company regarding certain Tankers* the tribunal stated that 'in application of a generally accepted principle, any person taking up residence or investing capital in a foreign country must assume the concomitant risks and must submit, under reservation of any measures of discrimination against him as a foreigner, to all the laws of that country', *The Deutsche Amerikanische Petroleum Gesellschaft oil tankers (USA, Reparation Commission)* (1926) II RIAA 777, 794; also *BP v Libya* (1974) 53 ILR 297 and *Aminoil v Kuwait* (1982) 21 ILM 976; JL Brierly 'Règles générales du droit de la paix' (1936) 58 RCADI 1, 171; see also the UK's Memorial in *Anglo-Iranian Oil Co* where the following formulation is suggested:

> it is contrary to international law for a State to subject a concession, granted to a foreign company, to a measure of nationalization or expropriation, if such measure operates exclusively, or in a discriminatory manner, against the foreign company, and it is not shown by the expropriating Government that the measure was justified in order to protect the vital interests of the State-the desire of the State to realize greater profits from the concession not being, as a matter of international law, a sufficient ground to justify the expropriation.

Anglo-Iranian Oil Co, Section C – Memorial by the Government of the UK, 64, 100; Newcombe and Paradell (n 246) 373-374; Peter Muchlinski, *Multinational Enterprises and the Law* (2nd edition, OUP, Oxford 2007) 600; S Friedman, *Expropriation in International Law* (Stevens & Sons Ltd, London 1953) 189-190; I Brownlie, *The System of the Law of Nations: State Responsibility* (OUP, Oxford 1983) 81. However, non-discrimination is not explicitly mentioned in the 1962 UNGA Resolution on Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) 17 UN GAOR Supp. (No 17) at 15 / UN Doc A/5217 (1962). Oppenheim affirmed already in 1905 that 'every State is by the Law of Nations compelled to grant to foreigners equality before the law with its citizens as far as safety of person and property is concerned', L Oppenheim, *International Law, A Treatise* (Volume I: Peace, Longmans, Greens & Co, London 1905) 376. Hertz argues in the context of expropriation '[i]t does not matter whether the discrimination is open or veiled, if only there is evidence that in its effects the measure affects practically aliens alone', JH Hertz, 'Expropriation of Foreign Property' (1941) 35 AJIL 243, 249; see also AP Fachiri, 'Expropriation and International Law' (1925) 6 BYIL 159, 160-161, 171.

Kulin v Romania (also known as the *Hungarian optants* case),[1059] concerning the implementation of the Romanian agrarian reform in the interwar period, and the related expropriation of certain land belonging to Hungarian nationals, the Council of the League of Nations affirmed that '[t]here must be no inequality between Romanians and Hungarians, either in the terms of the Agrarian Law or in the way in which it is enforced'.[1060]

The open-ended and value-laden conceptual nature of equality, which forms the philosophical core of the non-discrimination standard in expropriation, leaves wide discretion to the adjudicator to determine whether and to what extent the expropriatory measure in question is discriminatory. As in every non-discrimination clause in international economic law, the central question is what is (or considered to be) equal to what. In this regard, the most interesting and illuminating early, pre-investment case(s) on non-discrimination and expropriation is *Indonesian Tobacco*.[1061]

Following Indonesia's proclamation of independence from the Netherlands in 1945, Indonesia proceeded to a series of nationalisations, directly and exclusively affecting Dutch-owned enterprises. Indonesia did not attempt to conceal that its measure targeted exclusively foreigners. The General Explanation of the Act of Nationalisation contained in Ordinance No 2 promulgated in 1958 makes it clear that '[t]he nationalization of Dutch-owned enterprises is intended to further strengthen our national potential as well as to liquidate colonial economic power, in this case the Dutch colonial economy'.[1062] However, according to Lord McNair

[1059] *Emeric Kulin v Romania* (10 January 1927), (1927) 7 Recueil des decisions des Tribunaux Arbitraux Mixtes institués par les traits de paix [MAT] 138.

[1060] The Council of the League of Nations, First Meeting, Forty-Seventh Session of the Council, 19 September 1927, (1927) 8 League of Nations Official Journal 1378, 1382.

[1061] On the topic see generally Lord McNair's Opinion rendered for De Ondernemersraad voor Indonesia, Lord AD McNair, 'The Seizure of Property and Enterprises in Indonesia' (1959) 6 Netherlands Int L R 218.

[1062] General Explanation of the Act of Nationalisation (31 December 1958), quoted in translation in Da Sokarno and GA Maengkom, 'Act No. 86 of 1958 (Statutes 1958 No. 162) concerning the Nationalization of Dutch-Owned Enterprises In Indonesia' (1959) 6 Netherlands ILR 291, 293.

'the real motive underlying these measures is to bring pressure upon the Netherlands to transfer sovereignty in respect of West Irian to Indonesia'.[1063] Dutch and German courts examined the legality of the Indonesian nationalisation measures and reached different conclusions. The Bremen Court of Appeals pronouncing on the non-discrimination requirement of expropriation in *Indonesian Tobacco* held that colonial foreign investors and native (*in casu* Indonesian) investors were not in like circumstances. The Bremen Court of Appeal held that

> the equality concept means only that equals must be treated equally and that the different treatment of unequals is admissible… For the statement to be objective, it is sufficient that the attitude of the former colonial people to its former colonial master is of course different from that toward other foreigners. Not only were the places of production in the hands of the Netherlands, for the greater part colonial companies, but these companies dominated the worldwide distribution, beyond the production process, through the Dutch markets.[1064]

Conversely, the Courts of the former colonial power adopted a different, formal conception of equality. For the Amsterdam Appellate Court, the Indonesian nationalisation was

> a manifestly discriminating measure which in a very sharp manner attacks the rights and interests exclusively of nationals of the State of the Netherlands, though a state of war does not exist between Indonesia and that country[1065]

The different approach of the German and Dutch courts is telling and reflects how different values and more precisely different evaluations of political and historical phenomena (*in casu* as the Dutch colonial rule in Indonesia) led to diametrically opposed interpretations of the same (customary) rule prohibiting discriminatory expropriations.

The non-discrimination requirement in expropriation can be found in nearly every BIT.[1066] The formulation of the clause slightly varies. BITs stipulate that the expropriation

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[1063] McNair (n 1061) 246.

[1064] Quoted in M Domke, 'Indonesian Nationalization Measures before Foreign Courts' (1960) 54 AJIL 305, 315.

[1065] *ibid* 316.

[1066] Salacuse (n 692) 321; 'Most agreements include the same four requirements for a lawful expropriation, namely public purpose, non-discrimination, due process and payment of compensation', UNCTAD, *Bilateral*

should be carried out 'in a non-discriminatory manner',[1067] 'without discrimination',[1068] 'on-non-discriminatory basis',[1069] or use other equivalent expressions.[1070] These variations however are without legal significance.[1071] Likewise, a measure that manifestly distinguishes between foreign investors only constitutes discrimination.[1072] The jurisprudence is divided on the central question of how to determine discriminatory treatment:

> As to discriminatory intent, the Tribunal first notes that there is some difference of opinion as to whether such intent is necessary to show discrimination, or whether a discriminatory effect will suffice. In any event it is clear that a discriminatory effect must be shown, and the Tribunal does not consider that it has sufficient evidence before it to determine that issue.[1073]

Investment Treaties 1995-2006: Trends in Investment Rulemaking (UN, NY and Geneva 2007) 52; Article 6(b) 2012 US Model BIT.

[1067] Article 6(b) 2012 US Model BIT.

[1068] Article 4, China – Portugal BIT.

[1069] Article 1110 NAFTA; Article VI(1) ASEAN Investment Treaty.

[1070] See also Article 13(1)(b) ECT; Reinisch (n 1048) 295; Salacuse (n 692) 321.

[1071] UNCTAD Series on Issues in International Investment Agreements II, A Sequel, *Expropriation* (UN, NY and Geneva 2012) 34.

[1072] *ADC v Hungary*, Award [441]-[442].

[1073] *Siag v Egypt*, Award [439] (internal references omitted).

IX. NON-DISCRIMINATION, THE FULL PROTECTION AND SECURITY STANDARD AND COMPENSATION FOR EXTRAORDINARY LOSSES

Another stereotypical clause of BIT, which was also central in FCN treaties of the 19th century,[1074] is the obligation to provide full protection and security to foreign investments.[1075] Quite often, it is also added 'in accordance with international law'.[1076] The relationship between the 'full protection and security' standard and FET is unclear.[1077] For some tribunals the two standards are intrinsically linked,[1078] while for others the two obligations are to be

[1074] *E.g.* Article 4, The Treaty of Amity, Commerce and Navigation between Italy and Venezuela (adopted 19 June 1861).

[1075] *E.g.* Article 1105(1) NAFTA, Article 10(1) ECT, Article 2(2) Egypt-UK BIT (1975), Article 2(2) Sri Lanka-UK BIT (1980) and Article 2(2) China-Djibouti BIT (2003); *Mondev v USA*, Award [125]; Newcombe and Paradell (n 246) 308; the wording of the clause might be slightly differently from treaty to treaty but these variations are without legal significance, *Parkerings v Lithuania*, Award [353] citing N Rubins and S Kinsella, *International Investment, Political Risk and Dispute Resolution: a practitioner's guide* (Ocean Publications, New York 2005). For an analysis of the clause see Dolzer and C Schreuer (n 993) 160-166; GK Foster, 'Recovering "Protection and Security": The Treaty Standard's Obscure's Origins, Forgotten Meaning, and the Key Current Significance' (2012) 45 Vanderbilt Journal of Transnational Law 1095; C Schreuer, 'Full Protection and Security' (2010) 1 JIDS 353; Helge Elisabeth Zeitler, 'Full Protection and Security' in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (OUP, Oxford 2010) 183-212; G Cordero Moss, 'Full Protection and Security' in August Reinisch (ed), *Standards of Investment Protection* (OUP, Oxford 2008) 131-150.

[1076] *E.g*. Article I Abs-Shawcross Draft Convention; Article 10(1) ECT; Article II(2)(a) Treaty between the United States of America and the Republic of Argentina Concerning the Reciprocal Encouragement and Protection of Investment (adopted 14 November 1991, entered into force 20 October 1994).

[1077] *E.g.* one tribunal emphasised that the two standards are separate, yet it noted their 'interrelationship', concluded failure to provide FET entailed *ipso facto* a breach of the full protection and security standard, *Azurix v Argentina*, Award [407]-[408]; another tribunal noted that 'the concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the French BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security', *Suez v Argentina*, Liability [171].

[1078] *Vivendi v Argentina*, Award [7.4.15]; 'the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment, *Occidental v Ecuador*, Award, [187]; *National Grid v Argentina*, Award [187]-[190]; *CSOB v Slovakia*, Award [161]; *PSEG v Turkey*, Award [257]-[259] (in exceptional circumstances 'the connection with fair and equitable treatment becomes a very close one, ibid [259]); *Wena Hotels v Egypt*, Award [84]-[95]; see also Article 1105(1) NAFTA referring to both full protection and security and FET.

distinguished.[1079] However as one commentator concludes '[a]s a matter of substance, the content of the two standards is distinguishable'.[1080] It is equally unclear whether the standard reflects customary law[1081] or goes beyond the level of protection that customary rules provide,[1082] and whether it covers only physical[1083] or also nonphysical, i.e. legal[1084] or even commercial[1085] security.

The full protection and security is of interest from the perspective of non-discrimination in two regards. First, it is noteworthy that non-discrimination on behalf of the state cannot serve as an excuse for the violation of the protection and security standard. In *AMT v Zaire*, Zaire (as the Democratic Republic of the Congo then was) argued that although it was indeed in breach of its obligation of vigilance, there was no evidence that it 'has accorded in like circumstances a treatment less favourable to SINZA than that which it has accorded to its own nationals or companies'.[1086] The tribunal did not find this argument persuasive and noted that 'the repetition of breaches and failures to perform similar obligations it owes to third States will not in any way exonerate the objective responsibility

[1079] '[t]he notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap', *Jan de Nul v Egypt*, Award [269].

[1080] Schreuer (n 1075) 366; another author criticises the case law with the exception of *CMS v Argentina* and *Vivendi v Argentina*, on the basis that 'awards have simply disregarded that the respective treaties listed the two standards as two separate obligations and have treated them as equivalent', Cordero Moss (n 1075) 150; *contra* Newcombe and Paradell (n 246) 314.

[1081] 'The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law', *El Paso v Argentina*, Award [522]; 'it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens', *Noble Ventures v Romania*, Award [164].

[1082] *ELSI case* [111].

[1083] *Suez v Argentina*, Liability [167]-[169]; *Saluka v Czech Republic*, Partial Award [483]-[484]; *BG v Argentina*, Award [324]-[326].

[1084] *AES v Hungary*, Award [13.3.2]; *Azurix v Argentina* [408]; *Occidental v Ecuador*, Award [183], [187]; *CME v Czech Republic* [159]-[160]; *Lauder v Czech Republic*, Final Award [308].

[1085] *Biwater Gauff v Tanzania*, Award [729].

[1086] *AMT v Zaire*, Award [6.09].

of the State of Zaire for the breach of its obligation of the treatment of protection and security it owes to AMT by virtue of Article II paragraph 4 of the BIT'.[1087]

Second, given that the protection and security standard is primarily concerned with physical security, situations of armed conflict, insurrection or national emergency are when destruction of foreign property takes place and the standard is invoked. In certain BITs, there is a clause regarding cases of war, national emergency, insurrection and other extraordinary situations. The 1980 Sri Lanka-UK BIT, [1088] which was the basis of the claim in *AAPL v Sri Lanka*, constitutes a classic example. Article 2(2) of the BIT provides *inter alia* for 'full protection and security'. According to Article 4(1) of the same treaty

> Nationals or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State.[1089]

Article 4(2) of the treaty also provides:

> Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from
> (a) requisitioning of their property by its forces or authorities, or
> (b) destruction of their property by its forces or authorities which was not caused in combat action or was not required by the necessity of the situation shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.[1090]

[1087] *ibid* [6.10].

[1088] Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Democratic Socialist Republic of Sri Lanka for the Promotion and the Protection of Investments (adopted 13 February 1980, entered into force 18 December 1980) UKTS No 14 (1981); see also Article IV Treaty between the United States of America and the Republic of Zaire concerning the Reciprocal Encouragement and Protection of Investment (adopted 3 August 1984, entered into force 28 July 1989).

[1089] Article 4(1) UK-Sri Lanka BIT.

[1090] Article 4(2) UK-Sri Lanka BIT.

The question whether full protection and security standard and the clause relating to extraordinary situations, such as armed conflict, are both applicable at the same time,[1091] or the latter provision is *lex specialis*[1092] is still open.

Many BITs stipulate that compensation for losses suffered in this kind of situations, if offered, is to be provided on a non-discriminatory basis,[1093] although this is not required by customary international law[1094]. As it is the case with the interpretation of other non-discrimination clauses, tribunals are also divided on this issue: On the one hand, certain tribunals found that the non-discrimination requirement of this provision establishes a minimum floor with regard to compensation, and does not amount to derogation from the obligations under the BIT or an excuse for liability.[1095] On the other hand, other tribunals consider a reference to non-discrimination as a potentially justification for not offering compensation. In *LESI v Algeria* was called to interpret the Algeria-Italy BIT that contained in Article 4.1 a protection and security clause [1096] and in Article 4.5 a clause relating to extreme situations of armed conflict, insurgency and national emergency, which levelled down the protection to National Treatment and MFN.[1097] The tribunal first noted that full protection and security provided for under Article 4.1 of the BIT guarantees a high level of protection than non-discrimination under Article 4.5.[1098] The tribunal went on to say that the

[1091] *AMT v Zaire*, Award [6.14]; *AAPL v Sri Lanka*, Award [45]-[53].

[1092] *LESI v Algeria*, Award [174]; *AMT v Zaire*, Heribert Golsong Dissenting Opinion [6]; *AAPL v Sri Lanka*, Samuel Asante Dissenting Opinion 636-637.

[1093] *E.g.* Article 4, Argentina-UK BIT; however some BIT provide only for MFN and not NT, *e.g.* Article 4, Ethiopia-Malaysia BIT.

[1094] Newcombe and Paradell (n 246) 315.

[1095] *BG v Argentina*, Award [382]; *CMS Gas v Argentina*, Award [375].

[1096] Article 4.1 Algeria-Italy BIT.

[1097] Article 4.5 Algeria-Italy BIT.

[1098] *LESI v Algeria*, Award [174].

two articles could be applied cumulatively, given that the latter was a special exception, to be strictly interpreted,[1099] aimed at giving states more leeway in extraordinary circumstances, given that adhering to the full protection and security standard would be impossible.[1100] This gave rise to some criticism, with Dolzer and Schreuer arguing that 'the standard would be eviscerated and downgraded to a meaningless requirement if it were assumed-as was the case in *LESI v Algeria*-that it accords no more protection than clauses on national treatment or most-favoured-nation treatment'.[1101]

[1099] *ibid* [175].

[1100] *ibid* [174].

[1101] Dolzer and Schreuer (n 933) 162 (internal references omitted).

X. INTERIM CONCLUSIONS

The analysis of the vast jurisprudence of investment tribunals on non-discrimination clauses (MFN, National Treatment, the non-impairment clause, non-discrimination in expropriation and Full Protection and Security) confirmed that non-discrimination clauses are open-ended and able to accommodate different and often conflicting interpretations. This is *a fortiori* the case in relation to non-discrimination rules because of their conceptual nexus with equality. This conclusion supports the theoretical hypothesis and the main conceptual perspective of this thesis: the choice between antithetical interpretative outcomes does not depend so much on the correct application of the traditional methodological tools (as the ones provided in the VCLT) but it is within the inherent discretion of the adjudicator. Rather, it is the prioritisation of different values and competing understanding regarding the appropriate regulatory role of the State in the economy that critically influences the interpretative approach of investment tribunals.

CHAPTER V.
THE ROLE OF INSTITUTIONAL CHARACTERISTICS AND SUGGESTED PROCEDURAL ARRANGEMENTS

I. INTRODUCTION

The central conceptual foundation upon which this thesis is based is that law is best viewed as a *process* of decision-making,[1102] rather than an amalgam of legal rules having a predetermined normative content. Legal rules in general and non-discrimination clauses in international economic law in particular are substantively indeterminate. With the normative content of legal rules not being *a priori* fixed, antithetical interpretations of the same or to a very large extent similar provisions are possible, depending on the prioritisation of different values. As a result, the adjudicator (in *casu* international investment tribunals and the WTO DSS) enjoy broad discretion in selecting which value(s) to prioritise by making the corresponding interpretative choices. The analysis of the inconsistencies and interpretative shifts in the WTO jurisprudence (in Chapter III) and international investment arbitration jurisprudence (in Chapter IV) highlighted the substantive indeterminacy of non-discrimination rules in the realm of international economic law.

This last chapter builds on, and completes the analysis of the four previous chapters by putting forward two arguments. First, it explains that the unresovable indeterminacy in relation to the non-discrimination jurisprudence is positive in light of the institutional characteristics of the WTO and the investment arbitration system. In particular, the institutional structure of the WTO on the one hand, and the decentralised nature of the investment arbitration system on the other enable the contestation of different values, economic theories and approaches, which shape and are reflected in, the case law. Second, a

[1102] The legal significance of the *process* both from a practical and theoretical perspective has been already recognised in other fields of public international law. See the excellent analysis of the UN Security Council process for deciding on the imposition of sanctions in D Hovell, *The Power of Process: The Value of Due Process in Security Council Sanctions Decision-Making* (OUP, Oxford 2015).

series of specific proposals are suggested that will enhance the dialogue and value-contestation in the WTO and investment arbitration.

II. INSTITUTIONAL CHARACTERISTICS ALLOWING THE CONTESTATION OF DIFFERENT VALUES IN WTO AND INTERNATIONAL INVESTMENT ARBITRATION

1. The institutional architecture of the WTO

The WTO is a complex international organisation. The institutional framework of WTO has been extensively analysed and a detailed description of its main characterisits is not necessary here.[1103] The WTO is based on consensus decision-making processes[1104] and only exceptionally resorts to plurilateral solutions, as opposed to the 'single-undertaking' principle.[1105]

Two institutional features of the WTO are central for the purposes of the present analysis and both relate to the WTO DSS. First, unlike the judicial branches of other international organisations, the reports of the WTO Panels and the AB have to be discussed among, and adopted by the WTO Membership acting as the Dispute Settlement Body (DSB). In fact, Paneland AB reports become binding only after their adoption by the DSB.[1106] Second, the DSB operates under the principle of consensus regarding the adoption of Panel

[1103] See T Cottier and M Elsig (eds), *Governing the World Trade Organization: Past, Present and Beyond Doha* (CUP, Cambridge 2014); D Sarooshi, *International Organizations and the exercise of their sovereign powers* (OUP, Oxford 2005). On the institutional interaction of the WTO with other international organisations see RRF Yearwood, *The Interaction between World Trade Organisation (WTO) Law and External International Law: The Constrained openness of WTO law (a prologue to a theory)* (Routledge, London 2012) and M Foltea, International Organizations in WTO Dispute Settlement: How Much Institutional Sensitivity? (CUP, Cambridge 2012).

[1104] See W Guan, 'Consensus Yet Not Consented: A Critique of the WTO Decision-Making by Consensus' (2014) 17 JIEL 77; C-D Ehlermann and L Ehring, 'Decision-Making in the World Trade Organization, Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade' (2005) 8 JIEL 51; ME Footer, 'The Role of Consensus in GATT/WTO Decision-making' (1996-1997) 17 Northwestern J Int Law and Business 653.

[1105] 'Unlike the previous GATT system, the WTO Agreement is a single treaty instrument which was accepted by the WTO Members as a "single undertaking"', AB, Brazil - Desiccated Coconut [11]; see also R Wolfe, 'The WTO Single Undertaking as Negotiating Technique and Constitutive Metaphor' (2009) 12 JIEL 835.

[1106] See AB, *Japan – Alcoholic Beverages* [108]; AB, *US – Shrimp (Article 21.5 – Malaysia)* [109]; AB, *EC – Bed Linen (Article 21.5 – India)* [95]. Unadopted reports do not constitute *res judicata*, J Pauwelyn, 'How to Win a WTO Dispute Based on Non-WTO Law? Questions of Jurisdiction and Merits' (2003) 37 JWT 997, 1017-1019.

and AB reports.[1107] On the basis of the 'reverse' or 'negative' consensus rule, the Panel and the AB reports are quasi-automatically adopted by the WTO Membership (acting through the DSB) on the basis of consensus.[1108] This lies in stark contrast with the GATT model, which required (positive) consensus for the adoption of GATT Panel reports.[1109] The GATT *modus operandi* has been aptly labelled as 'a diplomat's jurisprudence'.[1110] In the WTO era, the introduction of the 'negative consensus' principle was one of the most important institutional innovations critically influencing the relationship between the judicial branch of the WTO and the WTO membership.[1111] Since the creation of the WTO, the WTO adjudicators, the Panels and the AB, 'reinvented themselves as judges'.[1112] Indeed, '[f]rom the outset, the Appellate Body made the conscious choice to function as if it were a court'[1113] and the WTO Panels and the AB made clear that they consider themselves as one of the international courts and tribunals.[1114] This removed any doubts as to the judicial (and not diplomatic) nature of the WTO DSS. In the words of the AB, the WTO DSS is a 'rules-based system of

[1107] 'Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus', article 2.4 DSU.

[1108] EU-Petersmann, *The GATT/WTO Dispute Settlement System: International Law, International Organizations and Dispute Settlement* (Kluwer Law International, The Hague 1997) 186; JH Jackson, 'Dispute Settlement and the WTO: Emerging Problems', (1998) 1 JIEL 32.

[1109] Although Article XXV:4 GATT provides that "except as otherwise provided for in this Agreement, decisions of the CONTRACTING PARTIES shall be taken by a majority of the votes cast" since the 1950s the customary practice of positive consensus developed and was later codified in the Ministerial Decision on Dispute Settlement of 29 November 1982, L/5424, (1983) (29th Supp) GATT BISD 13, 14 which stated that "The CONTRACTING PARTIES reaffirmed that consensus will continue to be the traditional method of resolving disputes".

[1110] E Hudec, 'The GATT Legal System: A Diplomat's Jurisprudence' (1970) 4 JWT 615.

[1111] A Yanovich and W Zdouc, 'Procedural and Evidentiary Issues' in D Bethlehem *et al* (eds), *Oxford Handbook of International Trade Law* (OUP, Oxford 2009) 344, 347.

[1112] A Stone Sweet, 'Judicialization and the Construction of Governance' (1999) Comparative Political Studies 147, 169-172.

[1113] I Van Damme, 'Treaty Interpretation by the WTO Appellate Body' (2010) 21 EJIL 605, 606.

[1114] AB, *US – Wool Shirts and Blouses* 14; Panel, *China – Intellectual Property Rights* [7.629]; Panel, *US – DRAMS* [4.261]; see also A Gourgournis, *Equity and Equitable Principles in the World Trade Organization: Addressing conflicts and overlaps between the WTO and other regimes* (Routledge, London 2015) 11-12.

adjudication'.[1115] Having said that, the 'diplomatic ethos' of the GATT-era is still present in the WTO jurisprudence.[1116]

Because of the negative consensus rule and the cumbersome consensus-based process for amending existing WTO obligations or adding new ones, constitutionally, 'the system lacks an effective legislative means of correcting judicial lawmaking'.[1117] The same applies to authentic interpretation. Article IX of the WTO Agreement governs that the Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. The AB was not only quick to point out that Article IX:2 of the WTO Agreement is 'meant to clarify the meaning of existing obligations, not to modify their content',[1118] but also interpreted the requirements set in Article IX:2 strictly.[1119]

Unlike many other international courts and tribunals, the WTO DSS is intrinsically linked to a fully fledged international organisation.[1120] WTO and international organisations in general 'are settings where a good deal of transnational deliberation occurs'.[1121] Indeed as

[1115] AB, *Canada – Continued Suspension* [433]; AB, *US – Continued Suspension* [433].

[1116] A Lang, 'Twenty Years of the WTO Appellate Body's "fragmentation jurisprudence"' (2015) 14 JITLP 166, 121.

[1117] R Steinberg, 'Judicial Lawmaking at the WTO: Discursive, Constitutional, and Political Constraints' (2004) 98 AJIL 247, 263.

[1118] AB, *EC – Bananas III (Article 21.5 – Ecuador II)* [383] and AB, E*C – Bananas III (Article 21.5 – US)* [383].

[1119] Cf AB, *US – Clove Cigarettes* [251]-[254] and Panel, *US – Clove Cigarettes* [7.575].

[1120] This is in stark contrast with the decentralised system of investment arbitration, which is further explored in Chapter V.II.2. below. According article 1 of the ICJ Statute, the ICJ is 'the principal judicial organ of the United Nations', the comparison with the WTO DSS is inapossite not least because of the lack of compulsory jurisdiction in the case of the ICJ.

[1121] I Johnstone, *The Power of Deliberation: International Law, Politics and Organizations* (OUP, Oxford 2011) 20; see also Sarooshi (n 238).

Sacerdoti observed '[t]he successful operation of the DSS is also due to it being part of a multi-lateral "closed" system within an international organisation (the WTO)'.[1122]

The first mechanism by which the WTO membership engages in an institutional dialogue with the WTO DSS is the adoption procedure of the reports by the WTO DSB. The adoption process creates opportunities for institutional dialogue between the WTO Membership and its judicial branch, in the context of which WTO members engage with the substance of the report.[1123] Essentialy, it provides a forum for contestation of different values. As Bartels notes the creation of the DSS did not 'fundamentally as a whole affect the powers of political organs'.[1124] Despite (or perhaps due to)[1125] the judicialisation of the dispute settlement mechanism, WTO Panels, and especially the AB, pay strict attention to the reactions of the WTO Members to their decisions. Such 'decisions by the WTO panels and Appellate Body remain at a political level subject to contestation by Member States within the WTO'.[1126] The jurisprudence on the question of *amicus curiae* submissions is an illuminating example demonstrating the manner and the extent of the influence that WTO members can exercise over the judicial branch of the WTO.[1127] Unsuccessful attempts to

[1122] G Sacerdoti, 'Resolution of international trade disputes in the WTO and other Fora' (2015) 14 JITLP 147, 148.

[1123] S Charnovitz, 'Judicial Independence in the World Trade Organization' in Laurence Boisson de Chazournes *et al* (eds), *International Organizations and International Dispute Settlement: Trends and Prospects* (Transnational Publishers, NY 2002) 229.

[1124] L Bartels, 'The Separation of Powers in the WTO: How to avoid Judicial Activism' (2004) 53 ICLQ 861, 864.

[1125] Steinberg for example argues that 'WTO constitutional rules offer no meaningful check or balance against such lawmaking, so that any constraint must come from politics', Steinberg (n 1117) 263.

[1126] Sarooshi (n 1103) 79.

[1127] See G Marceau and M Stilwell, 'Practical Suggestions for Amicus Curiae Briefs before the WTO Adjudicating Bodies' (2001) 4 JEIL 155; PC Mavroidis, 'Amicus Curiae Briefs Before The WTO: Much Ado About Nothing' in A Von Bogdandy et al (eds), *European Integration and International Co-ordination: Studies in Transnational Economic Law in Honour of Claus-Dieter Ehlremann* (Kluwer International, The Hague 2002); D Sarooshi, 'The Future of the WTO and Its Dispute Settlement System' (2005) 2 IOLR 129, 134-137; C Leng Lim, 'The Amicus Brief Issue at the WTO' (2005) 4 Chinese J Int L 85. As Mavroidis insightfully observes: '[i]ronically, it was in an Art. III GATT case that many (the overwhelming majority of) WTO Members thought it had trespassed its mandate when accepting amicus curiae briefs in EC – Asbestos', PC

submit *amicus curiae* briefs were made in earlier WTO cases (*US – Gasoline* and *EC – Hormones*). Nevertheless, in *US – Shrimp* the AB affirmed for the first time the power of Panels to accept unsolicited *amicus briefs* on the basis of article 13(2) DSU stipulating that 'Panels may seek information from any relevant source'.[1128] In *US – Lead and Bismuth II*, the AB further clarified that '[i]ndividuals and organizations, which are not Members of the WTO, have no legal right to make submissions to or to be heard by the Appellate Body'[1129] and the AB had no corresponding legal duty.[1130] Nonetheless, the AB added that it had 'the legal authority under the DSU to accept and consider *amicus curiae* briefs in an appeal in which we find it pertinent and useful to do so'.[1131] Subsequently, in *EC – Asbestos* the AB confirmed its power to accept unsolicited *amicus curiae* briefs, set up a procedure to facilitate their submission and established certain rules.[1132] However, in the General Council Meeting of 22 November 2000 a number of WTO Members expressed – quite vocally – their concerns in relation to the approach adopted by the AB regarding *amicus curiae* briefs.[1133] Following the outcry by the WTO Membership, the AB denied to all the organisations which have

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Mavroidis, *Trade in Goods* (2nd edition, OUP, Oxford 2012) 290. The issue of *amicus curiae* briefs is not unique to the WTO Dispute Settlement System. Arbitral tribunals accepted the submission of *amicus curiae* briefs based inter alia on analogies with WTO practice: '[t]he Tribunal in the present case finds further support for the admission of *amicus* submissions in international arbitral proceedings in the practices of NAFTA, the Iran-United States Claims Tribunal, and the World Trade Organization', *Suez v Argentina*, Amicus Curiae Order [15]; *Methanex v USA*, Decision on Amici Curiae [33], [52]; *UPS v Canada*, Decision on Amici Curiae [64]; see also NAFTA Free Trade Commission, Statement of the Free Trade Commission on Non-Disputing Party Participation, 7 October 2003; *Biwater Gauff v Tanzania*, Procedural Order No 5. In 2006 the ICSID rules were amended and the new Rule 37(2) makes provision for the submission of amicus curiae briefs 'after consulting both parties' and subject to certain conditions.

[1128] Article 13(2) DSU; AB, *US – Shrimp* [104].

[1129] AB, *US – Lead and Bismuth II* [41].

[1130] ibid.

[1131] ibid [42].

[1132] WTO Communication from the Appellate Body, WT/DS135/9 (8 November 2000).

[1133] General Council Minutes of Meetings held on 22 November 2000, WT/GC/M/60 (23 January 2001).

submitted an *amicus curiae* an application for leave to file a written brief.[1134] Since then the conditions laid down by the AB in *EC – Asbestos* have shown to be very difficult to meet in practice.[1135] As a result of the WTO Members' opposition, the AB has never considered any unsolicited *amicus curiae* briefs to be useful, and, as a result, has not taken them into consideration.[1136] Essentially the AB 'open[ed] up the process for submission briefs and immediately clos[ed] it following the November WTO Council meeting'.[1137] The submission of *amicus curiae* can be in and of itself a mechanism of enabling the contenstation of different values by offering different legal and political perspectives. Yet, given the AB's stance of the matter, the issue will not be further explored herein.

The second institutional feature of the WTO is the existence of different committees within the institutional structure of the organisation. While at first sight, the work of these committees might appear to be technocratic and devoid of any substantial political character, this is not the case. As Lang and Scott highlight WTO committees, such as the Committee on SPS Measures and the GATS Committees 'contribute to the emergence of interpretive communities which serve to elaborate upon the open-ended norms laid down in the relevant agreements'.[1138] Essentially, 'the extensive WTO committee system represents a form of

[1134] AB, *EC – Asbestos* [50]-[57].

[1135] For example the *amicus curiae* brief submitted by NGO's were not accepted in AB, *US – Tuna (Mexico) II* [8].

[1136] Y Bonzon, *Public Participation and Legitimacy in the WTO* (CUP, Cambridge 2014) 6; in a recent case the Panel accepted amicus curiae brief only to the extent incorporatd in the submission of the parties, Panel, *US – Tuna II (Mexico)* [7.182], [7.288], [7.363].

[1137] (footnotes omitted), Mavroidis (n 1127) 324; see also Lim (n 687) 120. Investment tribunal took into serious consideration the WTO practice regarding the admission of *amicus curiae* briefs, *Methanex v USA*, Decision on Amici Curiae [33]; *Suez v Argentina*, Amicus Curiae Order [15], [21]; Sarooshi (n 120) 464-46. See also Rule 37(2) of the ICSID Rules which were amended in 2006 to explicitly allow *amicus curiae* briefs; Article 4 of the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration (in effect from 1 April 2014); J Paulsson and G Petrochilos (eds), *Revision of the UNCITRAL Arbitration Rules: A Report* (2009) [132]-[136].

[1138] Lang and Scott (n hidden) 560.

political decision-making that can be used to elaborate upon and guide the meaning of texts.[1139]

The third mechanism which enables the dialogue between the WTO Membership and DSS is the adjudication process itself. As Cho noted

> There is an endogenous sociological dynamic amongst WTO members, wherein they engage in continuing discourse relating to the nature of WTO adjudication (adjudicative discourse). Not only as disputing parties, but also as interested parties, WTO members collectively contribute to the adjudicative discourse and influence the jurisgenerative, or jurisprudential, process through different modes of argumentation, persuasion, and deliberation.[1140]

Empirical research has shown that the pleadings of WTO members influence the content of the WTO Panels' and the AB's rulings, based on whether the submissions of WTO Members are picked up by the WTO DSS and are reflected in the content, ie in the reasoning of the decisions (rather than the outcome).[1141] In particular, countries which possess more wealth, power and experience in WTO litigation are able to yield more influence in that respect.[1142] Unsurprisingly, 'submissions by the United States and the EU appear as most influential' and 'US submissions appear significantly more influential than any other country'.[1143] This constitutes another indirect and nuanced way in which the WTO Members exercise influence over the judicial branch of the organisation.

2. The party-appointing system in international investment arbitration

One of the foundational principles of international arbitration is *party autonomy* which also extends to the right of each party to the dispute to appoint the arbitrator of their choice.

[1139] G Shaffer and J Trachtman, 'Interpretation and Institutional Choice at the WTO' (2011) 52 Virginia J Int Law 103, 123; see also Lang and Scott (n 560).

[1140] S Cho, 'Beyond Rationality: A Sociological Construction of the World Trade Organization' (2012) 52 Virginia J Int L 321, 346-347.

[1141] M Daku and K Pelc, 'Who Holds Influence over WTO Jurisprudence?' (March 2017) Working Paper, McGill University, available at SSRN: https://ssrn.com/abstract=2945027

[1142] Daku and Pelc ibid 23.

[1143] Daku and Pelc ibid 13.

Different arbitration rules provide for different procedures in case the parties could not agree on the presiding arbitrator but, in any event, each party can appoint one arbitrator. In general, party control is reflected in the involvement of the parties in the selection of the adjudicators.[1144] Aristotle was already aware of the different nature of arbitration when he wrote:

> and it is equitable to pardon human weaknesses, and to look, not to the law but to the legislator; not to the letter of the law but to the intention of the legislator; not to the action itself, but to the moral purpose; not to the part, but to the whole; not to what a man is now, but to what he has been, always or generally; to remember good rather than ill treatment, and benefits received rather than those conferred; to bear injury with patience; to be willing to appeal to the judgment of reason rather than to violence; to prefer arbitration to the law court, for the arbitrator keeps equity in view, whereas the judge looks only to the law, and the reason why arbitrators were appointed was that equity might prevail.[1145]

While nowadays it is clear that arbitration (which is rule-based) is distinct from mediation (which is not),[1146] inevitably, 'arbitrators bring their own perspectives and values to the dispute settlement process'.[1147]

The party appointing system not only 'democratizes the process',[1148] but also provides for and promotes value-pluralism. This is of paramount importance if law is conceptualised as a decision-making process. In particular, regarding the interpretation of non-discrimination, in light of the open-ended and value-laden concept of equality, value-pluralism achieved through the party-nomination method is a strong institutional mechanism, which renders the legal process more inclusive and, eventually, more legitimate.

[1144] WJ Davey, 'The Case for a WTO Permanent Panel Body' (2003) 6 JIEL 177, 183.

[1145] Aristotle, *Rhetorics*, 1374b.

[1146] WW Park, 'Arbitrator Integrity: The Transient and the Permanent' (2009) 46 San Diego Law Review 629, 693-694.

[1147] A Mills, 'The Balancing (and Unbalancing) of different Interests in International Investment Law and Arbitration' in Z Douglas *et al* (eds), *The Foundations of International Investment Law: Bringing Theory into Practice* (OUP, Oxford 2014) 452.

[1148] WW Park 'Arbitrator Integrity' in M Waibel *et al* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, Alphen aan den Rijn 2010) 189, 202.

Party-appointed arbitrators facilate the contestation of different values and bring additional perspectives for three reasons which are specific to investment arbitration. First, unlike the WTO, the participants in investment arbitration are more diverse both from the perspective of investors and respondent States. From small and medium enterprises and bondholders or depositors (in mass claims) to large multinational companies, claimants in investment arbitration have different profiles, possess different means and employ different counsel. Likewise, it has recently become apparent that the pool of respondents is no longer limited to developing States. Developed States such as Canada, Cyprus, Germany, Spain, and Italy are increasingly finding themselves in the position of the respondent in investment arbitration. Second, investment disputes arise out of a much more broader range of economic activities and relate to very different regulatory issues, compared to WTO disputes. Third, if at the WTO there is a certain imbalance between the power of the 'judicial' branch (the WTO DSS) and the 'legislative' branch (the WTO Membership) due to the fact that it is difficult to amend the WTO agreements, this is *a fortiori* the case in investment arbitration. States have tried to influence the interpretation of investment agreements. Certain examples, such as the 2001 NAFTA FTC Interpretative Note on the relationship of FET and customary international law have been discussed in Chapter IV above. However, this has shown to be the exception rather than the rule.[1149] As a result, it is much more difficult for States to offer insights and bring different perspectives directly. Thus, the role of party-appointed arbitrators in doing so is crucial.

Therefore, in light of this diversity *ratione personae* and *ratione materiae* the possibility to appoint different arbitrators is of paramount importance for ensuring that all interpretative perspective, which, as explained reflect different political perspectives, will be

[1149] C Schreuer, 'Diversity and Harmonization of Treaty Interpretation in Investment Arbitration' in M Fitzmaurice, O Elias, P Merkouris (eds), *Treaty Interpretation and the Vienna Convention on the Law of Treaties: 30 Years on* (Martinus Nijhoff, Leiden / Boston 2010) 129-151, 147-148.

presented. The need for the party-appointed arbitrator to be impartial and independent, but at the same time free to express and promote the values he or she endorses is phlegmatically epitomised in the anecdotal advise to a party-appointed arbitration (WW Park) by Sir Michael Kerr: 'steer a middle course between too much and too little independence'.[1150]

No one familiar with investment arbitration will dispute the paramount importance of arbitrators selection in a case. When an arbitrator is selected by the investor (the Claimant) and the arbitrator appointed by the Respondent State, each

> party will strive to select an arbitrator who has some inclination or predisposition to favor that party's side of the case such as by sharing the appointing party's legal or cultural background or by holding doctrinal views that, fortuitously, coincide with a party's case.[1151]

On the one hand, '[m]any of the arbitrators that were appointed, particularly by investors, evidenced a distinct commercial orientation in their profile and/or approach'.[1152] On the other hand, States are entirely free to appoint the arbitrators of their choice.[1153] It is also reported that in certain cases, State-appointed arbitrators come under pressure from the State

[1150] Quoted in Park (n 1148) 203.

[1151] D Bishop and L Reed, 'Practical Guidelines for Interviewing, Selecting and Challenging Party-Appointed Arbitrators in International Commercial Arbitration (1998) 14 Arbitration International 395, 396; see also M Hunter & J Paulsson, 'A Code of Ethics for Arbitrators in International Commercial Arbitration?' (1985) 19 International Business Law 153, 155 and E Onyema,'Selection of Arbitrators in International Commercial Arbitration' (2005) 8 International Arbitration Law Review 45.

[1152] A Roberts, 'State-to-State Investment Treaty Arbitration: A Hybrid Theory of Interdependent Rights and Shared Interpretive Authority' (2014) 55 Harvard Int L J 1, 25.

[1153] In the case of the arbitrator with the highest number of ICSID appointments (48), 44 were appointments by States, S Puig 'Social Capital in the Arbitration Market' (2014) 25 EJIL 387, 404. DiMascio and Pauwelyn reach the following conclusion with regard to the interpretation of NT by investment tribunals:

> [w]hat is apparent in any event, is that NAFTA tribunals' early enthusiasm for the protection of investor interests has, in more recent cases, been tempered by references to the public interest of host governments. One can only speculate, but *this shifts seems at least partly a response to outcries by both NAFTA governments and public opinion*

DiMascio and Pauwelyn (n 277) 79 (emphasis added). They further argue that the jurisprudence on National Treatment 'does show the early signs of cyclical interpretation, from an originally intrusive construction to a more recent, hands-off interpretation in favor of regulating governments', ibid 78.

apparatus.[1154] As a result, it seems that the party-appointment system is balanced and '[a]rbitration is an opened and free market'.[1155] Despite various sophisticated or less sophisticated criticisms levelled against the alleged systemic-bias of international investment arbitration,[1156] statistical data do not lend any support to such criticism. According to Professor Franck, States win in 58% of the cases compared to investors who win in 39% of the cases.[1157] UNCTAD also reports that of 244 cases, in 42% of the cases the decision was in favour of the State, in 31% of the cases in favour of the investor, while 27% of the cases were settled.[1158] Therefore that it is not suprising that despite such criticisms, BITs signed between developing States provide for Investor-State Dispute Settlement (ISDS).[1159]

Dissenting opinions also are relevant from two perspectives. First, 'the statistics show that dissenting opinions are almost universally issued in favor of the party that appointed the

[1154] TW Wälde, '"Equality of Arms" in Investment Arbitration' in K Yannaca-Small (ed), *Arbitration Under International Investment Agreements: A Guide to the Key Issues* (OUP, Oxford 2010) 161, 164. In *Lowen v USA* the US appointee, Judge Mikva recalls that prior to his appointment US State Department officials told him: 'You know, judge,' 'if we lose this case we could lose NAFTA'. 'Well, if you want to put pressure on me', Mikva replied, 'then that does it', D Schneiderman, 'Judicial Politics and International Investment Arbitration: Seeking an Explanation for Conflicting Outcome' (2010) 30 Northwestern Journal of International Law & Business 383, 404.

[1155] A Mourre, 'Are Unilateral Appointments Defensible?: on Jan Paulsson's Moral Hazard in International Arbitration' in S Kröll et al (eds), *International Arbitration and International Commercial Law: Synergy, Convergence and Evolution: liber amicorum Eric Bergsten* (Alphen aan den Rijn, Kluwer Law International 2011) 381, 382. Some arbitration rules such as the ICSID Arbitration Rules or the SCC Arbitration Rules restrict their parties discretion by not allowing the appointment of arbitrators having the nationality of the appointing party,. Other rules such as UNCITRAL Rules do not contain any restriction. Cf Articles 38 and 39 ICSID Arbitration Rules, Article 13(5) SCC Arbitration Rules and article 6(7) UNCITRAL Arbitration Rules.

[1156] M Waibel *et al* (eds), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, Alphen aan den Rijn 2010). Van Harten also notes that '[c]onsensual arbitration is broadly suitable as a means to settle disputes between companies or between states, but it is fundamentally inadequate as a substitute for the public courts in the regulatory domain', G Van Harten, *Investment Treaty Arbitration and Public Law* (OUP, Oxford 2006) 11. See also Pia Eberhardt and Cecilia Olivet, *Profiting from injustice: How law firms, arbitrators and financiers are fueling an investment arbitration boom*, Corporate Europe Observatory and the Transnational Institute (Nouvelles Imprimeries Havaux, Amsterdam/Brussels 2012); Osgood School of Law, York University, 'Public Statement on the International Investment Regime', (31 August 2010), http://www.osgoode.yorku.ca/public-statement/documents/Public_Statement_(final)_(Dec_2013).pdf.

[1157] SD Franck, 'The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law through Inconsistent Decisions' (2005) 73 Fordham L Rev 1521; SD Franck 'International Investment Arbitration: Winning, Losing and Why' (2009) 7 Columbia FDI Perspectives 1.

[1158] UNCTAD 'Report on Recent Developments in Investor-State Dispute Settlement (ISDS)' (May 2013).

[1159] Morocco-Nigeria BIT.

dissenter'[1160] and this is equally true for arbitrators appointed by the investor and those appointed by the State.[1161] Second, disseting opinions are not a rare phenomenon in investment arbitration, unlike in the WTO where dissents are almost unknown.[1162] As analysed above, the institutional structure of the WTO enables the value of contentestation to take place in other ways.

From an institutional and procedural perspective, the system of investment arbitration lies at the antipodes of the centralised, two-tier WTO system. The key difference between the two dispute settlement systems is the existence of the WTO AB, comprised of seven permanent members and having appellate jurisdiction. In 2015, in the context of the TTIP negotiations, the EU Commission suggested the creation of a Permanent Investment Court, modelled after the WTO AB. However, the proposal of the EU Commission appears to be impractical and plainly inconstistent with the ICSID Convention. EU proposal is hardly novel. In the past, many have also suggested creating an analogous body or upgrading, accordingly, the ICSID Annulment Committee.[1163] The idea for an *optional* ICSID Appeals Facility was discussed in 2004 by ICSID,[1164] but it was ultimately abandonded because it was considered 'premature', 'particularly in view of the difficult technical and policy issues'.[1165]Although the system of *ad hoc* arbitral appointments is criticised as being against

[1160] AJ Van Den Berg, 'Dissenting Opinions by Party-Appointed Arbitrators in Investment Arbitration' in M Arsanjani *et al* (eds), *Looking to the Future: Essays on International Law in Honor of W. Michael Reisman* (Martinus Nijhoff, Leiden 2010) 821, 824.

[1161] ibid 824-825.

[1162] See M Kolsky Lewis, 'The Lack of Dissent in WTO Dispute Settlement' (2006) 9 JIEL 895.

[1163] See C Henckels, *Proportionality and Deference in Investor-State Arbitration Balancing Investment Protection and Regulatory Autonomy* (CUP, Cambridge 2015) 5 with further references.

[1164] See 'Possible Improvements of the Framework for ICSID Arbitration' (ICSID Secretariat Discussion Paper, October 2004).

[1165] 'Suggested Changes to the ICSID Rules and Regulations' (ICSID Secretariat Working Paper, May 2005) 4.

the developing countries' interests,[1166] the proposal did not receive much support from the developing countries either.[1167] Paulsson cautioned against the 'panacea' or the 'promised land' of coherence that a permanent appellate body would bring in investment arbitration[1168] and accurately predicted that 'the same irreductible indeterminateness would be generated by appellate investment adjudicators'.[1169] The interpretative shifts and inconstancies in the jurisprudence of the WTO AB on non-discrimination (analysed in Chapter III) strongly indicate that Paulsson's assumption is right. Tams also concluded that the shortcomings of such a proposal outweigh the benefits,[1170] while Legum correctly observed that the creation of an appellate body in international investment arbitration would be a cure 'far worse than the disease'.[1171]

Having said that, the above analysis does not suggest that the current system of party-appointed arbitrators is ideal – far from it. Indeed four main areas of improvement can be identified.

[1166] See on the debate on investment arbitration and Developing Countries, SD Franck 'Conflating Politics and Development? Examining Investment Treaty Arbitration Outcomes' (2014) 55 Virgina J Int L 13, 23-31.

[1167] AH Qureshi and S Gulzar Khan, 'Implications of an Appellate Body for Investment Disputes from a Developing Country Point of View' in KP Sauvant and M Chiswick-Patterson (eds), Appeals Mechanism in International Investment Disputes (OUP, Oxford 2008) 267, 277–78.

[1168] J Paulsson, 'Avoiding Unintended Consequences' in KP Sauvant and M Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP, Oxford 2008) 241, 244.

[1169] ibid 245. McRae also notes that: '[t]here is no doubt that it would be possible to create an appeals facility for ICSID disputes to consider appeals on issues of law from investment tribunals. But it would not be a body that would bring 'coherence and consistency' to investment law', D McRae, 'The WTO Appellate Body: A Model for an ICSID Appeals Facility?' (2010) 1 JIDS 371, 386.

[1170] C Tams, 'Is there a need for an ICSID appellate structure?' in R Hoffman and CJ Tams (eds) *The International Convention for the Settlement of Investment Disputes: Taking Stock After 40 Years* (Nomos, Baden Baden 2007) 223, 250.

[1171] B Legum, Options to Establish an Appellate Mechanism for Investment Disputes in KP Sauvant and M Chiswick-Patterson (eds), *Appeals Mechanism in International Investment Disputes* (OUP, Oxford 2008) 231, 238.

First, it is a trite but sad observation that women are underrepresented in the arbitrators' community.[1172] A recent initiative which has been endorsed by many arbitration institutions and law firms serves both as a sign of the recognition of the problem and as an encouraging first step.[1173]

Second, arbitrators from developing countries in general and Africa in particular are also underrepresented. As Judge Yusuf of the ICJ recently pointed out there are no African arbitrators or conciliators in approximately 80% of ICSID cases involving Africa.[1174] Likewise, in a sample of 231 ICSID cases the presiding arbitrator is of African origin in only 20% of the cases.[1175] This does not dovetail with the role of the African state in the creation of the ICSID system and the non-neglible number of ICSID cases involving Africa.[1176] While the primary responsibility for appointing more African arbitrators lies with the parties to a dispute,[1177] the proliferation of regional arbitration centres and institutions as well as respondent states are also critical.

Third, the conflict of interests constitutes a sensitive issue in the party-appointing system. Recent initiatives, such as the IBA Guidelines on Conflicts of Interest in International Arbitration, which have been repeatedly cited and relied on by investment tribunals are

[1172] G van Harten, 'The (Lack of) Women Arbitrators in Investment Treaty Arbitration' (1 November 2011). FDI Perspectives, available at https://ssrn.com/abstract=2005336 (stating that until May 2010 until 4% of the women appointed are women).

[1173] See http://www.arbitrationpledge.com/.

[1174] L Yong and A Ross, 'Africa must have more representation on tribunals, says Somali judge' (15 October 2015) Global Arbitration Review.

[1175] Waibel and Yu (n 246) 15.

[1176] W L Kidane, *The Culture of International Arbitration* (OUP, Oxford 2017) 133-135; 15% of all ICSID cases relate only to Sub-Saharan Africa, see ICSID, *The ICSID Caseload – Statistics* (Issue 2017-1) 11.

[1177] E Onyema, 'Effective Utilization of Arbitrators and Arbitration Institutions in Africa by Appointors', 4th International Arbitration & ADR in Africa Workshop (29-31 July 2008), available at https://eprints.soas.ac.uk/5300/1/Arbitrators_and_Institutions_in_Africa.pdf.

definitely a step towards the right direction.[1178] However, all system participants, institutions, investors, States, and counsel should adopt a robust ethical approach. Conflicts of interests issues do not impact the particular dispute in the context of which arise but may have important systemic repercussions. A particular issue of considerable importance is the controversial practice of acting simultaneously as counsel and arbitrator in investment arbitrations ('double-hatting)'.[1179] Recent empirical studies confirm that

> it is a very small group but it is constituted by highly influential and well-known individuals. In other words, double hatting is not a common or widespread practice across the entire network of cases (i.e., breadth), it is practiced so consistently by a highly visible and powerful core of some of the most influential actors in the system (i.e., depth).[1180]

Nonetheless, in light of the importance of the issue, the better approach would be institutions (such as ICSID and the PCA) as well as States to ensure that no individual can serve at the same time as counsel and arbitrator in investment arbitrations. A reasonable definition of 'simultaneously' could be a three-year period in line with the approach of the IBA Guidelines.

Last but not least, a major issue is the lack of transparency in non-ICSID investment arbitration. The UNCITRAL initiatives towards transparency constitute undoubtedly an important first step in that regard.[1181] Likewise, the ICC (which administers primarly commercial but some investment arbitrations as well) has also started publishing since

[1178] Tribunals have described the IBA Rules as 'useful references', 'instructive' and 'a most valuable source of inspiration', see *Caratube and Hourani v Kazakhstan*, Decision on Proposal to Disqualify B Boesch [59]; *Alpha v Ukraine*, Decision on Proposal to Disqualify Y Turbowicz [56]; *Urbaser v Argentina*, Decision on Proposal to Disqualify C McLachlan [37].

[1179] See generally M Langford, D Behn, and R Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) JIEL (forthcoming) with further references.

[1180] ibid 28.

[1181] United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (2014) (the 'Mauritius Convention on Transparency') (adopted 10 December 2014; entered into force 18 October 2017); UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (1 April 2014).

2016.[1182] The ICC has recognized '[t]ransparency provides greater confidence in the arbitration process, and helps protect arbitration against inaccurate or ill-informed criticism'.[1183]

To conclude, addressing these shortcommings and in particular making the arbitrators community more representative by appointing more women and arbitrators from developing countries, adopting a robust approach in relation to conflicts of interests issues and improving transparency in general and in particular in relation to arbitral appointments will strengthen the legitimacy and acceptance of the party-appointing system. In other words, there is no need to dismantle completely the current party-appointing system, which is crucial for enabling value contestation, and replace it by a permanent investment court system, in order to make the improvements and changes that undoubtedly are called for.

[1182] ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2017), section III.B; see https://iccwbo.org/dispute-resolution-services/arbitration/icc-arbitral-tribunals/.

[1183] ICC, Note to Parties and Arbitral Tribunals on the Conduct of the Arbitration under the ICC Rules of Arbitration (2017) [27].

III. INTERIM CONCLUSIONS

Substantive indeterminacy of legal rules and the conceptualisation of law as a process was the theoretical perspective to analyse the case law on non-discrimination in WTO law and international investment arbitration (Chapters I and II). The comprehensive analysis of the inconsistencies of the WTO and international investment jurisprudence on non-discrimination confirmed both the conceptual malleability of equality and the concomitant discretion accorded to international investment tribunals as well as the WTO Panels and the AB (Chapters III and IV respectively). In this last chapter of the thesis the importance of *procedural* and *institutional* mechanisms for enabling the contestation of different values was highlighted. In particular, it was argued that the institutional framework of the WTO and the role of the DSB provides for a forum for dialogue and value-contestation between the WTO Membership and the WTO DSS. In like manner, the value-pluralism achieved through the system of party-appointed arbitrators performs a similar function in the realm of international investment arbitration.

CONCLUSIONS

This thesis sought to answer the following question: why is the jurisprudence on non-discrimination in international economic law characterised by such radical interpretative shifts and major inconsistencies? The answer, simply stated, is that such inconsistency is inevitable and, indeed, to be embraced.

That answer was demonstrated in three distinct steps. First, Chapter I and II established the fundamental premise of this thesis that law must be understood as a process of decision-making, rather than as a set of rules with a predetermined normative content accessible to the adjudicator. The judicial interpretation of rules does not involve the discovery of latent meaning; the adjudicator himself creates meaning, largely by reference to the prioritisation of competing values. Understanding the law in this way brings into the open the role of discretion and choice in the interpretation and application of legal rules, and helps to explain the possibility of different, or even contradictory, decisions within a single domain. This is particularly so in the domain of non-discrimination in the international economic law: not only do economic relations generate intense conflicts and competing political perspectives but, more importantly, non-discrimination as a concept is connected with the concept of equality, which is open-ended and value-depended. Second, Chapters III and IV illustrated this theory in practice. These Chapters offered a comprehensive analysis of the non-discrimination jurisprudence of investment tribunals, WTO Panels, and the AB, demonstrating the inconsistencies with respect to every element the relevant non-discrimination rules. The third and final proposition expounded in this thesis is that the inconsistencies and indeterminacy found in the jurisprudence, while unavoidable (as demonstrated in Chapters I and II), are in fact a positive feature of the international economic regime. As Chapter V explained, the discretion of investment tribunals in the interpretation of non-discrimination provisions is effectively constrained by the party-appointment system,

and the discretion of the WTO DSS is constrained by the institutional structure of the WTO and, in particular, the balance between the WTO Membership and the DSS. Value-pluralism is thereby ensured. Discretion is thus a positive characteristic of both regimes.

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