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Treatment No Less Favorable Provisions Within the Context of International Investment Law: "Kindly Please Check Your International Trade Law Conceptions at the Door."

Todd J. Weiler

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***Treatment No Less
Favorable Provisions
Within the Context of
International
Investment Law:
“Kindly Please Check
Your International
Trade Law Conceptions
at the Door.”***

Todd J. Weiler*

* Barrister & Solicitor, M.A. & LL.B., University of Western Ontario; LL.M. University of Ottawa, LL.M. & S.J.D. University of Michigan. An earlier version of this paper appears as Chapter 9 in: TODD J. WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT* (2013).

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I. Introduction

Taking on the subject of convergence of international trade law [“ITL”] and international investment law [“IIL”] is no small endeavour. As Professor Alford has commendably demonstrated, there are many facets to consider in entertaining the question of whether convergence is taking place and, if so, by what means? In the interests of not biting off more than I can chew, I have elected to restrict my analysis to the second part of his paper, which Prof. Alford described as being concerned with “the converging commitments in trade and investment arbitration against protectionism and discrimination.” While not indicative of my overall opinion of Prof. Alfred’s convergence hypothesis, there is good reason to object to the thesis noted above. I shall propose an opposite thesis, based upon textual analysis as informed by historical context.

My argument is that the thesis enunciated in part two of Prof. Alford’s paper is premised upon a proposition that is refuted by State practice, as reflected in the historical record. There has not been a convergence of commitments “against protectionism and discrimination” in ITL and IIL treaty practice,” at least not since the founding of the GATT in 1947. The case can certainly be made for a convergence of the standards of most-favoured-nation [“MFN”] treatment and national treatment [“NT”], but that convergence arguably took shape in the middle of the nineteenth century,¹ during the period of globalisation fostered by the Industrial Revolution. It was also a convergence that took place before the categories of ITL and IIL even existed. Moreover, whilst the normative consensus that emerged for the protection of transnational commerce certainly proscribed “protectionism and discrimination,” it went much further than that. It was about guaranteeing access to foreign participation in the host economy on the level of the “open door.”

This mid-nineteenth century convergence was reflected in a re-orientation of the term “national treatment,” which aligned it much more closely with MFN treatment, so much so that one could properly characterise the result as the coalescence of NT and MFN treatment into a single standard that guaranteed “treatment no less favourable” to the foreigner, *vis-à-vis* any and all suitable comparators. Ever since then, this “TNLF” standard has been typified by its two constant characteristics: (i) being based upon a comparison of two parties, one of which is the *demandeur*, and (ii) requiring that the *demandeur* be accorded nothing less than “treatment no less favourable” in result. It was

1. Douglas Dillon, *Foreign Investment and Economic Development*, 38 DEPT ST. BULL. 139, 142 (1958), where the Deputy Secretary for Economic Affairs, Douglas Dillon, addressing the Philadelphia Chamber of Commerce, made reference to the continued need for “the ‘open door’ for Trade and Investment,” and noted how, “[s]ince the war, extensive revisions [had] been introduced [to U.S. FCN treaties], designed specifically to encourage and protect more adequately the interests of private investors.” See also W.T.M. Beale, *Government Efforts to Increase Private Investment Abroad*, 39 DEPT ST. BULL. 967 (1958).

a standard that was very much rooted in classical liberal economic theory, which contemplated open borders and transnational economic integration. As such, the TNLF standard both fostered and was reinforced by the great period of nineteenth century globalisation.

By the mid-twentieth century, however, the normative zeitgeist in favour of globalisation had well and truly ebbed. The pendulous backlash against globalisation was reflected both in the rise of statist forms of “economic governance” worldwide and a retreat from binding international rules on the protection of foreign commerce. By the end of the Second World War, these currents of anti-globalisation were so strong that the only remaining redoubts of economic liberalism were to be found in the United States (on Wall Street, in certain Congressional factions, and in a dwindling clique of bureaucrats at a dysfunctional and distracted Department of State, who remained true to the principles espoused by the recently deceased giant of liberal [economic] internationalism, Cordell Hull.

It was largely thanks to the work of these small coterie of devout free marketers, swimming against the statist stream of state-capitalism, democratic socialism, radical socialism, full employment crusaders, New Dealers and Fabian socialists that held sway as the dominant discourse of governance, that ITL and IIL effectively became estranged from each other. While ITL came to prominence in the decades following the Second World War, IIL faded into the background. This was because the ITL regime fashioned at the end of the War was not inimical to any given economic model practiced at the municipal level. Indeed, the diplomatic negotiation of tariff reductions and the management of trade and monetary policy at a State-to-State level proved convivial both to those who favoured an incrementalist return to free and open market economies and those who favoured either piecemeal or wholesale movement towards State intervention in, or outright control over, municipal economic activity.

In contrast, IIL represented the one area of international commercial/economic law that could not be so easily divorced from liberal economic ideology. Either a municipal market is thrown open to foreign establishment on a TNLF basis or it remains closed, conditionally or otherwise. The Americans whose responsibility it was to reboot their country’s comprehensive commercial treaty program, whilst their colleagues were engaged in GATT negotiations in London, New York, Geneva and Havana, held steadfast to a pro-liberal conception of TNLF, as would their successors, right up until the time that the pendulum inevitably swung back towards neo-liberalism in the 1980’s (concomitant with a new period of globalisation fostered by the most recent Industrial Revolution: i.e. the information technology revolution).

While initially very successful, as the United States leveraged its hegemonic position as post-war rebuilders to obtain wide-ranging liberalisation commitments from conquered enemies and dependent allies before the politics of the Cold War took centre stage, the

pace of treaty-making quickly tapered off when it came time to conclude similar arrangements with developing countries whose post-colonial governments were enthralled with Statist approaches to economic governance. Vouchsafed by the principle of sovereignty itself, negotiators for these States were unwilling to admit foreign investment on a TNLF basis, with a commitment as unwavering as was the U.S. insistence upon obtaining such access. As such, few treaties would be concluded (at least until the economic tide turned back towards liberalism in the 1980s).² Hence, the global statist zeitgeist of the post-war period, which would not reach its apogee until the 1970's, favoured the growth of ITL and the near disappearance of IIL from the world economic stage.

In other words, ITL was the product of an economic epoch in which its systemic characteristics flourished, while those of what would become known as IIL faded. The very concept of ITL itself serves as testament to the decomposition of public international law rules governing the municipal regulation of transnational commerce that took place during the first half of the twentieth century. This process of disintegration had a markedly entropic impact upon the TNLF standard, effectively unbundling it for ITL, which has ever since conceived of MFN treatment and NT as distinct but related standards.

The argument I set out below is not that a *de facto* re-convergence of ITL and IIL could not possibly be in the cards. In other parts of his paper, Prof. Alford has explored numerous ways in which just such a phenomenon appears to be taking shape. My point is that compelling historical reasons explain why the language of ITL NT provisions and IIL NT (or TNLF) provisions are not alike. Indeed, I have no quarrel with those who either seek to measure or promote processes of de-fragmentation / re-convergence. After all, the distinction we make today between ITL and IIL is a comparatively new phenomenon. My concern lies with those whose approach to the subject of re-convergence is coloured by an ITL background, who might not even realise that they have forgotten to check their ITL notions about the purpose of NT and/or MFN treatment standards at the door, before entering into such an analysis.³

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2. During the 1950's and 1960's, States such as Switzerland and West Germany experienced greater success in maintaining their own commercial treaty programs, precisely because they were prepared to sacrifice obtaining what was a *sine qua non* condition for American negotiators, obtaining rights of establishment on a TNLF basis. It should be stressed, however, that in making this concession they did nothing to weaken the very premise of the TNLF standard itself. They just limited its application to post-establishment scenarios.
 3. This is particularly the case where there remains a paucity of IIL awards upon which to find our bearings. Prof. Alford only cites a small handful of five cases (of which I was involved as counsel in three), for the proposition that IIL tribunals are engaging in some sort of wholesale borrowing from ITL in the development of their analyses of TNLF provisions. With all due respect to the distinguished arbitrators concerned, the only reason those tribunals cited WTO cases in their awards was because that is what they were fed by counsel. Had they been left to deal with the language of the provisions at issue from the basis of first principle, most would have likely come to

II. The Importance of Historical Context

As explained further below, NT underwent a metamorphosis in the mid-nineteenth century – from a customary international law notion of procedural equality on the basis of the lowest common denominator to a treaty standard promising “treatment no less favourable.” It is important to recall, in this regard, that this transformation occurred at a time when commercial treaties still governed both trade and investment measures. NT would take a much different turn within the ITL context by 1947, however, with its adoption by negotiators as the primary anti-avoidance device for the GATT agreement on multilateral tariff reduction. Within the context of a multilateral trade agreement, in which the primary obligation was for all parties to accord TNLF to all other parties, NT effectively shed its role of guarantor of procedural equality for aliens and traders. Its new role was primarily only to prevent GATT Members from cheating on the concessions they had granted to each other, in order to benefit reciprocally, and fully, from the concessions made by other Members.

Inclusion of the NT standard in this multilateral instrument thus represented a clear line of demarcation between NT as an ITL standard and NT as an IIL standard. In the investment context, nationality remained relevant primarily in order to establish entitlement under the NT standard. In the trade context, nationality became an operative element in the NT theory of liability – i.e. it suddenly mattered whether the measure at issue had been implemented “so as to afford protection” on the basis of nationality.

To be clear, the seeds of this separation were strewn between 1863 and 1902. Just as the late nineteenth century investment boom was getting underway, Dr Carlos Calvo published his two-volume tract, *Derecho internacional teórico y práctico de Europa y America* in 1863, which formed the basis of what would come to be known as the Calvo Doctrine. In 1902, Argentine Minister of Foreign Affairs Luis María Drago declared what would become known as the Drago Doctrine.⁴ These two doctrines epitomised the

the same conclusion, but not in such a way as to suggest reliance upon ITL notions of TNLF provisions that just was not there.

4. As discussed in Chapters 3 & 4 of the book in which this article first appeared (WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW* (2013)), the *Calvo Doctrine* was premised upon the customary international law conception of national treatment: the foreigner can expect to receive treatment no better, and no worse, than citizens of the host State. Calvo asserted that jurisdiction over any transnational investment dispute must lie first with the legal system of the host State. Only if a manifest denial of justice thereby ensued, and all avenues of appeal available to the alien under the municipal legal system had been exhausted, could the matter be taken up on a State-to-State basis. In response to the gunboat diplomacy displayed by Britain, Germany, and Italy, during the 1902-1903 Venezuela Crisis, Dr Drago augmented Calvo’s thesis with the rejoinder that no foreign power, including the U.S.A., could use force against an American nation to collect upon sovereign debts. See generally DEXTER PERKINS, *THE MONROE DOCTRINE 1867-1907* (1966); HAROLD F. PETERSON, *ARGENTINA AND THE UNITED STATES 1810-1960* (1964); CÉSAR SEPÚLVEDA, *LA*

contest of views between capital exporting and capital importing States over the obligations of host States in respect of transnational investment under customary international law. The gist of Calvo's Doctrine was that host States were only obliged to accord national treatment and protection and security to aliens, assuming that their presence in the territory had necessarily required a grant of permission in the first place. When faced with this entirely plausible assertion of the status of customary international law during the mid-nineteenth century, capital-exporting States sought to fortify the language of their commercial treaties, both as a means of building a better case for their claims about the content of the customary international law minimum standard of treatment of aliens and as a means of ensuring acceptable treatment for their investors and their investments abroad.

Such "fortifications" included the deployment of various types of new justiciability clauses, such as FET, in their treaties.⁵ They also included attempts to strengthen the establishment and treatment rights accorded to their investors by pairing up the NT clauses with MFN clauses and extending their scope of application. Thus, the NT standard became increasingly related to the more robust concept of "treatment no less favourable"⁶ rather than being identified with the idea of "national treatment"⁷ which

RESPONSABILIDAD INTERNACIONAL DEL ESTADO Y LA VALIDEZ DE LA CLÁUSULA CALVO (1944);
MARÍA TERESA AGUILAR DE LA TORRE, LA CLÁUSULA CALVO (1959).

5. K. Scott Gudgeon, *United States Bilateral Investment Treaties: Comments on Their Origin, Purposes, and General Treatment Standards*, 4 INT'L. TAX & BUS. LAW. 105, 125 (1986).
6. Today it remains common for investment treaties to contain a combination clause, and the vast majority of treaties at least include both clauses in some form. Below are three prominent examples of the combination approach.

Article X(3) of the Energy Charter Treaty:

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.

Energy Charter Treaty, art. 10(3), Dec. 17, 1994, 2080 U.N.T.S. 95.

NAFTA Article 1104:

Each Party shall accord to investors of another Party and to investments of investors of another Party the better of the treatment required by Articles 1102 and 1103.

North American Free Trade Agreement art 1104, Dec. 17, 1992, 32 I.L.M. 289.

Treaty between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Encouragement and Protection of Investments:

The term "company" means any legal person constituted on the territory of one Contracting Party in accordance with the legislation of that Party and having its head office on the territory of that Party, or controlled directly or indirectly by the nationals of one Contracting Party or by legal persons having their head office in the territory of one contracting Party and constituted in accordance with the legislation of that Party.

Treaty between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Encouragement and Protection of Investments, art. 1(3), 3 January 2003, JORF n°246 du 21 octobre 2004 page 17812, texte n° 10.

7. *See, e.g.*, U.K. – Greece Treaty of Commerce and Navigation, U.K.-Greece, art. 3, July 16, 1926, 61 U.N.T.S. 15. U.K.T.S. No. 2 (1927):

The subjects or citizens of each of the two contracting parties in the territories of the

was now associated with the much less protective Calvo Doctrine.⁸

Given the pre-existing trend towards specialisation in commercial treaty practice had already began towards the end of the nineteenth century, and as consular issues, intellectual property protection issues and international judicial enforcement and arbitration issues became the subjects of their own treaties, it was perhaps inevitable that commercial treaties would devolve into two categories of general economic treaty: (1) the bilateral tariff and trade agreement; and (2) investment establishment and protection treaties. As it happened, both species of treaty inherited the more robust NT provision (i.e. the version tied to the TNLF standard). It would not be until after 1947, however, that the significance of this shared inheritance would come to the fore. As both U.S. and U.K. delegates stated during the GATT negotiating rounds, GATT Articles I and III were allegedly modelled on the commercial treaty practice of the two States. It was also noted that a primary role for GATT Article III would be to prevent cheating⁹ on tariff reductions (which evolved into a promise of universal market access once tariff rates were reduced to marginal levels). In contrast, the historical record is also clear that the primary purpose of the treatment provisions of any establishment treaty (i.e. investment treaty) was to foster transparency, predictability and certainty in municipal legal

other shall enjoy, in respect of their persons, their property, rights and interests, and in respect of their commerce, industry, profession, occupation or any other matter, in every way the same treatment and legal protection as the subjects or citizens of that party or of the most favored foreign country, in as far as taxes, rates, customs, imposts, fees which are substantially taxes, and other similar charges are concerned.

8. *But see:*

[Art. XIII] The subjects or citizens of each of the High Contracting Parties who shall conform to the laws of the country:

1. Shall have full liberty; with their families, to enter, travel, or reside in any part of the dominions and possessions of the other High Contracting Party.

...

[Art. XI] The High Contracting Parties agree that, in all matters relating to commerce, navigation, and industry, any privilege, favor, or immunity whatever which either High Contracting Party has actually granted or hereafter grant to any other foreign State, shall be extended immediately and unconditionally to the subjects or citizens of the other Contracting Party.

...

2. They shall be permitted to hire or possess the houses, manufactories, warehouses, shops, and premises which may be necessary for them.

3. They may carry on air commerce year in person or by any agents whom they may think fit to employ.

4. They shall not be subject in respect of their persons or property, or in respect of passports, or in respect of their commerce and industry, to any taxes, whether general or local or to imposts or obligations of any kind whatever other or greater than those which are or may be imposed upon needed subjects or citizens, or subjects or citizens of the most favored nation.

Treaty of Friendship, Commerce, and Navigation, U.K. –Nicar., art 8-art. 10, July 28, 1905, 1736 U.N.T.S. 1080.

9. *See, e.g.* Donald H. Regan, *Regulatory Purpose and "Like Products" in Article III:4 of the GATT, with Additional Remarks on Article III:2*, 36 J. Wld. Trd. 443, 453 (2002).

regimes, the absence of which represented probably the most significant impediment to increasing transnational investment.

In other words, just as tariff and trade negotiators began inserting NT clauses in trade treaties (to serve as prophylactic, anti-cheating devices) establishment treaty negotiators were still including NT clauses in their treaties to strengthen the *quid pro quo* bargain that was actually inherent in any foreign investment transaction: “if you invest in our territory, you should feel confident that you and your investments will be treated in compliance with the following standards.” So, while NT took up its relatively new post as a compliance mechanism for MFN within the trade context, NT and MFN served identical purposes in the IIL context: i.e. to promote establishment.¹⁰ The role of both versions of the TNLF standard in establishment treaties was thus “. . . to establish and to maintain at all times fundamental equality without discrimination among all of the countries concerned.”¹¹

III. Equal Access, Non-Discrimination, the “Open Door” and the “Level Playing Field”

Whatever 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, and cultural.¹²

The principle of legal certainty requires that every measure of the institutions having legal effects must be clear and precise and must be brought to the notice of the person concerned in such a way that he can ascertain exactly the time at which the measure comes into being and starts to have legal effects. Legal certainty must be observed all the more strictly in the case the measure is liable to have financial consequences in order for those concerned to precisely know the extent of the obligations which it imposes on them.¹³

At the beginning of this paper, a distinction was drawn between comparative treatment standards, as applied in the trade context, and comparative treatment standards applied in the investment context. The point bears repeating. Notionally, legitimate expectations are generated by any treaty promise. For example, it could be said that a foreign goods exporter holds a legitimate expectation, derived from GATT

10. LEAGUE OF NATIONS ECONOMIC AND FINANCIAL SECTION, COMMERCIAL POLICY IN THE POST-WAR WORLD: REPORT OF THE ECONOMIC AND FINANCIAL COMMITTEES OF THE LEAGUE OF NATIONS 72 (1945).

11. Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. 176, 192 (Aug. 27).

12. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 149 (2005).

13. Case T-115/94, Opel Austria GmbH v. Council of the EU, 1997 E.C.R. ¶ 12. cited in, *Thunderbird v. Mexico*, Wañlde Opinion, ¶ 46.

Article III, that the State of import will not impose a non-tariff barrier on its goods, which would generate “protective effects” for the benefit of its local competitor.¹⁴ The foreign investor does not stand in like circumstances with the goods exporter. The stakes are much higher for the foreign investor. Once its decision to establish has been made, its investment has been “captured,” so to speak. For the pure goods exporter, the stakes are unlikely to ever be as high as they are for the foreign investor, including most providers of services that play an integral role in the operation of some goods.

Paulsson once said: “the very fact of being foreign creates an inequality.”¹⁵ It is for this reason that the IIL TNLF standard can be distinguished from the ITL standards. The goods manufacturer likely has other markets it can access if relations sour in one country. In contrast, the foreign investor will always “playing all in” every time he establishes an investment. The IIL TNLF standard provides a putative foreign investor with what he prizes most of all: the assurance of equality, not just non-discrimination, but *de facto*, competitive equality as between himself and his commercial competitor. Given the stakes involved, a promise not to pass laws that discriminate on the basis of nationality is just not good enough for him to risk so much on a foreign investment. One

14. See, e.g., Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 14-15, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, WTO AB Rep. (Oct. 4, 1996), available at http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds8_e.htm. See the WTO Appellate Body:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III “is to ensure that internal measures ‘not be applied to imported or domestic products so as to afford protection to domestic production.’” Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. “[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise indirect protection could be given.” Moreover, it is irrelevant that “the trade effects” of the tax differential between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. 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.

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the WTO Agreement. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in Paragraph 6.13 of the Panel Report that “one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II” should not be overemphasized. The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. This is confirmed by the negotiating history of Article III.

15. PAULSSON, DENIAL OF JUSTICE 149 (2005).

commentator made the same point one century ago, towards the end of the world's last major foreign investment boom:

Security is the first condition of production. If the head of a firm is not certain of working at a profit, he ceases production. . . . If capital is rather doubtful about security, it emigrates, seeks State investments that offer a certain guarantee, and does not scatter itself in the form of wages: any government that frightens away capital is organising unemployment.¹⁶

This is why delegations negotiating the OECD Multilateral Agreement on Investment ["MAI"] rejected a proposal where terms such as "same" or "comparable" treatment [are used] as the appropriate standard [in the combined NT/MFN provision] rather than "no less favourable treatment."¹⁷ The purpose would be to prevent unlimited competition for international investment funds with consequential costs and distorted investment flows. As indicated in records of the negotiations, "[h]owever, most delegations considered that this would unacceptably weaken the standard of treatment from the investor's viewpoint."¹⁷

It is often heard that international investment arbitration is basically "arbitration without privity."¹⁸ This description denotes the fact that IIL treaty arbitrations proceed notwithstanding the fact that there is no legally enforceable agreement between the parties (at least in the common law sense). One might think this point so obvious that it need not have been made, but IIL specialists may find that it serves as effective shorthand for explaining that investor-State arbitration is qualitatively different from other forms of international dispute settlement. Using the expression "arbitration within privity" is akin to a contracts law professor explaining the principles underlying the doctrine of unilateral offer and subsequent acceptance. The host State has offered its unilateral consent, which remains open for any qualifying party to accept.¹⁹ But the

16. YVES GUYOT, *ECONOMIC PREJUDICES* 139 (1910).

17. OECD Negotiating Group on the Multilateral Agreement on Investment, Report of the Drafting Group on the Treatment of Investors and Investments, 5 (Organization for Economic Co-operation and Development, 1996). See Organization for Economic Co-operation and Development, Clarifications of the National Treatment Instrument, Annex C OECD National Treatment for Foreign-Controlled Enterprises, at 105 (2005) (where it was stated that, at least for the purposes of the 1993 OECD National Treatment instrument, "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." Given that this particular "clarification" is tautological, however, the question remains as to whether "treatment no less favourable," even within this particular context, should be presumed to be *per se* discriminatory.).

18. JAN PAULSSON, *Arbitration Without Privity*, 10 ICSID REV. 232 (1995).

19. See U.N. CONFERENCE ON TRADE AND DEV., *THE ROLE OF INTERNATIONAL INVESTMENT AGREEMENTS IN ATTRACTING FOREIGN DIRECT INVESTMENT TO DEVELOPING COUNTRIES* (U.N. Pubs. eds., 2009); See generally Leonard Baccini and Andreas Dur, Presentation at International Political and Economy Society: Investment Discrimination and Proliferation of Preferential Trade Agreements (Nov. 13, 2010) *available at*

analogy is more than procedural. By ratifying an instrument, the host State immediately and unconditionally advertises a warranty of fitness, upon which foreign investors are entitled to rely.²⁰ Whereas in the ITL context, a treaty obligation can only ever effectively be a promise of future compliance with one or more delineated norms, an ITL treaty obligation is a promise that bears with it the responsibility to make reparations if it is not kept. This is why successful ITL claims result, at best, in a declaration of non-compliance and the concomitant obligation to desist from the behaviour that caused it. By contrast, while the successful IIL claim also results in a declaration of noncompliance, along with an implicit obligation to conform to the offended norm, it also results in an obligation to either provide restitution in kind or to pay a sum of damages equal to that amount.²¹ The consequences are different because the nature and purpose of the underlying obligations are different.

Moreover, the typical ITL TNLF provision is not even concerned with obtaining market access *per se*, much less on a plenary basis – as are all IIL TNLF provisions. There are separate ITL provisions governing promises of market access for trade in various goods and services, such as GATS Article XVI. Indeed, there are also separate ITL agreements covering aspects of deep economic integration that facilitate market

http://ncgg.princeton.edu/IPES/2010/papers/S930_paper2.pdf. Also as stated by the Canadian Delegation, in its Report Upon Closure of Havana Conference:

Underlying Article 12 of the Havana Charter is the simple proposition – fostered principally by the United States Delegation – that if conditions are made favourable in the borrowing countries, lenders will again be prepared to furnish a significant volume of private (and public) capital for foreign investment. In order to provide the required conditions, expectant borrowing countries must offer assurances, first to attract private capital, and second to guarantee stable and equitable treatment for the foreign investors when their capital resources have been committed.

MICHAEL HART, ALSO PRESENT AT THE CREATION: DANA WILGREGG AND THE UNITED NATIONS CONFERENCE ON TRADE AND EMPLOYMENT AT HAVANA (Centre for Trade Policy and Law eds., 1995). As stated by the Canadian Delegation, in its Report Upon Closure of Havana Conference:

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20. That being said, it is interesting to note what a former State Department Assistant Legal Advisor had to say about the purpose of the U.S. BIT program at its inception: The BIT Model was not designed with an intent to catalyze investment decisions. Rather, the practical functions of the BIT program were conceived in more static, protective terms, in relation to stocks of investment already in place. In fact, the framers of the Model BIT were unaware of any proven relationship between the existence of FCN treaties or European BITs and investment flows.
Gudgeon, *supra* note 5, at 111.
21. *See* *Factory at Chorzów* (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 46–48 (July 26).

access for goods, such as NAFTA Chapters 7 and 9, which respectively govern the receiving State's sanitary and phytosanitary measures, and any measures that could constitute technical barriers to trade. When a host State agrees to welcome the establishment of investments on a TNLF basis, it has agreed to the same levels of access and integration for which these other ITL obligations are intended.

Investors prefer certainty and, all things being equal, they will invest in a territory where the track record is better or the treatment and/or indemnity promise is better. Nothing necessarily prevents them from making an investment in a riskier location, including one without the protection of an investment treaty (or a weak treaty with no TNLF provisions), and in so doing reap potentially higher returns. There is also nothing stopping the host State from offering a better or worse package of treatment promises to attract or retain existing foreign investments. With IIL, the most important feature is the availability of the TNLF promise itself. There is already sufficient heterogeneity amongst treaty clauses for host States to choose for themselves how much protection they are willing to promise and whether they are prepared to risk having some of their discretionary regulatory authority abridged in order to “send up a better signal” to the investors already committed to their territories and to those who have yet to decide. As Sykes has observed:

[I]nvestment agreements are motivated by a desire for commitments (or signals) from developing country governments to foreign firms, ensuring protection for the sunk investments of those firms. To reduce the risk premium on imported capital as much as possible, developing country governments must credibly promise monetary compensation for expropriation to the investors themselves. Investors cannot count on their home governments to protect them as well in the absence of a private right of action because, among other things, some investors may be politically ineffective. Host countries are thus better off by making a credible promise of compensation to all investors, whether or not they are well organized politically in their home countries. In the case of trade agreements, by contrast, officials in importing nations do not perceive any direct benefit from reducing the risks to foreign exporters. Increased imports are viewed as an “evil,” and are tolerated only because they are accompanied by market access concessions abroad that well-organized export groups demand. Parties to trade agreements thus have little interest in improving export opportunities for exporters that are not well organized.²²

From the perspective of historical development, however, the most crucial line of demarcation between ITL TNLF provisions and IIL TNLF provisions is apparent on their face. Whereas GATT Article III prohibits measures that accord treatment no less favourable “so as to afford protection” to like domestic products, IIL TNLF provisions

22. Alan O. Sykes, *Public vs. Private Enforcement of International Economic Law: Of Standing and Remedy* (U. Chicago Law & Econ., Olin Working Paper No. 235, 2005), available at http://ssrn.com/abstract_id=671801.

make no mention of the purpose of a measure. Strictly speaking, it should not matter whether a measure was adopted “so as to afford protection” to local investors or to other foreign investors. GATT Article III was manifestly intended to protect the MFN bargain struck by a group of countries then immersed in an economic discourse that favoured an overwhelming economic role for the State (but which subsequently evolved towards a bargain of embedded liberalism and then towards a bargain reflective of the economic liberalism of the Washington Consensus). Twentieth century IIL instruments were forged within an economic discourse that was much closer to classical liberalism and the language of their TNLF provisions reflects it.²³

IV. Nationality-Based Discrimination versus Effective Equality of Opportunity

The most common formulation of an IIL TNLF provision calls for a comparison of “treatment no less favourable . . . in like circumstances.” There is not even so much as a hint in such texts that the aim or intent of the State responsible for the impugned measure should be relevant in the determination of *prima facie* compliance. There is also no mention of the concept of nativist protectionism. The obligation presumes that establishment has been or will be granted on a TNLF basis, focusing instead on whether anything has happened to upset the equality of effective opportunity legitimately expected by the foreign investor from the moment of establishment. The nationality of the investor is only relevant in-so-far as it is necessary to hold the correct nationality in order to qualify for the TNLF offered under the provision (e.g. a Croatian investor cannot rely upon a NT obligation undertaken by Sweden as a host State to Russian investors). The plain and ordinary meaning of such provisions forecloses on any attempt to import the anti-cheating function of ITL TNLF provisions into the analysis. It is simply not necessary to determine whether *prima facie* less favourable treatment was accorded to the foreign investor on the basis of his nationality.

It lies for the host State to demonstrate why its less favourable treatment was accorded appropriately in the circumstances. It is not enough for a respondent to deny that less favourable treatment was accorded for reasons of atavistic nativism. That is but one of an infinite number of reasons that could be the true source of the motivation behind the offending measure – but good faith is generally always presumed of State conduct (which springs from a notion equivalent to being given the benefit of the doubt). The pertinent question is whether there is a legitimate reason as to why the equality of

23. See, e.g., Asoka Gunawardana and Jose Alvarez, *The Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86 ASIL –Proceedings of the Annual Meeting 544, 550 (1992); Richard L. Kaplan, *Review of E. Fry, Financial Invasion of the U.S.A.*, 129 U. PA. L. REV. 486, 487 (1980).

economic opportunity promised in the TNLF measure has not been accorded in result.²⁴

In other words, unlike some ITL TNLF provisions, IIL MFN and NT provisions always serve the same purpose: they are intended to provide the beneficiary with complete equality of economic opportunity, both in terms of establishment and treatment. It is also very important to understand the nature of the TNLF beneficiary in ILL, as compared to a beneficiary of GATT Article III. These beneficiaries stand in markedly different positions because of the differing means available to each in order to vindicate its rights/interests under the respective treaty regime. The beneficiary of a State's GATT Article III promise is not provided with a direct means of vindication. It is also not entitled to receive damages for harm already caused as a result of such non-compliance. Even if the GATT Article III beneficiary can convince its home State to raise the dispute before the WTO Dispute Settlement Body, the enquiry will necessarily focus upon the general question of whether the respondent can (and will be able to) comply with GATT Article III – an obligation it owes to the home State, not to the beneficiary.

In sharp contrast to the situation confronting the GATT beneficiary, the IIL TNLF beneficiary enjoys a personal right to demand compensation for non-compliance, not only for past harm, but also for present and future harm. The IIL beneficiary is not concerned with the general proposition of whether the respondent has previously complied with its TNLF obligations, or is capable of doing so in the future. In fact, the enquiry is not even focused on the respondent or its compliance, at least not *per se*. The focus rests instead upon the beneficiary. The arbitrators must determine whether the beneficiary received the best treatment (i.e. the best result) possible, *vis-à-vis* any relevant comparator, given similar circumstances. The very different types of dispute settlement mechanism available to these respective beneficiaries belies the differing nature of the obligations each is owed under a IIL treaty versus an ITL provision, such as GATT Article III. Form follows function.

Despite the flurry of IIL arbitrations that have taken place over the past decade, there still have been relatively few awards issued on the construction of TNLF provisions. Most of the handful of cases decided thus far has involved NAFTA Article 1102 – which is a good example of a typical IIL NT provision. In each of the NAFTA cases, the

24. When the object is to preserve competitive equality of opportunity in the IIL context, as opposed to merely rooting out nationality-based discrimination in the ITL context, the proper constitution of “treatment” focuses upon the results obtained in application of a measure, as opposed to the way in which such measure might have been applied. As Vierdag once observed:

Very often terms such as “favourable,” or rather “unfavourable” or “detrimental” are employed in descriptions of discrimination. In our opinion this is not necessary. Equality and inequality imply comparison between two or more comparable cases. If, for example, rights are accorded to some individuals, but not to others, then each time there is unequal treatment that is favourable to some and unfavourable to others.

E.W. VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW 68 (Martinus Nijhoff, 1973).

respondent State has taken the position that an investor must prove discriminatory intent, on the part of the host State, in order to prove that it has received less favourable treatment under the provision.²⁵ On its face, the provision provides no indication such a requirement could or should exist. As such, a plausible argument can only be sustained by explicit or implicit reference to the conceptions of ITL with discrimination and more or less favourable treatment. The first question, then, is whether the reference should be explicit or implicit. The early work of a few highly esteemed ITL scholars suggests that the answer will be the latter.

Each ITL publicist has started with the same premise, that while ITL and IIL obligations may appear similar, they are not the same and should not be treated as such. Consensus was, in fact, achieved in that all concluded that IIL arbitrators could do much better than to rely upon the *acquis* of the GATT or the WTO when seeking guidance on the interpretation of an IIL NT provision. Indeed, working independently, these ITL scholars attained an even higher level of consensus on how to approach the interpretation of IIL NT obligations, albeit on an implicit basis. Evidence of their consensus approach exists despite the fact that each cautions against transposing any ITL concepts, willy-nilly, into the IIL interpretative exercise.²⁶ The proof lies in their implicit transposition of the ITL requirement – that there always be some evidence of discriminatory intent, on the basis of nationality – into their IIL analysis.²⁷

The transposition remains implicit, for each scholar, because none ever acknowledge the fact that it has taken place. The need for evidence of discriminatory intent, based upon the nationality of the investor, simply appears in their analyses without the

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25. In contrast to the NAFTA experience, thus far Egypt, Croatia and the Czech Republic have each foregone seizing similar opportunities to raise intent-based arguments, in cases in which one stood as respondent. *See* *Champion Trading Co. v. Arab Republic of Egypt*, ICSID Case No. ARB/02/9 (Oct. 27, 2006); *Frontier Petroleum Serv. Ltd. v. The Czech Republic*, PCA Award IIC 465 (Nov. 12, 2010); *Ulemek v. Republic of Croatia*, UNCITRAL Canada-Croatia BIT (May 25, 2008). As I served as counsel for the claimants in all three cases, I have the pleadings for each on file.
26. JÜRGEN KURTZ, *The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and Its Discontents*, 20 EUR. J. INT'L L. 749, 751 (2009); JOOST PAUWELYN & NICHOLAS DIMASCIO, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 50-51 (2008); *see also* JÜRGEN KURTZ, NATIONAL TREATMENT, FOREIGN INVESTMENT AND REGULATION AUTONOMY: THE SEARCH FOR PROTECTIONISM OR SOMETHING MORE? IN: NEW ASPECTS OF INTERNATIONAL INVESTMENT LAW, P. KAHN & T. WÄLDE, eds., 311-351 (Martinus Nijhoff, 2007). To be fair, all three authors acknowledged the importance of being alert to the differing historical paths of ITL and IIL in both papers, and the authors also make considerable efforts to ascertain whether there were shared principles and approaches, whilst also attempting to identify the differences. Notwithstanding my criticisms of them, these papers should be read and commended for the insights they provide.
27. In a subsequent dispute involving the same two parties, but with their reserved, another WTO panel would rely heavily on GATT principles in its interpretation of the same provisions. *See EC – Trademarks and Geographical Indications*, WT/DS174/R, WTO Panel Rep. (adopted 20 April 2005). URL: <http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds174_e.htm>, accessed 30 December 2012.

slightest indication of how it got there. For example, in their paper on national treatment in the ITL and IIL contexts, DiMascio and Pauwelyn opined:

Most importantly, similar to recent WTO jurisprudence on “less favourable treatment” (not likeness), tribunals in the major investment disputes have also decided that, pursuant to the “in like circumstances” test, only foreign and domestic investments that raise similar public policy concerns should be compared. The basis of this position can be traced to the OECD’s analysis that, “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.” The tribunal in the NAFTA investment dispute *Pope & Talbot, Inc. v. Canada* later expressed the same idea more clearly by stating that, in essence, “**Article 1102 prohibits treatment that discriminates on the basis of the foreign investment’s nationality.**” Every subsequent major investment decision has agreed that the national treatment test’s objective is to ferret out discrimination based upon nationality, though some tribunals have disagreed about the method of accomplishing this result.²⁸

Unfortunately, their argument neither reflects the current state of IIL *jurisprudence constante* on the point, nor even the opinion of the Tribunal they cited. The confusion appears to have arisen from the authors’ having taken the *Pope & Talbot* Tribunal’s recitation of the Respondent’s arguments on nationality-based discrimination for its own views. In fact, the Tribunal rejected those very arguments in coming to a very different conclusion. Below is an unedited version of the same paragraph excerpted by the authors in the paragraph above. In both passages the same, specific text has been emboldened, with other pertinent portions underlined.²⁹

In one respect, this approach echoes the suggestion by Canada that **Article 1102 prohibits treatment that discriminates on the basis of the foreign investment’s nationality.** The other NAFTA Parties have taken the same position. However, the Tribunal believes that the approach proposed by the NAFTA Parties would tend to excuse discrimination that is not facially directed at foreign owned investments. A formulation focusing on the like circumstances question, on the other hand, will require 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. That is, once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances? It is in answering that question that the issue of discrimination

28. PAUWELYN & DIMASCIO, *supra* note 26, at 72 (emphasis added).

29. The authors made a further assertion, that, in their opinion “Every subsequent major investment decision has agreed . . .” PAUWELYN & DIMASCIO, *supra* note 26, at 72. One wonders about precisely which cases they had in mind, as no citations were provided in support of this audacious claim, the inauthenticity of which will be evinced with a review of all of the cases below.

may arise.³⁰

Just as a plain reading of the entirety of the *Pope & Talbot* Tribunal's award reveals the clarity of its opinion on the issue, so too does it quickly become manifest, upon reading of the text of NAFTA Article 1102,³¹ that there is no basis for supposing that less favourable treatment could be accorded under it, so long as nobody could prove that it was rendered discriminatorily, on the basis of nationality. Indeed, one need not even leave the WTO *aquis* to obtain a proper appreciation for the distinction that must be drawn between IIL TNLF provisions, which focus on equality from the perspective of the investor, versus ITL TNLF provisions, which focus on discrimination from the perspective of the respondent State. In the *Havana Club Case*, the Appellate Body construed Article 3:1 of the WTO TRIPS Agreement, which is an MFN provision, in a manner that was entirely consistent with the manner in which one should also construe a IIL TNLF provision.

Premised upon an extension of GATT principles to the TRIPS Agreement, the United States had argued that the “fundamental purpose” of TRIPS Article 3:1 was to “avoid protectionism,” and, as such, that measures should only be impugned on the basis of a finding of intent to discriminate on the basis of nationality (*de jure* or *de facto*). In response, the European Communities argued against the transposition, on the basis that a plain reading of the treaty texts did not support it. The WTO Appellate Body agreed. Much like a properly instructed IIL tribunal would do with a BIT TNLF provision, the Appellate Body recognised that TRIPS Article 3:1 possessed the “fundamental” character of another type of TNLF provision, namely GATT Article I, the MFN treatment provision. As such, the WTO Appellate Body recognised that TRIPS Article 3:1 is more than just an anti-avoidance mechanism. It therefore had little difficulty in concluding that both the MFN treatment and the NT provisions of the TRIPS were violated, because the U.S. measure at issue accorded less favourable treatment to European original trademark

30. *Pope & Talbot Inc. v. Canada*, 7 ICSID Rep. 120-121 (2005), NAFTA/UNCITRAL Trib., Award on the Merits of Phase 2, para. 79 (Apr. 10, 2001) (emphasis added).

31. North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, Art. 1102, 32 I.L.M. 289, 639 (1993):

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.

holders (a.k.a. “investors”) than it did to similarly situated U.S. original trademark holders.³²

When it comes to IIL NT provisions, IIL arbitrators may feel as though they are faced with something of an interpretive dilemma, given the relative paucity of previous awards. Rather than desperately turning to the GATT *acquis* for guidance, they should carefully canvass the material available elsewhere. For example, attention could be paid to trade law cases involving the MFN treatment obligation, where the analytical focus was on nationality as the threshold for qualifying for the more favourable treatment (i.e. the better result) demanded, as opposed to nationality being regarded as a motivating factor behind the treatment actually received.

The reasoning contained within certain PCIJ cases may also prove elucidative, as some have involved alleged interference with the exercise of private rights, and others have even addressed the principle of equality more generally. For example, one could review the judgment and separate opinions in the *Polish Nationals in Danzig Case*, as well as the reasoning behind the outcome in the related *German Settlers in Poland Case*.³³ The arguments considered in the latter case, by a divided court, could be elucidative for today's IIL debate over regarding nationality as the test of qualification for treatment sought, versus regarding it upon one's consideration of the motivation

32. Appellate Body Report, *United States - Section 211 Omnibus Appropriations Act of 1998*, para. 207, WT/DS176/AB/R, (Jan. 2, 2002), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds176_e.htm.

TRIPS Article 3

National Treatment

1. Each Member shall accord to the nationals of other Members treatment no less favourable than that it accords to its own nationals with regard to the protection of intellectual property, subject to the exceptions already provided in, respectively, the Paris Convention (1967), the Berne Convention (1971), the Rome Convention or the Treaty on Intellectual Property in Respect of Integrated Circuits. In respect of performers, producers of phonograms and broadcasting organizations, this obligation only applies in respect of the rights provided under this Agreement. Any Member availing itself of the possibilities provided in Article 6 of the Berne Convention (1971) or paragraph 1(b) of Article 16 of the Rome Convention shall make a notification as foreseen in those provisions to the Council for TRIPS.

Agreement on Trade-Related Aspects of Intellectual Property Rights, art. 3, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 319, 322 [hereinafter TRIPS Agreement].

TRIPS Article 4

Most-Favoured-Nation Treatment

With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members

Id. art. 4.

33. Questions Relating to Settlers of German Origin in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 19–20, 35–38 (Sept. 10). *See also*, German Interests in Polish Upper Silesia, 1926 P.C.I.J. (ser.A) No. 7, at 19 (May 25).

behind the treatment received.³⁴

The disagreement between the judges hearing the *Polish Nationals in Danzig Case* concerned the proper construction of a non-discrimination clause included in the 1919 *Treaty of Versailles*.³⁵ The Majority began its analysis by referring to the Court's advisory opinion in the *German Settlers in Poland Case*, which concerned the construction of a treaty for the protection of minorities. The court's decision upheld the interests identified in Article 93 of the *Versailles Treaty*. Article 93 provided: "Poland accepts and agrees to embody in a Treaty with the Principal Allied and Associated Powers such provisions as may be deemed necessary by the said Powers to protect the interests of inhabitants of Poland who differ from the majority of the population in race, language or religion." As described by the Court in the *German Settlers in Poland* judgment, the ancillary "Minorities Treaty" provided as follows:

Article 1 of this Treaty, Poland undertakes that the stipulations contained in Articles 2 to 8 shall be recognized as "fundamental laws" and that no law, regulation or official action shall conflict or interfere with or prevail over them. By Article 2, Poland further "undertakes to assure full and complete protection of life and liberty to all inhabitants of Poland without distinction of birth, nationality, language, race or religion."

The first paragraph of Article 7 provides:

"All Polish nationals shall be equal before the law and shall enjoy the same civil and political rights without distinction as to race, language or religion."

The first sentence of Article 8 contains the following additional stipulation:

"Polish nationals who belong to racial, religious or linguistic minorities shall enjoy the same treatment and security in law and in fact as the other Polish nationals."³⁶

The *German Settlers in Poland Case* involved a measure taken by the Government of Poland that would have the procedural effect of stripping German settlers of their property rights within its territory, based upon the date they had acquired their interest

34. Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 (Feb. 4). For a more recent example of a similar disagreement over the meaning of the term "discriminatory," see, Appellate Body Report, *European Communities - Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶¶ 148-174, WT/DS246/AB/R (Apr. 7, 2004), http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds246_e.htm.

35. Article 104(5):

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 to the detriment of citizens of Poland and other persons of Polish origin or speech.

Treaty of Versailles art 104(5), June 28, 1919, 994 U.N.T.S. 14544.

36. Questions Relating to Settlers of German Origin in Poland, Advisory Opinion, 1923 P.C.I.J. (ser. B) No. 6, at 20 (Sept. 10).

in the land. The Court observed that Poland had promised to ensure that all of its nationals, including the German settlers, would “enjoy the same civil and political rights and the same treatment and security in law as well as in fact” and that the measure at issue constituted a blatant violation of that promise. In particular, the Court concluded: “It is contrary to the principle of equality in that it subjects the settlers to a discriminating and injurious treatment to which other citizens holding contracts of sale or lease are not subject.”³⁷

The Majority in the *Polish Nationals in Danzig Case* borrowed upon the *German Settlers in Poland Case* opinion for the proposition that, for a prohibition against discrimination to be effective, it 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.” The Majority added: “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.”³⁸ In one fell swoop, then, the Majority thus indicated that – while it was prepared to entertain arguments about both *de facto* and *de jure* discrimination, its focus would be on identifying evidence of nationality-based discrimination. The Majority proceeded to juxtapose its approach with the one advocated on behalf of the petitioners:

The Polish Government contends that the stipulation in question prohibits any discrimination to the detriment of Polish citizens and other persons of Polish origin or speech as compared with Danzig citizens of German origin; in other words, that the former are entitled to national treatment . . .

With regard to this interpretation, the following observations may be made:

In the first place, the text does not say between whom no discrimination is to be made. The Polish argument makes a very important addition, namely, a standard of comparison; this addition finds no support in the text.

. . .

The Polish interpretation would result in granting national and, in certain respects, also minority treatment. In the Court's opinion, however, the object of the prohibition is to prevent any unfavourable treatment, and not to grant a special régime of privileged treatment.

In short, the Court is of the opinion that the contents of Article 104:5 are of a purely negative character in that they are confined to a prohibition of any discrimination; it is for this reason unable to read into them any standard of comparison.³⁹

37. *Id.* at 36-37.

38. *Treatment of Polish Nationals and Other Persons of Polish Origin or Speech in Danzig Territory*, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 44 at 807 (Feb. 4).

39. *Id.* at 807.

The Dissenting Judges proffered a different approach. Rather than focusing on the question of whether there was nationality-based discrimination, their only concern for nationality was as a basis of qualification for, and comparison of, treatment. In other words, they imported a TNLF test into Article 104(5) of the *Treaty of Versailles*. It takes only a moment's glance at the treaty text to conclude that the Dissenters were grasping at straws, however --as the provision specifically, and only, referred to eliminating discrimination.⁴⁰ Nevertheless, the approach they advocated would have been spot-on, had they actually been dealing with a provision containing TNLF language:

According to Article 104 (5), no discrimination is permitted at Danzig to the detriment of Polish nationals or other persons of Polish origin or speech.

That is a provision of an absolutely general character.

There is nothing to justify the addition thereto of any restrictions - whether directly or indirectly. There is nothing to justify any limitation of their scope, whether by seeking to circumscribe the category of persons as compared with whom discrimination is forbidden, or by seeking to limit the category of Polish elements entitled to the benefit of the clause, or again, indirectly, by requiring proof that the discrimination is based on an intention to cause prejudice to the Poles.

It cannot be maintained that the discrimination forbidden is to be understood only as based upon the Polish character of those against whom it is practiced. It is easy to see that the effect of Article 104(5) of the Treaty of Peace would thus be restricted, in the case of Polish nationals at Danzig, who would merely be entitled to equality of treatment with foreigners in general residing in the Free City. It will be readily perceived that, if this were so, a measure which placed the Polish nationals at Danzig in a position of inferiority to the nationals of Danzig would not constitute discrimination such as is forbidden by the Treaty, provided only that it was declared applicable to all persons of other than Danzig nationality.

...

To sum up, under Article 33, paragraph 1, of the Convention of Paris, the Free City undertakes not only to observe, in her treatment of the Poles of Danzig nationality forming a minority of the Danzig population, the rules for the protection of minorities, already stipulated in the Treaty concluded between Poland and the Principal Powers at the same time as the Peace Treaty with Germany; she further undertook, at the same time, not to subject other Polish elements at Danzig to a

40. In fact, the most cogent analysis was to be found in the Concurring Opinion:

The stipulation which the Court has to interpret is that of a prohibition of discrimination; that is all that under Article 104 (5) of the *Treaty of Versailles* and under Article 33 (1), second sentence, of the Convention of Paris Poland is entitled to claim. She is entitled to claim it whether it does or does not result in equality of treatment. If, in fact - and the existence of discrimination is a question of fact - there is no discrimination, Poland can have under the above treaties no claim to equal treatment. If in fact, in respect of any particular matter, absence of discrimination would result in equal treatment, equal treatment will be what she is entitled to claim for her citizens, but the basis of the claim will be that some inequality of which she complains is the result of discrimination. *Id.* at 822 (concurring).

different treatment from that applied to other inhabitants of the Free City, whether of Danzig or of other nationality.⁴¹

In a nutshell, the Dissenters in the *Polish Nationals in Danzig Case* appear to have committed an inverted version of the same *faux pas* committed by the trade law academics mentioned above. They appeared to regard a non-discrimination provision as though it were an equality clause, rather than confusing an equality clause for a non-discrimination provision. Another illustration of the proper approach to a TNLF clause can be drawn from Schwarzenberger's exposition on the character of an MFN clause, in which he observed, in relevant part:

[MFN] treatment does not demand compliance with any definite and objective rules of conduct. The rights actually enjoyed under the standard are merely the counterparts of the rights granted by the promisor to third States. In the absence of undertakings to third states, the [MFN] standard is but an empty shell, and, in operation, it is a shell with variable – and continuously varying – contents.⁴²

One of the conclusions to be drawn from Prof. Schwarzenberger's observation is that when one is dealing with a pure TNLF standard (i.e. one unadulterated by such additions as "so as to afford protection"), one must accept that the provision *really does mean what it says*. The only thing the beneficiary needs to 'do' in order to qualify for the treatment at issue is to 'be' a national of the State to whom the promise was made. Nationality is most certainly relevant for any TNLF clause, but it is only relevant in so far as it either qualifies, or disqualifies, one from eligibility as a beneficiary under it. Logic dictates that the result would be identical for both MFN treatment and NT; the only difference is the comparator (national of host State versus national of another State).

This point ties back, yet again, to the expectation generated by an MFN or NT pledge made in the investment context. The investor (and would-be beneficiary) is enticed to establish his investment in the territory of the host State, to operate his business and to reinvest his returns, having derived certainty from the host State's promise that he holds the right to unconditional receipt of the best treatment available to investors of a similar class in whatever he does.

The following thought experiment may also assist in illustrating the fundamental difference between ITL and IIL, which comes out in the question of whether discriminatory intent is a necessary element of the typical IIL NT provision:

(1) Assume that GATT Article I (MFN for products) no longer existed, all else remaining the same. Would NT work relatively effectively without MFN treatment? No, it could not. Without a MFN rule constraining their behaviour GATT members could raise or lower tariffs at their leisure. NT provisions would only be applied to domestic measures so as to curtail hidden forms of

41. *Id.* at 819.

42. Georg Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 22 BRIT. YB INT'L L. 96, 96 (1945).

discrimination. Otherwise, nationality-based discrimination practiced in full public view would operate in a largely unfettered fashion.

(2) Assume that NAFTA Article 1103 (MFN for investors and investments) no longer existed, all else remaining the same. Would NT work relatively effectively without MFNT? Yes, and few would even notice the difference. Investors and investments would still be owed the best treatment available to local comparators. It would merely remain theoretically possible that the government of the host State could decide to provide to a comparator of a third country better treatment than it provided to its own people and, (by operation of the NT provision) our subject investor. It could happen, but it is not very likely that it would.

(3) Assume that GATT Article III (NT for products) no longer existed, all else remaining the same. Would MFN work relatively effectively without NT? Yes, it would. While some *de facto* discriminatory measures could slip through the GATT net – effectively cheating on the grand MFN bargain between all of the members – the system would remain intact and would remain relatively useful.

(4) Assume that NAFTA Article 1102 (NT for investors and investments) no longer existed, all else remaining the same. Would MFN work relatively effectively without NT? It would work, but not that well. Investors and investments would still receive the best treatment available to third country comparators, but if the host State decided to shut out all foreigners, or treat them universally less favourably than home-grown competitors, the MFN obligation would be of no solace to the universally aggrieved foreigners.

Yet another way to think about the spuriousness of the “treatment on the basis of nationality” *problématique* is to unpack it from the perspective of a practitioner. Should it be necessary to prove that the impugned measure was imposed on the basis of nationality? If the answer is yes, how should one go about identifying such evidence? In the ITL context, the WTO Appellate Body has cautioned against any attempts to “sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent.” It has observed how “subjective intentions inhabiting the minds of individual legislators or regulators [should] not bear upon the inquiry, if only because they are not accessible to treaty interpreters.”⁴³ In other words, unless the politician responsible for the impugned measure is seeking the populist acclaim that sometimes flows from the brazen nationalisation or expropriation of a foreign investment,⁴⁴ he will be on the lookout for a way to conceal those intentions. Of course, this proposition is postulated upon the presumption that it would even be possible to discern where such “intent”

43. Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, ¶ 62, WT/DS87/AB/R, WT/DS110/AB/R (Dec. 13 1999). See also, Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, 28, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (Oct. 4 1996).

44. See, e.g., Jacquie McNish, *Chapter 11 for Abitibi? No, the Other Chapter 11*, THE GLOBE AND MAIL, 13 Jan. 2009, <http://www.theglobeandmail.com/report-on-business/chapter-11-for-abitibi-no-the-other-chapter-11/article1146613/>.

actually resided (e.g. in an individual or in the person of the executive, the legislature, the administration, etc.).

There is also the possibility that a measure could simply have a damaging and/or protective effect in a manner actually not intended by its originator. Typically, IIL tribunals will be entitled to call upon a municipal court, exercising *lex loci arbitri* jurisdiction over the arbitration, to rely upon its subpoena powers in order to satisfy arbitral requests for the production of documentary evidence. Even if IIL tribunals were not conservative about calling upon municipal courts to enforce production requests, one must also surmount likely claims of governmental privilege and sovereign immunity, which would likely impede (or arrest) the discovery process anyway.⁴⁵

For IIL practitioners, this conundrum lies in the heart of the *de jure / de facto* (“concerning law” / “concerning fact”) meme. Measures that evince some discriminatory animus on the basis of nationality on their face, are considered as *de jure* discrimination. Measures appearing to be neutral on their face (i.e. those that do not appear to be overtly discriminatory) are considered to be potentially *de facto* discrimination. In theory, one first determines whether the measure is discriminatory on its face. If not, then it must be either *de facto* discriminatory or not discriminatory at all. Two problems prevent one from applying the same approach in the IIL context. First, the only way to apply this particular meme is to start from the premise that one will either find discrimination on the basis of nationality out in the open or hiding in the woods. The very act of adopting this approach commits the treaty interpreter to construing an IIL NT or MFN provision as though they were akin to GATT Article III:4 for investment measures. Merely by seeking evidence of *de facto* discrimination, she has already limited herself to ferretting out measures imposed “so as to afford protection.”

The other problem with the *de jure / de facto* meme is that it is completely unnecessary in any event. Drawing such a distinction brings one no closer to actually determining whether the measure is discriminatory. If one agrees with the proposition that “treatment” refers to the results obtained through application of a measure, rather than the particular manner in which the measure has been applied to the investor, there is no point in determining whether a measure is discriminatory on its face or in fact. If the measure is discriminatory on its face, it will be discriminatory in fact as well. Hence

45. In this regard please note, above, the second last exception paragraph from the Canadian Model Treaty. It is a strongly worded blanket provision designed to prevent any successful document discovery activities. This change was made in response to the success of claimants in cases such as: *See Pope & Talbot v. Canada*, 7 ICSID Reports 102 (2005), NAFTA/UNCITRAL Trib., Award on the Merits of Phase 2, para. 79 (Apr. 10, 2001.); *S.D. Myers, Inc. v. the Government of Canada*, NAFTA Trib., 1st Partial Award, ¶ 251, IIC 249 (2000), 40 I.L.M. 1408 (2001), and: *In the Matter of an Arbitration Under Chapter Eleven of the North American Free Trade Agreement and the UNCITRAL Arbitration Rules Between Vito G. Gallo and the Government of Canada*, NAFTA/UNCITRAL Trib. Award, PCA Case No. 55798, IIC 522 (2011), in being able to obtain cabinet documents upon the order of a tribunal.

the distinction that lies at the heart of this meme sheds no light on the original goal: distinguishing between unintended inequalities of treatment versus inequalities that are of a discriminatory character (i.e. that afford protection to a local product).

Those attracted to the idea of unifying the construction of all TNLF provisions, regardless of treaty platform, risk confusing doctrinal heterogeneity for undesirable fragmentation.⁴⁶ Aided by historiography, an inductive analysis of TNLF provisions reveals that TNLF provisions were intended to serve vastly different functions when placed in the GATT versus being placed in a bilateral treaty of establishment (i.e. the precursor to today's BITs). It obviously lies for States to change the function of these provisions in future agreements should they desire. Adding five words--"so as to afford protection"-- to the existing model text would be sufficient.

In summary, when it comes to IIL TNLF provisions the treaty text really does speak for itself, supported by what historical practice tells us about their function, *in concreto*. Whereas the role of NT in the trade law context is adjunctive to MFNT, in the IIL context

46. Kurtz seemed to fall into this trap when he criticized the *Occidental* Tribunal. Reminiscent of the approach one might expect from a gifted IIL methodologist, Kurtz instinctively insisted upon reading a "protectionist purpose" test into IIL TNLF provisions – including the MFN clause at issue in the *Occidental* arbitration. In that case, the Tribunal correctly concluded that the investor, as a taxpayer was entitled to the same treatment accorded to other taxpayers, even though the better treatment at issue was accorded to a taxpayer operating in a different industry. Kurtz, seemingly scandalized by this result, remarked:

There is a serious flaw in this juridical move which is justified only by the investment treaty adjudicator's personal intuition of the role of national treatment in the system and its supposed difference to WTO law. There is no general exception provision (such as GATT Article XX) in most investment treaties to militate against overreach in the application of such a broad test. We are left then with an outcome – which looks solely to harm suffered by the foreign investor and excludes consideration of the motivations of the regulating state – that seriously risks invalidating measures that should be viewed as legal.

Kurtz, *supra* note 25, at 1096-1097. This analysis arguably ignores the conventional IIL approach to construing a TNLF clause however, which affords the host State an opportunity to justify the less favourable treatment it has accorded to the complaining investor (on a host of grounds far greater than those listed in GATT Article XX). Moreover, it appears to be premised upon an alleged *faux pas* committed by none other than the observer himself. One could perhaps even go so far as to say that it is the IIL expert who errs, when he relies on nothing more than his own personal intuition, informed by years of IIL research and/or practice – to assume that "protectionist purpose" need be imported from IIL practice into the IIL analysis – regardless of the manifest textual evidence to the contrary. For an example of a critique of the *Occidental* Tribunal's TNLF analysis that did not stray from IIL norms and presumptions, see: Susan D. Franck, Comment: *Occidental Exploration & Production Co. v. Republic of Ecuador, Final Award*, 99 AM. J. INT'L. L. 675 (2005). For an explanation of the IIL approach to balancing potentially conflicting norms and interests in the application of IIL TNLF provisions, see: Todd J. Grierson-Weiler & Ian A. Laird, *Standards of Treatment*, in: THE OXFORD HANDBOOK OF INTERNATIONAL INVESTMENT LAW, 259, 290-296 (Christoph Schreuer, et al., eds., 2008) 259, 290-296 (Oxford: Oxford University Press, 2008); or Todd Weiler, *The Treatment of SPS Measures under NAFTA Chapter 11: Preliminary Answers to an Open-ended Question*, 26 B.C. INT'L & COMP. L. REV. 229 (2003).

it is NT that is the more important of the two.

V. The Unique Character of the TNLF Standard within the IIL Context

The usual starting point for the analysis of an IIL TNLF provision will be the award in *Pope & Talbot v. Canada*, which furnishes us with a simple, three-pronged test:⁴⁷

- (a) Identify domestic investors and/or investments in a comparable position with the claimant;
- (b) Determine whether more favourable treatment has been provided to the domestic investor/investment; and
- (c) Determine whether the circumstances of the application of the measure justify the difference in treatment.

As noted above, TNLF provisions are, first and foremost, comparative obligations. The object of the comparison is to ensure that an equality of competitive opportunity is maintained as between the investor/investment and domestic, or other foreign, enterprises operating in like circumstances.⁴⁸ The scope for comparison of the investor/investment and the comparator will be based upon the ‘treatment’ accorded to them – i.e. the results of the measure being applied. In cases where the measure applied is specific to a certain industry the comparison will be made between enterprises operating within that same industry (rather than all enterprises in the territory, such as under a general tax measure).⁴⁹ The circumstances of ‘treatment’ received by the comparators are to be understood within the context of the competitive relationship between enterprises affected by the measure, and the manner in which the measure impacts upon their respective ability to compete.

The *Pope & Talbot* Tribunal found that, “as a first step, the treatment accorded to a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector...,” although the Tribunal cautioned that this was but a first step. The Tribunal supported this rationale by reference to the OECD *Declaration on National Treatment for Foreign-Controlled Enterprises*, an explanatory note to which provided, in part: “As regards the expression ‘in like situations,’ the comparison between foreign-controlled enterprises established in

47. See *Pope & Talbot v. Canada*, 7 ICSID Rep. 106-121 (2005), NAFTA/UNCITRAL Trib. Award on the Merits of Phase 2, ¶¶ 31-81(2001). For a similar BIT test with the same result, see also: *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award on Jurisdiction & Merits, ¶ 371, IIC 302 (2007).

48. Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, ¶¶ 142-148, WT/DS161/AB/R, WTO AB Rep. (Jan. 10, 2001).

49. See, e.g., Franck, *supra* note 45 (where the measure was a value added tax regime and the treatment was the receipt of refunds for taxes paid by some enterprises engaged in exporting their products but not the investor in exporting its products).

a an adhering country and domestic enterprises in that adhering country is valid only if it is made between firms operating in the same sector.”⁵⁰

Most of the tribunals asked to construe a TNLF provision have thus far started off by identifying comparators based upon the industry of the investor/investment in question. For example, in the *Feldman* case, the Tribunal started with a determination that the “applicable universe” of comparable investors and investments was made up of those businesses engaged in purchasing and reselling cigarettes, rather than a wider group, which would have included manufacturers. The measure at issue in the *Feldman* case was a rebate on export taxes.⁵¹ The comparison in *UPS v. Canada* was made between the national postal service and a privately owned courier company with respect to the impact of measures on competition between them in the expedited courier business.⁵² The comparison in *US – Cross Border Trucking Services* involved trucking businesses operating between Mexico and the United States.⁵³ The measure at issue was a prohibition on most Mexican-owned carriers operating in all but a tiny fraction of the United States market. The comparison in *ADF v. USA* was between steel products fabricated by the investor (a steel fabricator) versus steel products fabricated by domestic investors, with respect to their potential use in a highway project.⁵⁴ In *S.D. Myers, Inc. v. Canada*, the Tribunal held that the appropriate basis for comparison – involving a measure that banned the export of PCB wastes from Canada in comparison – was between service providers offering PCB waste destruction.⁵⁵ It found, for example:

The 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.” From the business perspective, it is clear that SDMI and Myers Canada were in “like circumstances” with Canadian operators such as Chem-Security and Cintec. They all were engaged in providing PCB waste remediation services . . .⁵⁶

Under IIL TNLF provisions, foreign investors and their investments are entitled to enjoy the best treatment accorded under a measure to comparable enterprises operating in like circumstances. As noted above, the focus of this stage of the analysis has been on the impact of the measure rather than on whether there is any evidence of intent to

50. OECD, NATIONAL TREATMENT FOR FOREIGN-CONTROLLED ENTERPRISES 106 (Paris, 2005).
 51. *Feldman v. Mexico*, NAFTA Trib., Award and Separate Opinion, ICSID Case No. ARB(AF)/99/1, ¶¶ 171-172, IIC 157 (2002), 42 ILM 625 (2003).
 52. *United Parcel Service of America, Inc. v. Canada*, NAFTA/UNCITRAL Trib., Award and Dissenting Opinion, IIC 306, 46 I.L.M. 922 (2007).
 53. *In the Matter of Cross-Border Trucking Services*, Case No. USA-MEX-98-2008-01, Pan. Rep., ¶¶ 252-57 & 291-94 (Feb. 6, 2001) (NAFTA Trib.).
 54. *ADF Group Inc. v. U.S.A.*, ICSID Case No. ARB(AF)/00/1, Award, ¶ 155 (Jan. 9 2003), 6 ICSID Rep. 470 (2004) (NAFTA Trib.).
 55. *S.D. Myers v. Canada*, NAFTA/UNCITRAL Trib., 1st Partial Award, ¶ 251, IIC 249 (2000).
 56. *Id.* at ¶¶ 250-51.

accord less favourable treatment on the basis of nationality.⁵⁷

Because proof of intent to discriminate on the basis of nationality is not necessary for a finding that less favourable treatment has been accorded under a measure, determining whether treatment was more or less favourable does not involve a global comparison of treatment received by foreigners and domestic investors. For example, sometimes measures accord more favourable treatment to a national champion, to the disadvantage of all others (domestic or foreign). Sometimes measures accord more favourable treatment to a chosen group of foreigners and/or domestic enterprises, to the disadvantage of all other competitors. When an individual investor claims ‘treatment no less favourable,’ the analysis is specific to the treatment being accorded to that claimant under the measure *vis-à-vis* its competitors. As the *Pope & Talbot* Tribunal stated:

The Tribunal believes that the language of Article 1102(3) was intended simply to make clear that the obligation of a state or province to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors. Since, as noted, the treatment of states and provinces in Article 1102(3) is expressly an elucidation of the requirement placed on the NAFTA Parties by Articles 1102(1) and (2), that interpretation lends support to the conclusion that, like states and provinces, national governments cannot comply with NAFTA by according foreign investments less than the most favourable treatment they accord to their own investments.

. . . The Tribunal thus concludes that “no less favourable” means equivalent to, not

57. See: *Id.* at ¶¶ 250-51, 254; *Pope & Talbot v. Canada*, 7 ISCID Rep. 102 (2005), NAFTA/UNCITRAL Trib. Award on the Merits of Phase 2, at ¶¶ 70 (2001); *Int’l Thunderbird Gaming Corp. v. The United Mexican States*, Separate Opinion, ¶¶ 175-77 (Jan. 26 2006), (NAFTA Trib.). Another example can be found in the *Siemens AG v. Argentina*, Case No. ARB 02/7, Award, ¶¶ 320-321 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009) (in which the Tribunal considered the national treatment analysis within the context of its construction of a ‘fair and equitable treatment’ provision). The Tribunal summarized the state of the law on national treatment as follows:

Whether 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*, where the tribunal considered different treatment on a *de facto* basis to be contrary to the national treatment obligation under Article 1102 of NAFTA. 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.

Siemens AG v. Argentina, Case No. ARB 02/7, Award, ¶¶ 320-321 (Feb. 6, 2007), 14 ICSID Rep. 518 (2009) (emphasis added).

better or worse than, the best treatment accorded to the comparator.⁵⁸

Treatment accorded under a measure will be considered less favourable when an investor demonstrates that a comparable enterprise, operating in like circumstances, has enjoyed some form of competitive economic advantage as between it and the investor/investment. The burden rests upon a claimant investor to prove it has suffered loss or damage because of the treatment accorded under a given measure. It does so by demonstrating that, but for the application of the measure, the investor/investment would have performed better, economically, within the circumstances of the relevant industry, than it actually did.

Once an investor has established that *prima facie* breach of either Article 1102 or Article 1103 has occurred,⁵⁹ the analysis turns to the question of whether the difference in treatment was justifiable in the circumstances. As the Panel in *U.S. Trucking Services* observed, differences in treatment received under a measure could be justified if the comparators did not deserve to receive the same treatment because of the circumstances in which the measure applied to them. The Tribunal also cautioned, however, that this "like circumstances exception" must be construed so narrowly as to strip the national treatment obligation of any true meaning.⁶⁰ The justification for applying what is effectively a "like circumstances exception" has been explained by various tribunals. For example, in construing a FET clause as though it were an NT clause, the Tribunal in *Parkerings v. Lithuania* stated:

Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the malicious intent of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances and the context.⁶¹

It would be impossible for an investor, in making out its *prima facie* case, to address

58. Pope & Talbot v. Canada, 7 ISCID Rep. 120 (2005), NAFTA/UNCITRAL Trib. Award on the Merits of Phase 2, at ¶¶ 41-42 (2001).

59. See, e.g., Int'l Thunderbird Gaming Corp. v. The United Mexican States, at ¶¶ 105-106; United Parcel Service of America, Inc. v. Canada, Decision on Jurisdiction, ¶ 84 (Nov. 2 2002), 7 ICSID Rep. 288 (2005); Int'l Thunderbird Gaming Corp. v. The United Mexican States, Award, ¶ 176 (Jan. 26, 2006), (NAFTA Trib.).

60. In the Matter of Cross-Border Trucking Services, NAFTA Trib. at ¶¶ 258-60.

61. Parkerings-Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/05/8, Award on Jurisdiction & Merits, ¶ 368, IIC 302 (2007).

the universe of reasons as to why the differential treatment accorded to it was unreasonable and/or disproportionate in the circumstances. Past tribunals have accordingly looked to the respondent to provide such justification.⁶² While the legal burden will obviously remain with the claimant, once a *prima facie* case has been made out it will behoove the respondent to supply an explanation as to why the differential treatment was reasonable and proportionate in relation to the objectives it claimed for the measure at the time it was imposed. The rationale for this step was explained in the *Pope & Talbot* Award, and in the separate opinion in *UPS v. Canada*, as follows:

Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA.

In one respect, this approach echoes the suggestion by Canada that Article 1102 prohibits treatment that discriminates on the basis of the foreign investment's nationality. The other NAFTA Parties have taken the same position. However, the Tribunal believes that the approach proposed by the NAFTA Parties would tend to excuse discrimination that is not facially directed at foreign owned investments. A formulation focusing on the like circumstances question, on the other hand, will require 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 or other foreign owned investments. That is, once a difference in treatment between a domestic and a foreign-owned investment is discerned, the question becomes, are they in like circumstances? It is in answering that question that the issue of discrimination may arise.⁶³

...

It is possible for two investors or enterprises to be in the same sector or to be in competition and nonetheless be quite unlike in respect of some characteristic critical to a particular treatment. The most natural reading of NAFTA Article 1102, however, gives substantial weight to a showing of competition between a complaining investor and an investor of the respondent Party in respect of the matters at issue in a NAFTA dispute under Article 1102. Article 1102 focuses on protection of investors and investments against discriminatory treatment. A showing that there is a competitive relationship and that two investors or investments are similar in that respect establishes a *prima facie* case of like circumstances. Once the investor has established the competitive relationship between two investors or investments, the [strategic] burden shifts to the

62. See, e.g., *Feldman v. Mexico*, at ¶¶ 177 *Feldman v. Mexico*, ¶¶ 177; Appellate Body Report, *United States-Measures Affecting Imports of Woven Wool Shirts and Blouses from India*, ¶ 14, WT/DS33/AB/R (Apr. 25, 1997); or *Asian Agricultural Products Limited v. Republic of Sri Lanka*, ICSID Reports, 526, 552 (1990) (in which it was observed: "In case a party adduces some evidence which prima facie supports his allegation, the burden of proof shifts to his opponent."). Requested FN for this as well.

63. *Pope & Talbot v. Canada*, NAFTA/UNCITRAL Trib. Award on the Merits of Phase 2, at ¶¶ 78-79 (2001), 7 ICSID Rep. 119-120 (2005).

respondent Party to explain why two competing enterprises are not in like circumstances.⁶⁴

Although a bald discrimination on the basis of nationality cannot be salvaged by assertion of governmental policy objectives, where the claim of national treatment violation rests on the effects of decisions not expressly predicated on nationality a different standard applies . . . There must be limits to the reach of policy justifications offered to support national treatment discriminations – that is, of justification offered to establish the unlikeness of circumstances under Article 1102 . . . But in my view, those limits should not be imposed through an overly critical examination of governmental policy choices by arbitral tribunals.⁶⁵

Delivery of the respondent's answer to the *prima facie* claim would then shift the strategic burden back to the claimant, who must rebut any reasonable justification provided. At the end of the day the tribunal will determine, on a balance of probabilities, whether the claimant made out a valid claim and whether the respondent succeeded in providing a reasonable and proportionate justification for the less favourable treatment allegedly received. What we have yet to see, thus far, is a thoroughgoing exposition of what, precisely, the nexus between the purported reason for the measure and the actual character or operation of the measure is. The *Pope & Talbot* Tribunal mentioned the idea of a "rational" connection, almost in passing, whereas its treatment of the justification put forward by the respondent seemed to hew closer to a "reasonable" connection requirement.⁶⁶ Another alternative would be to accept any excuse that appeared to be plausibly related to the purported purpose for the measure, whereas yet another option would be to demand that the measure be proved "necessary" to meet the purported policy goal. The way one delineates this relationship will largely determine the outcome of the case.

The third prong of the TNLF analysis thus essentially returns us to the familiar ground of balancing our obligation to maximise the *grundnorm* of equality and non-discrimination in construing what "treatment no less favourable... in like circumstances" ought to mean, with the good faith exercise of police powers, which are derived from the principle of sovereign equality. Varying degrees of deference ought to be available for the arbitrator's consideration, depending upon the character of the risk the State claims it has sought to reduce. For example, more leeway might be granted to respondents who have articulated a legitimate policy justification on the grounds of the protection of human health or the environment, whereas other justification may attract closer scrutiny (thereby requiring the respondent to prove the necessity of the measure, rather than just

64. UPS v. Canada, 7 ICSID Rep. 293 (2005) (opinion of Cass, J.). To be fair, as Prof. Alford noted, Arbitrator Cass made reference to WTO cases (provided by the claimant in support of the same propositions) in rendering his opinion.

65. *Id.*

66. Pope & Talbot v. Canada, NAFTA/UNCITRAL Trib. Award on the Merits of Phase 2, at ¶¶ 78-80 (2001), 7 ICSID Rep. 119-120 (2005).

its relation to the purported policy goal).⁶⁷ The danger that lies in being too generous on this score is that it could undermine the delicate balance between honouring the *grundnorm* and providing room for governmental discretion. Given the history of the TNLF standard as a potent device for safeguarding the promise of the "open door," arbitrators would probably be best advised to handle the "like circumstances" test with a light touch.

VI. Conclusion

There is much to be commended in Prof. Alford's contribution to the ongoing discussion on convergence between ITL and IIL regimes, which itself falls into the wider public international law discourse concerning fragmentation.⁶⁸ I would only suggest that, at least in so far as ITL and IIL are concerned with respect to the TNLF standard, we are not dealing with convergence, but rather with re-convergence (or perhaps just with coalescence towards a more practical and historically accurate normative approach to the transnational regulation of municipal economic measures).

And, finally, I would only ask that, before we wholeheartedly embrace this most desirable reunion of international economic law *gestalts* – which have suffered seven long decades of estrangement – we do our respective parts to give this reconciliation every opportunity to succeed. The key to any lasting relationship is the honest embrace of one's partner for whom he or she is, not whom one might want, or otherwise believe him or her to be. In the same way, let us please not confuse our understanding of how NT works in the ITL context for how TNLF works (or ought to work) in the IIL. We owe this much to both ITL and IIL, if we aim to ensure that the anticipated renewal of their connubial harmony lasts.

67. See, e.g., Weiler, *supra* note 45 at 240-244.

68. See, e.g., Rep. of the Int'l Law Comm'n, 58th Sess., May 1-June 9, July 3-Aug. 11, 2006, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006); Steven R. Ratner, *Regulatory Takings in Institutional Context: Beyond the Fear of Fragmented International Law*, 102 AM J. INT'L L. 475 (2008); Ruti Teitel & Robert Howse, *Cross-Judging: Tribunalization in a Fragmented but Interconnected Global Order*, 41 N.Y.U. J. INT'L L. & POL'Y 959 (2009).