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GROUP COMPARISON VERSUS BEST TREATMENT IN INTERNATIONAL ECONOMIC LAW NON-DISCRIMINATION ANALYSIS

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The sensitivity of international economic law non-discrimination analysis results from the need to protect the potential benefits flowing from trade liberalization and investment without encroaching excessively into national policy space. This is especially the position for origin neutral measures which, on the one hand, negatively impact trade or investment activities, but which, on the other hand, are defended on the basis that they further legitimate policy objectives such as public health or morals, environmental protection or animal welfare. The three elements of the analysis, comprising identification of comparators, treatment no less favourable (TNLF) and regulatory context, are therefore about defining the content, and circumscribing the limits, of *de facto* discrimination.

This is an interesting time in which to study this concept. Recent trade law cases have been decided under the hitherto dormant non-discrimination obligation in the World Trade Organization (WTO) Agreement on Technical Barriers to Trade (TBT).¹ This has required consideration of how this obligation, and others within the TBT, correspond with analogous provisions in the General Agreement on Tariffs and Trade (GATT).² While some doctrinal uncertainties remain, much more is now known about how the various jigsaw pieces fit together. Alongside the case law developments, academic interest has surged. Seminal works originally written in anticipation of these developments have been updated,³ while new work has aimed at influencing how adjudicators conceptualize the issues before them.⁴ In terms of the overall thrust of the literature, there seems to be a measure of consensus that doctrinal developments are now informed more by the need to protect policy space than they once were. In this regard, scholars have detected ‘a rise in regulatory autonomy’⁵ and the possible emergence of a ‘Trade Constitution 2.0’.⁶ Of course, there are also healthy differences of opinion and not just at the level of fine detail.⁷

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¹ Agreement on Technical Barriers to Trade (15 April 1994) LT/UR/A-1A/10 < <https://docs.wto.org> > (TBT).

² General Agreement on Tariffs and Trade (entered into force 1 January 1948) 55 UNTS 194 (GATT).

³ Gabrielle Marceau and Joel P Trachtman, ‘A map of the World Trade Organization law of domestic regulation of goods: The Technical Barriers to Trade Agreement, the Sanitary and Phytosanitary Measures Agreement, and the General Agreement on Tariffs and Trade’ (2014) 48 *Journal of World Trade* 351.

⁴ Robert Howse and Joanna Langille, ‘Permitting pluralism: The seal products dispute and why the WTO should accept trade restrictions justified by noninstrumental moral values’ (2012) 37 *Yale Journal of International Law* 367.

⁵ Michael Ming Du, ‘The rise of national regulatory autonomy in the GATT/WTO Regime’ (2011) 14 *Journal of International Economic Law* 639.

⁶ Sungjoon Cho, ‘Trade Constitution 2.0’ (*International Economic Law and Policy Blog*, 28 March 2014) <<http://worldtradelaw.typepad.com/ielpblog/2014/03/trade-constitution-20.html?cid=6a00d8341c90a753ef01a73d9c8289970d#comment-6a00d8341c90a753ef01a73d9c8289970d>>.

⁷ For example, while the necessity concept has been defended as the most useful means of restraining the reach of *de facto* discrimination, thereby protecting policy space, it has also been connected with the appraisal of measures which do not discriminate but which nevertheless create unjustified obstacles or restrictions, thereby potentially diminishing policy space. See, respectively, Gaëtan Verhoosel, *National Treatment and WTO Dispute Settlement: Adjudicating the Boundaries of Regulatory Autonomy* (Hart Publishing 2002); Nicolas F Diebold, ‘Standards of non-discrimination in international economic law’ (2011) 60 *International and Comparative Law Quarterly* 831.

In the investment law context, the recent *Bilcon v. Canada* award confirmed a national treatment infringement while further engagement with this norm can be expected in *Mesa Power v. Canada*.⁸ Of particular interest in the international economic law scholarship is the comparative work dealing with the trade and investment regimes. The fact that the very same measures challenged in the trade regime through intergovernmental dispute settlement may also be challenged through investor-state arbitration in the investment regime, under similarly framed non-discrimination norms, means that it is no longer sufficient (if it ever was) to focus only on one of these regimes. Naturally, therefore, an emerging theme of the literature is the extent to which doctrinal positions and developments in one regime should influence the other. The debate is informed by accounts of the historical development, political economies and institutional settings of the two regimes. This leads some commentators to understand the respective non-discrimination norms in a fundamentally different way,⁹ while others see greater scope for convergence.¹⁰

This article focuses on arguably the most divergent aspect of the non-discrimination analysis in the two regimes being the choice between the group comparison and best treatment approaches. Under the group comparison, it is necessary, in order to establish a national treatment violation, to demonstrate that the measure impacts disproportionately or asymmetrically against imported goods or foreign investments relative to domestic comparators. The best treatment approach is the opposite paradigm under which it is sufficient to demonstrate that an individual imported product or foreign investment encounters the burden of a measure when a domestic comparator does not. It is substantially easier to establish a violation under the best treatment paradigm. Here, the overall distribution of the positive and negative impacts of a measure as between domestic and foreign comparators is formally irrelevant. A single better treated domestic comparator will suffice, even if the measure generally burdens domestic comparators more than foreign comparators. In the trade regime, it is now reasonably well established that the TNLF standard requires a group comparison. This is reflected in the WTO Appellate Body's now often repeated dictum from *EC-Asbestos* that the treatment of the group of like imported products must be compared to, and be no less favourable than, the treatment of the group of like domestic products.¹¹ In contrast, the best treatment approach is more closely associated with the investment regime. It is a controversial doctrine as indicated by Canada's submission in the *Bilcon* arbitration under Chapter 11 of the North American Free Trade Agreement (NAFTA)¹²:

(...) the Claimants allege only that the treatment they were accorded was less favourable than some of the treatment accorded to a small sample of other EAs [environmental assessments] hand-

⁸ *Bilcon of Delaware, Inc v Government of Canada* (Award on Jurisdiction and Liability, 2015) PCA Case No 2009-04 (Bilcon); *Mesa Power Group, LLC v Government of Canada* (Notice of Intent, 2011) PCA Case No 2012-17.

⁹ Todd Weiler, *The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context* (Brill 2013). Writing in the context of how to safeguard state regulatory freedom in the two regimes, see Diane A Desierto, 'Public policy in international investment and Trade law: Community expectations and functional decision-making', <http://works.bepress.com/diane_desierto/6>.

¹⁰ Nicholas DiMascio and Joost Paywelyn, 'Nondiscrimination in trade and investment treaties: Worlds apart or two sides of the same coin?' (2008) 102 *American Journal of International Law* 48; Diebold (n 7); Jürgen Kurtz, 'The merits and limits of comparativism: National treatment in international investment law and the WTO', in Stephan W Schill (ed), *International Investment Law and Comparative Public Law* (Oxford University Press 2010) 243-278.

¹¹ WTO, *European Communities: Measures Affecting Asbestos and Asbestos-Containing Products – Report of the Appellate Body* (5 April 2001) WT/DS/135/AB/R [100] (EC - Asbestos).

¹² North American Free Trade Agreement (opened for signature 17 December 1992, entered into force 1 January 1994) (1993) 32 ILM 289 & 605 (NAFTA).

picked in support of their claim. They ignore the fact that (...) they were accorded the same treatment as many other domestic EA proponents. In doing so, they seem to claim that these instances of equal treatment are irrelevant because [NAFTA] Articles 1102 and 1103 require that Canada provide them with the “best” treatment, i.e. treatment no less favourable than every single domestic investor. This is an absurd and untenable interpretation of [NAFTA] Articles 1102 and 1103.¹³

The article presents a positive and normative analysis of these two approaches. Part I covers the trade law position. It begins with the seminal statement from *EC-Asbestos*, proceeding in turn to the pre-*Asbestos* and post-*Asbestos* positions. As indicated, the group comparison is reasonably well established in the trade regime. Nevertheless, there are statements in the GATT / WTO *acquis* which explicitly endorse best treatment, and others which are difficult to reconcile with the preference for a group comparison. As these statements have not been overruled, it is important to query their current status. This matter is of interest both in the context of trade law intergovernmental dispute settlement, and in the context of investor state dispute settlement in which there is reliance on the GATT / WTO *acquis*. The key theme of Part I is that the weight which should be attributed to apparent endorsements of best treatment depends on a number of considerations. Foremost is the distinction between *de jure* and *de facto* discrimination. It is argued that best treatment endorsements are only of note in alleged cases of *de facto* discrimination. Secondly, even in this context, it must be asked whether an endorsement of best treatment is operating as a firm legal principle, or merely as a device for circumventing evidential difficulties connected with a full quantitative group comparison. Thirdly, best treatment endorsements should not be considered in isolation from indications that evidence of disproportionate impact was influential in the evaluation of the measure. Part I concludes with the view that there is very little if any support for the best treatment approach in GATT/WTO *acquis*, particularly in light of the recent TBT case law. This is a vital point bearing in mind that some investment tribunals have found strong support for best treatment in this *acquis*.

Part II proceeds to the investment law position, beginning with the text of the NAFTA Article 1102 National Treatment principle. This provision arguably requires a best treatment approach and was interpreted as such by the *Pope & Talbot* tribunal.¹⁴ A different interpretation of this provision is proposed under which it is not understood as explicitly requiring best treatment. *Pope & Talbot* is then discussed in order to dispel the common understanding that this case provides strong support for best treatment. A further seven awards are evaluated with the key theme developed in Part I in mind. The objective is to discover the real extent of the support for best treatment in the investment law *acquis*. A different picture emerges from that in the existing literature, some of which gives a strong impression that a best treatment approach applies under the TNLF standard.¹⁵ It is only possible to accept this generalization when the TNLF standard is considered in isolation from the comparator element of the analysis. A holistic appraisal reveals that best treatment is not nearly as entrenched as it might be, even in a system based on arbitration which is more likely to generate different strands of analytical approaches than intergovernmental dispute settlement.

Part III considers whether investment tribunals should continue to consider evidence on the overall impact of challenged measures, or whether a robust best treatment standard should be more fully

¹³ *Bilcon of Delaware, Inc v Government of Canada* (Rejoinder of the Government of Canada, 2013) PCA Case No 2009-04 [179].

¹⁴ *Pope & Talbot Inc. v Government of Canada* (Award on the Merits of Phase 2, 2001) UNCITRAL (Pope & Talbot).

¹⁵ DiMascio and Pauwelyn (n 10) 76-77; Diebold (n 7) 844; Weiler (n 9) 435, 449 and 450; more nuanced – Kurtz (n 10) 264.

embraced. The analysis begins with a critique of the view that trade law and investment law national treatment provisions are fundamentally different in that the latter are concerned, not with nationality based discrimination, but with a broader concept of equality. If correct, this perspective might indeed favour best treatment in investment disputes. This is because asymmetry in the distribution of the positive and negative impacts of a measure between foreign and domestic entities is an evidential consideration which indicates (but does not establish)¹⁶ nationality based discrimination in origin neutral measures. This evidence can perhaps be dispensed with if the concern is not to detect discrimination on this prohibited ground. This article disagrees with this perspective. Non-discrimination in both regimes is about prohibiting nationality based discrimination, albeit that the investment regime may develop a distinctive and broader view of this concept.

The Part III analysis proceeds to the further distinctions between the two regimes which have been linked with best treatment in investment law. These include the ideas that the two regimes have different political economies geared towards protecting different values; that claimants cannot be expected to establish that challenged measures disproportionately impact foreign investments; that investors can be at greater risk than traders by reason of sunk costs; that investment cases can arise in the context of intense competition between the claimant and a single domestic comparator and that they can involve decisions addressed to individual investments as opposed to measures of general application. Both individually and cumulatively, these arguments do not support best treatment as a generally applicable concrete rule. This is simply because such a rule entails ignoring evidence which is relevant to nationality based discrimination – the distribution of the burdens and benefits of a measure as between domestic and foreign entities. On the other hand, there is scope for considering how the burden of proof should be allocated as this evidence may be more readily available to respondent states than claimants. The evidence must also be handled in a case specific manner. For example, to the extent that market share is divided mainly between two entities, one foreign and one domestic, the analysis should prioritize the difference in treatment between these entities without attributing much weight to the treatment of other entities with small market share. Finally, nationality based discrimination can be revealed by evidence other than the distribution of burdens and benefits such as evidence indicating that nationality based considerations have informed a decision taken by a discrete group of individuals and affecting only the claimant.

Part IV covers the *Bilcon* award which recently found a violation of the NAFTA Article 1102 national treatment norm. While the case did not ultimately pronounce on the status of the best treatment paradigm, it is regrettable that the tribunal did not engage in a clear identification and weighing and balancing of all the available evidence. The basic conclusion in Part VI is that best treatment has not, and should not, permeate into every stage of the investment law national treatment analysis. This is because evidence on the distribution of the positive and negative impacts of a measure as between domestic and foreign investments is an indicator of nationality based discrimination. Such evidence will have a stronger role to play in some cases than others. However, it must in principle be weighed and balanced along with all other reliable evidence when deciding whether there is a violation.

¹⁶ It is well understood that a prohibition on origin neutral regulations lacks normative force even when an asymmetric impact can be observed. This is because there may be a valid public policy explanation for this asymmetry which would need to be assessed somewhere – whether within likeness, TNFL, or under an exceptions provision. See, Federico Ortino, ‘From “Non-Discrimination” to “Reasonableness”: A Paradigm Shift in International Economic Law?’ (2005) Jean Monnet Working Paper No. 01/05 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=922524>.

I. GROUP COMPARISON OR BEST TREATMENT IN THE TRADE CONTEXT

EC-Asbestos

The analysis here works outwards from the Appellate Body's most well-known statements in *EC-Asbestos*. The case is also the appropriate starting point because it requires consideration of *de jure* and *de facto* discrimination, a distinction which is crucial to the group comparison / best treatment issue.

At issue was a French ban on the import and domestic manufacture and sale of asbestos fibres, analysed primarily as a possible violation of GATT Article III:4. Canada argued that prohibited asbestos-containing products on the one hand, and permitted substitutes on the other hand, were like products and that the former were subject to less favourable treatment.

Was this case about *de jure* or *de facto* discrimination? This depends on exactly how these terms are defined. However, perhaps the most common understanding is that *de jure* cases involve discrimination which is plain from the face of the measure while *de facto* cases require consideration of evidence and arguments beyond the face of the measure. In the tax context, a measure taxing imported cars more heavily than domestic cars would be a *de jure* violation of GATT Article III:2 first sentence. The measure distinguishes between cars based on a prohibited criterion – their origin. Here, neither the likeness nor the TNLF ('in excess of' in this context) norms play any role in terms of confirming the violation or exonerating the measure. They are completely superfluous. It follows that, within the TNLF analysis, the choice between the group comparison or best treatment approaches does not arise. Cases of possible *de facto* discrimination arise whenever measures distinguish between products on any basis other than origin, excluding measures which distinguish based on thinly disguised proxies for origin and which can therefore be viewed as equivalent to *de jure* violations. A measure establishing different tax rates for cars based on their carbon emissions may, or may not, involve *de facto* discrimination. The answer cannot be found on the face of the measure so that likeness and TNLF norms must be considered. Here, the choice between the group comparison and best treatment is intensely pertinent to the outcome.

Note that the paragraph above shifted attention from *Asbestos* and the possible Article III:4 violation to tax distinctions covered by Article III:2. This was deliberate as the distinction between *de jure* and *de facto* discrimination is at its clearest and simplest in the tax context. The utility of this reasonably clear distinction can be lost when tribunals use the term *de jure*, and, even more so, *de jure* discrimination in the context of alleged Article III:4 violations. Indeed, if we stick to the definitions above, it is entirely possible to argue that there is no such thing as a *de jure* violation of Article III:4. There are measures which explicitly (or *de jure*) treat the same domestic and imported goods differently. However, these are not cases of *de jure* discrimination, by reason of a cornerstone of GATT / WTO discrimination law originating from *US-Section 337*:

The words "treatment no less favourable" in [Article III] paragraph 4 call for effective equality of opportunities for imported products in respect of the application of laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products (...). On the one hand, contracting parties may apply to imported products different formal legal requirements if doing so would accord imported products more favourable treatment. On the other hand, it also has to be recognised that there may be cases where application of formally identical legal provisions would in practice accord less favourable treatment to imported products and a contracting party might thus have to apply different legal provisions to imported

products to ensure that the treatment accorded them is in fact no less favourable. For these reasons, the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4. In such cases, it has to be assessed whether or not such differences in the legal provisions applicable do or do not accord to imported products less favourable treatment (...).¹⁷

Once it is accepted that both formally different and formally identical treatment of like domestic and imported products may or may not amount to less favourable treatment, it must also be accepted that, as a general rule, it is only possible to allege a possible *de facto* breach of III:4. It is generally not possible to look at the measure, notice that it provides for formally different or identical treatment, and conclude from this that there is a violation. All we can say is that there may or may not be a violation depending on whether there is less favourable treatment. For some measures, it will be reasonably obvious that there is less favourable treatment. *Korea – Beef*, which involved the formal separation of the sale of domestic and imported beef, is a good example even though the Appellate Body devoted considerable attention to the TNLF standard.¹⁸ However, no matter how high the degree of obviousness, the measure is still generally a possible case of *de facto* discrimination. The most that needs to be conceded here is a need to preserve the possibility of something akin to a *de jure* Article III:4 violation for formally origin neutral distinctions which are a close proxy for origin.¹⁹

In light of this background, it can be argued that the panel misunderstood the distinction between *de jure* and *de facto* discrimination:

8.155 Inasmuch as the Decree does not place an identical ban on PVA, cellulose or glass fibre and fibro-cement products containing PVA, cellulose or glass fibres [permitted], we must conclude that *de jure* it treats imported chrysotile fibres and chrysotile-cement products [prohibited] less favourably than domestic PVA, cellulose or glass fibre and fibro-cement products [permitted].

8.156 Having established *de jure* discrimination on the basis of the Decree and, moreover, the European Communities not having submitted any evidence that might lead us to believe that the Decree is applied in such a way as not to introduce less favourable treatment for chrysotile fibres and chrysotile-cement products as compared with PVA, cellulose and glass fibres and fibro-cement products containing PVA, cellulose or glass fibres, we do not consider it necessary to determine whether there is any *de facto* discrimination between these products.

The panel clearly identifies *de jure* discrimination contrary to Article III:4. However, *de jure* discrimination must be indisputable from the face of the measure. This is not the position in cases (like *Asbestos*) in which a likeness analysis has to be undertaken. In addition, the very fact that the panel's likeness analysis was overturned by the Appellate Body, based on the health risks of asbestos products compared to safer substitutes, underlines that this was a possible case of *de facto* discrimination.

What might the panel have had in mind? Possibly, the panel was indicating that when the TNLF element is considered in isolation (likeness having been confirmed by the panel) there was *de jure*

¹⁷ *United States-Section 337 of the Tariff Act of 1930 – Report by the Panel* (7 November 1989) GATT BISD 36S/345 [5.11] (Section 337).

¹⁸ WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body* (10 January 2001) WT/DS161.169/AB/R [130]-[151].

¹⁹ James Flett, 'WTO space for national regulation: Requiem for a diagonal vector test' (2013) 16 *Journal of International Economic Law* 37, 87.

discrimination. At first glance this appears to make sense. A ban on products of Canadian origin while domestic like products are permitted surely constitutes less favourable treatment. However, this is only indisputable from the face of the measure if we prefer the best treatment approach over a group comparison in the TNLf analysis. Paragraph 8.155 above exhibits this preference. An imported product is banned while substitute domestic products, which are like products, are allowed. Indeed, it is significant that the *Pope & Talbot* investment tribunal viewed the *Asbestos* panel's statement as exhibiting a best treatment approach rather than using 'disproportionality as an element of its analysis of the requirements of national treatment'.²⁰ For this investment tribunal, '[o]nce the panel found domestic like products to asbestos, the imports from Canada could lay claim to treatment accorded those products'.²¹

In sum, if the *Asbestos* panel was thinking about the TNLf standard in isolation, there is indisputably a violation if (but only if) the banned product is entitled to the best treatment afforded to the like (or even a like) domestic product.

On the other hand, if a group comparison is required, there is a further analytical stage after the likeness analysis. It must be decided whether the group of like imported products, consisting of the like permitted and prohibited products advantaged and disadvantaged by the measure, are disproportionately disadvantaged relative to the same group of like domestic products. According to the Appellate Body in *Asbestos*:

(...) even if two products are "like", that does not mean that a measure is inconsistent with Article III:4. A complaining Member must still establish that the measure accords to the group of "like" imported products "less favourable treatment" than it accords to the group of "like" domestic products (...) [A] Member may draw distinctions between products which have been found to be "like", without, for this reason alone, according to the group of "like" imported products "less favourable treatment" than that accorded to the group of "like" domestic products.²²

This passage has been widely interpreted as requiring a group comparison. Shortly after the case, Ehling considered that:

The group in singular implies that there is only one group on each side which must, therefore, include all of the like products, whether favoured or disfavoured, under the origin-neutral measure (...). There is no less favourable treatment, when the quantitative ratio between favoured and disfavoured products is equivalent on both sides and the measure imposes no burden which is qualitatively heavier for foreign goods.²³

The Appellate Body's statement therefore requires an analytical stage under Article III:4 TNLf standard. The violation of this standard is not clear from the face of the measure just because an imported product is banned when a domestic like product is allowed. *Asbestos* was therefore a case of possible *de facto* discrimination, both in its entirety and when TNLf is considered in isolation. It is important to point out, however, that nothing turned on the choice between a group comparison or best treatment. As indicated, the Appellate Body did not consider the asbestos containing products and substitutes to be like products so that its statement above was an *obiter dictum*. Moreover, even

²⁰ *Pope & Talbot* (n 14) [60].

²¹ *ibid.* The Appellate Body report in *EC - Asbestos* was circulated the day after this Award so that Canada would not have been able to rely on this report during the *Pope & Talbot* hearings.

²² *EC - Asbestos* (n 11) [100].

²³ Lothar Ehling, 'De facto discrimination in WTO law: National treatment and most-favoured nation treatment-or equal treatment?' (2002) 36 *Journal of World Trade* 921, 943-944.

had the products been like, the measure would likely have fallen foul of a group comparison. Canada is among the world's primary sources of asbestos fibre while France does not mine asbestos or make asbestos products. Measures which fall foul of a group comparison automatically fall foul of a best treatment approach since this is a much lesser standard. The sensitive cases are those in which a measure survives a group comparison but would almost certainly fall foul of a best treatment approach as long as there is an imported product subject to a disadvantage not encountered by a like domestic product.

The Appellate Body has often repeated the group comparison dictum in its recent GATT Article III:4 and TBT Article 2.1 jurisprudence. However, before considering these affirmations, the analysis now turns to the pre *Asbestos* case law in order to assess the extent of support for the group comparison and best treatment approaches. As will be seen, some care is required in assessing the presence of the best treatment approach. Explicit statements endorsing best treatment need to be considered in context and discounted if irrelevant to the disposal of the case. At the opposite end of the spectrum, the question is whether any measures, which would or might have been exonerated under a group comparison, have been confirmed as violations based on best treatment. It must also be considered whether preferences for best treatment have been erased by the *Asbestos* dictum, or whether earlier statements remain as valid expressions of the GATT / WTO *acquis* capable of being applied in certain situations or under certain provisions.

The pre Asbestos position

*Malt Beverages.*²⁴

The most explicit endorsement of best treatment in the trade law *acquis* was provided in *Malt Beverages*:

The Panel did not consider relevant the fact that many of the state provisions at issue in this dispute provide the same treatment to products of other states of the United States as that provided to foreign products. The national treatment provisions require contracting parties to accord to imported products treatment no less favourable than that accorded to any like domestic product, whatever the domestic origin. *Article III consequently requires treatment of imported products no less favourable than that accorded to the most-favoured domestic products.*²⁵

While the emphasized sentence clearly reflects best treatment, the nature of the measure at issue substantially reduces the weight of this endorsement. The state excise tax exemptions available to the in-state producers of beer and wine in some US states were not available to any foreign producers. As such, the measure distinguished on the basis of a prohibited criterion - origin. This aspect of the case involved *de jure* discrimination contrary to Article III:2 first sentence. As noted, the likeness and TNLF analyses ('in excess' in the tax context) are superfluous when the origin based discrimination is indisputable from the face of measure. Analytical tools within these analyses are only required in order to decide the fate of measures which are possible cases of *de facto* discrimination. As such, there are two complementary ways to think about the emphasized sentence. First, the panel's endorsement of best treatment is of no relevance to the certain fate of the origin specific measure before it. The statement need not have appeared in the panel's analysis and the violation could have been explained in the clearer and more direct manner used in this paragraph. The second way to think

²⁴ *United States – Measures Affecting Alcoholic and Malt Beverages – Report of the Panel* (19 June 1992) GATT BISD 39S/206.

²⁵ *ibid* [5.17] (emphasis added).

about the sentence is that it would be entirely correct if it commenced with the additional phrase, ‘When tax measures distinguish explicitly on the basis of origin’ or some such words. However, without this addition, the sentence is clearly capable of being understood as applicable also to possible cases of *de facto* discrimination. So interpreted, the statement is an *obiter dictum* because of the *de jure* nature of the measure.

Another measure at issue in this case provides something close to an example of tax distinctions based on criteria which are a close proxy for origin. Mississippi applied a lower tax rate to wines produced from a certain variety of grapes native only to the south-eastern United States and the Mediterranean region. The panel found this tax treatment to imply ‘a geographical distinction’ affording ‘protection to local production of wine to the disadvantage of wine produced where this type of grape cannot be grown’.²⁶ This comes close to a statement that this measure involved a *de jure* Article III:2 first sentence national treatment violation based on a distinction which is a close proxy for origin. The complainant (Canada) could also have pleaded a *de jure* violation of GATT Article I, based on the advantage to wine produced in Mediterranean countries from the favoured grape variety. Given the possibility of thinking about this measure as involving *de jure* discrimination, the point is once again that the fate of this measure is known independently of the choice between group comparison and best treatment. A stated preference for best treatment in *de jure* cases does not operate as an analytical tool in order to reveal a violation. Such statements merely describe a consequence which flows from a prohibition on explicitly origin based discrimination.

This leaves the question of whether this panel dealt with any claims of possible *de facto* discrimination and whether, in respect of these claims, the preference was for group comparison or best treatment. Also at issue were origin neutral measures maintained by several states placing restrictions on point of sale, distribution and labelling of beer above certain alcohol contents. Canada argued that this measure discriminated against imported beer. Within its Article III:4 analysis, the panel assessed the likeness of beer above and below the thresholds using the ‘aim and effect’ methodology. As the likeness analysis was therefore informed by the language of Article III:1, it was pertinent to assess whether differentiations between products are made such ‘as to afford protection to domestic production’. As part of this analysis, the panel considered that the burdens resulting from the measures did ‘not fall more heavily on Canadian than on United States producers’.²⁷ Clearly, this is not a full group comparison. However, it is a clear indication that the panel was looking for disproportionate impact or asymmetry as evidence of protective application. As the panel seemed to be content that there was no such evidence, there was no protective application, and the likeness of beer above and below the thresholds was denied. The interesting observation here is that the ‘aim and effect’ approach to likeness in this case preserved regulatory autonomy in the same way as a group comparison under the TNL standard would have done had likeness been confirmed. Both enquiries can involve a search for asymmetric impact as evidence of *de facto* discrimination.

To conclude on *Malt Beverages*, the apparently strong endorsement of a best treatment approach was made in the context of a measure which was a *de jure* violation of Article III:2. The statement does not, therefore, endorse the use of a best treatment approach as a means of uncovering discrimination which is not already clear from the face of measure. In contrast, when the panel assessed another measure as a possible *de facto* violation of Article III:4, the panel referred to the lack of asymmetry as evidence of the absence of discrimination. This is at odds with a best treatment approach which merely considers whether an imported product is treated less favourably than a like domestic product.

²⁶ *ibid* [5.26].

²⁷ *ibid* [5.73].

This case is the focal point for claims that trade law discrimination analysis applies a best treatment approach. At issue was an EEC complaint against Section 337 of the United States Tariff Act of 1930 which regulated unfair methods of competition in imports including the import of goods infringing US patents. S337 investigations were carried out exclusively by the United States International Trade Commissions (USITC) in respect of imports only. However, patent holders could generally choose to institute proceedings against imports under S337, under federal district court procedures alleging breach of domestic patent laws, or in both fora. Domestically produced goods were subject only to district court procedures. The EEC argued that there was an Article III:4 violation based on the radically different and less favourable treatment of imports under S337 compared to domestic goods under the federal district court procedures.

In considering the panel's response, it is useful to work outwards from the passage which appears to be more consistent with a best treatment approach than a group comparison and which has been understood as such by an investment tribunal.²⁹

5.14 (...) the "no less favourable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favourable treatment of some imported products against less favourable treatment of other imported products. If this notion were accepted, it would entitle a contracting party to derogate from the no less favourable treatment obligation in one case, or indeed in respect of one contracting party, on the ground that it accords more favourable treatment in some other case, or to another contracting party. Such an interpretation would lead to great uncertainty about the conditions of competition between imported and domestic products and thus defeat the purposes of Article III.³⁰

The focus here on individual cases of imported products and the rejection of balancing, puts us in mind of a preference for best treatment under Article III:4. Ehring seeks to allay concern about this preference on the basis that the 'dispute dealt with a rule applicable only to goods of foreign origin, thus a case of overt discrimination, not one of *de facto* discrimination'. He goes on to note that 'origin-neutral rules by definition never provide for less favourable treatment within the same regulatory sub-group because imports and domestic products receive the same treatment. Hence the rejection of the "on the whole" comparison in this [facially discriminatory] jurisprudence, i.e. the inadmissibility of "balancing" cannot simply be transferred to origin-neutral rules'.³¹

I agree with this argument. Indeed, it was made above in different terms in relation to *Malt Beverages*. The fate of measures which exhibit *de jure* discrimination which is indisputable from the face of the measure is certain independently of the operation of any analytical tools within the likeness and less favourable treatment analyses. Put in different terms, the manner in which the measure operates in the marketplace is an irrelevant and superfluous consideration. Note, however, that this assessment only applies to measures exhibiting *de jure* discrimination as defined in this article, rather than also to possible cases of *de facto* discrimination. This is where I diverge from Ehring's point of departure in seeing *Section 337* as a case of overt (*de jure*) discrimination. This was, indeed, a case of different rules applicable to domestic and imported goods. However, in the context of regulatory measures

²⁸ *Section 337* (n 17).

²⁹ *Pope & Talbot* (n 14) [68].

³⁰ *Section 337* (n 17) [5.14].

³¹ Ehring (n 23) 947.

covered by Article III:4, the application of different rules may or may not amount to less favourable treatment. As the panel noted, ‘the mere fact that imported products are subject under Section 337 to legal provisions that are different from those applying to products of national origin is in itself not conclusive in establishing inconsistency with Article III:4’.³² Measures falling under Article III:4 are therefore usually possible cases of *de facto* discrimination other than when the different rules are a thinly disguised proxy for origin. It follows that the apparent rejection of the group comparison in the *Section 337* passage above cannot be marginalized on the basis that the case involved a *de jure* violation. However, a different approach can be used to explain the passage.

The passage rejects balancing the unfavourable and favourable impact of a measure on imports only. While this element of balancing must occur in a group comparison, it is only one side of the equation – the other side being the unfavourable and favourable impact of the measure on like domestic products. The real balancing in the group comparison is between both sides of the equation as opposed to within one side. The obvious riposte is that, as the panel rejected the balancing which must occur on one side of the equation, it can be taken to have rejected the group comparison. However, attention must then turn to exactly why balancing on one side of the equation was rejected.

The panel seemed to reject any balancing of more favourable treatment of some imports with less favourable treatment of others simply because of the difficulty (perhaps near impossibility) of reaching a reasonably robust conclusion on the outcome of such an exercise. This is shown by the immediate context in which the passage (paragraph 5.14) is located. In paragraph 5.12, the panel describes the US position on less favourable treatment as involving examination of the ‘actual results of past Section 337 cases’ and engagement with the noted balancing / offsetting exercise. The panel ‘doubted the feasibility’ of this approach without saying more. To elaborate, the weight attributed to favourable and unfavourable elements of treatment would frequently be contested such as to make the balancing exercise inherently complex and uncertain.

An example of this complexity and uncertainty can be provided. The Section 337 time limits for the completion of proceedings were short and fixed whereas no fixed time limits applied before a federal district court. The panel considered that this amounted to less favourable treatment on the basis that complainant patent holders would have greater opportunity than respondents to prepare cases before bringing complaints, and because ‘defence in general benefits from delay’.³³ The panel then noted a possible offsetting element. When the complaint fails, short time limits might benefit respondents by quickly ending commercial uncertainty for their business. For the panel, this did not ‘justify the less favourable treatment in other cases’. One can imagine the difficulty which the panel would have encountered had it considered the outcomes of individual Section 337 cases, even in relation to this single element, in order to attribute a proportion to the detrimental and beneficial outcomes for imports caused by the short fixed time limit. I am inclined to agree with the EEC argument that, ‘[s]uch an approach would be impossible to apply in practice, because it would be impossible to say when a rule discriminating against imports was offset and when it was not’.³⁴ This is surely why the panel fell back on basing its decision ‘(...) on the distinctions made by the laws, regulations or requirements themselves and on their potential impact, rather than on the actual consequences for specific imported products’.³⁵

³² *Section 337* (n 17) [5.11].

³³ *ibid* [5.19].

³⁴ *ibid* [3.17].

³⁵ *ibid* [5.12].

The point is reinforced by recalling the relative simplicity of the balancing exercises within and between both sides of the equation in other cases. In *Asbestos*, the relevant like (according to the panel) products were either banned or permitted. Therefore, the group comparison here can be undertaken as long as the relative proportions of banned and permitted products within the group of like domestic products, and the group of like imports, are known. Similarly, the treatment of products in different tax categories is known with certainty. However, in *Section 337*, elements of alleged less and more favourable treatment would be based on arguments likely to be contested.

While a quantitative group comparison was completely unfeasible in this case, the panel was reasonably confident that the differences between Section 337 and federal district court proceedings would generally or disproportionately work to the detriment of imports. As noted, imports could be subject to either regime or both, while domestic goods could only be subject to court proceedings. Therefore, for imports (but not domestic goods), complainants were able and likely to choose the regime least favourable to the respondent.³⁶

In sum, it is submitted that the following propositions can be gleaned from this case. Panels will assess whether measures which are possible *de facto* breaches of Article III:4 are likely to disproportionately disadvantage imports. However, they will avoid doing so by comparing the actual treatment of the groups of like domestic products and imports when this exercise is inherently uncertain and unlikely to generate a robust conclusion. Far from a rejection of asymmetry against imports, the case is about a qualitative search for possible / likely asymmetry when a quantitative exercise via group comparison is not feasible. So understood, the case necessarily survives the *Asbestos* dictum and provides little support for a best treatment approach in trade law.

Taking this interpretation as a hypothesis, what can be learnt from subsequent cases which have cited the passage rejecting the notion of balancing (para. 5.14) from *Section 337*? Is the hypothesis proved, or are there cases in which a group comparison, even when feasible, was rejected?

US – Taxes on Automobiles.³⁷

Of the measures at issue in this case, Ehring covers the graduated Gas Guzzler tax and the luxury tax noting that the panel based its findings here on the absence of ‘inherent asymmetry’ in the sense that these measures did not inherently disfavour imports.³⁸ For the most part, therefore, the case was about the absence of asymmetry / disproportionality leading to the absence of Article III:2 violations. In contrast, the panel’s review of the ‘two-fleet’ requirement as a possible *de facto* violation of Article III:4 seems, at first sight, to endorse a best treatment approach. This measure required all manufacturers to separately obtain a figure of at least 27.5 mpg for both their domestic and imported fleets of vehicles sold in the US. Manufacturers were therefore prevented from averaging together the mpg ratings of their imported and domestic cars. The EC argued that the two-fleet rule had been added at the behest of union pressure to prevent the major US auto makers from importing small cars in order to meet the economy target and, therefore, to keep small car production in the US. The panel found that the two-fleet rule ‘prevented manufacturers of large domestic cars from meeting the

³⁶ *ibid* [5.18].

³⁷ *United States: Taxes on Automobiles – Report of the Panel* (circulated 11 October 1994) GATT, DS31/R (US - Taxes on Automobiles).

³⁸ Ehring (n 23) 940.

[economy] requirement for their domestic fleet by adding to it small foreign cars'.³⁹ Small foreign cars were therefore in a less favourable position than small domestic cars.

The possible retort to this, by way of offsetting or balancing, is that manufacturers of large foreign cars were also prevented from meeting the economy requirement for their imported fleet by adding to it small domestic cars. Therefore, the measure potentially disadvantaged some small domestic cars. While the panel noted this possibility of balancing, it found that the two-fleet rule 'accorded to particular products of foreign origin conditions of competition less favourable than those accorded to like domestic products'.⁴⁰ Based on the *Section 337* dictum, the panel considered that, 'under Article III:4 a contracting party cannot justify less favourable treatment to an individual product by showing that other products receive more favourable treatment'.⁴¹

These findings look like an endorsement of best treatment by reason of the reference to 'particular products of foreign origin', and to 'an individual product'. Small foreign cars were entitled to the best treatment given to small domestic cars even though the measure potentially disadvantaged some small domestic cars. However, was this an endorsement of best treatment in circumstances in which a quantitative group comparison was not feasible? While a group comparison in this case would not have been as difficult to undertake as in *Section 337*, we are still a good distance away from the certain regulatory treatment of different products within the group of like products in *Asbestos* and in the tax context. A group comparison in *Taxes on Automobiles* would have compared the treatment of imported small cars disadvantaged and advantaged by the two-fleet rule, with the treatment of disadvantaged and advantaged domestic small cars. The proportions within each of the four categories would probably have been impressionistic and contested. After all, the panel noted with regard to the luxury tax that 'there was considerable uncertainty as to the proportion of foreign and domestic automobiles selling above and below the threshold'.⁴² It is perhaps unlikely that the quantitative burdens and benefits of the two-fleet rule would have been any clearer.

Notably, however, the panel did seem to be reasonably confident that there was an asymmetric impact here, based on its analysis under the Article XX(g) head of provisional justification. Here, it noted that the evidence 'suggested that separate foreign fleet accounting primarily served to inhibit imports of small cars', '(...) which did not contribute directly to fuel conservation in the United States'.⁴³ It follows that, even though disproportionality was not a strict legal requirement within the Article III:4 analysis, the panel clearly had this notion in mind when deciding whether the two-fleet rule should be confirmed as a violation or exonerated. This considerably reduces the significance which can be attached to a best treatment approach within the specific context of deciding whether there is a violation. It does not matter very much if evidence of disproportionality is not considered under Article III:4, if it is later considered under an exception provision. Indeed, it begs the question of why, if disproportionality is going to play a strong role under an exception provision, it should not be considered (qualitatively if not quantitatively) in order to determine whether there is a violation at all.

In sum, *Taxes on Automobiles* endorsed a best treatment approach in circumstances in which a quantitative group comparison may well have been difficult. More importantly, evidence of asymmetric impact clearly influenced the Article XX(g) analysis. In both this case and *Section 337*, notwithstanding the 'rejection of balancing passage', it is clear that evidence of asymmetric impact

³⁹ *US - Taxes on Automobiles* (n 37) [5.47].

⁴⁰ *ibid.*

⁴¹ *ibid* [5.48].

⁴² *ibid* [5.12].

⁴³ *ibid* [5.60].

was important to establishing or confirming the violations. It is therefore a mistake to consider the rejection of balancing passage in isolation when deciding what propositions these cases stand for.

US – Gasoline.⁴⁴

Bringing the discussion into the WTO era, a similar pattern is repeated in this case, albeit that the panel's analysis comes close to merely paying lip service to the *Section 337* dictum. The measure at issue was another possible *de facto* breach of Article III:4 involving formally different rules for domestic and imported gasoline. Importers had to meet a set statutory baseline for cleanliness, whereas domestic refiners were given individual baselines. The panel noted the less favourable treatment of 'a batch of imported gasoline which was chemically-identical to a batch of domestic gasoline that met its refiner's individual baseline, but not the statutory baseline levels'. 'In this case, sale of the imported batch of gasoline on the first day of an annual period would require the importer over the rest of the period [but not the domestic refiner] to sell on the whole cleaner gasoline in order to remain in conformity with the Gasoline Rule.'⁴⁵ This puts us in mind of a best treatment approach since the example is about the impact of selling one batch of imported gasoline relative to one batch of domestic gasoline, rather than all imported and domestic gasoline.

Relying on the *Section 337* dictum, the panel then rejected the US argument that the treatment provided to domestic and imported gasoline was, on the whole, equivalent. For the panel, '[t]his amounted to claiming that less favourable treatment of particular imported products in some instances would be balanced by more favourable treatment of particular products in others'. This was not accepted on the basis that Article III:4 was, '(...) understood as applicable to each individual case of imported products'.⁴⁶

However, the panel ended its analysis by noting that the treatment of imported gasoline was generally less favourable. Indeed, the asymmetry could hardly have been more pronounced. While almost all gasoline importers were required to meet the statutory baseline, '97 percent of US refiners did not and were not required to meet the statutory baseline'.⁴⁷

Canada – Periodicals.⁴⁸

There is one case, however, in which the Appellate Body relied on the *Section 337* dictum to endorse a best treatment approach without any accompanying direct statements identifying asymmetric impact. The measures at issue in *Canada – Periodicals* were intended to safeguard advertising revenues for domestic periodicals and, therefore, to ensure the viability of periodicals with distinctively Canadian content. These objectives were threatened by split run editions of US periodicals - those with the same editorial content as provided to the US market but with different advertising content specific to Canadian consumers. One of the measures was an 80% tax on the value of the advertising content in all split runs, whether produced domestically or imported. This tax measure was introduced in order to reinforce an import ban on split runs. The effectiveness of the import ban was degraded by the ability of foreign-based publishers to electronically transmit editorial

⁴⁴ WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Appellate Body* (20 May 1996) WT/DS2/AB/R (US - Gasoline).

⁴⁵ WTO, *United States: Standards for Reformulated and Conventional Gasoline – Report of the Panel* (20 May 1996) WT/DS2/R [6.10].

⁴⁶ *ibid* [6.14].

⁴⁷ *ibid* [6.15].

⁴⁸ WTO, *Canada: Certain Measures Concerning Periodicals – Report of the Appellate Body* (30 July 1997) WT/DS31/AB/R (Canada – Periodicals).

content to Canada for the printing of split runs. The Appellate Body confirmed the import ban as an Article XI violation and reviewed the tax under Article III:2 second sentence, finding first that imported split runs subject to the tax were directly competitive or substitutable (DCoS) with domestic non-split runs not subject to the tax. Given the magnitude of the tax difference, findings of dissimilar taxation and protective application followed.

The Appellate Body's reasoning in *Canada – Periodicals* seems to be an endorsement of best treatment as opposed to a search for disproportionality via comparison of the groups of DCoS imported and domestic products. Indeed, the Appellate Body noted that 'dissimilar taxation of *even some* imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provisions of the second sentence of Article III:2'.⁴⁹ The *Section 337* rejection of balancing dictum was then quoted, thereby effectively rejecting Canada's argument that claims of *de facto* discrimination under Article III:2 must examine the treatment of imports 'as a class'.⁵⁰ The only hint that shows that the Appellate Body might have had disproportionality in mind comes in its conclusion which refers to the tax affording protection to Canadian periodicals as opposed to Canadian non-split runs.

It is worth speculating on what a group comparison would have revealed in this case. The group comparison would only have been a potentially useful device if the proportions of imported and domestic split runs and non-split runs were based on what they might have been in the absence of both measures. In other words, the reference point for the group comparison would have been a point in time before the measures distorted the market. While this would have been an uncertain exercise, disproportionality might have been revealed. Canadian consumers probably had more interest in US editorial content than US consumers had in Canadian editorial content.⁵¹ This would produce high levels of imports of US split runs and relatively low levels of production and sales of split runs in Canada, destined for the US market. The introduction of the tax would then disproportionately apply to imported split runs for a short period of time until it became prohibitive of all split runs. To complete the group comparison, the evidence seemed to indicate roughly equal proportions for non-split run imported and domestic periodicals not subject to the 80% tax.⁵² Therefore, the neutrality of these proportions would not have affected a conclusion of overall disproportionality caused by the imbalance in the proportions of domestic and imported split runs subject to the 80% tax.

However, this group comparison might have been problematic in terms of revealing asymmetry and *de facto* discrimination. In order to ensure that advertising is placed in magazines with distinctively Canadian editorial content, it was necessary to remove split run magazines with US editorial content from the Canadian market, regardless of whether these magazines were printed in the US or Canada. Therefore the domestic product (magazines with Canadian editorial content) needed to be protected from both an imported product (split run US magazines printed in the US) and another domestic

⁴⁹ *ibid* 29 (emphasis added).

⁵⁰ *ibid* 12.

⁵¹ Both the panel and the Appellate Body noted this statement from a former Minister of Canadian Heritage: 'Canadians are much more interested in American daily life, be it political or sports life or any other kind, than vice versa. Therefore, the reality of the situation is that we must protect ourselves against split-runs coming from foreign countries and, in particular, from the United States.' *Canada – Periodicals* (n 47) 28; WTO, *Canada: Certain Measures Concerning Periodicals – Report of the Panel* (30 July 1997) WT/DS31/R [3.188] (*Canada – Periodicals*).

⁵² The Appellate Body noted that panel's statement that foreign magazines 'account for slightly more than half (50.4 per cent) of the entire circulation of English language magazines destined for the general public in Canada'. *Canada – Periodicals* (n 48) 27; *Canada Periodicals* (n 51) [3.29].

product (split run US magazines printed in Canada⁵³). Suppose that, without the tax, there was or might have been significant levels of split run US magazines printed in Canada. Upon the introduction of the tax, it would apply to the advertising content in this domestic product. This would be a factor indicating no asymmetry and no violation if the proportions of split runs printed in Canada and printed in the US were roughly equal. To reconcile this point with the previous paragraph, the unreciprocated level of Canadian interest in US editorial content would not only produce high levels of imports for US split runs, and relatively low levels of production and sales of split runs in Canada destined for the US market. It would also potentially produce high levels of another detrimentally affected Canadian product – split run US magazines printed in Canada.

In sum, a group comparison might have revealed that the measures operated in a roughly even handed manner as between the groups of badly treated and the groups of well treated DCoS products. Yet we are instinctively drawn towards the need to establish a violation here by reason of the protection of the ‘most’ domestic product (Canadian non-split runs) both from a ‘less’ domestic product (US split runs printed in Canada) and a US product (US printed US split runs). It may therefore be that the utility of a group comparison is partly lost in cases which do not fit with the traditional idea of protecting a domestic industry from import competition; cases in which a domestic product is just as much of a threat as imported products for the purposes of the objective pursued by the measure.

Other GATT Article III:2 second sentence cases.

Subsequent panels, in more straightforward cases fitting the traditional mould, have shed light on the operation of Article III:2 second sentence. These cases have confirmed that disproportionality is not required when searching for dissimilar taxation of DCoS products. However, they have also placed strong emphasis on disproportionality under the requirement of ‘so as to afford protection to domestic production’. Indeed, a recurring theme in these cases is that higher tax rates apply mainly to imported products. In *Chile – Taxes on Alcoholic Beverages*, the panel considered it sufficient that ‘certain of the imports are taxed dissimilarly compared to certain of the domestic substitutable products’,⁵⁴ thereby removing any need to show disproportionality at this stage. However, this requirement is effectively reintroduced when searching for protective application. For the panel, it was important to know ‘who receives the benefit of the dissimilar taxation’. This was ‘implicit’ in any consideration of the magnitude of the tax difference which ‘would not be particularly relevant if the products realizing the resulting benefits were imports’.⁵⁵ Protective application was also considered in *Philippines – Taxes on Distilled Spirits*. The panel noted that ‘*de facto* the measure results in all domestic distilled spirits enjoying the favourable low tax, while the vast majority of the imported spirits are subject to higher taxes’.⁵⁶ Disproportionality is therefore clearly an important evidential factor in uncovering *de facto* discrimination here.

GATT Article I.

To comment briefly on the position under GATT Article I, there are similarly no conclusive statements on whether a group comparison or best treatment approach applies. In *Canada – Autos*, certain parts of the Appellate Body’s analysis seemed to favour a best treatment approach. This observation is partly based on the manner in which the Appellate Body recalled the language of

⁵³ This is assuming that a split run US magazine printed in Canada is a domestic Canadian product.

⁵⁴ WTO, *Chile: Taxes on Alcoholic Beverages – Report of the Panel* (12 January 2000) WT/DS87/R and WT/DS110/R [7.97].

⁵⁵ *ibid* [7.123].

⁵⁶ WTO, *Philippines: Taxes on Distilled Spirits – Report of the Panel* (20 January 2012) WT/DS396/R and WT/DS403/R [7.182].

Article I as requiring, ‘that “*any advantage, (...) granted by any Members to any product originating in (...) any other country shall be accorded immediately and unconditionally to the like product originating in (...) the territories of all other Members*”’.⁵⁷ The choice of emphasis here indicates that favourable treatment given to a single product from country X must be extended to all like products from all WTO Members. Under this interpretation, there would be a violation even if a high proportion of like products from the complainant WTO Member were accorded the same favourable treatment as the favoured product from country X. However, the case involved pronounced disproportionality in the availability of the ‘advantage’. It is reasonably clear that the Appellate Body considered this to be an important consideration. It noted the ‘Panel’s conclusion that, in practice, a motor vehicle imported into Canada is granted the “advantage” of the import duty exemption only if it originates in one of a small number of countries (...)’.⁵⁸ The Appellate Body then confirmed the violation based on ‘both the text of the measure and the Panel’s conclusions about the practical operation of the measure’.⁵⁹

The development of Article I jurisprudence is likely to follow the same path as Article III jurisprudence. Article I covers discrimination between WTO Members not only in relation to border measures (*Canada – Autos*), but also in relation to internal taxes and regulations. There is no reason why a different approach should be applied depending on whether internal measures allegedly discriminate between imported and domestic goods, or between imports. There is similarly no reason why a harmonized approach here should not be extended to allegedly discriminatory border measures under Article I.

Summary of the pre Asbestos position.

This section has mainly considered the extent of support for the group comparison and best treatment approaches in the pre *Asbestos* case law. There are certainly passages in these cases which appear to strongly endorse a best treatment approach. However, there are also reasons to doubt whether these statements were a sufficient basis to impugn any measure in these cases.

In the first place, very little weight can be attributed to statements supporting a best treatment approach in cases involving *de jure* discrimination such as the state excise tax exemptions in *Malt Beverages*. The violations in these cases are established from the face of the measure, rather than through the tribunal’s best treatment analysis. In this context, endorsements of best treatment merely describe a consequence which flows from a prohibition on explicitly origin based discrimination. Cases involving possible *de facto* discrimination in which there is support for best treatment provide a stronger basis to argue that this concept was part of the GATT *acquis*. In *de facto* cases, tribunals have to choose what analytical tools to use in order to reveal possible violations and best treatment is a much easier standard to satisfy than a full quantitative group comparison. While a number of cases have recited the *Section 337* rejection of balancing passage, there was, to a greater or lesser extent, quantitative or qualitative evidence of asymmetry in all these cases. Sometimes, this evidence is overwhelming and of a quantitative nature as in *US – Gasoline*. In other cases, such as *Section 337* itself, panels have been strongly influenced by qualitative evidence that the measure is apt to operate disproportionately to the detriment of imported products. This case also indicates that panels will avoid searching for *de facto* discrimination via a full quantitative group comparison when this exercise is inherently uncertain and unlikely to generate a robust conclusion. This must still be the

⁵⁷ WTO, *Canada: Certain Measures Affecting the Automotive Industry – Report of the Appellate Body* (19 June 2000) WT/DS139/AB/R and WT/DS142/AB/R [79] (Appellate Body’s emphasis).

⁵⁸ *ibid* [80].

⁵⁹ *ibid* [81].

position in Article III:4 cases, even though the Appellate Body endorsed a group comparison in *Asbestos*.

Canada – Periodicals demonstrates further difficulties in undertaking a quantitative group comparison, this time under Article III:2 second sentence. A group comparison here might have produced a questionable result, because the protected domestic product was under threat not only from a DCoS imported product but also from a DCoS domestic product. It may be that a best treatment approach in cases of this nature is sufficient. The Appellate Body may have contented itself with asking whether Canada was openly seeking to protect a purely domestic product (Canadian non-split runs) from a purely imported product (imported US split runs). Given the positive answer and the magnitude of the tax differential, it is perhaps understandable that no reference was made to the potential domestic products also subject to the tax (US split runs printed in Canada).

Subsequent cases establish the general position under Article III:2 second sentence. Asymmetry is not a requirement when searching for dissimilar taxation of DCoS domestic and imported products. A best treatment approach applies. However, asymmetry strongly informs the ‘so as to afford protection’ analysis. *Canada – Autos* was an Article I case. It can be read as supporting best treatment, but there was pronounced asymmetry on the facts which the Appellate Body referred to in its conclusion.

Therefore, in every case containing statements which are arguably consistent with best treatment, other than *Canada – Periodicals*, asymmetry has played a strong role at some point in the analysis. There is always the argument that asymmetry merely confirms and reinforces a conclusion which has already been reached based on best treatment. However, I am more inclined to think that best treatment was used as a device to circumvent evidential difficulties which can arise under a full quantitative group comparison. This was almost certainly the position in *Section 337*, which, as noted, has traditionally been the focal point of claims that best treatment is part of the trade law *acquis*. It is entirely possible that there is now a stronger appetite among tribunals to overcome evidential difficulties, albeit that there will continue to be scenarios which defy a full quantitative group comparison.

The post Asbestos position

US – Clove Cigarette.

The *Asbestos obiter dictum* in which the Appellate Body called for a group comparison was confirmed in *US – Clove Cigarette*. The measure at issue was an origin-neutral ban on most flavoured cigarettes excluding tobacco and menthol flavours. The ban was directed towards reducing youth smoking. It was of concern to Indonesia – a significant producer of clove cigarettes. It argued that there was a TBT Article 2.1 national treatment violation. Much like the panel in *Asbestos*, the *Clove Cigarette* panel chose a narrow product scope for its likeness analysis. Indeed, the panel considered that it would be ‘exceeding its terms of reference’ to widen the enquiry as Indonesia’s panel request had identified the products at issue as ‘imported clove cigarettes *versus* domestic menthol cigarettes’ without referring to any other type of cigarette.⁶⁰

While a narrow product scope for likeness can be a precursor for best treatment, the panel went on to firmly reject this approach agreeing with the US that it was an ‘extreme view that had been squarely

⁶⁰ WTO, *United States: Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Panel* (24 April 2012) WT/DS406/R [7.147] (US-Clove Cigarette).

rejected by the Appellate Body' in *Asbestos*.⁶¹ The panel went on to explain that comparing only the treatment of imported clove cigarettes with domestic menthol cigarettes was equivalent to, and therefore satisfied, a group comparison. This was because the vast majority of Indonesian cigarettes imported into the US were clove cigarettes.⁶² With respect to the panel, this does not in itself establish disproportionate impact against Indonesian cigarettes until we know the corresponding proportion of like US cigarettes not subject to the ban, or at least the corresponding proportion of like US produced menthol cigarettes not subject to the ban. In a different section of its report, the panel indicated that domestically produced menthol cigarettes accounted for approximately 25 per cent of the entire cigarette market.⁶³ It can also probably be inferred that the panel agreed with Indonesia's argument that menthol cigarettes are mainly produced locally⁶⁴ and that only a negligible proportion are imported.⁶⁵

The US appealed the panel's less favourable treatment findings on the basis that it had failed to undertake the group comparison envisaged by the Appellate Body in *Asbestos*. The US considered that the panel should have considered the 'treatment of all domestic and imported cigarettes with characterizing flavors'.⁶⁶ Therefore, domestic flavoured cigarettes other than menthols, as well as menthol cigarettes from other countries were improperly excluded. This latter category raises the question of whether the group comparison in national treatment cases needs to encompass imported products from states other than the complainant. The US appeal also argued that the panel should not have limited its analysis to products on the market at the time the ban went into effect. The panel ought to have considered domestic flavoured cigarettes other than menthols on the market in the years preceding the ban. The US argued that the ban was enacted in response to an 'emerging trend of products' that US producers 'were actively exploring'.⁶⁷ Therefore, the panel ought to have considered not only the impact of the ban on US products in existence in the few years preceding the ban, but also US products which might have come into existence but for the ban.

A number of aspects of the Appellate Body's response are notable in terms of clarifying the requirement for and content of a group comparison. First, it is interesting that *Section 337* is referenced as requiring 'effective equality of opportunity for imported products'.⁶⁸ No reference is made to the rejection of balancing passage which, as noted above, has been cited with approval in a number of pre *Asbestos* cases including by the Appellate Body in *Canada – Periodicals*, albeit in the context of an Article III:2 second sentence violation. Secondly, the following statement can be regarded as the clearest possible affirmation of the *Asbestos* dictum with some added clarifications:

In sum, the national treatment obligation of Article 2.1 calls for a comparison of treatment accorded to, on the one hand, the group of products imported from the complaining Member and, on the other hand, the treatment accorded to the group of like domestic products. In determining what the scope of like imported and domestic products is, a panel is not limited to those products specifically identified by the complaining Member. Rather, a panel must objectively assess, based on the nature and extent of their competitive relationship, what are the domestic products that are like the products imported from the complaining Member. Once the universe of imported and

⁶¹ *ibid* [7.273].

⁶² *ibid* [7.276].

⁶³ *ibid* [7.289].

⁶⁴ *ibid* [7.50].

⁶⁵ *ibid* [7.52].

⁶⁶ WTO, *United States: Measures Affecting the Production and Sale of Clove Cigarettes – Report of the Appellate Body* (24 April 2012) WT/DS406/AB/R [24] (US-Clove Cigarette).

⁶⁷ *ibid* [26].

⁶⁸ *ibid* [176].

domestic like products has been identified, the treatment accorded to all like products imported from the complaining Member must be compared to that accorded to all like domestic products. The ‘treatment no less favourable’ standard of Article 2.1 does not prohibit regulatory distinctions between products found to be like, provided that the group of like products imported from the complaining Member is treated no less favourably than the group of domestic like products.⁶⁹

This passage rejects the US submission that the group of imported products should include products from other than the complaining Member. As discussed by Ehring, this position strengthens the national treatment obligation. It means that ‘every WTO Member is entitled to have its products protected against *de facto* less favourable treatment than that accorded to the group of like domestic products’. National treatment therefore goes beyond preventing ‘Members from granting preferences to their national products to the detriment of imports as a whole’.⁷⁰ There is also a pragmatic concern here. A group comparison between just the complainant and respondent states can sometimes be a difficult and contested exercise. To include the position of all other WTO Members, or even the major producers and exporters of the products in question, would be onerous to say the very least.

The passage also clarifies that panels cannot be limited to the range of domestic and imported products identified by the complaining Member. This is a necessary aspect of a group comparison since complainants have an incentive to narrow the range of like products which, if taken to the extreme of confining likeness to one imported and one domestic product, effectively brings the analysis back to a best treatment approach. As with the panel report, however, it is a point of regret that the Appellate Body does not indicate in this section of its report the proportion of menthol cigarettes consumed in the US that are domestically produced. Factoring in the 25 percent market share of menthols and Indonesia’s view of this position noted above, the group comparison clearly reveals asymmetry when almost all cigarettes imported from Indonesia are cloves, while almost all menthols consumed in the US are domestically produced, and when domestically produced cigarettes with other flavours were, according to the US, ‘on the market for a relatively short period of time and represented a relatively small market share’.⁷¹

Finally, the Appellate Body agreed with the parties that ‘Article 2.1 does not establish a temporal limitation on the evidence that the Panel could review’. Therefore, evidence that the ban ‘had “chilling” regulatory effects on domestic producers of flavoured cigarettes’ prior to its entry into force could be relevant.⁷² I am inclined to agree that all evidence which is pertinent to revealing *de facto* discrimination can and should be considered. However, when the group comparison at the time of the dispute reveals pronounced asymmetry, caution should be exercised before attributing much weight to other evidence indicating that the asymmetry would not have been as pronounced, or even absent, without the measure. While this may imbalance this part of the appraisal of the measure towards the complainant’s interests, it must be noted that the respondent can defend asymmetry as an incidental and acceptable side effect of a legitimate regulatory concern whether as the final step of the Article 2.1 analysis, or under GATT Article XX when the measure is challenged under Article III:4. In short, measures cannot be confirmed as violations merely because they disproportionately disfavour imports.

⁶⁹ *ibid* [194].

⁷⁰ Ehring (n 23) 971.

⁷¹ *US-Clove Cigarette* (n 66) [200].

⁷² *ibid* [206].

The meaning of less favourable treatment under TBT Article 2.1 was once again at issue in *US – Tuna II*. Mexico complained about the non-eligibility of its tuna exports for the US dolphin safe-label which was of considerable commercial value on the US tuna product market. The label could not be used for tuna caught using a fishing method referred to as ‘setting of dolphins’. Mexico argued that the measure deprived its tuna products of the competitive opportunities afforded to like products from the US and a number of other countries. Referring to its previous statements in *Cigarettes*, the Appellate Body reiterated that panels should consider ‘whether the technical regulation at issue modifies the conditions of competition in the relevant market to the detriment of the group of imported products *vis-à-vis* the group of like domestic products’.⁷⁴ Based on the panel’s factual findings, the group comparison was clearly satisfied. It had noted that, based on the current practices of the Mexican and US fleets, most tuna caught by Mexican vessels was not eligible for the label, while most tuna caught by US vessels was potentially eligible for the label.⁷⁵

Despite these proportions, the panel had found that there was no TBT Article 2.1 violation. It effectively considered whether the group comparison should be based on the current practices of the Mexican fleet, or on what these practices might have been had this fleet made different commercial choices in the direction of adapting in order to meet the dolphin safe eligibility criteria. In the panel’s words, the question was whether Mexican tuna products were ‘effectively denied access to the advantage provided by the label’.⁷⁶ Unsurprisingly, the panel thought not. Setting on dolphins could be practiced or not practiced by vessels of all nationalities. Therefore, any disadvantage encountered through non-eligibility for the label resulted from the choices of the Mexican fleet as opposed to the measure itself.⁷⁷ The measure did ‘not inherently discriminate on the basis of the origin of the products’.⁷⁸

The notion that this is an inapposite methodology stems from the high probability of a negative answer. It is rarely impossible for producers to adapt their product in order to gain access to an advantage afforded by the regulations of a foreign market. This could be the position, for example, when compliance with the measure requires the use of a certain raw material only available in the regulating state and not exported. However, such a measure would be an example of *de jure* discrimination because the measure imposes a requirement which is a proxy for origin. The panel’s approach therefore narrows the scope of *de facto* discrimination, and potentially to a significant extent. Domestic producers for whom the domestic market is likely to be important will be more naturally inclined to adapt to the regulation than foreign producers for whom individual export markets may be less important. It seems very dubious to base the absence of a violation partly on the observation that domestic producers quickly adapted to the regulation while some foreign producers chose not to. The panel’s approach also creates the possibility that the fate of the measure will depend, to some extent, on difficult evaluations of the costs of adaptation to the measure. When the costs are trivial, it is somewhat more acceptable to attribute any detriment to the private choice not to adapt to meet the regulation. Conversely, detriment flows from the measure itself when adaptation costs are

⁷³ WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Appellate Body* (13 June 2012) WT/DS381/AB/R (US-Tuna II).

⁷⁴ *ibid* [215].

⁷⁵ *ibid* [234].

⁷⁶ WTO, *United States: Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Report of the Panel* (13 June 2012) WT/DS381/R [7.291] (US – Tuna II).

⁷⁷ *ibid* [7.344].

⁷⁸ *ibid* [7.377].

prohibitive. Of course, most cases are likely to fall within the grey area between these positions. For these reasons, it is reassuring that the Appellate Body rejected the panel's approach.

For the Appellate Body, enquiring into whether 'imported products could somehow gain access to the advantage, for example, by complying with all applicable conditions' was not relevant to detecting less favourable treatment.⁷⁹ The panel's reasoning was 'difficult to reconcile with the fact that a measure may be *de facto* inconsistent with Article 2.1 even when it is origin neutral on its face'.⁸⁰ The Appellate Body went on to confirm detrimental impact and a modification of the conditions of competition based on the proportions above.

US – COOL. Both the panel and Appellate Body findings in *US – COOL* reinforce the notion that the group comparison must be based on the actual operation of the measure in the market place, as opposed to what that operation might have been had private operators responded to it in a different manner. The measure at issue established four country of origin labels for meat with eligibility for each depending on where specific livestock production and processing steps (birth, raising and slaughtering) took place. This was challenged as a TBT Article 2.1 violation. The panel found that the design of the COOL measure and its operation in the US market meant that the least costly way to comply was to rely exclusively on domestic livestock.⁸¹ The Appellate Body considered that this was a sufficient basis for a finding of detrimental impact under the Article 2.1 less favourable treatment analysis. It considered that a 'market's response to the application of a governmental measure is always relevant to an assessment of whether the operation of that measure accord *de facto* less favourable treatment to imported products'. Based on this response, the measure had given rise to 'adverse effects in the market, which disparately impacted imported products'.⁸² While the panel equated this disparate impact with a violation of Article 2.1, the Appellate Body found the panel's analysis to be incomplete and proceeded to consider whether the detrimental impact stemmed exclusively from a legitimate regulatory distinction.⁸³

MFN Under TBT Article 2.1 and GATT Article I. The cases above impregably establish a group comparison for alleged TBT Article 2.1 and GATT Article III:4 trade in goods national treatment violations. The most obvious extension would be to the MFN component of TBT Article 2.1 and, by analogy, GATT Article I claims dealing with matters covered by Article III:4 (internal regulatory measures). Indeed, this extension has been authoritatively endorsed at least at panel level.

The *Tuna* panel on an *obiter* basis (for it did not consider that the detrimental impact was attributable to the measure) endorsed the group comparison for Article 2.1 in general – both the national treatment and MFN components - as follows: '(...) what matters for the purposes of determining whether there is a violation of Article 2.1 is (...) whether the group of imported products is placed at a disadvantage (...) compared to the groups of like domestic and imported products originating in any other country.'⁸⁴

In contrast to *Tuna*, the MFN component of Article 2.1 was directly at issue in *EC–Seal Products* which involved a prohibition on placing all seal products on the EU market other than those falling

⁷⁹ *US-Tuna II* (n 73) [211].

⁸⁰ *ibid* [225].

⁸¹ WTO, *United States: Certain Country of Origin Labelling (COOL) Requirements – Report of the Panel* (23 July 2012) WT/DS384/R and WT/DS386/R [7.350] (US-COOL).

⁸² WTO, *United States: Certain Country of Origin Labelling (COOL) Requirements – Report of the Appellate Body* (29 May 2015) WT/DS384/AB/RW and WT/DS386/AB/RW [289] (US – COOL).

⁸³ *ibid* [293].

⁸⁴ *US-Tuna II* (n 76) [7.375] (emphasis in original).

under the Inuit Community (IC) and Marine Management exceptions. The panel here used much the same formulation as that provided above.⁸⁵ It went on to find that the relevant groups of seal products from each country were those subject to the prohibition and those not subject to the prohibition under the exceptions. When applying the MFN group comparison, the panel found that ‘all, or virtually all, seal products from Greenland are eligible to access the EU market under the IC exception, while the majority of like products produced by Canada do not conform to the requirements of the IC exception and thus are ineligible to benefit under the EU Seal Regime’.⁸⁶ As such the measure resulted in a detrimental impact on the competitive opportunities for the group of like Canadian imported products relative to the group of like Greenlandic imported products. On appeal, the Appellate Body reversed the panel’s finding that the Seal Regime was a technical regulation. It followed that the panel’s Article 2.1 findings were of no legal effect.⁸⁷

However, it is reasonably clear that the Appellate Body envisages a group comparison for the MFN component of Article 2.1. In *Cigarettes*, the Appellate Body considered it the duty of panels ‘under Article 2.1 to identify the products of domestic and other origins that are like the products imported from the complaining Member’. As noted above, this was in the context of correcting the panel’s overly narrow view of the likeness assessment. If a group comparison did not apply under the MFN component of Article 2.1, there would be no point in instructing panels to identify the range of imported products from other than the complaining Member which are like the products imported from the complaining Member. In other words, if best treatment applied under the MFN component, it would be sufficient for panels to merely assess the complainant’s view that a particular imported product is like a product from the complainant.

It would be inconceivable if these endorsements of the group comparison for the MFN component of Article 2.1 did not carry over to GATT Article I claims dealing with matters covered by Article III:4. While neither the panel nor the Appellate Body in *Seal Products* took the opportunity to put this beyond doubt by referring to groups of products from different states, it is again reasonably clear that the group comparison applies under Article I.⁸⁸ This is especially evident from the Appellate Body’s interpretation of Article I. The language below from *Seal Products* evokes the *Asbestos* passage⁸⁹ which established the group comparison for Article III:4:

[Under Article I:1] (...) any advantage granted by a Member to imported products must be made available “unconditionally”, or without conditions, to like imported products from all Members. However, as Article I:1 is concerned, fundamentally, with protecting expectations of equal competitive opportunities for like imported products from all Members, it does not follow that Article I:1 prohibits a Member from attaching any conditions to the granting of an “advantage” within the meaning of Article I:1. Instead, it prohibits those conditions that have a detrimental impact on the competitive opportunities for like imported products from any Member. Conversely, Article I:1 permits regulatory distinctions to be drawn between like imported products, provided

⁸⁵ WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Panel* (18 June 2014) WT/DS400/R and WT/DS401/R [7.149], [7.155] (EC-Seal Products).

⁸⁶ *ibid* [7.164].

⁸⁷ WTO, *European Communities: Measures Prohibiting the Importation and Marketing of Seal Products – Report of the Appellate Body* (18 June 2014) WT/DS400/AB/R and WT/DS401/AB/R [5.70] (EC-Seal Products).

⁸⁸ The panel did not refer to a group comparison for Article I, but nevertheless based the violation on the pronounced asymmetry produced by the measure with the ‘vast majority’ of seal products from Canada and Norway not meeting the IC exception and ‘virtually all’ Greenlandic seal products qualifying under the exception (*EC-Seal Products* (n 85) [7.597]).

⁸⁹ *EC - Asbestos* (n 11) [100].

that those distinctions do not result in a detrimental impact on the competitive opportunities for like imported products from any Member.⁹⁰

This passage begs the question of whether granting an advantage to imported products from one state, which satisfy a condition, while depriving non-complying like products from another state of the advantage, will ever not result in a detrimental impact on competitive opportunities. If the regulatory context is not considered at this stage of the analysis, the only obvious answer is that there will not be detrimental impact when the condition does not disproportionately burden the group of like imports from the complainant state relative to the group of like imports from another state. As for why the Appellate Body did not put the group comparison beyond doubt for Article I claims, the explanation is probably that the language ('any advantage' / 'any product') can be read as consistent with a best treatment approach. It is however regrettable that the Appellate Body in *Seals* has retained some of the uncertainty noted above in relation to *Canada – Autos*. MFN provisions can be expressed in terms of TNLF, as under TBT Article 2.1. This language does not require a group comparison any more than the language of Article I. However, it has been interpreted as such in the context of national treatment claims. There is no reason for a different approach in MFN claims.

Notwithstanding some remaining ambiguity, it is reasonable to claim that a group comparison in MFN claims is all but an explicitly established requirement. Such a confirmation is surely only a small final step away. The parameters of the MFN group comparison are likely to align with those of the national treatment group comparison. In Article 2.1 national treatment claims panels need only, indeed must only, compare the treatment of the group of like domestic products with the group of like imported products from the complainant. If this carried over to the MFN context, panels would compare only the treatment of the group of like imported products from a particular country (probably the country raised by the complainant) with the group of like products from the complainant. It is submitted that this is the correct approach. The settled position for national treatment is effectively that domestic products cannot be favoured over imports from any particular WTO Member, even if imports as a whole are not disfavoured. In the MFN context, the possibility of a successful claim should also be open even when imports as a whole are not disfavoured. The pragmatic concerns mentioned above also apply here. The group comparison becomes ever more complex and contested as the position imports from numerous states are considered.

Summary of the post Asbestos position.

These cases firmly entrench a group comparison resulting in a finding of asymmetry as a necessary condition for TBT Article 2.1 and GATT Article III:4 national treatment violations. The cases also come close to explicitly extending this requirement to TBT Article 2.1 and GATT Article I MFN claims. The *Section 337* rejection of balancing passage which can be (mis)interpreted as supporting best treatment is conspicuously absent from the recent cases. If this is a deliberate omission, it is a welcomed one. When the passage is considered in its immediate context within the case, it is clear that the panel only rejected a certain type of balancing requested by the respondent (one side of the group comparison equation) on the basis of the near impossibility that this exercise would cast any light on whether the measure disproportionately disfavoured imports. Based on other evidence pertaining to how the measure would very likely operate in practice, the panel was reasonably certain of disproportionate impact. Therefore, if, as is hoped, the *Section 337* rejection of balancing passage has gone, it should be replaced with the understanding that respondent states can and should present

⁹⁰ *EC - Seal Products* (n 87) [5.88].

evidence to demonstrate the absence of asymmetry, but that evidence which cannot assist in reaching a robust conclusion will be rejected.

The parameters of the group comparison have been clarified. First, in national treatment claims, the group of like imported products are confined to those from the complainant's origin. Secondly, panels have a duty to independently determine the range of imported and domestic products which are like. In practice, panels can be advised to be sceptical about the narrowness of the range of products raised by the complainant and the breadth of the range raised by the respondent. A narrow product scope serves the complainant by potentially bringing the standard to a best treatment approach – is this one imported product treated less favourably than the only domestic product which is like? Conversely, an expansive product scope serves the respondent by identifying domestic products which encounter the detriment of the measure and like imported products of the complainant which do not. Thirdly, parties have the opportunity to argue that the proportions of like domestic and imported products encountering the detriment of the measure at the moment in time the group comparison is undertaken should not be immediately accepted as dispositive of asymmetry or its absence. Evidence that the measure impacted on production patterns from an earlier point in time is admissible. Finally, it will be extremely difficult for a respondent state to demonstrate that depressed commercial opportunities for the group of like imported products results from the choices or private operators. Indeed, if one of the possible choices results in a detriment for imported products under a government measure (foreign producers choosing not to change their fishing method / domestic meet processors choosing to process only domestic meet), this detriment will be attributed to the measure, other than in circumstances which have yet to be clarified.⁹¹

The only trade in goods discrimination norm which has escaped recent attention is Article III:2 first sentence. However, there can be little doubt that a unified approach applies within Article III. This follows from the Appellate Body's statements on Article III as a whole and on the relationship between paragraphs 2 and 4:

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures.⁹²

We recognize that the relationship between these two provisions is important, because there is no sharp distinction between fiscal regulation covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation (...) but were able to use another form of regulation (...) to achieve those ends. This would frustrate a consistent application of the 'general principle' in Article III:1.⁹³

⁹¹ In several of the post *EC - Asbestos* cases considered, the Appellate Body noted as the final requirement for a GATT Article III:4 violation that, '...for a measure to be found to modify the conditions of competition in the relevant market to the detriment of imported products, there must be a "genuine relationship" between the measure at issue and the adverse impact on competitive opportunities for imported products' (*EC - Seal Products* (n 87) [5.101]; *US - COOL* (n 82) [270]; *US - Tuna II* (n 73) note 457 to [214]). This final requirement may have been included in order to give panels and the Appellate Body the possibility of considering regulatory context within the national treatment analysis when the public policy objective at issue cannot be sufficiently accommodated under the closed list of GATT Article XX.

⁹² WTO, *Japan: Taxes on Alcoholic Beverages – Report of the Appellate Body* (1 November 1996) WT/DS8/AB/R, WT/DS10/AB/R and WT/DS11/AB/R [16] (Japan – Alcoholic Beverages); repeated in *EC - Asbestos* (n 11) [97].

⁹³ *EC - Asbestos* (n 11) [99].

Based on these statements, it is almost self-evident that a unified approach applies within Article III. To apply a best treatment approach only under Article III:2 first sentence would have enormous implications in terms of limiting policy space under this provision and steering states towards non-fiscal regulation.

Conclusions on the GATT / WTO acquis

In terms of a conclusion on the entire GATT / WTO *acquis*, it is reasonable to claim that evidence showing that measures impact disproportionately on imported goods is at the very least highly pertinent for alleged *de facto* violations of the non-discrimination norms. Indeed, such evidence is usually indispensable and a necessary element for establishing a violation. The 'gold standard' by way of demonstrating disproportionate impact is the quantitative group comparison. However, depending on the nature of the measures at issue, it will not always be possible to reach a robust conclusion on the proportions of like imported and domestic goods which encounter the favourable and less favourable treatments. All reliable evidence capable of casting light on disproportionate impact must therefore be considered. A proper understanding of the GATT/ WTO *acquis* provides very little if any support for the best treatment approach.

II. GROUP COMPARISON OR BEST TREATMENT IN THE INVESTMENT CONTEXT

NAFTA Article 1102

The starting point for analysing whether the investment regime prefers a best treatment approach over the group comparison is NAFTA Article 1102. Many of the cases which elucidate the meaning of national treatment in the investment context have been decided under this provision, which arguably expressly requires a best treatment approach.

Article 1102: National Treatment

1. Each Party shall accord to investors of another Party treatment no less favorable 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 favorable 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 favorable than the most favorable 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.⁹⁴

The main consideration when interpreting Article 1102 is that the operation of paragraphs 1 and 2, applicable to national governments, must be reconciled with the operation of paragraph 3, applicable to states and provinces. There are two reasons for this as identified by the *Pope & Talbot* tribunal. The

⁹⁴ North American Free Trade Agreement, 32 ILM 289, 605 (1993).

opening phrase of paragraph 3 establishes an express linkage with paragraphs 1 and 2. Paragraph 3 is intended to explain how paragraphs 1 and 2 operate in the context of states or provinces.⁹⁵ Secondly, the relationship between the paragraphs cannot be understood such as to impose a stricter obligation on states and provinces under paragraph 3 than on the NAFTA Parties themselves under paragraphs 1 and 2.⁹⁶ Therefore, if paragraph 3 requires a Canadian province to provide an individual US investment with the best treatment accorded in like circumstances to an individual Canadian investment, paragraphs 1 and 2 must be interpreted as requiring the same of Canada. This is how paragraph 3 was interpreted in *Pope & Talbot*. According to the tribunal, paragraph 3 was included ‘simply to make clear that the obligation of a state or province was 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’.⁹⁷ While the tribunal did not expressly say so, paragraphs 1 and 2 were therefore understood as if they contained the phrase ‘most favorable treatment’.

This is an entirely plausible, but unsatisfying interpretation, for it leaves the question of why ‘most favorable treatment’ was not incorporated in paragraphs 1 and 2. The reason for this difference might be because paragraph 3 was intended to cover the situation where, for example, a Canadian province accords different treatment to in province investments and out of province Canadian investments. The province could be treating the investments of out of province investors less favourably or indeed more favourably than the investments of in province investments.⁹⁸ Therefore, the NAFTA drafters needed to respond to the possible perception within provinces of two different groups of domestic investments – in province and out of province. They did so by adding the ‘most favourable treatment’ language to paragraph 3, thereby requiring provinces to add foreign investments to the most favourably treated domestic group. This interpretation is different from that adopted by the *Pope & Talbot* tribunal, because the focus is on identifying the most favourably treated domestic group, rather than the best treatment given to ‘*any*’ domestic investment.

This interpretation, which gives the ‘most favorable treatment’ language a specific purpose in paragraph 3, is arguably corroborated the equivalent but different provision in the US Model BIT:

The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.⁹⁹

This provision recognizes the possible perception within regional governments of two groups of domestic investments. However, in contrast to NAFTA Article 1102(3), foreign investments under the US Model BIT are only entitled to be grouped with out of region domestic investments as opposed to in region domestic investments. Foreign investments may therefore be treated less favourably than in

⁹⁵ *Pope & Talbot* (n 14) [40] (emphasis in original).

⁹⁶ *ibid* [41].

⁹⁷ *ibid*.

⁹⁸ Canada has referred to this possibility in *Bilcon*: ‘Contrary to what the Claimants assert, Article 1102(3) requires only that a state or province must provide the better of the treatment that it provides to its own investors or to other domestic investors. In essence, it accounts for the possibility that a state or province will choose to provide its own investors with less favourable treatment than it provides other domestic investors. In such, instances, it is the treatment provided to other domestic investors that is the appropriate comparator for the purposes of Article 1102.’ See *Bilcon* (n 13) [180].

⁹⁹ United States Model Bilateral Investment Treaty (2012) art 3(3) (US Model BIT).

region domestic comparators. Because of this difference, the ‘most favorable treatment’ language is not needed in the US Model BIT.

The crucial insight here is that ‘most favorable treatment’ has a particular function in Article 1102(3). It requires that foreign investments must be grouped with either in province or out of province entities – whichever are the most favourably treated. Beyond this, the language does not need to be interpreted as having the additional function of imposing a best treatment requirement. The language must have a function, but it need not have two functions. Restricted to the first function, there is scope for asking how the measure impacts on investments in two groups; one composed of the claimant and other other foreign investments, the other composed of the relevant domestic investments be they in province or out of province. If all foreign investments (including the claimant) encounter the detrimental impact of the measure, while the domestic comparators do not, there will be a violation. On the other hand, if most foreign investments (excluding the claimant) do not encounter the detrimental impact, while most domestic comparator investments do, there is less likely to be a violation.

Under NAFTA Article 1102, paragraphs 1 and 2, the ‘most favorable treatment’ language is not required because national governments are much more likely to perceive that there is only one group of national investments. This interpretation does not impose a stricter obligation on states and provinces than national governments, as would be the position if best treatment were required only of provinces. Rather, the nature of the obligation is merely subtly modified to properly reflect contrasting perceptions held by provinces and national governments on the number of groups of domestic investments. So understood, ‘most favourable treatment’ in paragraph 3 does not add a best treatment requirement to this paragraph and, by extension to paragraphs 1 and 2. Rather, this language serves a different purpose under paragraph 3, which does not apply under paragraphs 1 and 2, or under the US Model BIT. Of course, this is without prejudice to whether the ‘treatment no less favorable’ language should be interpreted as requiring best treatment. It is just that the words ‘most favorable treatment’ are arguably not relevant to this issue.

Pope & Talbot – assessing the extent of the best treatment endorsement

As indicated, *Pope & Talbot* represents the focal point for best treatment in the investment regime. The dispute arose from Canada’s allocation of quotas for export of softwood lumber from four ‘covered’ provinces, including British Columbia. This allocation implemented the Softwood Lumber Agreement (SLA) concluded with the US to settle a trade dispute. A US investor in British Columbia engaged in softwood lumber production challenged the allocation under NAFTA Article 1102(2). The claimant argued that it had been treated less favourably than domestic producers in the non-covered provinces, who faced no quota, as well as domestic producers in the covered provinces, who were allocated a greater quota share.

Canada argued that the claim was based on the ‘treatment no less favorable’ language applicable to national governments under Article 1102(2), rather than on ‘the treatment no less favourable than the most favourable treatment’ language applicable to provinces under Article 1102(3). According to Canada, paragraph 2 permitted ‘national governments to provide foreign investments with something less than the most favourable treatment’¹⁰⁰ - an argument which effectively calls for consideration of whether the measure impacts disproportionately on foreign owned investments. The tribunal rejected

¹⁰⁰ *Pope & Talbot* (n 14) [39].

this argument as described above. As noted, the preferred approach was plausible, but not the only interpretation. Indeed, it is possible that the tribunal was troubled by its preferred approach.

Rather than rest its conclusion on the group comparison versus best treatment issue on the Treaty text alone, it proceeded to consider Canada's argument that the search for disproportionate impact was an established feature of the GATT / WTO *acquis* in alleged cases of *de facto* discrimination.¹⁰¹ In terms of the state of development of this *acquis*, the most recent case considered was the panel in *Asbestos*, rather than the Appellate Body's subsequent endorsement of the group comparison in this case. As noted, the panel's approach was indeed more consistent with best treatment than a group comparison. Nevertheless, the *Pope & Talbot* tribunal's treatment of other cases comes close to wilful blindness in terms of denying the force of other dicta which have been commonly understood as involving a search for disproportionate impact. This is especially evident in the following passage from *Pope & Talbot* which considers the panel's confirmation of a GATS Article XVII national treatment obligation in *EC – Bananas*:

53. In the event, the *Bananas* panel found that the EC's operator category rules were formally identical, in that both EC origin and non-EC origin suppliers could qualify for Category A and Category B treatment. The panel therefore addressed the question whether, applying the test of GATS Article XVII.3, those rules nonetheless modified the 'conditions of competition' to the detriment of the foreign origin suppliers. It was in this context that the panel considered whether, despite their facial neutrality, the operator categories in fact functioned neutrally. In finding that they did not, the panel ascertained that most non-EC origin suppliers fell within Category A and most EC origin suppliers fell within the favoured Category B. In other words, the natural affinity that one would expect between the country of origin of the bananas and the country of origin of wholesalers of those bananas was confirmed by the evidence.

54. It was for this reason that the panel found that non-EC origin suppliers received less favourable conditions of competition. In reaching this conclusion, the panel made no analysis whether the effect the regime was disproportionately unfavourable to one group or the other, but found, in essence, that Category A could be fairly described as 'mostly non-EC wholesalers' and Category B as 'mostly EC wholesalers'.¹⁰²

It is surely beyond dispute that the WTO panel was looking for evidence of disproportionate impact on non-EC origin suppliers, found this, and considered that this was evidence of *de facto* discrimination.¹⁰³

The *Pope & Talbot* tribunal's analysis also provides an opportunity to reiterate a theme developed above. Among the endorsements of best treatment in the GATT / WTO *acquis*, the tribunal did not see any reason to differentiate between those made in the context of measures which were *de jure* discriminatory, and those which were possible examples of *de facto* discrimination. For the tribunal, 'Canada has presented no reasons to justify treating the two forms of disadvantage differently'.¹⁰⁴ However, as argued above, little weight can be attributed to best treatment endorsements made in the context of *de jure* discrimination. The fate of such measure is known independently of the choice

¹⁰¹ *ibid* [45].

¹⁰² WTO, *European Communities: Regime for the Importations, Sale and Distribution of Bananas – Report of the Panel* (25 September 1997) WT/DS/27/R. The relevant section of the panel report interpreted by the *Pope & Talbot* tribunal in the passage above comprise [7.327] – [7.341] (notes omitted).

¹⁰³ I therefore concur with Ehring who notes that, 'both the panel and the Appellate Body based their reasoning on the asymmetric impact of the measure' (n 23) 934.

¹⁰⁴ *Pope & Talbot* (n 14) [42].

between group comparison and best treatment. A stated preference for best treatment in *de jure* cases does not operate as an analytical tool in order to reveal a violation. Such statements merely describe a consequence which flows from a prohibition on explicitly origin based discrimination.

Of course, all of this is, to some extent, of limited current relevance. Even if the GATT / WTO *acquis* could once be interpreted as favouring best treatment, the preference is now for a group comparison or at least for evidence of disproportionate impact as evidence of *de facto* discrimination. It is hoped that investment tribunals will correctly interpret the WTO law position as requiring such evidence.

Nevertheless, the *Pope & Talbot* tribunal appeared to be strongly in favour of a best treatment approach independently of the trade law position. It concluded that “no less favorable” means equivalent to, not better or worse than, the best treatment accorded to the comparator’.¹⁰⁵ If one were to stop reading the case at this point, the reasonable impression would be that evidence of disproportionate impact on foreign investors is not relevant under Article 1102. Read as a whole, however, the national treatment analysis does not establish this proposition. Indeed, an entirely plausible reading of the case is that there was ultimately no national treatment violation because there was no evidence of disproportionate impact on foreign investors. This emerges from the tribunal’s treatment of the ‘like circumstance’ language of Article 1102. The following test was set out:

(...) as a first step, the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector. However, that first step is not the last one. 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.¹⁰⁶

Differences in treatment between a domestic and foreign investment in the same economic sector must therefore be justified ‘by showing that it bears a reasonable relationship to rational policies not motivated by preference of domestic over foreign owned investments’.¹⁰⁷ Like circumstances under Article 1102 is not just about the extent of the competitive relationship between the foreign and domestic investment as represented by the comparison between investments in the same economic sector. It also requires consideration of regulatory context. If the different treatment can be explained with reference to a rational policy not motivated by origin / nationality based discrimination, the entities being compared will not be in like circumstances. Once it is understood that ‘like circumstances’ is about regulatory context which, in turn, is inexorably linked with a search for nationality based discrimination, it becomes inappropriate to limit the enquiry to the treatment given to the claimant and an individual domestic comparator. This is simply because tribunals should wish to consider all available evidence which is relevant to the presence or absence of a rational policy unconnected with nationality. One vital evidential aspect is whether the challenged measures disproportionately affect foreign investments. If there is asymmetry, this is not fatal for the respondent, but its challenge will then be to establish that this asymmetry is merely incidental to the rational policy being pursued. On the other hand, if there is no asymmetry, it will be somewhat easier for the respondent to explain any differences in treatment to the extent that there are any. The case itself illustrates the latter situation.

¹⁰⁵ *ibid* [42].

¹⁰⁶ *Ibid* [78].

¹⁰⁷ *ibid* [79].

The tribunal first considered whether the producers in covered provinces were in like circumstances with those in the non-covered provinces. There was a distinct difference in treatment here since producers in the non-covered provinces could freely export unlimited quantities to the US without paying any export fees. It is notable that the tribunal did not frame the analysis as might be expected in a regime based on best treatment in all aspects of the national treatment analysis. The tribunal does not ask whether the claimant is in like circumstances with one more favourably treated domestic investment in a non-covered province. On the contrary, the tribunal noted that, ‘all softwood lumber producers in the non-covered provinces were afforded more favourable treatment than producers in the covered provinces, including the Investment’.¹⁰⁸ As for whether there was a rational basis for the difference in treatment, the tribunal accepted that the choice of covered provinces was linked to resolving the lengthy softwood lumber trade dispute. The covered provinces accounted ‘for 95% of Canada’s softwood lumber exports to the US, and only those provinces faced a real threat of countervailing duty actions by the US Department of Commerce’.¹⁰⁹ Within the covered provinces, there were over 500 Canadian owned producers affected in precisely the same manner as the Investor. Therefore, the choice of provinces could not ‘reasonably be said to be motivated by discrimination outlawed by Article 1102’.¹¹⁰ Put a little differently, none of the producers in the covered provinces (domestic and foreign owned) were in like circumstances with any of the producers (domestic and foreign owned) in the non-covered provinces. These two groups of producers were in unlike circumstances because there was a rational basis on which to treat them differently. Relevant to accepting this rational basis was that the SLA did not single out the claimant or target foreign owned investments. There was no disproportionate impact on foreign owned investments.

The search for nationality based distinctions for which evidence of disproportionate impact is relevant is also evident in a subsequent section of the like circumstances analysis when the tribunal considers the treatment of producers in British Columbia – one of the covered provinces. A dispute with the US about reduction in stumpage fees charged by British Columbia was settled by burdening only producers exceeding certain levels of exports, including the claimant.¹¹¹ The tribunal opined:

The settlement undoubtedly had a greater adverse effect on some B.C. producers than others, but there is no convincing evidence that it was based on any distinction between foreign-owned and Canadian owned companies. Indeed, there were some 132 B.C. companies (...) each of which was [adversely] affected by the settlement and only one of which (as far as the Tribunal knows) is owned by NAFTA investors.¹¹²

A best treatment approach puts us in mind of the rejection of evidence relating to the absence of disproportionate impact on foreign owned investments. *Pope & Talbot* does not strongly support this notion. It may be that an individual claimant is entitled to the best treatment afforded to any domestic investment in like circumstances. However, the key point here is that the claimant and the comparator must be in like circumstances. The case reveals that this legal standard requires consideration of regulatory context. This, in turn, is strongly associated with allowing tribunals to make or avoid making an inference of origin based discrimination. If differences in treatment cannot be explained with reference to a rational policy, the inference can be made. Evidence that the adverse impact of a measure is disproportionately encountered by foreign owned investments is highly relevant to the presence of a convincing rational explanation and origin based discrimination. More will be required

¹⁰⁸ *ibid* [85].

¹⁰⁹ *ibid* [86].

¹¹⁰ *ibid* [87].

¹¹¹ *ibid* [102].

¹¹² *ibid* [103].

of the respondent state to show the presence of a rational explanation when there is evidence of disproportionate impact.

ADF v US – lack of evidence of disproportionate impact leads to failure of claim

There are further statements in the subsequent NAFTA Chapter 11 cases which establish that evidence of disproportionate impact is highly relevant. It is reasonably clear that the claim of *de facto* discrimination under Article 1102 in *ADF v US*¹¹³ failed because of lack of evidence that the measure was apt to disproportionately burden foreign owned investments. The case concerned Buy American conditions under which the release of federal funds for public works depended on the use of steel produced in the US. ADF Inc. was a Canadian company involved in a high project near Washington as a sub-contractor. It planned to buy US- produced steel, fabricate this steel at its Canadian plant and then ship the fabricated product back to the construction site. However, this would have rendered the steel of Canadian origin under the Buy American measure. The US argued successfully that the measure was not *de jure* discriminatory. The steel had to be fabricated in the US regardless of the nationality of the investor owning the steel.¹¹⁴ The claim of *de facto* discrimination arose from the possibility that steel owned by US investors would generally be fabricated in the US such that the Buy American prescriptions would tend not to disturb the commercially optimum plan for US investors, for whom, the ability to fabricate in Canada was ‘irrelevant’. Indeed, the claimant contended that its US investment was ‘alone’ in having to choose between expanding its US facility, subcontracting the fabrication to its US competitors, or abandoning the project.¹¹⁵

The tribunal noted these assertions but found that the claimant had failed to establish *de facto* discrimination. Insufficient evidence on ‘the comparative economics of the situation’ had been presented. Of relevance here were the relative costs of fabrication in Canada and the US, fabrication capacity and transportation costs.¹¹⁶ These considerations might have corroborated the claimant’s assertions to the effect that the measure in practice burdened only or mainly foreign investments. Alternatively, they might have led the tribunal to consider that US investments could rationally have chosen to fabricate in Canada but for the Buy American requirements. There is no indication that the tribunal would have confirmed a violation based on a best treatment approach via the identification of a single US investment fabricating steel in the US.

Corn Products International v Mexico – evidence of disproportionate impact leads to success of the claim

Evidence of disproportionate impact was similarly relevant in *Corn Products International v Mexico*.¹¹⁷ The investment here was a US owned company producing High Fructose Corn Syrup (HFCS) in Mexico, most of which was supplied to the Mexican soft drinks industry in competition with sweeteners made from cane sugar. The challenged measure was a 20% excise tax on any soft drink using a sweetener not made from cane sugar. This resulted in a significant switch by drink bottlers from HFCS to cane sugar sweeteners. The claimant argued that ‘cane sugar and HFCS producers were in like circumstances and that the tax was designed to favour the predominantly Mexican owned sugar producers at the expense of the HFCS producers who were foreign-owned’.¹¹⁸

¹¹³ *ADF Group v United States* (Award, 2003) ICSID Case No ARB (AF)/00/1 (ADF v US).

¹¹⁴ *ibid* [156].

¹¹⁵ *ibid* [66].

¹¹⁶ *ibid* [157].

¹¹⁷ *Corn Products International Inc v Mexico* (Decision on Responsibility, 2008) ICSID Case No ARB (AF)/04/1 (CPI).

¹¹⁸ *ibid* [5].

The tribunal was able to easily confirm a violation. HFCS and cane sugar producers were in like circumstances because the products were ‘interchangeable and indistinguishable from the point of view of the end-users (i.e. the purchaser of soft drinks)’.¹¹⁹ There was no valid regulatory context to inform the like circumstances analysis. Mexico’s attempt to defend to the tax as a countermeasure against US import restrictions on Mexican sugar and against US obfuscation of the NAFTA Chapter XX dispute settlement mechanism was rejected.¹²⁰

Of more interest for present purposes, the tribunal proceeded to find a breach of the TNLF standard on the basis of pronounced asymmetry in the nationality of the enterprises subject to, and not subject to the tax:

the uncontradicted evidence in this case was that production of HFCS in Mexico was wholly concentrated in foreign-owned enterprises (...), whereas production of sugar was largely carried out by Mexican nationals (with the Mexican State itself owning a substantial part of sugar production). Thus, the effect of what was, in substance, a special tax on HFCS was the distortion of the market in favour of domestic suppliers and to the disadvantage of the foreign investors protected by Chapter XI of the NAFTA.¹²¹

Of still greater interest, the tribunal indicated that it would not have found a violation had the tax affected domestic and foreign owned enterprises in equal proportion:

(...) if HFCS had been produced in equal (or nearly equal) volume by Mexican-owned and US-owned firms (...), a measure designed adversely to affect the market for HFCS in order to protect the position of the sugar industry could not have been held to violate the requirement of national treatment.¹²²

The absence of a violation here is at odds with the *Pope & Talbot* tribunal’s view that, “no less favorable” means equivalent to (...) the best treatment accorded to the comparator’.¹²³ In the above counter-factual, the claimant would still have been in like circumstances with the comparator Mexican sugar industry. Therefore, there would be no possibility within the like circumstances analysis of considering asymmetry as part of regulatory context. The claimant would then be entitled to TNLF than the best treatment afforded to the Mexican sugar industry, notwithstanding the pronounced negative impact of the measure on the Mexican HFCS industry. Based on the *CPI* tribunal’s counter-factual, it can be taken not to have agreed with the *Pope & Talbot* tribunal’s view that, under the Article 1102 TNLF analysis, a best treatment approach applies.

*Archer Daniels Midland Company, Tate & Lyle Ingredients Americas, Inc. v. Mexico*¹²⁴ – doctrinal ambivalence and apparent support for best treatment

Undoubtedly, however, there is significant doctrinal ambivalence in the investment regime on the relevance of disproportionate impact under Article 1102. This is demonstrated most sharply by contrasting the case above with *ADM*. This earlier decision was a separate challenge to the same

¹¹⁹ *ibid* [126].

¹²⁰ Within the like circumstances analysis itself, [128] is effectively a rejection of the countermeasures argument as valid regulatory context. The tribunal also separately considered and rejected the countermeasures defence in Part IX of its decision.

¹²¹ *CPI* (n 117) [132].

¹²² *ibid*.

¹²³ *Pope & Talbot* (n 14) [42]

¹²⁴ *Archer Daniels Midland Company, Tate & Lyle Ingredients Americas, Inc v Mexico* (Award, 1997) ICSID Case No ARB (AF)/04/5 (ADM).

Mexican tax. The tribunal clearly considered that Article 1102 provides for and requires best treatment:

‘(...) Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances, including the domestic cane sugar producers.’¹²⁵

Of course the two cases correctly reached the same conclusion that Article 1102 had been breached. To that extent, the cases are consistent. However, even at the level of apparent differences in legal doctrine (which could be vital in other cases) the cases can be reconciled. First, the measure at issue embodied a distinction which was a close proxy for origin. The tax was clearly conceived with a view to substantially reducing demand for HFCS and all HFCS producers in Mexico were foreign owned.¹²⁶ As such, the case arguably involved *de jure* discrimination, and, as argued above, a stated preference for best treatment in *de jure* cases does not operate as an analytical tool in order to reveal a violation. Such statements merely describe a consequence which flows from a prohibition on explicitly origin based discrimination. In this sense, the cases can be reconciled on the basis that the preference for asymmetry or best treatment was simply irrelevant to the certain fate of the measure in both cases.

The second and stronger way to reconcile the cases begins by acknowledging that they were clearly analysed by the tribunals as involving possible *de facto* discrimination. After all, there was discussion of whether HFCS and cane sugar producers were in like circumstances in both cases – a superfluous analytical step in true *de jure* cases. In *de facto* cases, the fate of the measure can depend upon the choice between searching for asymmetry or settling for best treatment, albeit that, the measure at issue fell afoul of the asymmetry test and, therefore, also best treatment. How then can the preference for best treatment in *ADM* be reconciled with the search for asymmetry in *CPI*? The answer is that there was no valid regulatory context in either case to inform the like circumstances analysis. Regulatory context is directly about whether there is a rational explanation for a difference in treatment and indirectly about revealing origin based discrimination. Evidence of asymmetry is highly relevant to these direct and indirect enquiries. Put differently, had there been some valid regulatory context, the *ADM* tribunal may well have considered it appropriate and necessary to consider evidence of asymmetry in its like circumstances analysis, while also endorsing best treatment under the TNLF language.

Is there any evidence of this claim in the *ADM* award, which endorsed best treatment? The tribunal certainly considered that Article 1102 is about revealing origin based discrimination. It noted that ‘Article 1102 prohibits treatment which discriminates on the basis of the foreign investor’s nationality’.¹²⁷ It also emphasized that the claimant is not entitled to the best treatment accorded to all domestic investments, but only those domestic investments which are in like circumstances:

it is necessary to consider the question of ‘like circumstances’ before the question of ‘no less favorable treatment’ because if the circumstances are not ‘like’, no obligation arose for the

¹²⁵ *ibid* [205], with similar statements at [196] and [211].

¹²⁶ The claimant in *CPI* (n 117) [100] presented an argument to this effect which the tribunal did not appear to engage with.

¹²⁷ *ADM* (n 124) [205].

Respondent State to accord Claimants' HFCS investment the best treatment accorded to Mexican cane sugar investments.¹²⁸

The tribunal arguably therefore establishes the foundation for considering evidence of asymmetry. It may have done so had there been a valid regulatory context to inform the 'like circumstances' analysis. As in the trade regime, endorsements of best treatment must be carefully considered in the entire context of the case at hand. Best treatment in one stage of the analysis does not at all preclude evidence of asymmetry at a different stage of the analysis.

*United Parcel Service of America, Inc. v Canada*¹²⁹ – indications that disproportionate impact is relevant (majority) / explicit endorsement of best treatment (dissent)

A further indication that evidence of disproportionate impact on foreign owned investments is relevant under Article 1102 is provided by *UPS*. Statements within the tribunal's 'like circumstances' analysis strongly suggest that it was looking for evidence of nationality based discrimination for which evidence of disproportionate impact is highly relevant. It noted that the challenged measures, 'concern the manner in which Canada Customs processes goods imported as mail, and the manner in which Canada Customs processes goods imported by express consignment operators or couriers such as UPS and for that matter Purolator and Canada Post's own competitive courier products'.¹³⁰ The emphasized words here would be beside the point if the tribunal was committed to a best treatment approach under which the focus is on the most favourable treatment given to Canada Post as a mail importer. It would not be relevant to note, in effect, that the claimant's investment (UPS) was treated in the same manner as Canadian owned entities (Purolator and Canada Post's own courier products) in like circumstances. Indeed, the most likely explanation for noting the presence of Canadian entities subject to the adverse impact of the challenged measures is that the tribunal considered it appropriate to form a view on whether these measures distinguished on the basis of nationality. The tribunal proceeded to find that 'Customs treatment of international mail is not "in like circumstances" with the treatment accorded to UPS Canada and other couriers including Purolator'.¹³¹ It considered that there was compelling evidence that, 'Customs administrations throughout the world accord different treatment to postal traffic than is accorded to express consignment operators for the simple reason that circumstances are not like'.¹³² Had the tribunal decided that Canada Post's postal / mail traffic was in like circumstances with the claimant's courier services, it would then have needed to decide on whether to apply a best treatment approach. Would it have confirmed a violation simply on the basis of the less favourable treatment of the foreign owned courier compared to the domestic postal operator (best treatment), or would it have considered as relevant the market presence of domestic couriers impacted in the same way as the claimant (evidence of lack of asymmetry)? Again, the emphasized words hint towards the second approach.

A dissenting Separate Statement was provided in the case. Indeed the dissent seemed to better understand and respond to the claimant's argument that the express courier services provided by its investment should not be compared to the treatment of all goods imported as mail, but should rather be compared to the express mail services provided by Canada Post in order to determine whether UPS

¹²⁸ *ibid* [196].

¹²⁹ *United Parcel Service of America, Inc v Canada* (Award on the merits, 2007) UNCITRAL (*UPS*).

¹³⁰ *ibid* [90] (emphasis added).

¹³¹ *ibid* [102].

¹³² *ibid* [118].

and Canada Post are in like circumstances.¹³³ The dissent accepted, ‘substantial and persuasive evidence that [several] Canada Post [mail] products are close substitutes for UPS Canada [courier] products’.¹³⁴ Among other consideration, there was evidence that Canada Post routinely looked to competing UPS services for determining its own prices.¹³⁵ The evidence strongly indicated that Canada Post and UPS were ‘in like circumstances with respect to actions concerning those products’.¹³⁶ The dissent proceeded to identify the differences in the Customs treatment of these competing products. Among these differences was that Canada Post was paid handling fees by Canada Customs for services that UPS Canada was required to perform without compensation.¹³⁷ In terms of regulatory context, the dissent did not consider that such differences in treatment could be explained with reference to international agreements. While acknowledging the existence of provisions specifying treatment to be given to items imported through the postal stream there was, according to the dissent, nothing to require the differences challenged before the tribunal.¹³⁸ Canada therefore failed to rebut the prima facie case that UPS Canada and Canada Post had been accorded different customs treatment in like circumstances.

I am inclined to agree with the dissent on this particular aspect. However, the difference between the majority and the dissent does not in itself establish, or even suggest, that evidence of Canadian owned couriers being subject to the detrimental treatment should be rejected. It is entirely compatible with this aspect of the dissent to consider (as the majority seemed to) whether UPS Canada and Canadian owned couriers encountering the disadvantageous customs treatment were also in like circumstances. Whether this additional ‘like circumstances’ comparison is undertaken depends on the weight which is attributed to evidence of disproportionate impact in revealing an Article 1102 violation. It is pure speculation as to how the majority would have resolved the case had it agreed with the dissent on the point covered above – that UPS and Canada Post were in like circumstances with regard to some closely competing courier and mail products. However, it is reasonable to suppose that the majority would have continued to attribute some weight to evidence that Canadian owned couriers in like circumstances with UPS Canada also encountered the disadvantageous customs treatment.

Notably, the dissent itself only referred to disadvantaged Canadian owned couriers by way of dismissing this treatment as irrelevant. The statement below is perhaps the single most explicit endorsement of best treatment:

[E]ffective parity of foreign and domestic investors and investments (...) does not exist where a NAFTA Party favors a national champion over other investors and investments. The violation is not mitigated by existence of discrimination against other domestic investors or investments as well as against foreign investors and investments. It is, as UPS urges, enough to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment.¹³⁹

¹³³ The dissent noted: ‘UPS directs attention solely to differences in treatment of a category of items carried by both UPS Canada and Canada Post that have similar characteristics and markets. This category is composed of items that are committed by identified patrons for express delivery, items that receive special handling, are subject to special tracking, and have characteristics that make them especially valuable in distinction to ordinary mail delivery. That is the set of items for which a determination must be made as to whether UPS and Canada Post are in like circumstances.’ See *UPS* (n 129) [20] of dissent.

¹³⁴ *ibid* [21].

¹³⁵ *ibid* [24].

¹³⁶ *Ibid* [25]

¹³⁷ *ibid* [29].

¹³⁸ *ibid* [40].

¹³⁹ *ibid* [60].

The dissent agreed with UPS that this position was ‘consistent with precedent under GATT and WTO’.¹⁴⁰ Perhaps surprisingly, bearing in mind that the Appellate Body had long since delivered its opinion in *Asbestos* calling for a group comparison, Canada did not challenge this assessment. Indeed, it considered decisions interpreting the GATT and GATS national treatment obligations to be ‘inapposite’.¹⁴¹

*Methanex Corporation v. United States*¹⁴² – both endorsement of, and aversion towards, best treatment

The *Methanex* case involved an origin-neutral Californian ban on Methyl Tertiary Butyl Ether (MTBE) on environmental grounds (protecting groundwater and drinking water from MTBE contamination). This was challenged as an Article 1102(3) violation by a methanol producer; methanol being a MTBE ingredient. Naturally, the ban also affected all other methanol producers, 47% of whom in the US were domestic.¹⁴³ Methanex argued that it was in like circumstances with domestic ethanol producers which were not affected by the MTBE ban and that, under Article 1102(3), it was ‘entitled to the best, not the worst, treatment accorded to like domestic investors and their investments’.¹⁴⁴ Based on these facts, Methanex would succeed if a best treatment approach is applied and if it is in like circumstances with domestic ethanol producers. Its claim would fail if, (a) a best treatment approach is applied but it is not in like circumstances with domestic ethanol producers, or (b) it is in like circumstances with domestic ethanol and methanol producers, but the tribunal prefers a disproportionate impact test to best treatment.

The claim failed based on the (a) analysis. The discussion below explores the following propositions – that the tribunal’s primary ‘like circumstances’ analysis was extremely strange and that this might be explained by the tribunal’s aversion to the best treatment approach.

On the claimant’s argument that it was entitled to best treatment under Article 1102(3), the tribunal responded:

(...) this is an entirely plausible reading of the provision: if a component state or province differentiates, as a matter of domestic law or policy, between members of a domestic class [methanol and ethanol producers], which class happens to serve as the comparator for an Article 1102 claim, the investor or investment of another party is entitled to the most favourable treatment accorded to some members [ethanol producers] of the domestic class.¹⁴⁵

Therefore, *if* the domestic class which serves as the comparator were composed of methanol and ethanol producers, there would have been an Article 1102(3) violation. Methanex would have been deprived of the most favourable treatment as accorded to ethanol producers which were not subject to the ban. However, the tribunal decided that the domestic comparator was composed of only domestic methanol producers as opposed to methanol and ethanol producers. As such, there was no violation. Methanex had been afforded the best treatment given to the only relevant domestic comparator – the

¹⁴⁰ *ibid* [55] and [61].

¹⁴¹ *ibid* [56]. This can now be taken to be Canada’s firm position on this matter most recently repeated in *Bilcon* (n 13) [190].

¹⁴² *Methanex Corporation v United States of America* (Final Award of the Tribunal on Jurisdiction and Merits, 2005) UNCITRAL (Methanex).

¹⁴³ *ibid* Part IV – Chapter B [18].

¹⁴⁴ *ibid* [20].

¹⁴⁵ *ibid*[21].

domestic methanol producers. Unfortunately for Methanex, this best treatment amounted to being negatively affected by the MTBE ban.

As noted, the tribunal's primary like circumstances analysis was extremely strange. In essence, it amounted to not considering whether Methanex was in like circumstances with non-identical domestic ethanol producers, on the basis that there were identical domestic comparators – the domestic methanol producers:

The key question is: who is the proper comparator? Simply to assume that the ethanol industry or a particular ethanol producer is the comparator here would beg that question. Given the object of Article 1102 and the flexibility which the provision provides in its adoption of 'like circumstances', it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like', as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed. The difficulty which Methanex encounters in this regard is that there are comparators which are identical to it.¹⁴⁶

The tribunal does not make it absolutely clear what it considers 'the object of Article 1102' to be. However, given that its primary 'like circumstances' methodology was as suggested by the US, it can be taken to have agreed with the US that the provision addresses 'discrimination on the basis of nationality of ownership of an investment'.¹⁴⁷ I have no objection to this characterization. However, I also consider that the 'nationality based discrimination' argument is often used by respondent states with a view to 'hypnotizing' tribunals towards a subconscious understanding that only *de jure* discrimination will violate the relevant norm.¹⁴⁸ The passage above indicates that the tribunal may have fallen under this spell. Granted, identical comparators should never be ignored, but neither should non-identical comparators be ignored when there are identical comparators. It is trite that, in claims of *de facto* discrimination, the treatment within each regulatory sub-group [methanol producers] is the same. Therefore, to find that there is no violation because all methanol producers are affected by the MTBE ban, is merely to find that the ban is *de jure* non-discriminatory or origin neutral. However, this just begs the question of whether the ban might be *de facto* discriminatory, which depends on whether methanol producers are in like circumstances with ethanol producers.¹⁴⁹

If the tribunal did not fall under any spell, what else might explain this deficiency in the primary like circumstances analysis? Perhaps the tribunal was simply averse to the best treatment approach, which it considered to be a plausible reading of Article 1102(3), and needed to find a way of rejecting the claim before arriving at this stage of the analysis. If the non-identical domestic ethanol producers had been held to be in like circumstances, Methanex would have been entitled to TNLF than this comparator. By focusing only on the identical comparator, Methanex is only entitled to equal

¹⁴⁶ *ibid* [17].

¹⁴⁷ *ibid* [14].

¹⁴⁸ The *Pope & Talbot* tribunal (n 14 [70] (notes omitted)) understood this danger: 'In one respect, this approach [the tribunals approach towards 'like circumstances'] 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.' My reading of this passage is that the tribunal agrees that Article 1102 is about uncovering nationality based discrimination which can be both explicit and concealed in origin neutral measures.

¹⁴⁹ The tribunal's approach led Kurtz to comment: 'The artificial and formalist *Methanex* test of searching for domestic and foreign actors that are 'identical' runs the very real risk of excluding swathes of discriminatory conduct from the scope of national treatment protection.' See Jürgen Kurtz, 'The use and abuse of WTO law in investor-state arbitration: Competition and its discontents' (2009) 20 *European Journal of International Law* 749, 769.

treatment with this comparator – which is what it was accorded. The general point here is that narrowing the comparator limits the extent to which the best treatment approach expands the national treatment requirement in investment law – at least when this narrowing means that there is no favourably treated comparator in like circumstances.

This explanation (aversion towards best treatment) for the strange primary like circumstances analysis can be corroborated. It was in the immediate context of the passage above that the tribunal referred to the substantial methanol industry in the US, 47% of which was domestic.¹⁵⁰ *Pope & Talbot* is also cited as a case in which the claim was rejected on the basis that ‘there were more than 500 Canadian producers in other provinces which were subject to the fees’ encountered by the claimant.¹⁵¹ Clearly, therefore, the *Methanex* tribunal attributed substantial weight to the lack of asymmetry of the measure before it. This consideration can inform the like circumstances analysis when it is considered in relation to regulatory context. However, the absence of asymmetry cannot justify the exclusion of non-identical comparators when there are identical comparators.

The criticism above of the tribunal’s primary like circumstances methodology is tempered by the secondary strand of its analysis. Having indicated that non-identical comparators are not relevant when there is an identical comparator, the tribunal nevertheless proceeded to compare methanol and ethanol producers, concluding as follows:

The incontrovertible fact is that Methanex produced methanol as a feedstock for MTBE and not as a gasoline additive in its own right. Aside from the federal prohibition of the use of methanol as an oxygenate, methanol has been tried as a fuel in only limited experiments, but would require, if it were to be used, significant and expensive retro-adjustments in gasoline engines. As a result, the ethanol and methanol products cannot be said to be in competition, even assuming that this trade law criterion were to apply. Insofar as there is a binary choice, it is between MTBE and other lawful and practicable oxygenates.¹⁵²

In denying the like circumstances of the claimant and domestic ethanol producers, the tribunal might also have considered regulatory context – a key respect in which the likeness analysis in the investment regime differs from the trade regime. Even if the tribunal had found methanol and ethanol producers to be operating ‘in the same business or economic sector’ (to use the *Pope & Talbot* test), it would still have been possible to deny like circumstances on the basis that the ban had ‘a reasonable nexus to [non-discriminatory] rational government policies’.¹⁵³ The tribunal undertook a detailed review of the scientific evidence which led to the ban in the form of research conducted by the University of California. It concluded that the resulting Report reflected, ‘a serious, objective and scientific approach to a complex problem in California’.¹⁵⁴ Thus there was a valid explanation for the MTBE ban and its non-discriminatory nature was reinforced by the roughly equal proportion of foreign and domestic owned methanol producers in the US.

¹⁵⁰ *Methanex* (n 142), Part IV – Chapter B, [18].

¹⁵¹ *ibid* [19].

¹⁵² *ibid* [28]. Kurtz observes that the tribunal’s analysis of the competitive relationship between ethanol and methanol focused narrowly on the perception of a particular class of consumer - gasoline blenders - on the substitutability of the products. The tribunal might have found strong substitutability and therefore competition had it considered the perception of another class of consumer – integrated oil refiners. Methanex had presented evidence that this class of consumer switched from methanol to ethanol subsequent to the ban. Kurtz (n 10) 261.

¹⁵³ *Pope & Talbot* (n 14) [78].

¹⁵⁴ *Methanex* (n 142), Part III – Chapter A, [101].

In sum, it is possible to cite certain passages from the *Methanex* award as endorsing best treatment. However, to rely on these passages in isolation from the like circumstances analysis would be to exaggerate the real extent of this endorsement. The lack of asymmetry clearly informed the like circumstances analysis. While this led to a strange test in the primary analysis, it might have more appropriately featured in a consideration of regulatory context.

*Feldman v Mexico*¹⁵⁵ – the strongest but not especially strong best treatment endorsement (majority) / strongest rejection of best treatment (dissent)

In the discussion above, *Pope & Talbot* was identified as the focal point for best treatment in the investment regime. The tribunal concluded that “no less favorable” means equivalent to, not better or worse than, the best treatment accorded to the comparator’.¹⁵⁶ However, as the discussion proceeded to show, the overall impact of the measure on domestic and foreign owned investments strongly informed the like circumstances analysis and resulted in the failure of the Article 1102 claim. As such, the award as a whole does not strongly support best treatment.

In contrast to *Pope & Talbot*, the investment award which leans most towards best treatment in terms of the overall analysis and outcome is *Feldman*. However, by no means does the award provide an unequivocal endorsement of best treatment. This is because it is reasonably clear that the tribunal would have attributed weight to evidence of even handed treatment as between foreign and domestic investors, had this evidence been available. However, the majority decision stands out as being at odds with the trade law approach, in particular, on the scope for finding *de facto* discrimination in the face of limited evidence on the distribution of less and more favourable treatment.

In *Feldman*, the claimant’s investment, CEMSA, purchased cigarettes in Mexico from volume retailers for export. Along with comparator domestic reseller / exporters, CEMSA was not entitled to tax rebates on cigarette exports. These rebates were only legally available in respect of exports by cigarette producers. The claimant argued, *inter alia*, that this limitation had been waived for a domestic reseller / exporter, the Poblano Group, which had received rebates in a time frame within which the claimant had been denied rebates. As such, the allegation was of *de facto* discrimination arising from the manner of application of an origin neutral law.

In its introduction to the national treatment analysis, the tribunal signals that broad evidence of how domestic and foreign owned investments have been treated is desirable, thereby putting the reader in mind of a search for asymmetry. The analysis was:

complicated by the fact that only a limited amount of relevant factual information has been presented to the Tribunal, particularly with regard to the various domestic companies which may be in the business of reselling and exporting cigarettes from Mexico, and the treatment by SHCP of those resellers other than the Claimant.¹⁵⁷

If the tribunal was strongly inclined towards best treatment, the treatment given to domestic entities other than those raised by the claimant and the treatment given to foreign investors other than the claimant would not be relevant. Yet, the tribunal seemed to consider that it was on somewhat unfirm ground in attempting a national treatment analysis without this evidence.

¹⁵⁵ *Marvin Roy Feldman Karpa v United Mexican States* (Award, 2002) ICSID Case No ARB(AF)/99/1 (Feldman).

¹⁵⁶ *Pope & Talbot* (n 14) [42].

¹⁵⁷ *Feldman* (n 155)[166].

The lack of inclination towards best treatment is also indicated by the tribunal's approach to the TNLF language. This was in marked contrast to the approach in *Pope & Talbot* (clear endorsement of best treatment at this stage of the analysis) even though the *Feldman* award cited other aspects of the *Pope & Talbot* award with approval. For the *Feldman* tribunal:

NAFTA is on its face unclear as to whether the foreign investor must be treated in the most favorable manner provided for any domestic investor, or only with regard to the treatment generally accorded to domestic investors, or even the least favorably treated domestic investor. There is no 'most-favored investor' provision in Chapter 11, parallel to the most favored nation provision in Article 1103, that suggests that a foreign investor must be treated no less favorably than the most favorably treated national investor, if there are other national investors that are treated less favorably, that is, in the same manner as the foreign investor. At the same time, there is no language in Article 1102 that states that the foreign investor must receive treatment equal to that provided to the most favorably treated domestic investor, if there are multiple domestic investors receiving differing treatment by the respondent government.¹⁵⁸

Rather than depict Article 1102 as being unclear, the tribunal might simply have endorsed best treatment citing *Pope & Talbot*. However, the tribunal decided instead that it need not express a view on the matter. It noted that, 'the known "universe" of investors is only two, or at the most three, one foreign (the Claimant) and one domestic (the Poblano Group companies), and the Tribunal must make its decision on the evidence before it'.¹⁵⁹ Effectively, the tribunal indicates here that it is not applying a best treatment approach, but rather undertaking a group comparison by comparing the treatment of all domestic and foreign entities in like circumstances for which cogent evidence had been presented. A fully fledged best treatment approach entails that evidence of lack of asymmetry be discarded if the claimant is treated less favourably than one domestic entity with which it is in like circumstances. As the tribunal did not discard any such evidence, it did not endorse best treatment.

How then can it be claimed that the *Feldman* award leans more than any other towards best treatment? This is simply because the violation was confirmed in the face of evidential uncertainty, when, in the trade law context, such uncertainty has led the Appellate Body to fall back on the face of the measure – *de jure* non-discriminatory. For the *Feldman* majority, the evidence of discrimination was 'admittedly limited'.¹⁶⁰ However, once the claimant showed that it was denied rebates when some domestic resellers / exporters were granted rebates, this established a presumption of discrimination with the burden of proof then shifting to the respondent to show that Mexican owned exporters were being treated in the same manner as the claimant.¹⁶¹ As the respondent did not introduce any such evidence, the violation was established.

The trade law comparison is from *US – Gambling*¹⁶², in which Antigua challenged the 1961 Wire Communications Act alleging that it prevented suppliers in Antigua from providing gambling and betting services in the US on a cross border basis even though the US had undertaken to provide market access in its GATS Schedule of commitments. The Appellate Body confirmed a GATS Article XVI Market Access violation leaving the issue of possible justification under the Article XIV(a)

¹⁵⁸ *ibid* [185]. This statement resembles one contained in the UNCTAD, 'Series on Issues in International Investment Agreements, National Treatment' (1999) Sales No. E.99.II.D.16, 38-39.

¹⁵⁹ *ibid* [186].

¹⁶⁰ *ibid* [176].

¹⁶¹ *ibid* [176] and [178].

¹⁶² WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Appellate Body* (20 April 2005) WT/DS285/AB/R (US - Gambling).

public morals exception. Overruling the panel, the Appellate Body considered that the prohibition on internet gambling was ‘necessary to protect public morals’.¹⁶³ The measure then needed to be appraised under the Article XIV chapeau which requires that ‘measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail’.

In the chapeau analysis, the panel questioned whether the US was consistent in prohibiting the remote supply of gambling and betting services. Antigua argued that internet operators in the US were offering betting services via the internet and that the US had not taken enforcement action against them. The panel considered the evidence to be inconclusive but also found that the US had failed to demonstrate that the manner in which it enforced laws against US firms was consistent with the chapeau.¹⁶⁴ This approach is reminiscent of that adopted by the majority in *Feldman* a few years earlier. A lack of evidence on the enforcement action, if any, taken by the US against several domestic providers of internet gambling services effectively raised a presumption of non-conformity with the chapeau which the US failed to rebut.

The Appellate Body ‘agree[d] with the Panel that, in the context of facially neutral measures, there may nevertheless be situations where the selective prosecution of persons rises to the level of discrimination’.¹⁶⁵ However, it proceeded to find that, ‘[f]aced with the limited evidence the parties put before it with respect to enforcement, the Panel should rather have focused, as a matter of law, on the wording of the measures at issue’.¹⁶⁶ As these measures did not on their face discriminate between foreign and domestic providers, there was no chapeau violation on the basis of selective enforcement.¹⁶⁷

In sum, the majority approach in *Feldman* is the strongest endorsement of best treatment in the investment context by reason of a confirmed national treatment violation in the face of uncertainty about the overall distribution of the detriment of the application of the measure at issue as between domestic and foreign entities. There was a violation because it was reasonably clear that the claimant had been treated less favourably than at least some domestic entities. In *Gambling*, this type of uncertainty led the Appellate Body to fall back on the face of the measure and deny the discriminatory application of the measure under the chapeau analysis. While I consider the *Feldman* award to be the strongest endorsement of best treatment, I do not consider it to be an especially strong endorsement. As indicated, there was overwhelming evidence that the majority would have considered wider evidence on the overall distribution of the detriment had it been presented by the respondent. Such evidence is strictly not relevant if a violation can be established if the claimant is treated less favourable than any single domestic entity in like circumstances.

As a limited endorsement of best treatment, the *Feldman* award can also be contrasted with *International Thunderbird v Mexico*.¹⁶⁸ This NAFTA Article 1102 claim centred on alleged selective enforcement of gambling laws applicable to slot machines. The case is arguably distinguishable from

¹⁶³ Ibid [327]

¹⁶⁴ WTO, *United States: Measures Affecting the Cross-Border Supply of Gambling and Betting Services – Report of the Panel* (20 April 2005) WT/DS285/R [6.585]-[6.589] (US - Gambling).

¹⁶⁵ *US – Gambling* (n 162) [354].

¹⁶⁶ *ibid* [357].

¹⁶⁷ In contrast, the Appellate Body confirmed non-conformity with the chapeau in relation to the Inter State Horse Racing Act which, on its face, authorized domestic service suppliers, but not foreign service suppliers, to offer remote betting services for certain horse races. See [371].

¹⁶⁸ *International Thunderbird Gaming Corporation v United Mexican States* (Award, 2006) UNCITRAL (Thunderbird).

Feldman in that it was at least reasonably clear here that the claimant had been treated less favourably than one competing domestic entity, whereas, in *Thunderbird*, the tribunal was not convinced that even a single domestic entity had escaped enforcement action. Nevertheless, *Thunderbird* is much closer to the Appellate Body in *Gambling* than to the panel in this case and the *Feldman* majority. The tribunal found ‘insufficient evidence’ establishing that Mexico had knowledge of facilities that remained open and deliberately allowed them to remain open.¹⁶⁹ The available evidence indicated that enforcement actions, ‘were directed at both Mexican and non-Mexican gambling operations and that they were overall consistent’.¹⁷⁰ Unlike *Feldman*, this case indicates that claimants are unlikely to succeed unless the overall pattern of applying, waiving or enforcing a measure favours domestic comparators.¹⁷¹

If the *Feldman* award is the strongest (if not especially strong) endorsement of best treatment, the dissent in this case is the strongest rejection. Citing the International Law Commission Articles on the Responsibility of States for Internationally Wrongful Acts, the dissent noted as follows:

Discrimination, according to international law, is determined on the basis of composite acts which involve the adoption of a systematic policy or practice by the responsible State. Therefore, if only a “universe of two” has been “proved to exist” in the record before this Tribunal, as the Award so acknowledges, it would be in order to conclude that no sufficient evidence is available to uphold the claim of discrimination and of differential treatment given to the investor of another State, vis-à-vis the treatment generally accorded to domestic investors.¹⁷²

Is it submitted that this assessment is overly broad even in response to the type of measure at issue in *Feldman*, and inapplicable with respect to measures of general application. *Feldman*, and the aspects of *Gambling* considered above, involved origin neutral measures which were only capable of producing detrimental impact through the manner of their application by public bodies. When the issue is whether an origin neutral law is being selectively applied or waived or enforced such as to result in *de facto* discrimination, it may be improper to attribute much weight to one application which favours a domestic entity alongside an application which disfavors a domestic entity. The natural and proper inclination here would be to assess whether these particular instances are part of a discernible pattern or systemic practice to the detriment of foreign entities. To this extent, the statement above is acceptable in the sense of providing a starting point. Nevertheless, it is important not to lose sight of the idea that evidence of disproportionate impact does not exhaust the evidence which is relevant to revealing *de facto* discrimination. The possibility of a violation cannot be excluded just because the market is contested only between one domestic entity and one foreign entity – a ‘universe of two’. After all, in respect of these two entities, there could be a pattern of application which disfavors only the foreign entity. When there are only two entities, it would even be wrong to automatically exclude the possibility of *de facto* discrimination when there is only one instance of application as opposed to a pattern. Suppose that this single application destroys the viability of the foreign entity when the

¹⁶⁹ *ibid* [180].

¹⁷⁰ *ibid* [182].

¹⁷¹ Indeed, the *Thunderbird* tribunal leaned too far in this direction in also clearly indicating that the illegality of gambling in Mexico precludes an Article 1102 violation even when ‘without doubt’ there is a lack of uniformity and consistency in enforcement. *ibid* [183]; Vandeveld comments that, ‘[c]overed investments are entitled to non-discriminatory treatment, including in the application of criminal laws’, and that an exclusion from national treatment here would require an explicit exception. Kenneth J Vandeveld, *Bilateral Investment Treaties: History, Policy and Interpretation* (Oxford University Press 2010) 380.

¹⁷² *Marvin Roy Feldman Karpa v United Mexican States* (Dissenting Opinion of Jorge Covarrubias Bravo, 2002) ICSID Case No ARB(AF)/99/1, 15-16 (*Feldman*).

domestic entity operating under the same business model is left to flourish over a period long enough to see the demise of its only competitor. This would be pertinent evidence of *de facto* discrimination.

The ‘composite acts’ theory is, furthermore, inapplicable to measures of general application where any detrimental impact results not from the manner of application by a public body, but rather the response of the market to the measure. Thus the MTBE ban at issue in *Methanex* potentially involved *de facto* discrimination, even though the ban was an individual act as opposed to a series of acts or omissions.

Conclusions on the investment regime

Based on the analysis above, to what extent is there support for best treatment in the investment regime? The answer depends on how this question is understood. The narrow understanding is to consider only how the TNLF language has been interpreted. The question is whether, at this stage of the analysis, best treatment is preferred. This entails that no weight is attributed to evidence on the distribution of the positive and negative impacts of measures as between foreign and domestic entities at this stage of the analysis. The broader understanding of the question requires a holistic appraisal of how the different elements of the non-discrimination analysis relate to and influence each other. Even if TNLF is confirmed as requiring best treatment, the case as a whole may not support best treatment if the tribunal has considered and been influenced by evidence on asymmetry within the ‘like circumstances’ analysis.

Under the narrow understanding, there is a reasonably strong, but not universal, level of support for best treatment. This mixed picture is painted on the canvas of NAFTA Article 1102, which arguably requires best treatment when interpreting TNLF. The *Pope & Talbot* tribunal concluded that “‘no less favorable’ means equivalent to, not better or worse than, the best treatment accorded to the comparator”.¹⁷³ Similarly, the *ADM* tribunal considered that, ‘(...) Claimants and their investment are entitled to the best level of treatment available to any other domestic investor or investment operating in like circumstances’.¹⁷⁴ The dissent in *UPS* considered that it was, ‘enough [for the claimant] to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment’.¹⁷⁵ More guardedly, the *Methanex* tribunal considered best treatment to be, ‘an entirely plausible reading of the provision [NAFTA Article 1102(3)]’.¹⁷⁶ Still more guardedly, the majority in *Feldman* considered that ‘NAFTA is on its face unclear as to whether the foreign investor must be treated in the most favorable manner provided for any domestic investor, or only with regard to the treatment generally accorded to domestic investors, or even the least favorably treated domestic investor’.¹⁷⁷ In contrast, the *Feldman* dissent rejected best treatment as being inconsistent with the general international law conception of non-discrimination norms.¹⁷⁸

Under the broader understanding, there is very little support for best treatment in the investment regime. The strongest evidence that best treatment informs the entire national treatment analysis would be a violation despite evidence indicating an absence of asymmetry / evidence indicating that the measure operates in an even handed manner as between domestic and foreign entities. The only support for this position is the dissent in *UPS*. The *ADM* Award does not fall within this category. This was not a case in which a violation was confirmed despite the absence of asymmetry. Rather, it

¹⁷³ *Pope & Talbot* (n 14) [42].

¹⁷⁴ *ADM* (n 124) [205]. See also [196] and [211].

¹⁷⁵ *UPS* (n 129) [60] (dissent).

¹⁷⁶ *Methanex* (n 142) [21].

¹⁷⁷ *Feldman* (n 155) [185].

¹⁷⁸ *Feldman* (n 172) 15-16.

was a case in which a violation was confirmed without referring to evidence of pronounced asymmetry. Of course, this raises the possibility that the tribunal would also have confirmed a violation even in the absence of asymmetry. As indicated, however, there is no majority finding to this effect in any award to date. Furthermore, the *CPI* Award, which was a separate challenge to exactly the same Mexican measures, placed considerable reliance on asymmetry within its findings, even indicating there would not have been a violation in the absence of this asymmetry. Even though the *Pope & Talbot* tribunal endorsed best treatment under TNLF, evidence of the absence of asymmetry featured strongly in the ‘like circumstances’ analysis leading to the absence of a violation. Any impact of endorsing best treatment was negated within the ‘like circumstances’ analysis. Along similar lines, the *Methanex* tribunal considered best treatment to be a plausible reading of Article 1102(3). However, its primary ‘like circumstances’ analysis was rather strange in that non-identical comparators were discounted because there was an identical comparator. This is perhaps explicable on the basis of the tribunal’s aversion towards best treatment which is arguably corroborated by the tribunal’s reference to the lack of asymmetry resulting from the MTBE ban. The *Feldman* Award does not expressly endorse best treatment. However, it leans more towards best treatment than any other Award by reason of a confirmed violation in the face of limited evidence on whether the measure was applied in an even handed manner as between foreign and domestic entities. In sum, there is overwhelming evidence that investment tribunals take into account and are influenced by evidence on the distribution of the positive and negative effect of measures as between foreign and domestic comparators. This is at odds with an overall national treatment conception based on best treatment.

III. HOW SHOULD THE INVESTMENT LAW POSITION EVOLVE?

Given that the trade law position is now reasonably well settled and that the investment law position is very unsettled (at least upon first impression as opposed to the detailed analysis above), perhaps the best angle from which to approach the normative analysis is to ask how, if at all, the investment law position should evolve. Should the investment regime align with the trade regime thereby rejecting best treatment even under TNLF? Should it depart from the trade regime thereby allowing best treatment to inform the entire national treatment analysis? Or should the investment regime (indeed both regimes) preserve the discretion to choose between best treatment and the search for asymmetry while establishing more clearly what has informed this choice in individual cases?

Nationality Based Discrimination in the Investment and Trade Regimes

Weiler’s work provides an appropriate starting point. He argues that the investment regime TNLF standard is not about revealing nationality based discrimination. As such, caution is required before transposing trade law standards of non-discrimination into the investment regime. If this view is correct, it would indeed provide an explanation for favouring best treatment in the investment regime. This is simply because asymmetry is clearly an evidential consideration which indicates (but does not establish) nationality based discrimination.

The foundation for this argument is an account of the historical development and eventual divergence of the trade law and investment law regimes. The author proceeds to explain the implications of the historical account for how investment law TNLF standards should be interpreted while also arguing

that these ideas are already reflected in the investment case law. At every stage of the analysis, I am not strongly convinced that clear distinctions between the two regimes are established.

Within the historical analysis, there is reference to the limited usefulness of investment law national treatment guarantees by reason of the Calvo doctrine of the late 19th Century under which aliens were entitled to treatment no worse than and, more significantly, no better than domestic citizens.¹⁷⁹ Jurisdiction over investment disputes was with the host state's domestic courts with the matter being taken up on a state to state basis in the event of a municipal denial of justice. The Calvo doctrine clearly did not afford foreign investments very much protection to the extent that capital importing states treated their nationals badly. Weiler depicts the response to the Calvo doctrine as involving not only the incorporation of fair and equitable treatment standards into treaties providing a floor below which treatment could not fall, but also a move away from mere national treatment towards 'the more robust concept of "treatment no less favourable"'.¹⁸⁰ It is clear that a fair and equitable treatment standard has the potential to enhance the protection of foreign investors when local standards of protection for all investors, domestic and foreign, are unsatisfactory. However, it is more difficult to see how a reconceptualization of a non-discrimination principle can achieve the same goal of enhanced protection if the root problem is that host states uniformly treat all investments badly.¹⁸¹ The ineffectiveness of non-discrimination norms here stems from the absence of relatively well treated domestic comparators.¹⁸²

Fair and equitable treatment standards in investment treaties have been interpreted as, and sometimes expressly provide for, a broader notion of discrimination than that associated with national treatment provisions. For example, the leaked CETA text provides that the fair and equitable treatment standard is breached by measures constituting, '[t]argeted discrimination on manifestly wrongful grounds, such as gender, race or religious beliefs'.¹⁸³ Provisions such as this seem to serve to expand the list of prohibited grounds on which foreign investors cannot be discriminated against. It is difficult to see how this expansion supports the view that national treatment provisions are not about nationality based discrimination. The expansion merely establishes that the protection of investors against discrimination under fair and equitable treatment standards goes beyond nationality based discrimination. Looked at from the opposite angle, if investment law national treatment provisions are not about nationality based discrimination, 'nationality' would surely be among the prohibited grounds in the draft provision.

¹⁷⁹ For a further account of the origin and development of the Calvo doctrine, see Santiago Montt, *State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation* (Hart Publishing 2012) Ch. 1; Weiler (n 9).

¹⁸⁰ Weiler (n 9) 418.

¹⁸¹ Kurtz notes that, '[t]he role of relative standards of treatment (like national treatment) was a marginal one ... given the emphasis on fixing strong, absolute protections, especially on guarantees of full compensation in the event of expropriation' [notes omitted]. Kurtz (n 149) 744.

¹⁸² A UNCTAD study suggests that this is an explanation for the absence of national treatment clauses in some investment treaties: '[H]ome countries might not have found it worthwhile to insist on the granting of national treatment standard in host countries where the conditions available to national firms were below a certain minimum.' See UNCTAD (n 158) 16.

¹⁸³ Comprehensive Economic and Trade Agreement between Canada and the EU art X.9 para 2(d) <www.bilaterals.org/IMG/pdf/-2.pdf> 158 (CETA). Commentators have linked this provision with statements made by the NAFTA Chapter 11 tribunal in *Waste Management, Inc v United Mexican States* (Award, 2004) ICSID Case No ARB(AF)/00/3, [98]. See discussion thread at the *International Economic Law and Policy Blog* <<http://worldtradelaw.typepad.com/ielpblog/2014/08/ceta-and-investment.html?cid=6a00d8341c90a753ef01b7c6cec872970b#comment-6a00d8341c90a753ef01b7c6cec872970b>>.

Weiler proceeds to depict bilateral trade agreements and investment treaties as providing for the robust TNL standard until a parting of the ways with the conclusion of the GATT 1947. From this point, the trade law TNL standard in Article III would become an anti-avoidance provision to prevent states from cheating on their tariff concessions. States would be prevented from using internal restrictions to achieve protectionist goals that would otherwise be achieved by tariffs. Of course, Article III is not just an anti-avoidance provision because it applies whether or not a tariff binding has been made.¹⁸⁴ However, this just reinforces the role of Article III in preventing protectionism through internal measures and does not therefore undermine Weiler's position. I begin to disagree with Weiler in his depiction of the functions which the trade law TNL standard simultaneously jettisoned. At this point, according to Weiler, national treatment 'shed its role of guarantor of procedural equality for aliens and traders'.¹⁸⁵ In contrast, the investment Treaty TNL standard retained this role without adopting any anti-avoidance role and its inexorable link with prohibiting protectionism. The focus of investment treaties remained as 'fundamental equality without discrimination'¹⁸⁶ and 'to foster transparency, predictability and certainty in municipal legal regimes, the absence of which represented probably the most significant impediment to increasing transnational investment'.¹⁸⁷

Granted, GATT Article III is about prohibiting protectionism through internal measures. However, does the nature and scope of this prohibition not extend to the aspects which Weiler claims have been jettisoned in the trade regime but not in the investment regime? The prohibition encompasses a notion of 'equality'. As the Appellate Body has noted, 'Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products'.¹⁸⁸ The anti-avoidance function of Article III is also surely about fostering transparency, predictability and certainty with a view to increasing international trade. Protectionism is channelled towards transparent and predictable tariffs which can be progressively negotiated down. My general reservation, therefore, is that Weiler's statements on the nature of the investment regime which are intended to identify how it is distinct, are also applicable to the trade law regime. The statements do more to establish that the regimes are closely comparable as opposed to distinct.

In relation to a claim that the investment regime is not concerned with nationality based discrimination, it is necessary to define exactly what is meant by this concept. As already indicated, respondent states sometimes refer to nationality based discrimination in the very narrow sense of *de jure* discrimination which is indisputable from the face of measure. A broader understanding is that *de facto* discrimination is also covered, but it is only revealed to the extent that there is direct evidence of intention to differentiate on the basis of nationality – statements made in national parliaments or memoranda within public bodies applying measures and the like. A still broader conception is that nationality based discrimination can be revealed, 'from the *design*, the *architecture*, and the revealing *structure* of a measure'.¹⁸⁹ It is submitted, however, that an inference of nationality based discrimination can only ultimately be drawn when any detrimental impact caused by a measure cannot be explained with reference to a legitimate regulatory objective.

Weiler is enigmatic as to which understanding he has in mind. However, he does dismiss the second position above – the idea that it should be 'necessary to prove that the impugned measure was

¹⁸⁴ *Japan – Alcoholic Beverages* (n 91) 17.

¹⁸⁵ Weiler (n 9) 477.

¹⁸⁶ *ibid* 420.

¹⁸⁷ *ibid* 419.

¹⁸⁸ *Japan–Alcoholic Beverages* (n 92) 16.

¹⁸⁹ This is the Appellate Body's understanding of the 'so as to afford protection' language of Article III:2 second sentence originating from *Japan–Alcoholic Beverages* (n 92) 29.

imposed on the basis of nationality'.¹⁹⁰ Notably, he does this with reference to the Appellate Body's warning against attempts to 'sort through the many reasons legislators and regulatory often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent'.¹⁹¹ This establishes that the two regimes are comparable. Neither is concerned with nationality based discrimination in the sense of direct evidence of discriminatory intent. As the *Feldman* tribunal noted, 'requiring a foreign investor to prove that discrimination is based on his nationality could be an insurmountable burden to the Claimant, as that information may only be available to the government'.¹⁹² This common feature of the two regimes casts doubt on the following statement:

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.¹⁹³

Rejecting the global comparison cannot be explained on the basis that there is no need to prove discriminatory intent, because there is equally no need to prove this in the trade regime in which the global comparison is pertinent evidence of *de facto* discrimination. Other explanations of the investment regime are a similarly good fit for the trade regime:

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 beneficiary under it.¹⁹⁴

This aspect of nationality also applies to trade. Only imported goods qualify for the treatment at issue. In both regimes, nationality is also surely relevant in another sense. The national of a beneficiary state is entitled to TNLF than a domestic investor in like circumstances, in the same way that imported goods are entitled to TNLF than like domestic goods. In other words, the presence of investments / goods of two different nationalities is implicit under all TNLF clauses whether or not the clause also refers to affording protection. This is a live matter which features in the claimant's submissions in *Mesa Power v. Canada*:

NAFTA Article 1102 establishes a requirement where the treatment provided to an American Investor, like Mesa, is compared to more favourable treatment provided to an investor, or investment, with the nationality from the host state, Canada. The ultimate ownership of that better treated investment is irrelevant.¹⁹⁵

Canada does not agree:

Ignoring the requirement to specify a domestic comparator under Article 1102 would transform the national treatment obligation into a provision prohibiting any form of differentiation between

¹⁹⁰ Weiler (n 9) 444.

¹⁹¹ *ibid* 444-445 citing WTO, *Chile: Taxes on Alcoholic Beverages – Report of the Appellate Body* (12 January 2000) WT/DS87/AB/R [62].

¹⁹² *Feldman* (n 155) [183].

¹⁹³ Weiler (n 9) 450.

¹⁹⁴ *ibid* 433.

¹⁹⁵ *Mesa Power Group, LLC v Government of Canada* (Investor's Reply Memorial and Rejoinder on Jurisdiction, 2014) UNCITRAL, PCA Case No 2012-17 [432].

investors (...). If the NAFTA Parties had intended to agree to a general provision banning all discrimination irrespective of the nationality of the ultimate investor receiving the allegedly more favourable treatment, they could have done so. They did not.¹⁹⁶

The argument that investment law non-discrimination provisions are not about nationality based discrimination also confronts express statements to the contrary in several of the Awards covered above. The *Feldman* Award noted:

It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or ‘by reason of nationality (...)’ However, it is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances.¹⁹⁷

This passage indicates that TNLF clauses are about a broad conception of nationality based discrimination even in the absence of additional language referring to ‘protection’.¹⁹⁸

This broad conception entails that, under both regimes, we ultimately want to know whether any detrimental impact caused by a measure can be explained with reference to a legitimate regulatory objective. It is this enquiry which indirectly reveals the presence or absence of the broad conception of nationality based discrimination.

Protectionism as the Essence of Nationality Based Discrimination or as a Type of Nationality Based Discrimination?

It is however arguable that the absence of ‘so as to afford protection’ in investment law national treatment provisions is significant for the way in which they are interpreted. This may have implications for the process by which nationality based discrimination is revealed without, however, undermining the view that this is the ultimate concern of both regimes.

The trade regime is concerned with whether measures which adversely affect imported products afford protection to domestic production. The strongest evidence for this is that likeness in the trade regime is about the nature and extent of the competitive relationship between products. A higher tax on vodka than shochu potentially affords protection to domestic shochu, but could not possibly afford protection to domestic cutlery even if the tax on cutlery is substantially lower than that on vodka. The beverages are in a reasonably close competitive relationship while vodka and cutlery are not.

¹⁹⁶ *Mesa Power Group, LLC v Government of Canada* (Government of Canada’s Rejoinder on the Merits, 2014) UNCITRAL, PCA Case No 2012-17 [96] – [97].

¹⁹⁷ *Feldman* (n 155) [181].

¹⁹⁸ The *Feldman* passage is echoed in *ADM* (n 124) [205] ‘Article 1102 prohibits treatment which discriminates on the basis of the foreign investor’s nationality. Nationality discrimination is established by showing that a foreign investor has unreasonably been treated less favorably than domestic investors in like circumstances.’ In *CPI* (n 117) it was noted that ‘[i]t is also relevant that, again in contrast to *GAMI* and *Methanex*, nationality was a highly pertinent factor in the imposition of the tax’ [137]. Outside of the NAFTA Chapter 11 context, a tribunal noted, ‘[t]he purpose of [national treatment in the US – Egypt BIT] is to promote foreign investment and to guarantee the foreign investor that his investment will not because of his foreign nationality be accorded a treatment less favourable than that accorded to others in like situations’. *Champion Trading Co v Egypt* (Award, 2006) ICSID Case No ARB/02/9, [126].

In contrast to the trade regime, it is possible that investment regime national treatment provisions can be violated even if measures which adversely affect foreign investments do not afford protection to domestic investments. This may seem to be at odds with the discussion above. Among the most clearly articulated test for ‘like circumstances’ is the *Pope & Talbot* statement that, ‘the treatment accorded a foreign owned investment protected by Article 1102(2) should be compared with that accorded domestic investments in the same business or economic sector’.¹⁹⁹ Arguably, entities in the ‘same business or economic sector’ should be compared because they are likely to be in a strong competitive relationship.²⁰⁰ If this is correct, there could only be an investment law national treatment violation when there is protection of domestic investments competing with the claimant. However, there is an alternative view under which the focus on entities in the ‘same business or economic sector’ can be an appropriate starting point, not so much because of the likely competitive relationship, but more because these entities are likely to raise the same regulatory concerns.²⁰¹ Indeed, this is arguably inherent in the phrase ‘same business or economic sector’. Non-competing enterprises in the same economic sector can be readily envisaged. Take quarrying and mining as an economic sector. Coal and gold mines do not compete either in terms of outputs or for the land on which the activity is carried out unless it happens to be rich in both deposits. However, both mines could raise comparable regulatory concerns. Extending this logic, the ‘same business or economic sector’ test may *not* be an appropriate starting point because entities in entirely different sectors may also raise the same regulatory concerns. The final step is then to acknowledge that there can be an investment law national treatment violation when there is inexplicably different treatment of a claimant and domestic investments which operate in different business sectors, but whose activities raise the same regulatory concern.²⁰² There will be a violation here even though there is no protection of, or competitive advantage for, the better treated domestic investments because they are in a different sector than the claimant.

The *Occidental*²⁰³ case has been associated with the possibility of national treatment violations even in the absence of a competitive relationship between the foreign and domestic comparators.²⁰⁴ The claimant was an oil exporter invested in Ecuador. Along with other oil exporters, it had been denied refunds on value added tax (VAT) even though the tax law provided for VAT refunds for ‘export-oriented manufacturers’.²⁰⁵ Other foreign and domestic producers, such as flower exporters, enjoyed the continuous benefit of VAT refunds.²⁰⁶ The claimant argued that the meaning of ‘in like situations’ covered ‘companies engaged in exports even if encompassing different sectors’.²⁰⁷ Ecuador argued that the meaning covered only companies in the same sector and that all oil producers were treated alike.²⁰⁸ The tribunal agreed with the claimant. The relevant ‘situation’ covered ‘all exporters that

¹⁹⁹ *Pope & Talbot* (n 14) [78].

²⁰⁰ This is clearly what the tribunal in *SD Myers, Inc v Canada* had in mind when noting that the claimant was, ‘in a position to take business away from its Canadian competitors’. See *SD Myers, Inc v Canada* (Partial Award, 2000) UNCITRAL, [251]. Vandeveldel comments that ‘the dispositive consideration ... was that the companies receiving different treatment were in the same sector and in direct competition’. Vandeveldel (n 165) 383.

²⁰¹ DiMascio and Pauwelyn (n 10) 75-76 and 85.

²⁰² Vandeveldel notes that investments may be like if ‘none of the differences [are] relevant to legitimate non-discriminatory policies of the host state’. Vandeveldel (n 171) 383.

²⁰³ *Occidental Exploration and Production Company v Republic of Ecuador* (Award, 2004) LCIA Case No UN3467 (Occidental).

²⁰⁴ DiMascio and Pauwelyn (n 10) 74-75, 85.

²⁰⁵ *ibid* [125].

²⁰⁶ *ibid* [168], [172].

²⁰⁷ *ibid* [168].

²⁰⁸ *ibid* [171].

share such condition',²⁰⁹ while, 'the purpose of national treatment in this dispute (...) is to avoid exporters being placed at a disadvantage in foreign markets because of indirect taxes paid in the country of origin'.²¹⁰ The tribunal confirmed a violation without very much further analysis. In terms of explaining the decision, the refusal of VAT refunds for oil exporters plainly did not afford any protection to flower exporters. However, considered from the perspective of regulatory context, Ecuador failed to offer a valid reason for differentiating between exporters of different products. While Ecuador considered that there was no right to VAT refunds under its legislation,²¹¹ its Supreme Court had confirmed this right for all exporters.²¹² Had there been valid reasons for the differential treatment of oil exporters, it is plausible that the tribunal would have regarded this as a consideration, perhaps even a decisive consideration, weighing against a violation.

As decided, the case cannot be accommodated within any conception of nationality based discrimination. However, the reason for this should not be exaggerated. The overly broad understanding is that it is not meaningful to talk in terms of nationality based discrimination when there is no competitive relationship between the comparators, and therefore no possibility that domestic investments were protected in the sense of gaining a competitive advantage. However, this position can also be regarded as merely an indicator of the absence of nationality based discrimination. Suppose that in *Occidental*, the tribunal had found that all or most oil exporters were foreign investments. Supplemented with the existing consideration that there was no valid reason to treat oil exporters differently from other exporters, this would provide an indication of nationality based discrimination even in the absence of a competitive relationship between flower and oil exporters. The measure would harm mainly foreign investments for no apparent valid reason. As indicated however, the case as decided did not provide any indication of the proportion or market share of domestic and foreign oil exporters.²¹³ As such, a national treatment violation was confirmed in the absence of any indication of nationality based discrimination. In a qualified manner, I am therefore inclined to agree with the view that *Occidental* stretched the national treatment principle beyond its proper scope of operation. As Diebold notes, 'the true question in *Occidental* was not whether the differential tax treatment between exporters of oil and exporters of flower is discriminatory, but whether the tax treatment of foreign invested oil exporters is more burdensome than necessary or whether it violates legitimate expectations'.²¹⁴ This is correct, but, in my view, only because there was no evidence that oil exporters in Ecuador were mainly foreign owned, as opposed to the broader perspective that, 'regulations with no effect between domestic and foreign competitors should not be dealt with under a non-discrimination obligation'.²¹⁵ Admittedly my preferred position is at the boundary of how far a prohibition on nationality based discrimination can be extended.

²⁰⁹ *ibid* [176].

²¹⁰ *Ibid* [175].

²¹¹ *ibid* [37].

²¹² *ibid* [141].

²¹³ It is notable that another case in relation to the same measures provided this information: 'Flowers, broccoli, tea, timber, bananas, shrimp, fresh fish sectors exporters - all producers of non-manufactured goods - are entitled to VAT refunds in Ecuador. The oil and gas sector adversely affected by such interpretation is exclusively and entirely composed of foreign companies, a situation that is not shared by the other non-manufacturing export sectors in Ecuador just mentioned. There is no convincing uncontested evidence proving that Petroecuador [a domestic entity] is subject to VAT. There is uncontested evidence that any shortfall caused by an eventual absence of VAT refunds to Petroecuador is covered through infusion of funds from the Ecuadorian State, a windfall benefit which, certainly, does not extend to the foreign oil companies.' *EnCana Corporation v Republic of Ecuador* (Partial Dissenting Opinion, 2005) LCIA Case No UN3481 [40].

²¹⁴ Diebold (n 7) 853-854.

²¹⁵ *ibid* 856.

However, the WTO Appellate Body's national treatment jurisprudence now arguably extends beyond regulations with no effect between foreign and domestic competitors.²¹⁶

In sum, based on the current state of the trade and investment case law, the evidence indicates that both regimes are ultimately concerned with nationality based discrimination. The investment regime may well evolve towards a broader understanding of this concept under which violations can be confirmed without evidence of any competitive relationship between the comparators. This development is acceptable. Nationality based discrimination need not be confined to serving the end of prohibiting economic protectionism and unfair competitive conditions. The broader end is simply to engender confidence that the host state will not differentiate on the basis of nationality. A violation is less likely but far from impossible between non-competing comparators. Nationality based discrimination cannot be excluded, when, for example, inexplicably different treatment is provided to non-competing entities and when the burden of the measure is encountered disproportionately by foreign investments. This evidence, as opposed to a preference for best treatment, is generally relevant to revealing nationality based discrimination. The two regimes therefore need to be distinguished in different ways if best treatment is to prevail in the investment regime.

Should Different Political Economies Shape the Content of Rights or Merely the Burden of Proof?

A number of commentators explain that the regimes have different political economies geared towards protecting different values. The trade regime zooms out to the macro level protecting the overall benefit of equal competitive conditions, whereas the investment regime zooms in to the micro level of protecting the value of specific investments. National treatment in the trade regime is violated when the conditions of competition between like domestic and imported goods are modified to the detriment of imports. In strict legal theory, this can be established without demonstrating any adverse impact on trade flows.²¹⁷ The protection of overall welfare is in turn reflected in the remedy of prospectively bringing offending measures into conformity via withdrawal or modification. In contrast, the investment regime's focus on the measure's actual impact on the claimant is reflected in the damages remedy.

²¹⁶ Pauwelyn notes as follows in relation to *US – COOL* in which the Appellate Body found a violation of the TBT 2.1 national treatment obligation but not of the Article 2.2 'more trade restrictive than necessary' standard: 'Ultimately, what the AB faulted COOL on was not so much origin-based discrimination but rather the fact that, irrespective of the origin of the meat, "the informational requirements imposed on upstream producers under the COOL measure are disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels" [347]. This "disproportionality" was, in turn, labelled as not being "even-handed" which, in turn, was labelled as "arbitrary and unjustifiable discrimination" which, ultimately, led the AB to conclude that COOL's detrimental impact on imports did not "stem exclusively from a legitimate regulatory distinction" [349].' See Joost Pauwelyn, 'COOL ... but what is left now for TBT Art. 2.2?' (*International Economic Law and Policy Blog*, 3 July 2012) <<http://worldtradelaw.typepad.com/ielpblog/2012/07/cool-but-what-is-left-now-of-tbt-art-22.html>>.

²¹⁷ This position formally applies to tax measures and regulatory measures. In practice, however, while the actual impact of the measure is indeed completely irrelevant in tax cases, the impact is highly pertinent in establishing that regulatory measures have modified competitive conditions. If imported products are taxed in excess of like domestic products, there is a violation even if the volume of the imported products has increased after the introduction of the tax. On the other hand, the Appellate Body did not consider that a measure requiring retailers to choose between selling domestic or imported beef was plainly and automatically a violation of Article III:4. It only confirmed a violation having considered how retailers responded to the measure (WTO, *Korea: Measures Affecting Imports of Fresh, Chilled and Frozen Beef – Report of the Appellate Body* (10 January 2001) WT/DS161/AB/R and WT/DS169/AB/R [143]–[148]). Nevertheless, there is a distinct difference between the actual impact of a measure on a particular investment, and the response of an entire market segment to a measure.

Does the different nature of what is protected in the two regimes need to be reflected, not only in affording standing to individual claimants to vindicate their rights, but also in an adjustment to the content of these rights? Granted, there would be little value in affording individual investors the ability to vindicate their rights while defining the content of these rights such as to make it virtually impossible to establish a violation. However, there is ample scope for safeguarding the ability to vindicate rights via allocation of burdens of proof. It may well be unreasonable to require claimants to provide detailed evidence of the overall distribution of the beneficial and detrimental impact of a measure as between foreign and domestic comparators.²¹⁸ However, it does not follow from what may be an insurmountable evidential burden²¹⁹ that a claimant should be able to establish a violation by identifying a single more favourably treated domestic comparator. On the contrary, it is a sufficient allowance that this could be enough to establish a *prima facie* case or a presumption of a violation. The respondent would then be able to argue either that the measure does not disproportionately disadvantage foreign owned investments, or that the claimant is not in like circumstances with the comparator/s it has identified.²²⁰

To this, there is the response that claimants are entitled to vindicate their own rights which should not be undermined because the preponderance of other foreign investors do not encounter the detrimental impact of the measure. But the nature of the individual right which the claimant is able to assert has been demonstrated above. It is a right not to be subjected to nationality based discrimination. Evidence on the distribution of the burdens and benefits of a measure is highly pertinent in the context of nationality based discrimination. This is why even tribunals which have strongly endorsed best treatment have clearly been strongly influenced by this evidence. Indeed, it is inconceivable that it could be rejected to the extent that it is available.

Sunk Costs Entitle Investments to Greater Protection?

A related argument which is sometimes used in support of best treatment explains why the investment regime focuses on protecting the value of individual investments.²²¹ Traditional forms of investment, such as capital expenditure on factories in host states, involve greater sunk costs and therefore risk than trade which only involves goods crossing the border. Traders can briskly react to trade barriers by seeking new markets or increasing sales to existing markets. Investors may not have the same degree of flexibility if, for example, products produced in, and for consumption in, a host state are rendered unviable by a new and unexpected measure. As noted by the CPI tribunal:

²¹⁸ The *Pope & Talbot* tribunal (n 14 [72]) considered that this would ‘hamstring foreign owned investments seeking to vindicate their Article 1102 rights’.

²¹⁹ Kurtz has written of ‘various and often deep forms of informational asymmetry [which] should inform our thinking on how properly and fairly to allocate both the burden of proof (the responsibility to adduce evidence before an adjudicator) and the requisite standard of proof (the type and quantum of evidence necessary to persuade an adjudicator) on particular substantive questions, including national treatment’. See Kurtz (n 144) 758 and Kurtz (n 10) 267-268.

²²⁰ Illustrative here is the *Nykomb v Latvia* tribunal’s analysis of the discrimination claim under Article 10(1) of the Energy Charter Treaty. This provision provides in part that, ‘...no Contracting Party shall in any way impair by unreasonable or discriminatory measures their [the Investor’s Investments] management, maintenance, use, enjoyment or disposal’. The alleged discriminatory measure was the payment of a double tariff to two companies which the claimant’s investment was deprived of. The Tribunal considered that the claimant’s company and one of the comparators in particular were closely comparable and ‘subject to the same laws and regulations’. It proceeded to find that, ‘in accordance with established international law, the burden of proof lies with the Respondent to prove that no discrimination has taken or is taking place’. As the respondent failed to provide an explanation for the difference in treatment, the burden of proof was not satisfied and the violation was established. See *Nykomb Synergetics Technology Holding AB v Latvia* (Arbitral Award, 2003) 34.

²²¹ DiMascio and Pauwelyn (n 10) 57; Weiler (n 9) 429-430.

[T]here is no evidence that CPI did - or could have - switched to customers in the United States for its Mexican-produced HFCS when it was confronted with the loss of its Mexican market as a result of the HFCS tax. On the contrary, the fact that it was obliged to close one plant and significantly reduce production elsewhere in Mexico, together with the lengths it went to in order to develop alternative products for different markets within Mexico (e.g. by trying to develop cleaning products based on HFCS) suggest that no alternative market in the United States was, in reality, to be found.²²²

The greater risk of sunk costs in investment does not provide any support for best treatment in the national treatment analysis. The argument above applies equally here. Evidence about the distribution of the positive and negative impacts of a measure simply cannot be declared irrelevant in the context of a prohibition of nationality based discrimination. The sunk costs argument can also be addressed head on. Investments can vary widely with regard to the level of commitment in host states. For example, the investment in *SD Myers v Canada* involved a host state commercial presence to capture waste remediation contracts via marketing and customer contact. The treatment of the waste was carried out upon its exportation to a home state facility.²²³ Sunk costs may be still less of an issue in the context of debt and portfolio investments. Even if the sunk costs argument is accepted as weighing in favour of a best treatment standard, there are other arguments which weigh in favour of interpreting the investment law national treatment standard in a manner deferential to most states. Politicians tend to highlight growth in foreign investment and newly created jobs more than increases in imported goods. As Pauwelyn and DiMascio note, ‘foreign products always remain foreign, whereas foreign investments become local’.²²⁴ The same authors highlight that there can be a darker side to this positive footprint. With not only products, but also the producer and production process crossing the border, there is greater risk of environmental damage and labour exploitation.²²⁵ Both points suggest a deferential approach to national treatment which can be weighed against the need for enhanced protection for foreign investments on the basis of possible sunk costs. Interesting though these arguments are, they are very much secondary to those which flow from the nature of a prohibition on nationality based discrimination.

Intensity of Competition

A different argument defends best treatment on the basis that many disputes arise in the context of intense competition between a domestic champion and a foreign competitor sharing between them a significant portion of the market. This argument informs the dissent in *UPS*. As noted, the dissent contained the single most explicit endorsement of best treatment. It was, ‘enough [for the claimant] to establish that a NAFTA Party has given one or more of its investors or investments more favorable treatment’.²²⁶ The dissent continued:

Frequently, the most significant competition in a given field will be between a domestic entity or investor and a foreign investment or investor. In that setting, preferential treatment for a favored domestic investor or investment is effectively a discrimination against the foreign investor or

²²² *CPI* (n 117) [130].

²²³ *SD Myers* (n 200) [93].

²²⁴ DiMascio and Pauwelyn (n 10) 56.

²²⁵ *ibid* 57-58.

²²⁶ *UPS* (n 129) [60] (dissent).

investment, even if other domestic investors or investments receive treatment equivalent to that given to foreign investors or investments.²²⁷

The NAFTA jurisprudence lacks a consistent position here. In particular, the *Feldman* dissent, in the strongest rejection of best treatment, considered that, ‘if only a “universe of two” has been “proved to exist” in the record before this Tribunal, as the Award so acknowledges, it would be in order to conclude that no sufficient evidence is available to uphold the claim of discrimination’. I have already explained my reservations about this position,²²⁸ and I agree that there should probably be a violation in the situation outlined in the UPS dissent, absent a convincing explanation for the challenged measure. However, this is not an argument in favour of systematically rejecting evidence about the distribution of the positive and negative impacts of a measure as between foreign and domestic investments. It is rather an argument in favour of refining the way in which this evidence is evaluated.

It is necessary to consider not just the number of foreign and domestic entities encountering the positive and negative impacts, but also the market share of these entities. Suppose that 90% of the market share is split between one domestic and one foreign entity in equal proportions. The measure has a detrimental effect only on the claimant foreign entity. The remaining 10% of the market is contested by a dozen companies. Half of these are domestic entities and encounter the detrimental effect of the measure. The other half are foreign entities which do not encounter the detrimental impact. It would plainly be inappropriate here to conclude that there is no violation on the basis that the claimant is the only foreign entity out of seven encountering the detrimental effect of the measure, while six of the seven domestic entities encounter the detrimental effect. The correct approach would be to attribute substantial weight to what is happening as between the two entities contesting 90% of the market and much less weight to what is happening between the entities contesting the remaining 10%.

There may very well be nationality based discrimination at work in this example in the sense of protecting the position of the largest domestic firm at the expense of its largest foreign competitor. The TNFL standard may indeed have been violated, primarily because of the difference in treatment between one domestic and one foreign entity. However, the scenario can easily be changed to increase the importance of considering the overall impact of the measure as between foreign and domestic entities. Suppose that the claimant is among the dozen entities which contest 10% of the market. Along with almost all other market participants including the major firms, the claimant encounters the detrimental effect of the measure. One of the six domestic entities with a 0.5% market share is unaffected. As there is very unlikely to be nationality based discrimination at work here, it is doubtful whether a best treatment approach would be used to find a violation of the TNLF standard. While the ordinary run of cases may more closely resemble the former scenario than the latter, this cannot result in the automatic rejection of evidence on the overall impact of a measure in all cases. It is just that this evidence will carry less weight in some cases than others in terms of revealing *de facto* discrimination.

Individual Decisions and Measures of General Application

A final argument in support of best treatment is that measures challenged in investment disputes are more likely to consist of individual decisions addressed only to the claimant, whereas trade disputes tend to be more concerned with measures of general application.²²⁹ Of course, several investment

²²⁷ *ibid* [62].

²²⁸ See 43.

²²⁹ Diebold (n 7) 846, 855.

disputes have concerned the exact same measures of general application also challenged in the trade regime.²³⁰ It is also a peculiarity of the trade regime that some measures of a so called discretionary nature, which are capable of being applied in conformity with, and in violation of, WTO law, can only be challenged when they are applied in an inconsistent manner.²³¹ To the extent that this peculiarity exists,²³² some trade disputes can only be about measures as applied in individual cases.

Nevertheless, there is something to the argument that best treatment has a place when the case is about applications of legal measures addressed only to the claimant's investment. There is a somewhat greater possibility that nationality based considerations have entered into the decision making process here than in the case of generally applicable measures. This is because the decision makers have a particular applicant before them whose nationality is known. The decision will only affect the applicant, so that there is no need to consider possible adverse effect on a certain proportion of domestic firms. Additionally, there may be more scope for considering evidence of subjective discriminatory intent when a decision is addressed to the claimant, as opposed to when a general measure, is challenged. With a general measure, it is not possible to know what motivated all or most individual legislators. Even if some have expressed nationality based motivations, others may have expressed support for or been motivated by a legitimate policy concern. In contrast, decisions are likely to emanate from a smaller group of individuals, so that there is scope for attributing more weight to expressions of nationality based animus to the extent that such evidence is available.

Again, however, the somewhat greater possibility of nationality based discrimination in this context can be accommodated by allocating the burden of proof. The claimant should be able to establish a *prima facie* case by establishing that the challenged constraint has not been applied to one domestic entity with which it is in like circumstances. However, the respondent should also have the opportunity to argue that the measure is applied to foreign and domestic entities which are in like circumstances in an even handed manner. This approach was adopted by the majority in *Feldman*. As explained, there was every indication here that the majority would have considered evidence relating to even handed application. As Mexico declined to present such evidence, a violation was established based on less favourable treatment of the claimant relative to a domestic competitor.

IV. *BILCON V CANADA*

The *Bilcon* award on jurisdiction and merits was issued on 17 March, 2015.²³³ This section considers the contribution of this case towards the investment law non-discrimination *acquis* and the extent to which best treatment may have been endorsed.

²³⁰ Mexico's tax on high fructose corn syrup is a prominent instance. See WTO, *Mexico – Tax Measures on Soft Drinks and Other Beverages* - Report of the Appellate Body (24 March 2006) WT/DS308/AB/R. The investment case are *ADM* (n124); *CPI* (n117) and *Cargill Incorporated v United Mexican States* (Award, 2009) ICSID Case No. ARB(AF)/05/2. 18 September 2009).

²³¹ Simon Lester, 'A framework for thinking about the "discretion" in the mandatory / discretionary distinction' (2011) 14 *Journal of International Economic Law* 369; Nicolas Lockhart and Elizabeth Sheargold, 'In search of relevant discretion: The role of the mandatory / discretionary distinction in WTO law' (2010) 13 *Journal of International Economic Law* 379.

²³² See Simon Lester, 'A Brief Update on the Mandatory / Discretionary Distinction' (*International Economic Law and Policy Blog*, 12 December 2014) <<http://worldtradelaw.typepad.com/ielpblog/2014/12/a-brief-update-on-the-mandatorydiscretionary-distinction.html>>

²³³ *Bilcon* (n 8).

The case involved a refusal to grant a permit to the claimant's investment for the development of a 152ha quarry and dock at Whites Point in Digby County, Nova Scotia. This refusal culminated from the most rigorous of four forms of environmental assessment under the Canadian Environmental Assessment Act (CEAA) – a Joint Panel Review consisting of concurrent federal and provincial assessments in one joint process. According to Bilcon's evidence, this form of assessment was extremely rare, having previously been applied to 0.3% of projects throughout Canada.²³⁴ Bilcon considered that it had been treated less favourably than a number of Canadian investors in like circumstances. It complained not of the outcome of the review, but of the mode of review and the failure to apply the legally mandated CEAA evaluative standard common to all modes of review - 'likely significant adverse effects after mitigation'. Rather than applying this standard, the concept of 'community core values' was adopted (this concept finding no expression in the relevant statutes, regulations or guidelines).²³⁵ The tribunal found that an assessment of the mode of review was time barred by NAFTA Article 1116(2),²³⁶ and therefore confined itself to the alleged failure to apply the proper evaluative standard.

The case was decided primarily under the Article 1105 fair and equitable treatment standard. In finding a violation, the majority was greatly influenced by its view that there had been a failure to follow Canadian law – a matter which was of equal relevance in the Article 1102 national treatment analysis. In its conclusions on the minimum standard of treatment, the majority noted:

The *Waste Management* test mentions arbitrariness. The Tribunal finds that the conduct of the joint review was arbitrary. The JRP effectively created, without legal authority or fair notice to Bilcon, a new standard of assessment rather than fully carrying out the mandate defined by the applicable law, including the requirement under the CEAA to carry out a thorough "likely significant adverse effects after mitigation" analysis.²³⁷

In its Article 1102 national treatment analysis, the tribunal dealt first with the comparator element, noting Bilcon's argument that 'all enterprises affected by the environmental regulatory process' were in like circumstances.²³⁸ At first sight, this is an overly broad proposition. After all, it would involve no inquiry into whether the proposed comparators are in the same business or economic sector, or whether they raise the same type and gravity of regulatory concern such as environmental damage. However, the proposition is not untenable in the context of this case. Recall that the measure under review was ultimately limited to an unprecedented decision to ignore a legally mandated standard in favour of a different standard not expressed in the CEAA. The absence of choice renders it irrelevant to find out whether the proposed comparators are in the same economic sector or raise similar regulatory concerns. If all enterprises subject to an environmental assessment are entitled to a certain treatment, they are all in like circumstances. There is no scope for enterprises to differ in some respect which would explain the non-application of a legally mandated standard. In contrast, if the case had also been about the discretionary matter of the mode of review, it would be vital to know whether Bilcon was treated less favourably than comparators in the same sector or raising similar environmental concerns. Here, different treatment could be explicable on various legitimate grounds.

²³⁴ *Bilcon of Delaware, Inc v Government of Canada* (Memorial of the Investors, 2011) UNCITRAL, PCA Case No 2009-04 [72]. The tribunal accepted this evidence at *Bilcon* (n 8) [688].

²³⁵ The majority agreed with Bilcon's view on the provenance of the 'community core values' standard [503], further describing the concept as 'fundamentally novel'. See *Bilcon* (n 8) [573].

²³⁶ *ibid* [280-281].

²³⁷ *ibid* [591]. The dissent disagreed with the idea that a breach of Article 1105 can be founded on a failure to follow domestic law not confirmed by Canadian courts. For the dissent, 'a potential breach of Canadian law does not meet the high threshold of the *Waste Management* threshold' [36].

²³⁸ *ibid* [695].

On this matter, the tribunal considered that Bilcon’s ‘broad proposition might be correct’, but that it was a ‘more abstract and sweeping proposition’ than necessary to decide the case.²³⁹ Instead, the tribunal observed that ‘many of the comparison cases brought forward by the Investors qualify as “sufficiently” similar to sustain an Article 1102 comparison for the purpose of this case’.²⁴⁰ The tribunal did not explicitly identify the criteria for comparison which led it to this view. Ordinarily, this would be an unfortunate omission. However, bearing in mind that the claimant’s broad proposition was indeed correct, I am not inclined to criticize this failure. Also, from the comparisons drawn by the tribunal, it is possible to work out that the relevant considerations included commonalities in business and economic sector, type and severity of environmental damage, proximity to populated areas and degree of community opposition.²⁴¹

In applying these criteria, the tribunal in fact repeatedly recognized and confirmed the claimant’s position. In other words, the tribunal effectively confirmed that there was no scope for enterprises to differ in some respect which would explain the non-application of a legally mandated standard. All proposed projects subject to an environmental assessment were indeed in like circumstances for the purpose of entitlement to a legally mandated standard of review:

Canada contends that Tiverton involved a quarry that would only be operated for several months to provide material for the terminal. Furthermore, there was no significant public opposition. These points might weigh both on whether it was reasonable to conduct a lower-level of environmental assessment (a comprehensive assessment or screening rather than review panel) of the quarry or even of the terminal, notwithstanding that the environmental impacts might have been as serious, even potentially more serious in some respects, than the Bilcon project. They might provide a basis for explaining why the analysis by the JRP in this case could focus considerable attention on reporting and analyzing concerns raised by members of the local community. These points do not explain, however, why the Bilcon project was not, as part of the analysis, subjected in all of its likely adverse effects to the same thorough application of the approach—including identifying mitigation measures—required by s. 16 of the *CEAA*.²⁴²

The tribunal’s discussion of the TNLF standard was not differentiated from the comparator element. Indeed, the conclusion on TNLF came early on in the comparisons between the various projects:

The fact that assessments in these cases were carried out in accordance with the usual “likely significant adverse effects after mitigation” analysis is sufficient to conclude that they received more favorable treatment than did the Investors in like circumstances.²⁴³

Understandably, the tribunal did not refer to the best treatment issue. This was clearly not a case in which some or many domestic comparators had been treated in the same manner as the claimant, while some or just one had been treated more favourably. It was rather a case in which all domestic comparators received the mandated treatment while the claimant’s project was subject to unprecedented and less favourable treatment at odds with the legislation. This is indicative of nationality based discrimination.

²³⁹ Ibid [695].

²⁴⁰ Ibid

²⁴¹ Ibid [696-708].

²⁴² Ibid [700] (notes omitted). See also [697], [704], [705] and [708].

²⁴³ Ibid [696].

On the other hand, the tribunal did not refer to evidence indicating the absence of nationality based discrimination. In failing to do so, it leaned towards a characteristic of the best treatment paradigm. This approach involves paying little attention to evidence that a measure has been applied to foreign and domestic entities in an even handed manner. In its national treatment analysis, the tribunal did not refer to the treatment of foreign owned entities under the favourable mandated standard.²⁴⁴ In other words, there was evidence indicating that the favourable treatment was evenly distributed between foreign and domestic entities so that there was no systematic pattern of differential treatment based on nationality.

It is regrettable that the tribunal did not refer to this evidence as part of a clear identification, weighing and balancing of all evidence relevant to nationality based discrimination. Notwithstanding this omission, it is submitted that the circumstances as a whole could reasonably be taken as indicating a violation. It is significant that the only applicant to have received the unusual treatment was the claimant – a foreign owned entity. From here, the question is whether there is any reasonable explanation for this unique occurrence. As already indicated, the tribunal considered that there was no ground on which to depart from the mandated standard. There was no possible basis of distinction between projects subject to an environmental assessment which could explain the failure to carry out the ‘significant adverse effects after mitigation’ analysis. Additionally, the case was about a decision making process directly concerning only an entity known to be foreign, as opposed to a general measure affecting many entities, which just happens to adversely affect only one entity, which happens to be foreign. An inference of nationality based discrimination can reasonably be made in these circumstances, notwithstanding the presence of other foreign entities treated in the normal manner. As the tribunal noted, ‘(...) the emphasis on “community core values” raises the serious question of whether the project would have received more favorable treatment if the investor had not been foreign’.²⁴⁵

The national treatment analysis in this case would have been more complex had it extended to the mode of review which was time barred. In this context, the claimant’s argument that it was in like circumstances with all other enterprises subject to an assessment could not have been correctly accepted. The claimant’s project would only be in like circumstances with projects which did not differ in some respect relevant to the choice of review mode. The range of comparators could then have been narrowed on the basis that considerations such as level of public opposition could legitimately have informed the choice between different review modes.

A further narrowing could have resulted from deference to the choice of review mode.²⁴⁶ Tribunals have sometimes attached a high weight to deference. *GAMI v Mexico*²⁴⁷ involved a programme of nationalization of sugar mills in order to place them in the hands of solvent enterprises. Around half of the sugar mills were expropriated including the five mills owned by GAMI’s Mexican subsidiary, GAM. The tribunal considered that GAM was not in like circumstances with BSM, a domestic comparator which was in a similarly precarious financial position whose five mills had not been expropriated. On the need for deference, the tribunal opined:

²⁴⁴ In the tribunal’s brief statements on Article 1103, reference was made to Bilcon having identified a series of better treated projects of foreign companies [727].

²⁴⁵ *ibid* [715].

²⁴⁶ See Stephan W Schill, ‘Deference in investment treaty arbitration: Re-conceptualizing the standard of review’ (2012) 3 *Journal of International Dispute Settlement* 577.

²⁴⁷ *Gami Investments, Inc v The Government of the United Mexican States* (Final Award 2004) UNCITRAL.

The Government may have been misguided. That is a matter of policy and politics. The Government may have been clumsy in its analysis of the relevant criteria for the cut-off line between candidates and non-candidates for expropriation. Its understanding of corporate finance may have been deficient. But ineffectiveness is not discrimination. The arbitrators are satisfied that a reason exists for the measure which was not itself discriminatory. That measure was plausibly connected with a legitimate goal of policy (ensuring that the sugar industry was in the hands of solvent enterprises) and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity.²⁴⁸

Suppose that this narrowing process resulted in a complainant being in like circumstances with only one better treated domestic comparator. In this situation, the claimant should not automatically win based on a firm legal principle that requires best treatment. There is no such entitlement. On the other hand, it should also be possible for the complainant to win. This is because the described narrowing process has eliminated comparators which have justifiably been better treated – those which did not raise the same type or gravity of regulatory concern and those where the better treatment falls within a margin of discretion. The differential treatment between the claimant and the one remaining comparator is inexplicable on any legitimate ground. In this situation, a tribunal could be satisfied that nationality based considerations have entered into the decision making process, especially if there is evidence of subjective discriminatory intent on the part of the decision makers. A violation in this situation would result from weighing and balancing all the evidence which is relevant to the presence and absence of nationality based discrimination rather than from a firm principle which requires best treatment.

V. CONCLUSION

Even investment tribunals which have explicitly endorsed best treatment have considered whether challenged measures have tended to impact more heavily on foreign than domestic investments. This is as might be expected given that tribunals properly view TNLF provisions as prohibiting nationality based discrimination. There is a magnetic attraction between this prohibition and evidence on the distribution of the positive and negative impacts of measures as between foreign and domestic investments. Naturally, therefore, tribunals should consider this, and all other, reliable evidence.

In terms of advice for respondent states, the evolution of Canada's position is surprising. From a reliance on the WTO law position in support of considering evidence on the distribution of the burdens and benefits of challenged measures (*Pope & Talbot*), it now considers this comparison to be inapposite (*UPS / Bilcon*). Bearing in mind that respondent states are understandably averse to best treatment, there is scope for referring investment tribunals to WTO law, under which evidence of disproportionate impact is now firmly established as a relevant consideration. The advice for Treaty drafters is that there is some scope for clarifying the TNLF standard, to the extent that phrases such as 'no less favourable than the most favourable treatment' can presently be understood as requiring best treatment. Treaty drafters could consider whether there is any alternative wording which could clarify the underlying rationale of this language in provisions applicable to the states and provinces of NAFTA and BIT Parties. Such a move could improve the clarity of decisions in investment disputes. It is arguably anomalous to find within some decisions that best treatment has been endorsed under the TNLF analysis while also effectively rejected in other parts of the analysis via consideration of evidence on the distribution of the measure's impacts. If the Treaty language was not capable of being

²⁴⁸ *ibid* [114].

understood as requiring best treatment under the TNLF standard, this evidence could be brought out into the open and considered within the TNLF analysis where it most belongs.

Beyond this, there is little scope for further clarification which would be of much assistance to claimants and respondent states. This is because the weight given to the various indicators of nationality based discrimination can vary considerably from one case to the next. Claimants will sometimes win and sometimes lose when they have been treated less favourably than a single domestic comparator. Of relevance will be the size of the market share jointly contested by the claimant and the domestic comparator. The higher this market share, the greater the weight which can be attributed to the relative treatment of just two entities. Also of relevance in cases involving decisions taken by a discrete and identifiable group of individuals, and directly affecting only the claimant, will be evidence that nationality based considerations have subjectively motivated the decision makers. This evidence is more likely to be reliable and therefore relevant in the investment regime in which cases are more often focused on individual decisions. To the extent that trade cases tend to be about measures of general application, available evidence of subjective motivations of a larger quorum will tend to be less reliable. It follows that, in general, there is greater scope in the investment regime for a lack of evidence on the overall distribution of the impacts of a measure to be offset by other evidence indicating the presence of nationality based discrimination.

In terms of state regulatory autonomy and policy space, this article has not detected a significant gap between the trade and investment regimes.²⁴⁹ All other aspects of the national treatment analysis being equal, best treatment under the TNLF element would shrink policy space in the investment regime relative to the group comparison in the trade regime. However, all other aspects of the analysis are not equal. The regulatory context approach to the comparator element in the investment regime is almost as firmly established as the competition approach in the trade regime. Taking account of regulatory context by asking whether there is a legitimate reason to treat proposed comparators differently from the claimant, has a greater potential to reduce the range of comparators relative to a competition based approach. Investment law national treatment therefore front-loads the preservation of policy space in the comparator element. As has been shown, this has involved consideration of the overall impact of challenged measures. By the time investment tribunals arrive at the TNLF analysis, much of the contribution towards preserving policy space made by the trade law group comparison may already have been achieved. This is not to say that best treatment should be applied under the TNLF standard. Rather, the key point to bear in mind is that outcomes in trade and investment cases should result from consideration of all available reliable evidence relevant to nationality based discrimination.

²⁴⁹ In this regard, the majority award in *Feldman* represents an exception. See text accompanying notes 150-165.