system, but has tended to play a relatively minor role in the jurisprudence—in part because intentional discrimination between trading partners is relatively rare, and the GATT envisions a key carve-out to MFN for regional integration agreements like free trade agreements (FTAs) and customs unions. Meanwhile, MFN has taken on an expanded role in investor-state dispute settlement (ISDS). In particular, and quite controversially, some arbitral tribunals have entertained investor-claimant attempts to import substantive and procedural provisions into a BIT, from other, more favorable treaties, under the rubric of MFN treatment. As a result, more recently, MFN has also become a key site for negotiation in investment treaty drafting.

It is not our intention to revisit the classical debates about non-discrimination in trade and investment law. For example, we mostly leave to the side questions like whether the proper test for non-discrimination in trade analyzes only a measure's effects, or whether the analysis should take into account both aims and effects; or what ought to be the proper regulatory balance between non-discrimination (e.g. GATT Arts. I and III) and the law of justification (GATT Art. XX). Similarly, we mostly avoid questions of whether CIL requires states to afford foreign investors merely NT (the Calvo Doctrine) or a more absolute international minimum standard (IMS) of treatment; or, indeed, how far BITs and FTA investment chapters go in enshrining the IMS, and how far they go beyond it.

Our goal is to push the ball considerably beyond these perennial questions—focusing on the resurgence and evolution of non-discrimination at the cutting-edge of IEL. Through a round of six questions, below, we consider to what extent the foundational principles of NT and MFN are in a state of flux. What new questions have arisen? And which questions remain open? Do NT and MFN track across trade and investment? What might account for any differences? Might we be seeing a (re)turn away from absolute standards toward a more minimal non-discrimination regime in trade and/or investment? And to what extent would such a shift be desirable?

The below reflects only the beginning of a conversation on what we take to be a resurgent centrality of the law of non-discrimination, and where we might go from here. It is presented in dialogue form, to reflect how our discussion unfolded at the 112th ASIL Annual Meeting.

I.

Julian Arato

To what extent are the conceptual contours of non-discrimination a live issue in trade and investment? Where do you see the biggest open questions? Are the old fights becoming relevant again? And what new frontiers?

Remarks by Tania Voon*

doi:10.1017/amp.2019.65

One of the most important developments in non-discrimination in the investment context has been the inclusion in the investment chapter of the Trans-Pacific Partnership (TPP) of footnote 14, which reads:

> For greater certainty, whether treatment is accorded in "like circumstances" under Article 9.4 (National Treatment) or Article 9.5 (Most-Favored-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

* University of Melbourne.

https://doi.org/10.1017/amp.2019.65 Published online by Cambridge University Press

Following the United States' withdrawal from the TPP, the remaining eleven TPP signatories negotiated to convert the TPP into the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), which has now been signed by those eleven countries and awaits entry into force.

The CPTPP retains footnote 14, which is a significant provision because of its departure from the general approach of the World Trade Organization (WTO) to likeness and non-discrimination. Specifically, the WTO Appellate Body has long rejected the notion of an "aims and effects" test, according to which the likeness of goods, services or service suppliers could be assessed by taking into account the regulatory purpose of the challenged measure (whereby, for example, a bicycle is not like a motorbike in connection with an environmental measure because of their different environmental impacts). The Appellate Body has also rejected the relevance of regulatory purpose in identifying less favorable treatment under Article I (most-favored nation treatment) or Article III:4 (national treatment) of the GATT 1994. The Appellate Body affirmed this approach in *EC-Seal Products* in 2014.

I see footnote 14 as a welcome departure from this traditional approach in WTO law to non-discrimination. The traditional approach leaves too much work to be done by the "general exceptions" in Article XX of the GATT 1994 and the corresponding exceptions in Article XIV of the General Agreement on Trade in Services (GATS). Thus, the Appellate Body had to construct a different approach to the non-discrimination obligation in Article 2.1 of the Agreement on Technical Barriers to Trade (TBT), because that agreement lacks a general exceptions provision. The Article 2.1 "gloss" introduced by the Appellate Body specifies that where the detrimental impact of a challenged measure on an imported product stems exclusively from a legitimate regulatory distinction, the measure does not accord less favorable treatment contrary to Article 2.1.[1] While not targeting the characterization of likeness or like products in the manner of footnote 14, the Appellate Body's clarification in respect of Article 2.1 of the TBT Agreement properly recognizes the relevance of regulatory purpose to the identification of discrimination.

An important advantage of both footnote 14 of the CPTPP and the TBT gloss is that they do not limit the range of legitimate regulatory objectives to an exhaustive list. In contrast, under GATT Article XX and GATS Article XIV, the respondent must be able to fit their claimed objective within one of the enumerated paragraphs, such as the protection of human, animal, or plant life or health or the conservation of exhaustible natural resources. Some of these paragraphs are broad, for example the reference to public morals in paragraph (a). However, if we try to fit too much within these paragraphs a risk of abuse arises. Additional objectives that one might expect to be regarded as legitimate do not obviously fit within any of the paragraphs, such as wealth redistribution, or aspects of human rights.

Remarks by Jennifer Thornton*

doi:10.1017/amp.2019.66

The United States and its TPP partners negotiated footnote 14 in the context of a larger effort to clarify the scope of key substantive obligations in the Agreement's investment chapter, with a view to better insulating legitimate public welfare measures from challenge before Investor-State Dispute Settlement (ISDS) tribunals constituted pursuant to its terms. While some TPP partners originally advocated for the inclusion of a "General Exceptions" article in the investment chapter along the lines of GATT Article XX, the TPP parties ultimately concluded that ISDS tribunals typically have accorded more deference to states when interpreting non-discrimination obligations in investment agreements than has the WTO Appellate Body when interpreting the GATT. For that reason, the

[1] *See, e.g.*, Appellate Body Report, US – Clove Cigarettes, [174], [181].

* Former United States Trade Representative.

https://doi.org/10.1017/amp.2019.65 Published online by Cambridge University Press