Remarks by Federico Ortino*

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When it comes to trade law, it is true that there appear to be certain signs that we are moving back to non-discrimination and away from deeper forms of integration. However, this is possibly (and hopefully) only a limited and temporary shift. The strongest evidence of such a shift regards the apparent interpretation by the WTO Appellate Body (AB) of the key provisions in the TBT Agreement in such a way as to give prevalence to the national treatment standard in Article 2.1 over the necessity requirements in Article 2.2. For example, in *US – Tuna II* (Mexico) the AB found the U.S. dolphin-safe regulations under review inconsistent with Article 2.1, while also reversing the panel finding that the U.S. dolphin-safe regulations were inconsistent with Article 2.2. Such a result is surprising if one considers the general agreement among commentators that the disciplines embodied in the TBT Agreement (as well as in the SPS Agreement) went beyond the non-discrimination obligation of the GATT.

There is no doubt that the non-discrimination principle, particularly found in the national treatment standard, remains one of the cornerstones of WTO law in combatting protectionism. However, in my view, there are at least two reasons why the interpretation given by the AB of Article 2.1 TBT should be abandoned. First, it is not in line with a proper balance between sanctioning nationality discrimination based on disparate impact between domestic and imported competitive products, on one hand, and permitting members' pursuit of legitimate public policies through reasonable measures. While the AB has managed to find that balance in its interpretation of GATT Articles III and XX over the years, it appears to have so far failed when it comes to TBT Article 2.1. In this latter context, and despite the AB attempt to read in to Article 2.1 a so-called "public policy justification" (through the concept of "legitimate regulatory distinctions"), the practical result is that the balance is skewed excessively in favor of disparate impact on imported products.

Second, there must be a better (i.e., more limited) interpretation of the non-discrimination provision in the TBT, that is in line in particular with the object and purpose of one of the so-called "new generation" agreements. Contrary to the GATT, there is no mention of eliminating discriminatory treatment in the preamble of the TBT. Instead, the emphasis there is on ensuring that technical regulations and standards "do not create unnecessary obstacles to international trade" and thus permitting measures inter alia "necessary for the protection of human, animal life or health" as long as "they are not applied in a manner constituting a means of arbitrary or unjustifiable discrimination." Accordingly, the focus of the TBT (and thus the interpretation of its key provisions) should be on the necessity requirements rather than on the non-discrimination principle.

III.

Julian Arato

Some argue that there is evidence the investment regime is moving in a similar direction, or that it ought to be pushed back to a non-discrimination regime (what might be termed a neo-Calvo approach).[1] *One example scholars have made much of is the recent "Agreement in Principle" on the Japan-EU Economic Partnership Agreement (JEEPA), which includes non-discrimination provisions without the typical absolute standards of treatment (e.g. FET and Expropriation). Do*

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[1] *See, e.g.*, Robert Howse, *The New Calvo Doctrine of the Trump Administration: Renegotiating the Investment Chapter of NAFTA*, Int'l Econ. L. & Pol'y Blog (July 7, 2017), *available at* http://worldtradelaw.typepad.com/ielpblog/2017/07/the-new-calvo-doctrine-of-the-trump-administration-renegotiating-the-investment-chapter-of-nafta.html

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you read the JEEPAthis way? More generally, do you see evidence of a shift away from absolute standards, toward non-discrimination paradigm, in investment treaties?

Remarks by Emi Nagaoka*

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When it comes to the investment agreement (IA) between Japan and the EU or the EU member states, which means not only the investment part of the JEEPA but also the new investment treaty that would be concluded in the future, it is not considered that Japan and the EU have reached agreement without the absolute standards of treatment (e.g. FET and expropriation). Indeed, the text of the investment part of the JEEPA presented on the European Commission's website, which has not been legally verified yet as of today (April 5, 2018), has not stipulated said absolute standards, and such investment part is even titled as "Investment Liberalization"[2] implying that only the non-discrimination provisions are provided. However, from the viewpoint of promoting investment as well as protecting the investors in the other countries, the level of liberalizing investment should not be decreased nor should the coverage of the standard or treatment be limited. In particular, FET is the most important standard of treatment for investors and most of them have relied on FET as their legal basis where they submit claims in the ISDS procedure. It is apparent that most countries also take the absolute standards important and necessary and the recent IAs including the CPTPP containing the absolute standards are considered to comply with such countries' perspective.

At the beginning of March 2018, Japan's chief negotiator officially declared that the remaining issue on the investment part which had not been contained in the JEEPA would be provided in the new IA between Japan and the EU or EU member states. Considering Japan's recent IAs and the Japanese policy and practice shown by those IAs, the absolute standards should be the essential element for Japan, and it is apparent that Japan could not have reached the JEEPA's agreement in principal on July 2017 without confirming that remaining issues such as the issue on the absolute standards would be contained in the new IA.

Federico Ortino

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Even when it comes to investment, despite appearances to the contrary, it does not seem to me that there is a shift to the non-discrimination principle. First, there is no doubt that absolute standards such as fair and equitable treatment or the provision on expropriation have by far overshadowed the relative standards, in particular national treatment. Second, while the MFN standard has, on the other hand, been a key provision in investment treaty arbitration, particularly as an

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[1] *See, e.g.*, Robert Howse, *The New Calvo Doctrine of the Trump Administration: Renegotiating the Investment Chapter of NAFTA*, Int'l Econ. L. & Pol'y Blog (July 7, 2017), *available at* http://worldtradelaw.typepad.com/ielpblog/2017/07/the-new-calvo-doctrine-of-the-trump-administration-renegotiating-the-investment-chapter-of-nafta.html

[2] According to the text of the JEEPA ("Agreement Between the European Union and Japan for an Economic Partnership") on the European Commission's website as of April 18, 2018, the investment part of that agreement is provided in Section B Investment liberalization of Chapter 8 Trade in Services, Investment Liberalisation and Electronic Commerce, *available at* https://eur-lex.europa.eu/resource.html?uri=cellar:cf1c4c42-4321-11e8-a9f4-01aa75ed71a1.0001.02/DOC_2&format=PDF#page=186.

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