

**NON-DISCRIMINATION IN
INTERNATIONAL LAW AND SOVEREIGN
EQUALITY OF STATES:
AN HISTORICAL PERSPECTIVE**

*Michail Risvas**

ABSTRACT.....	80
I. INTRODUCTION.....	80
II. CONNECTING ECONOMIC NON-DISCRIMINATION AND SOVEREIGN EQUALITY OF STATES: THE HISTORICAL PERSPECTIVE.....	83
A. <i>Non-Discrimination in International Economic Law and Sovereign Equality of States in the Era of Colonialism</i>	85
B. <i>Non-Discrimination in International Economic Law, Sovereign Equality of States, and the Cold War</i>	98
III. ECONOMIC NON-DISCRIMINATION AND SOVEREIGN EQUALITY OF STATES IN CONTEXT: INTERNATIONAL INVESTMENT AND TRADE LAW.....	101
IV. CONCLUSION: EXPLAINING THE DISCREPANCY OF THE LEGAL AND HISTORICAL PERSPECTIVES.....	110

* Michail Risvas is a doctoral candidate in international law at the University of Oxford, Faculty of Law and an associate at Three Crowns LLP in Paris. Email: michail.risvas@balliol.ox.ac.uk © Michail Risvas, 2016; all rights reserved. The author would like to thank his supervisor Professor Dan Sarooshi as well as Odysseas G Repousis, Michail Dekastros, Stavros-Evdokimos Pantazopoulos and Ryan Manton. All errors remain the sole responsibility of the author. The views expressed in this article are the author's alone and do not engage the responsibility of his colleagues or Three Crowns LLP.

Abstract

The interpretation of non-discrimination clauses lies at the epicenter of the practice of international courts and tribunals. In today's world, an important part of the jurisprudence interpreting non-discriminatory standards, such as the national treatment standard and the most-favorable nation treatment, is in fact "economic." The reason lies with the ever-expanding fields of international investment law and international trade law, that have brought about the creation of a large body of investor-state arbitration awards, WTO Panel Reports and WTO Appellate Body Reports, all interpreting and applying economic non-discriminatory standards. At the same time, the principle of Sovereign Equality of States, the cardinal organizational and constitutional principle of international relations is constantly the focus of legal and political debates in the international scene. Despite the prominence and prevalence of both concepts, little attention or no attention has been paid to the history of their interrelationship. The present article offers a detailed historical analysis of the relationship between the principles of non-discrimination and Sovereign Equality of States, which is instrumental in the better understanding of both concepts.

I. INTRODUCTION

The interpretation of non-discrimination clauses lies at the epicenter of the practice of international courts and tribunals.¹ In today's world, an important part of the jurisprudence interpreting non-discriminatory standards is in fact "economic." The reason lies with the ever-expanding fields of international investment law and international trade law that led to the creation of a large body of investor-state arbitration awards, WTO Panel Reports and WTO Appellate Body Reports, all of which interpret and apply economic non-discriminatory standards. Although non-discrimination in economic affairs may seem distant from the principle of Sovereign Equality of States, a closer look at these notions reveals that—historically—they were connected. Economic non-discrimination clauses such as the National

1. See Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law*, 38 J. WORLD TRADE 1, 2 (2004).

Treatment standard and the most-favored nation (MFN) treatment,² have an extensive pedigree and originate from ancient times.³ The pivotal role that non-discrimination clauses play in contemporary international trade and investment law, however, traces back to the 19th and 20th century when intensified international treaty practice made such clauses prevalent.⁴ At the same time, the single most important historical phenomenon for the development of international law and the conceptualization of the principle of Sovereign Equality of States was *colonialism* and the process of *decolonization*.⁵ In other words, economic non-discrimination preceded the development of Sovereign Equality of States and, as this article shows, also played a crucial role in the development of the latter notion.

Setting out from the above premise, this article explores the

2. The objective of the MFN's clause is "foreign parity," whereas National Treatment clauses aims at "inland parity." Georg Schwarzenberger, *The Most-Favoured-Nation Standard in British State Practice*, 22 BRIT. Y.B. INT'L L. 119 (1945). The WTO Appellate Body described the Most Favoured Nation under GATT, art. 1 as the "cornerstone of GATT" and as "one of the pillars of the WTO trading system." Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 69, WTO Doc. WT/DS139/AB/R (May 31, 2000); Appellate Body Report, *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, ¶ 101, WTO Doc. WT/DS246/AB/R (Apr. 7, 2004). The WTO Appellate Body also noted that "[f]or more than fifty years, the obligation to provide most-favoured-nation treatment in Article I of the GATT 1994 has been both central and essential to assuring the success of a global rules-based system for trade in goods." Appellate Body Report, *United States – Section 211 Omnibus Appropriations Act of 1998*, ¶ 297, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002). This was also true during the first period of globalization in the long 19th century (1815-1914). In the 1870s the Earl of Granville, British Foreign Secretary remarked, in a letter to the British Minister in Washington, that "the most-favoured-nation clause has now become the most valuable part of our system of commercial treaties and exists between nearly all nations of the earth." KHURSID HYDER, *EQUALITY OF TREATMENT AND TRADE DISCRIMINATION IN INTERNATIONAL LAW* 23 n.6 (1968).

3. TODD WEILER, *THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT* 336-39 (2013).

4. See STEPHAN SCHILL, *THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW* 29-31 (2009) (describing the prevalent use of non-discriminatory clauses in multilateral commerce treaties for the purpose of securing non-discriminatory treatment between the contracting parties and preventing parties from seeking preferential treatment in trade and investment in specified territories).

5. See ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* 196-97 (2004).

historical relationship between Sovereign Equality and economic non-discrimination. Montesquieu declared in the 18th century that “[w]e need to clarify history through [the study of] laws and laws through history.”⁶ Indeed, the study of history is essential for comprehending international law.⁷ The understanding of international legal norms cannot (and should not) occur in clinical isolation from their historical context and roots. For example, Todd Weiler, a scholar who emphasizes the importance of historical analysis in international investment law, accurately observed in relation to the international minimum standard of treatment—another legal standard encountered in recent investment treaties—that “any international rules being enforced by such coercive means would eventually come to be inextricably identified with them.”⁸ Such is the case with the concept of the international minimum standard that was initially imposed unilaterally “by means of military coercion or applied military force” and eventually transformed into a reciprocal standard.⁹ In other words, the focus is on the origins and common roots. In addition, such examination also has important practical repercussions, as it can lead to the alleviation of misunderstandings and misinterpretations when interpreting economic non-discriminatory standards.¹⁰

Taking the above introductory remarks into consideration, this article explores the relation between non-discrimination and

6. CHARLES-LOUIS DE SECONDAT, BARON DE LA BREDE ET DE MONTESQUIEU, 4 DE L'ESPRIT DES LOIS 118 (9th ed. 1748) (“Il faut . . . clarifier l’histoire par les lois, & les lois par l’histoire.”).

7. WEILER, *supra* note 3, at 24 (arguing that historical analysis enables treaty interpreters to understand the policy context and the meaning of the treaty terms existing at the time the treaty was negotiated); George Rodrigo Bandeira Galindo, *Martti Koskenniemi and the Historiographical Turn in International Law*, 16 EUR. J. INT’L L. 539, 541 (2005); Martti Koskenniemi, *Why History of International Law Today?*, 4 RECHTSGESCHICHTE 61, 61 (2004).

8. WEILER, *supra* note 3, at 98.

9. *Id.* at 61, 98.

10. Such interpretive problems have been looming since the beginning of the 20th century. For example, in 1909 Hornbeck noted in relation to the MFN clause that “[r]arely does a conditional provision so extensively used and so vital in its bearing upon economic relations escape misinterpretation and avoid becoming the source of misunderstanding.” Stanley Hornbeck, *The Most-Favored-Nation Clause (Part 1)*, 3 AM. J. INT’L L. 395, 395 (1909).

Sovereign Equality in four parts, including this introduction and a relatively short conclusion. Part II deals with the historical connection between the principle of Sovereign Equality of States and non-discrimination in international economic relations. In particular, Part II focuses on economic non-discrimination in the colonial and Cold War context. Part III analyzes non-discrimination in international trade and investment law from a purely legal perspective. Part IV concludes and offers an exegesis of the discrepancy between the history and present legal construction of Sovereign Equality in relation to economic non-discrimination.

II. CONNECTING ECONOMIC NON-DISCRIMINATION AND SOVEREIGN EQUALITY OF STATES: THE HISTORICAL PERSPECTIVE

During the Cold War, both the International Law Commission¹¹ and Soviet international legal scholarship linked non-discrimination in international economic relations and the principle of Sovereign Equality of States together.¹² However, such link was more broadly recognized. In his 1968 monograph on the subject, Khursid observed:

[t]he term discrimination in international law, no matter in what context it is used, cannot be considered apart from the principle of equality inasmuch as it invariably suggests unequal treatment. Trade discrimination in international law should be examined against the general background of the principle of equality of states to determine whether or not it sets up a compulsory standard of equality of treatment in commercial matters.¹³

The discarded Japanese proposal during the discussion for the 1919 Covenant of the League of Nations expressed the same idea:

[t]he equality of nations being a basic principle of the

11. G.A. Res. 174 (II), ¶ 1 (Nov. 21, 1947). The mandate of the International Law Commission, which is a UN organ, is to codify and progressively develop the international law. Sir Michael Wood, *Statute of the International Law Commission*, U.N. AUDIOVISUAL LIBR. OF INT'L L. 1 (2009).

12. See *infra* Part II.A.

13. HYDER, *supra* note 2, at 15.

League of Nations, the High Contracting Parties agree to accord as soon as possible to all aliens [who are] nationals of state members of the League equal and just treatment in every respect making no distinction either in law or fact on account of their race or nationality.¹⁴

This idea seems to have survived in various forms to this day.¹⁵

Instead of providing a comprehensive treatment of the subject, the historical perspective will be developed in fragments, focusing on distinct episodes and using historical snapshots. Connecting MFN and National Treatment obligations with the principle of Sovereign Equality can be largely attributed to distinct historical experiences. The first relates to the Colonial era (Section A).¹⁶ In this context, the experiences include: (i) non-discrimination under the *Calvo* Doctrine; (ii) the notorious “*unequal treaties*” signed between the Great Powers on the one part and semi-independent, quasi-colonized states on the other;¹⁷

14. JAMES CRAWFORD, *BROWNLIE'S PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 635 (8th ed. 2012).

15. See WILLIAM J. DAVEY, *NON-DISCRIMINATION IN THE WORLD TRADE ORGANIZATION: THE RULES AND EXCEPTIONS* 68 (2012) (“The most-favoured-nation clause promotes the idea of sovereign equality”); see also OSWALDO DE RIVERO B., *NEW ECONOMIC ORDER AND INTERNATIONAL DEVELOPMENT LAW* 28 (1980) (“The concept of equality on which article I of GATT is based . . . [is] basing the legal framework of international economic relations on the dogma of ‘sovereign equality’ abstractly.”).

16. See NATHANIEL BERMAN, *PASSION AND AMBIVALENCE: COLONIALISM, NATIONALISM, AND INTERNATIONAL LAW* 41-45 (2012) (contrasting the restatement-and-renewal and the genealogical approaches to the colonial period’s impact on international law and its role in the forging of sovereign equality); see also ANGHIE, *supra* note 5, at 3 (arguing that international law doctrines, such as the sovereignty doctrine, resulted out of the attempt to create a legal system during the colonial confrontation period); MICHAEL HARDT & ANTONIO NEGRI, *EMPIRE* 128 (2000) (arguing that the colonized *other* was essential for the construction of colonizers’ identity); MARTTI KOSKENNIEMI, *THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960*, at 134-35 (2001) (describing the development of equal sovereignty during the colonization period).

17. Unequal treaties are also referred to as “Leonine Treaties.” ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 100 (2d ed. 2010); see VAUGHAN LOWE, *INTERNATIONAL LAW* 75 (2007) (discussing why weak states that signed treaties with imperialist powers during the colonization period have not sought to escape from these treaties by pleading coercion); Lucius Cafilisch, *Unequal Treaties*, 25 *GERMAN Y.B. INT’L L.* 52, 62 (1993) (providing a list of “unequal” bilateral agreements which tended to benefit the Great Powers); Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 *NORDIC J. INT’L L.* 335, 342-43 (2005); Alice De Jonge,

(iii) the League of Nations mandates; and (iv) the *U.S. Nationals in Morocco* case, representing distinct episodes or historical snapshots that are worth analyzing. The second historical experience relates back to antagonism in international affairs between capitalist States and socialist States during the Cold War (Section B).¹⁸

A. *Non-Discrimination in International Economic Law and Sovereign Equality of States in the Era of Colonialism*

Before the UN Charter and the wave of Decolonization,¹⁹ “full” Sovereign Equality was recognized as a constitutional principle within the homogeneous and closed group of Western nations to the exclusion of other non-Western States.²⁰ As R.P. Anand critically observes:

several Asian States got eliminated from the orbit of the family of nations under the impact of colonialism. But even those which survived, such as Turkey, Persia, Siam, China and Japan, were treated as being outside the family of nations, especially after the Congress of Vienna in 1815. The so-called “family of nations” was restricted to a small selective European-Christian community with a provincial outlook.²¹

From Unequal Treaties to Differential Treatment: Is There a Role of Equality in Treaty Relations?, 4 ASIAN J. INT'L L. 125, 129-30 (2014); Ingrid Detter, *The Problem of Unequal Treaties*, 15 INT'L & COMP. L.Q. 1069, 1070 (1966) (explaining that when a state gains independence it may be compelled to enter into treaties that favor the more dominating party to the treaty regardless of whether these treaties are in conflict with the newly independent state's national interest).

18. For an excellent introduction, see generally ODD ARNE WESTAD, *THE GLOBAL COLD WAR: THIRD WORLD INTERVENTIONS AND THE MAKING OF OUR TIMES* (2005).

19. U.N. Charter art. 2, ¶ 1; G.A. Res. 1514 (XV), at 66 (Dec. 14, 1960).

20. ANGHIE, *supra* note 5, at 37; KOSKENNIEMI, *supra* note 16, at 134-36; Anne Orford, *Constituting Order*, in *THE CAMBRIDGE COMPANION TO INTERNATIONAL LAW* 271, 278-79 (James Crawford & Martti Koskenniemi eds., 2012); see also *Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.)*, Judgment, 1952 I.C.J. Rep. 176, 185 (Aug. 27) (“Morocco, even under the Protectorate, has retained its personality as a State in international law”); GERRY SIMPSON, *GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER* 232-34 (2004) (explaining that as some Western European states began adopting forms of democracy, they continued to relegate non-European societies to a second-class status due to a “perceived lack of civilisation”).

21. R.P. Anand, *Sovereign Equality of States in International Law*, 197 RECEUIL DES

Independent or quasi-independent non-Western States, such as Japan, China, Persia, and the Ottoman Empire, were part of the international system, as evidenced by their participation, for example, in the Hague Conferences of 1899 and 1907. And yet, the international system fell “short of recognizing their voices as of equal importance with those of the European and American powers.”²² Koskenniemi insightfully summarizes the paradoxical nature of the relationships between Western and non-Western States in the Colonial era: “[i]n order to attain equality, the non-European community must accept Europe as its master—but to accept a master was proof that one was not equal.”²³

The impact that colonialism had on constructing the European identity (or identities) and the formation of international law cannot be overstated. Naturally, the subject cannot be fully explored herein; rather, the focus will center on how the experience of Colonialism shaped the perception of sovereignty and influenced the development of non-discrimination rules in international economic law. The two above-mentioned examples, however, clearly indicate that historical experience shaped the understanding of both concepts together with their interrelationship. Since privileged and non-reciprocal obligations of non-discrimination regarding trade were granted by non-fully-sovereign States to Western Colonial Powers, the former were conceptually correlated with sovereignty and perceived as a symbol of colonial dependence.

COURS 17, 55-56 (1986).

22. John Westlake, *The Native States of India*, in THE COLLECTED PAPERS OF JOHN WESTLAKE ON PUBLIC INTERNATIONAL LAW 621, 623 (L. Oppenheim ed., 1914). The eminent Chinese international lawyer Wang Tieya was surprised and disappointed when his supervisor while studying in London back in 1937, Herbert Arthur Smith, did not consider China as an independent State. See Ronald St. John Macdonald, *Introduction, Wang Tieya: Persevering in Adversity and Shaping the Future of Public International Law in China*, in ESSAYS IN HONOUR OF WANG TIEYA 1, 6 (Ronald St. John Macdonald ed., 1994); see also SIMPSON, *supra* note 20, at 141 (explaining that during the Second Hague Conference, China, an “uncivilised” power, opposed the Great Powers’ proposal of distributing judicial seats in a permanent judicial body based on a form of legalized hegemony).

23. KOSKENNIEMI, *supra* note 16, at 136.

1. The Calvo Doctrine

By the end of the 19th century, Latin American countries were no longer European colonies but “important members of the family of nations.”²⁴ Nonetheless, their sovereignty has been violated and their national pride has been humiliated by so-called “gunboat diplomacy.”²⁵

With the exception of the *Drago Doctrine*,²⁶ which had a more limited ambit, the Calvo Doctrine traditionally was the guiding principle of the Latin American approach(es) towards international law and politics.²⁷ Proclaimed by Carlos Calvo, the celebrated Argentine jurist of the 19th century, the Calvo Doctrine had two aspects: one substantive and one procedural.²⁸ From a substantive perspective, the Calvo Doctrine required equality of treatment between nationals of the Host State and foreigners, therefore rejecting any claim for better treatment, and recognition, of the “International Minimum Standard” of treatment.²⁹ From a procedural perspective, the Calvo Doctrine denied foreigners access to *fora* and remedies that were not

24. *North American Dredging Company of Texas v. United Mexican States* (U.S. v. Mex.), 4 R.I.A.A. 26, ¶ 9 (Gen. Claims Comm’n 1926).

25. ANDREW GRAHAM-YOOLL, *IMPERIAL SKIRMISHES: WAR AND GUNBOAT DIPLOMACY IN LATIN AMERICA* 91 (2002); Lawrence D. Taylor, *Gunboat Diplomacy’s Last Fling in the New World: The British Seizure of San Quintin, April 1911*, 52 *AMERICAS* 521, 521 (1996).

26. In a diplomatic note to the United States, in 1902, Luis María Drago, the Argentine Minister of Foreign Affairs, proclaimed the Drago Doctrine principle, which differed from the Calvo Doctrine, that “public debt cannot give rise to armed intervention or even to the material occupation of the soil of American nations by a European Power.” Luis María Drago, *State Loans in their Relation to International Policy*, 1 *AM. J. INT’L L.* 692, 709 (1907); see also MICHAEL WAIBEL, *SOVEREIGN DEFAULTS BEFORE INTERNATIONAL COURTS AND TRIBUNALS* 37-38 (2011) (discussing the influence that the Drago Doctrine had on outlawing the use of force with regard to sovereign debt); *Convention Respecting the Limitation of the Employment of Force for the Recovery of Contract Debts*, Oct. 18, 1907, 36 Stat. 2241, U.N.T.S. 537.

27. ANGHIE, *supra* note 5, at 209; Rodrigo Polanco Lazo, *The No of Tokyo Revisited: Or How Developed Countries Learned to Start Worrying and Love the Calvo Doctrine*, *ICSID REV.* 1, 5, 9-10, 18 (2014); Wenhua Shan, *Is Calvo Dead?*, 55 *AM. J. COMP. L.* 123, 123-27 (2007).

28. MARTINS PAPANINSKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* 23 (2013); Shan, *supra* note 27, at 126-27.

29. Shan, *supra* note 27, at 126; see *Harry Roberts v. United Mexican States* (U.S. v. Mex.), 4 R.I.A.A. 77, ¶ 8 (Gen. Claims Comm’n 1926) (discussing equality of treatment of aliens and nationals).

available to nationals, and effectively limited their options to recourse to the domestic judicial system.³⁰

At least *prima facie* it seems that “equality is the central tenet of the Calvo Doctrine.”³¹ As Paparinskis noted, “[p]robably largely motivated by the abuse of gunboat diplomacy by the Western home States, the Calvo Doctrine relied on the equality of States to argue that . . . alien[s] should not be entitled to better substantive or procedural treatment than the nationals of the host State.”³² The “essence” of the Calvo Doctrine is both “absolute equality” between nationals of the Host State and foreigners and “non-intervention.”³³ “As capital importers, the Latin American states saw the Calvo Doctrine as a means of safeguarding national sovereignty.”³⁴ “Taken in its historical and political context, the Calvo Doctrine was an understandable attempt to rid the newly independent states of the trauma of foreign intervention.”³⁵ The link between National Treatment as the floor of investor protection strictly provided for under the Calvo Doctrine was also explicitly highlighted by Latin American countries. For example:

At the 1930 Hague Conference Latin American jurists defended the national treatment standard based on the principle of equality between States and the need for their countries to protect themselves against interferences from stronger economic and military powers.³⁶

30. Shan, *supra* note 27, at 126-27.

31. Denise Manning-Cabrol, *The Imminent Death of the Calvo Clause and the Rebirth of the Calvo Principle: Equality of Foreign and National Investors*, 26 L. & POL'Y INT'L BUS. 1169, 1172 (1995).

32. PAPANINSKIS, *supra* note 28, at 23-24.

33. DONALD R. SHEA, *THE CALVO CLAUSE: A PROBLEM OF INTER-AMERICAN AND INTERNATIONAL LAW AND DIPLOMACY* 19-20 (1955); *see also* MEG N. KINNEAR ET AL., *INVESTMENT DISPUTES UNDER NAFTA: AN ANNOTATED GUIDE TO NAFTA CHAPTER 11*, at 12-1102 (2009) (“The principle of national treatment has historically been used in two contexts, one limiting rights granted foreign traders and investors and the other expanding those rights.”).

34. JAN PAULSSON, *DENIAL OF JUSTICE IN INTERNATIONAL LAW* 21 (2005). “Strict adherence to the Calvo Doctrine was understandable when international law offered no options other than local courts or foreign warships.” *Id.* at 22.

35. *Id.* at 21.

36. Raúl Emilio Vinuesa, *National Treatment*, in 7 MAX PLANCK ENCYCLOPEDIA OF

2. Unequal Treaties: The Case of China

During the colonial era, the conclusion of unequal treaties in Asia was a “frequent occurrence.”³⁷ Those signed with China during the 19th century and the first half of the 20th century were paradigmatic³⁸ and received overwhelming attention in legal and historical scholarship.³⁹ A permanent characteristic of these treaties, along with “other humiliating restrictions upon sovereignty”⁴⁰ such as extraterritoriality,⁴¹ was the non-reciprocal MFN. The latter, granted on behalf of China to Colonial Powers, was unilateral, “lopsided” and unequal. Later on, and as soon as the Empire of Japan emerged as a competitor to Western States in the Far East, achieving unilateral MFN treatment in China became a key objective of its foreign policy.⁴² Murase aptly summarizes Imperial Japan’s policy:

Japan had been placed in the difficult position of “victim” under the unilateral MFN scheme imposed by the Western Powers. Yet Japan soon became a “victimizer” in relation to neighboring Asian countries, imposing upon them the same unilateral clause that the West had foisted upon Japan.⁴³

PUBLIC INTERNATIONAL LAW ¶ 17 (2012).

37. Christian Tomuschat, *Asian and International Law—Common Ground and Regional Diversity*, 1 ASIAN J. INT’L L. 217, 222 (2011).

38. Anne Peters, *Unequal Treaties*, in 10 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 36, ¶ 10; Hungdah Chiu, *China’s Struggle Against the “Unequal Treaties” 1927-1946*, 5 CHINESE TAIWAN Y.B. INT’L L. & AFFAIRS 1, 2 (1985); Deter, *supra* note 17, at 1074.

39. *E.g.*, Peters, *supra* note 38, ¶ 7; Matthew Craven, *What Happened to Unequal Treaties? The Continuities of Informal Empire*, 74 NORDIC J. INT’L L. 335, 336-37, 361 (2005); Dong Wang, *The Discourse of Unequal Treaties in Modern China*, 76 PAC. AFF. 399, 401 (2003).

40. JEROME ALAN COHEN & HUNGDAH CHIU, 2 PEOPLE’S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY 1114 (1974).

41. Extraterritorial consular jurisdiction of Great Powers provided protection to their subjects to the exclusion of domestic laws. *Japanese House Tax (Ger., Fr., Gr. Brit. v. Japan)*, Hague Ct. Rep. (Scott) 53 (Perm. Ct. Arb. 1905); see TURAN KAYAOĞLU, *LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA 3-6* (2010) (examining the roles of 19th century British extraterritorial courts and the extension of legal imperialism to non-western territories).

42. Shinya Murase, *The Most-Favored-Nation Treatment in Japan’s Treaty Practice During the Period 1854-1905*, 70 AM. J. INT’L L. 273, 284-85 (1976).

43. *Id.* at 284.

At the same time, MFN also proved an important technical obstacle in revisionist attempts.⁴⁴ It rendered the renegotiation of one “unequal treaty” with a particular Western State without necessarily involving all other Colonial Powers an impossibility.⁴⁵

Given the privileged position of foreigners in Qing China, National Treatment was not as common as MFN.⁴⁶ However, when they needed to obtain equal rights with the Chinese for their own nationals, they also concluded treaties containing unilateral National Treatment.⁴⁷

The non-reciprocal obligation of non-discrimination with regard to trade rapidly became the symbol and synonym of the privileged position that Western Colonial Powers enjoyed in China.⁴⁸ MFN, in particular, was regarded as an “important question related to national sovereignty.”⁴⁹ In 1879 a senior Chinese diplomat complained that MFN “was not in accordance

44. Peters, *supra* note 38, ¶¶ 1, 4-5; Charlotte Ku, *Abolition of China's Unequal Treaties and the Search for Regional Stability in Asia, 1919-1943*, 12 CHINESE TAIWAN Y.B. INT'L L. & AFFAIRS 67, 68 (1992-1994); Murase, *supra* note 42, at 288-89.

45. Peters, *supra* note 38, ¶¶ 8-10. This was intrinsically linked to the very reason for the creation of MFN, as no Colonial Power agreed to be placed in an inferior position in relation to others regarding trade with China. In 1843 the U.S. Secretary of State, Webster, instructed the new U.S. envoy in China, Cushing:

you will signify, in decided terms and a positive manner, that the government of the United States would find it impossible to remain on terms of friendship and regard with the emperor, if greater privileges or commercial facilities should be allowed to the subjects of any other government than should be granted to the citizens of the United States.

DANIEL WEBSTER, DIPLOMATIC AND OFFICIAL PAPERS OF DANIEL WEBSTER WHILE SECRETARY OF STATE 364 (1848).

46. *E.g.*, Treaty Concerning the Promotion and Reciprocal Protection of Investments, Ger.-Pol., art. 3(3), Nov. 10, 1989, 29 I.L.M. 334, 1708 U.N.T.S. 324; Wei Wang, *Historical Evolution of National Treatment in China*, 39 INT'L LAW. 759, 761 (2005); *see also* Wenhua Shan et al., *National Treatment for Foreign Investment in China: A Changing Landscape*, 27 ICSID REV. 120, 121, 126 (2012) (examining China's historical reluctance to grant National treatment); Jian Zhou, *National Treatment in Foreign Investment Law: A Comparative Study from a Chinese Perspective*, 10 TOURO INT'L L. REV. 39, 118 (2000) (“... in the real world foreigners and foreign investments do receive treatment less than the national treatment standard in various aspects”).

47. Wang, *supra* note 46, at 762-63.

48. *Id.* at 760-61.

49. Yen-P'ing Hao & Erh-min Wang, *Chinese Views of Western Relations, 1840-95*, in 11 THE CAMBRIDGE HISTORY OF CHINA: LATE CH'ING, 1800-1911, PART 2, at 196 (John K. Fairbank & Kwang-Ching Liu eds., 1980).

with international law.”⁵⁰ The amalgam of unequal treaties in China was not only inaugurated by gunboat diplomacy and coercion,⁵¹ but also should be viewed as “a special sector of the Chinese polity in which Chinese sovereignty was not extinguished, but was overlaid or supplanted by that of the treaty powers.”⁵²

Against this historical and legal background, it comes as no surprise that the general denunciation of unequal treaties and the abolition of unilateral non-discrimination clauses emerged as a priority for the Chinese National Movement.⁵³ Furthermore, both nationalist and communist Chinese legal scholars embraced the doctrine of unequal treaties and their invalidity.⁵⁴

The juridical apex of this effort was the dispute between Belgium and China before the Permanent Court of International Justice (PCIJ) concerning the denunciation of a Friendship, Commerce and Navigation (FCN) treaty between the two States.⁵⁵ Belgium sought to retain the status quo, including an unequal MFN, while China insisted on “equality and reciprocity.”⁵⁶ While China eventually agreed to a reciprocal MFN, Belgium rejected the time frame for negotiations and

50. *Id.*

51. John K. Fairbank, *The Creation of the Treaty System*, in 10 THE CAMBRIDGE HISTORY OF CHINA: LATE CH'ING, 1800-1911, PART I, at 259 (John K. Fairbank ed., 1978).

52. *Id.* at 260.

53. See Ku, *supra* note 44, at 80-83 (discussing the historical background behind the Chinese National Party's denunciation of unequal treaties).

54. Peters, *supra* note 38, ¶¶ 4, 7; cf. KAZIMIERZ GRZYBOWSKI, SOVIET PUBLIC INTERNATIONAL LAW: DOCTRINES AND DIPLOMATIC PRACTICE 41-42, 513-14 (1970) (explaining that communist scholars adhere to the doctrine of unequal treaties where imperialist states reduce weaker nations); Jesse Finkelstein, *An Examination of the Treaties Governing the Far-Eastern Sino-Soviet Border in Light of the Unequal Treaties Doctrine*, 2 B.C. INT'L & COMP. L. REV. 445, 454-56 (1979) (arguing that Soviet and Chinese conceptions of unequal treaties developed independently and Chinese scholars view unequal treaties as invalid because they “undermine the most fundamental principles of international law”).

55. Denunciation of the Treaty of November 2nd, 1865, between China and Belgium, (Belg. v. China), 1927 P.C.I.J. No. 19, at 5 (Jan. 4) [hereinafter Denunciation of Sino-Belgian Treaty]; Caffisch, *supra* note 17, at 60-63.

56. L.H. Woolsey, *China's Termination of Unequal Treaties*, 21 AM. J. INT'L L. 289, 290 (1927).

launched proceedings before the PCIJ.⁵⁷ However, proceedings were suspended and a new treaty was concluded in 1928.⁵⁸ After the Second World War, the unequal treaties were renegotiated and unilateral MFN clauses were replaced with reciprocal ones—Article I of the GATT being the most important and obvious example.⁵⁹ Likewise, the evolution from unilateral to bilateral and then to multilateral National Treatment is seen to:

reflect the Chinese people's revolution from a semi-colony [*banzhimindi*] and semi-feudal [*banfengjian*] country to an independent and modern country. . . . Thus, the historical evolution of national treatment in Modern China (1840-1949) is a miniature of the history of modern China and the history of Western civilization.⁶⁰

This legacy significantly contributed to establishing an ideological and conceptual link between economic non-discrimination and Sovereign Equality of States; it also significantly influenced China's perception of the WTO regime and the international economic system *in toto*.⁶¹

3. The League of Nations and the Mandate System

After the end of the First World War in 1918, the League of Nations—the progenitor of the United Nations—was created.⁶² As

57. *Id.* at 290-93.

58. Denunciation of Sino-Belgian Treaty, *supra* note 55, at 18-19; Chiu, *supra* note 38, at 9-10.

59. General Agreement on Tariffs and Trade, art. I, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194; Ku, *supra* note 44, at 79-81, 83, 85-86. China was one of the 23 GATT contracting parties in 1947.

60. Wang, *supra* note 46, at 778.

61. Pasha Hsieh, *China's Development of International Economic Law and WTO Legal Capacity Building*, 13 J. INT'L ECON. L. 997, 1000-02 (2010); Gretchen Harders-Chen, *China MFN: A Reaffirmation of Tradition or Regulatory Reform?*, 5 MINN. J. GLOBAL TRADE 381, 381-82 (1996). Chinese BITs did not include a National Treatment provision until 1986, and still today less than half of the 130 Chinese BIT provide for NT. Shan et al., *supra* note 46, at 133; Stephan Schill, *Tearing Down the Great Wall: The New Generation Investment Treaties of the People's Republic of China*, 15 CARDOZO J. INT'L & COMP. L. 73, 95 (2007). Given that most of the Chinese BITs contain an MFN provision, National Treatment can be imported through the MFN provision, Chiu, *supra* note 38, at 27.

62. Treaty of Peace with Germany [Treaty of Versailles], art. 1, June 28, 1919, 225 Consol. T.S. 188.

the Allied Powers decided to strip Germany of all its colonies⁶³ and Turkey of all the Ottoman Empire's possessions in the Middle East,⁶⁴ the League of Nations catered for the administration of these territories through the creation of a complex and institutionalized mandate-system.⁶⁵ Article 22 of the Covenant of the League of Nations put in place a system of colonial administration which was based on the classification of the territories under mandates into three categories depending on the level of advancement.⁶⁶ Article 22 stipulated:

To those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant.

The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.

The character of the mandate must differ according to the stage of the development of the people, the

63. According to the Treaty of Versailles: "In territory outside her European frontiers as fixed by the present Treaty, Germany renounces all rights, titles and privileges whatever in or over territory which belonged to her or to her allies, and all rights, titles and privileges whatever their origin which she held as against the Allied and Associated Powers." *Id.* at art. 118; S.W. Armstrong, *The Doctrine of the Equality of Nations in International Law and the Relation of the Doctrine to the Treaty of Versailles*, 14 AM. J. INT'L L. 540, 540 (1920).

64. Treaty of Versailles, *supra* note 62, at art. 22.

65. See James C. Hales, *The Creation and Application of the Mandate System: A Study in International Colonial Supervision*, 25 TRANSACTIONS GROTIUS SOC'Y 185, 187-88 (1939).

66. League of Nations Covenant art. 22.

geographical situation of the territory, its economic conditions and other similar circumstances.⁶⁷

The territories of the former Ottoman Empire (Syria and Lebanon, Palestine and Transjordan, and Iraq), constituted "A" mandates, whose independence was *ante portas* and enjoyed internal autonomy, German territories in Central Africa (the Cameroons, Togoland, Tanganyika, Rwanda-Urundi) became "B" mandates with the Mandate given responsibility of their administration, while "C" mandates (South West Africa and the Pacific Islands) were "best administered under the laws of the Mandatory as integral portions of its territory."⁶⁸

The three-tier mandate system resulted from a compromise between U.S. President Woodrow Wilson, leaders of the British Dominions (such as Jan Smuts of South Africa and William Morris Hughes of Australia), and the British Empire.⁶⁹ This difference in views was also reflected in the economic regime of the colonies under the mandate system.⁷⁰ The territories

67. *Id.* at art. 22, ¶ 1-3.

68. *Id.* at art. 22, ¶ 6. In reference to "A" mandates, the Charter states:

Certain communities formerly belonging to the Turkish Empire have reached a stage of development where their existence as independent nations can be provisionally recognized subject to the rendering of administrative advice and assistance by a Mandatory until such time as they are able to stand alone. The wishes of these communities must be a principal consideration in the selection of the Mandatory.

Id. at art. 22, ¶ 4. The Charter also says the following about "B" mandates:

Other peoples, especially those of Central Africa, are at such a stage that the Mandatory must be responsible for the administration of the territory under conditions which will guarantee freedom of conscience and religion, subject only to the maintenance of public order and morals, the prohibition of abuses such as the slave trade, the arms traffic and the liquor traffic, and the prevention of the establishment of fortifications or military and naval bases and of military training of the natives for other than police purposes and the defence of territory, and will also secure equal opportunities for the trade and commerce of other Members of the League.

Id. at art. 22, ¶ 5. For additional explanations about the mandate system, see ANGHIE, *supra* note 5, at 121-22; KOSKENNIEMI, *supra* note 16, at 171.

69. See ANGHIE, *supra* note 5, at 121 (stating that Dominion powers were unwilling to accept any provisions suggesting that former German territories may become independent).

70. In general, the economic provisions of the Covenant of the League of Nations did not include a non-discrimination clause or a robust trade commitment for free trade.

classified under “A” and “B” mandates were guaranteed a regime of complete industrial, commercial, and economic equality.⁷¹ For example, the first paragraph of Article 11 of the French Mandate for Syria and the Lebanon provided:

The Mandatory shall see that there is no discrimination in Syria or the Lebanon against the nationals, including societies and associations, of any State Member of the League of Nations as compared with its own nationals, including societies and associations, or with the nationals of any other foreign State in matters concerning taxation or commerce, the exercise of professions or industries, or navigation, or in the treatment of ships or aircraft. Similarly, there shall be no discrimination in Syria or the Lebanon against goods originating in or destined for any of the said States; there shall be freedom of transit, under equitable conditions, across the said territory.⁷²

Article 7 of the Belgian Mandate for East Africa (Ruanda-Urundi) equally stipulated:

The Mandatory shall secure to all nationals of States Members of the League of Nations the same rights as are enjoyed by his own nationals in respect to entry into and residence in the territory, the protection afforded to their person and property, the acquisition of property, movable and immovable, and the exercise of their profession or trade, subject only to the requirements of public order, and on condition of compliance with the local law.

Further, the Mandatory shall ensure to all nationals of States Members of the League of Nations, on the same

Article 23(e), which was a compromise to accommodate post-World War I (economic) nationalism, provided that “[s]ubject to and in accordance with the provisions of international conventions existing or hereafter to be agreed upon, the Members of the League: (e) will make provision to secure and maintain freedom of communications and of transit and equitable treatment for the commerce of all Members of the League.” League of Nations Covenant art. 23(e).

71. See ANGHIE, *supra* note 5, at 208-09 (discussing the Western view that host states are bound by international minimum standards with regards to their treatment of foreign investment).

72. French Mandate for Syria and the Lebanon, 3 LEAGUE OF NATIONS OFFICIAL JOURNAL 1013, art. 11 (1922).

footing as to his own nationals, freedom of transit and navigation, and complete economic, commercial and industrial equality; provided that the Mandatory shall be free to organise public works and essential services on such terms and conditions as he thinks just.

Concessions for the development of the natural resources of the territory shall be granted by the Mandatory without distinction on grounds of nationality between the nationals of all States Members of the League of Nations, but on such conditions as will maintain intact the authority of the local Government.

Concessions having the character of a general monopoly shall not be granted. This provision does not affect the right of the Mandatory to create monopolies of a purely fiscal character in the interest of the territory under mandate, and in order to provide the territory with fiscal resources which seem best suited to the local requirements or, in certain cases, to carry out the development of natural resources, either directly by the State or by a controlled agency, provided that there shall result therefrom no monopoly of the natural resources for the benefit of the Mandatory or his nationals, directly or indirectly, nor any preferential advantage which shall be inconsistent with the economic, commercial and industrial equality hereinbefore guaranteed.

The rights conferred by this article extend equally to companies and associations organised in accordance with the law of any of the Members of the League of Nations, subject only to the requirements of public order, and on condition of compliance with the local law.⁷³

In stark contrast, the mandates of territories under “C” mandate were silent on the economic regime, which was the product of a diplomatic compromise.⁷⁴

Although the issue of sovereignty in regard to mandate territories remained generally questionable,⁷⁵ the three-tier

73. Belgian Mandate for East Africa, 3 LEAGUE OF NATIONS OFFICIAL JOURNAL 862, art. 7 (1922).

74. See ANGHIE, *supra* note 5, at 122 (highlighting that the primary focus of C mandates as protecting “the interests of backward people, to promote their welfare and development and to guide them toward self-government”).

75. KOSKENNIEMI, *supra* note 16, at 172 (discussing the varying opinions about

mandate system consisted of divided territories that depended on their level of advancement—how developed they were (or, more accurately, how the Europeans perceived them to be)—to obtain full independence and sovereignty.⁷⁶ In other words, the degree of political autonomy determined how rigid the obligation to accord non-discriminatory treatment would be. Consequently, the complete equality and the stricter prohibition of discrimination in the economic field in “A” and “B” mandates was not difficult to become intertwined with the idea of State Sovereignty.

4. The U.S. Nationals in Morocco Case

The conceptual link between non-discrimination and sovereign equality can also be discerned within the colonial context in the United States’ arguments before the International Court of Justice (ICJ) in *U.S. Nationals in Morocco*.⁷⁷ In that case, the United States made a distinction which, while delicate and subtle, illuminates the perception of MFN in the colonial era. The United States distinguished between MFN treaties signed exclusively between Western States and those signed between Western and non-Western States.⁷⁸ According to the United States’ arguments, MFN treaties between Western States could be seen as devices for assuring permanent equality, because:

[t]heir common foundation of jurisprudence and socio-political development required that sovereign equality and exact reciprocity prevail among themselves. In turn their main object in using the most-favored-nation clause was to obtain a guarantee

where sovereignty with regard to the mandate lies); Francis B. Sayre, *Legal Problems Arising from the United Nations Trusteeship System*, 42 AM. J. INT’L L. 263, 271-72 (1948).

76. There are of course exceptions, such as the Final Act (1885) of the Berlin Conference (1884-1885)—the epitome of the “scramble for Africa” which included Free Trade and non-discrimination. Matthew Craven, *Between Law and History: The Berlin Conference of 1884-1885 and the Logic of Free Trade*, 3 LONDON REV. INT’L L. 31, 31-33 (2015); see also Oscar Chinn (Britain v. Belg.), P.C.I.J. Rep. Series A/B, No. 63 (1934) (finding that the Belgian government did not violate their international legal obligations towards the British government).

77. Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), 1952 I.C.J. Rep. 176, 184-86.

78. Counter-Memorial of United States, Rights of Nationals of the United States of America in Morocco (Fr. v. U.S.), I.C.J. Pleadings, *Rights of Nationals of the United States of America in Morocco*, Vol. I, at 375 (Dec. 20, 1951).

that exact equality of treatment with all third States be maintained at any given point of time with regard to commercial, shipping, and other such rights and privileges.⁷⁹

However, the United States argued that treaties containing MFN concluded with non-Western States, such as Mohammedan States, were primarily concerned with obtaining a privileged position rather than equality of treatment due to the disparity between the social order and legal system of the Mohammedan States compared to their own.⁸⁰ At the heart of the United States' submissions to the ICJ lies the idea that equality of treatment through MFN is only possible or desirable between Western Powers.

B. Non-Discrimination in International Economic Law, Sovereign Equality of States, and the Cold War

The conceptual relationship between non-discrimination in trade on one hand, and Sovereign Equality of States on the other, was never explicitly articulated during the Colonial era. By contrast, during the Cold War, Socialist States and jurists attempted to directly and explicitly connect non-discriminatory treatment with the Sovereign Equality of States, also claiming that the latter was a rule of customary law.⁸¹ This attempt had a significant impact on legal debates concerning international trade and marked the work of the International Law Commission (ILC) on MFN. Socialist States and scholars insisted that the principle of sovereign equality of States enshrined in Article 2(4) of the UN Charter prohibits trade discrimination.⁸² In his historic speech at

79. *Id.*

80. *Rights of Nationals of the United States*, 1952 I.C.J. Rep. at 191.

81. See ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES* 194-98 (2009) (demonstrating how the ICJ defined the rights inherent in MFN clauses using customary law precedent as a foundation); John N. Hazard, *Commercial Discrimination and International Law*, 52 AM. J. INT'L L. 495 (1958) (demonstrating the Eastern State Traders' arguments that equality founded in MFN clauses should act as if customary international law and that such clauses should be considered as acting for the Sovereign Equality of States).

82. Friedl Weiss, *The Principle of Non-Discrimination in International Economic Law: A Conceptual and Historical Sketch*, in *INTERNATIONAL LAW BETWEEN UNIVERSALISM AND FRAGMENTATION*, Festschrift in Honour of Gerhard Hafner

the 1959 UN General Assembly, Nikita Khrushchev, then leader of the USSR, explicitly linked the issue of non-discrimination in trade with the principle of Sovereign Equality of States under the UN Charter:

As you know, the Soviet Union has consistently advocated the greatest possible development of trade ties between States on the basis of equality and mutual advantage. We are firmly convinced that trade provides a good foundation for the successful development of peaceful co-operation between States and the strengthening of confidence between peoples. We consider this view to be fully in accordance with the United Nations Charter, which commits all States Members to the development of friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples.⁸³

Usenko, a Soviet international lawyer, summarized the position of the Socialist States, arguing that:

the principle of non-discrimination is the general outcome of the sovereign equality of countries. It has the character of a mandatory, common legal norm and therefore does not require treaty recognition. However, as an *international-legal norm* the most-favored-nation principle is of a treaty character.⁸⁴

Over the course of the 20th century, the Socialist States concluded bilateral trade agreements with MFN clauses,⁸⁵ despite criticism

274-75 (Isabelle Buffard et al. eds., 2008); Hazard, *supra* note 81, at 495-97.

83. H.E. Mr. Nikita S. Khrushchev, Chairman of the Council of Ministers of the Union of Soviet Socialist Republics, Address at the 799th Plenary Meeting, ¶ 44, U.N. Doc. A/PV.799 (Sept. 18, 1959).

84. Evgenii Usenko, *Most-Favored-Nation Treatment in Soviet American Trade Relations*, 5 DENV. J. INT'L L. & POL'Y 243, 244 (1975).

85. See, e.g., 1972 Agreement Between the Government of the United States of America and the Government of the Union of Socialist Soviet Republics Regarding Trade art. 1, 11 I.L.M. 1321 (1972); Agreement (with Protocol) Concerning Reciprocal Trade Relations and the Status of the Trade Delegation of the Union of Soviet Socialist Republics in France art. 1, 221 U.N.T.S. 92 (1951); see also GEORGE GINSBURGS, *The Soviet Union, "Ius Commercii" and International Law: The Case of the Most-Favored-Nation Clause*, in SOVIET LAW AFTER STALIN 83-86 (Donald Barry et al. eds., 1978) (demonstrating how various international bilateral trade agreements of the USSR featuring MFN clauses); Kazimierz Grzybowski, *Socialist Countries in GATT*, 28 AM. J. COMP. L. 539, 539 (1980)

that such clauses were meaningless in treaties involving States with non-market economies.⁸⁶In particular, during the Cold War, many of the Socialist States of Eastern Europe became GATT contracting parties.⁸⁷ One of the main motivations behind this was the need to emphasize their sovereignty, which was often diminished due to interventions from the USSR within the Socialist sphere of influence, pursuant to the Brezhnev doctrine.⁸⁸ Tunkin, the leading Soviet international lawyer of the time, wrote in the aftermath of the USSR's military intervention in Hungary (1956) and Czechoslovakia (1968) and argued that the "sovereignty of socialist states actually is popular sovereignty, popular not only in form but in substance because a socialist state serves the people and acts in its interests."⁸⁹ He explains that:

the principles of equality and noninterference as principles of proletarian internationalism include, for example, not only the mutual obligations not to violate each other's respective rights, but also the duty to render assistance in the enjoyment of these rights, as well as jointly defending them from the infringements of imperialists, in conformity with the principles of socialist

(stating that Poland, Romania, Hungary, and Yugoslavia all became members of the GATT, and thus joined the world trade system based in part on the MFN clause); Paul Lansing & Eric Rose, *The Granting and Suspension of Most-Favored-Nation Status for Nonmarket Economy States: Policy and Consequences*, 25 HARVARD INT'L L.J. 329, 329 (1984) (discussing the Socialist Republic of Romania's MFN clause with the United States); Stephan Lopatkiewicz, *Institutionalizing East-West Commercial Relations: The Franco-Soviet Experience*, 15 HARVARD INT'L L.J. 1, 2 (1974) (looking at the legal framework between France and the Soviet Union for their commercial relations).

86. See Boris Nolde, *La clause de la nation la plus favorisée et les tarifs préférentiels*, 29 RECUEIL DES COURS 5, 83-84 (1932) (Fr.).

87. Czechoslovakia and Cuba (before they became socialist) were original contracting parties to the GATT. Yugoslavia joined the GATT in 1966, followed by Poland, Romania, and Hungary. Finally, the USSR applied for GATT membership in 1986, but its application was not approved until its dissolution in 1991. Kevin Kennedy, *The Accession of the Soviet Union to GATT*, 21 J. WORLD TRADE 23, 24 (1987) Grzybowski, *supra* note 85, at 547.

88. ROBERT A. JONES, THE SOVIET CONCEPT OF "LIMITED SOVEREIGNTY" FROM LENIN TO GORBACHEV: THE BREZHNEV DOCTRINE 257 (1990); JOHN NORTON MOORE & ROBERT F. TURNER, INTERNATIONAL LAW AND THE BREZHNEV DOCTRINE 9-10 (1987); GREGORY TUNKIN, THEORY OF INTERNATIONAL LAW 86-87 (William Butler trans., 1974);

89. TUNKIN, *supra* note 88.

internationalism.⁹⁰

Hazard notes that socialist States “value being treated as equals” and points to the “prestige value” of the MFN provision.⁹¹ This approach was also echoed in the ILC report on MFN.⁹² It is of no coincidence that Ustor from Hungary People’s Republic and Ushakov from the USSR were appointed consecutively as special rapporteurs for the report on the MFN in the ILC.⁹³ The MFN, “in the Commission’s view, may be considered as a technique or means for promoting the equality of States.”⁹⁴

III. ECONOMIC NON-DISCRIMINATION AND SOVEREIGN EQUALITY OF STATES IN CONTEXT: INTERNATIONAL INVESTMENT AND TRADE LAW

Despite the long pedigree of parallel political and legal trajectories, from a strictly legal perspective, economic non-discrimination is considered to be unrelated to the principle of Sovereign Equality of States. Nolde noted in 1924 that discrimination in international trade does not amount to derogation of the principle of Sovereign Equality of States:

[i]n fact, without undermining the principle of legal equality of foreign States in the field of trade, the State may introduce at home rules that will place some nations actually in a better position than others.⁹⁵

McRae correctly rejects the link between non-discrimination in international trade and sovereign equality of States, by

90. *Id.*

91. Hazard, *supra* note 81, at 497.

92. *Report of the International Law Commission on the Work of its Thirtieth Session*, [1978] 2 Y.B. Int’l L. Comm’n 11, U.N. Doc. A/33/10.

93. *Report of the International Law Commission on the Work of its Nineteenth Session*, [1967] 2 Y.B. Int’l L. Comm’n 344, U.N. Doc. A/CN.4/199; *Report of the International Law Commission on the Work of its Twenty-Ninth Session*, [1977] 2 Y.B. Int’l L. Comm’n 4, U.N. Doc. A/32/10.

94. *Report of the International Law Commission on the Work of its Thirtieth Session*, *supra* note 92.

95. “En effet, sans déroger au principe d’égalité juridique des États étrangers en matière des échanges, l’État peut introduire chez lui des règles qui placeront de fait certaines nations dans une position plus favorable que certaines autres.” Boris Nolde, *Droit et technique des traités de commerce*, 3 RECUEIL DES COURS 291, 410 (1924) (Fr.).

employing two arguments.⁹⁶ His first argument is that non-discrimination in trade has nothing to do with States as such, but with individuals.⁹⁷ That is why the accession article of the WTO refers to a state or separate custom territory.⁹⁸ Hong Kong and the EU are not “States,” yet they are members of the WTO.⁹⁹ The formulation of this argument, however, is not entirely accurate. The idea that one State treats another State in a discriminatory manner is both abstract and theoretical because in practice, the treatment is usually granted to individuals based on nationality, rather than to the State itself.¹⁰⁰ McRae’s second argument is that non-discrimination in international trade is just a mechanism that permits the operation of *comparative advantage*.¹⁰¹ Ricardo, expanding on Adam Smith’s theory of *absolute advantage*, argued that free trade is not a zero-sum game.¹⁰² On the contrary, all countries can benefit from free trade

96. Donald McRae, *The Traditional Relationship Between International Trade Law and International Law*, 260 RECUEIL DES COURS 109, 140-41 (1996).

97. *Id.* at 142; see also GAIL E. EVANS, LAWMAKING UNDER THE TRADE CONSTITUTION: A STUDY IN LEGISLATING BY THE WORLD TRADE ORGANIZATION 69-70 (2000) (arguing that the private sphere, rather than the sovereign equality of states, drives the MFN non-discrimination principles, despite express obligations to third party states).

98. General Agreement on Tariffs and Trade, *supra* note 59, at art. XXXIII; see also Marrakesh Agreement Establishing the World Trade Organization, art. XII, Apr. 15, 1994, 1867 U.N.T.S. 154.

99. Membership of the World Trade Organization, WTO Doc. WT/INF/43/R.19 (Dec. 1, 2015); Sunniva Samdal, The Issue of Legal Personality Within the Modern International Legal System 2 & n.10, <https://www.aber.ac.uk/en/media/departmental/lawcriminology/pdf/publications/auslcj2014/5---The-Issue-of-Legal-Personality-within-the-Modern-International-Legal-System.pdf> [<http://perma.cc/PTZ9-HGPE>].

100. In his monograph Vierdag explains:

the customs authority of the State “treats” certain imported goods unequally by imposing heavy duties on these goods and on similar goods (*ceteris paribus*) in violation of a most-favoured-nation clause, the discrimination does not concern the goods in question, but the individuals or the State who have rights with respect to the goods. The exporters expected to be under the protection of the most-favoured-nation clause, or, at the diplomatic level, their State was entitled to require equal treatment to the benefit of its traders.

E. W. VIERDAG, THE CONCEPT OF DISCRIMINATION IN INTERNATIONAL LAW 36 (1973).

101. McRae, *supra* note 96, at 165-66.

102. See DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 89-90 (3d ed. 1821) (explaining that free trade encourages a global economy driven by comparative advantage where States are allowed to specialize and mutually benefit or at the least impose no significant loss on each other).

by exploiting their comparative advantages.¹⁰³ The principle of non-discrimination in international trade facilitates the function of comparative advantage because it facilitates the purchase of goods from the most efficient foreign producers by eliminating national discriminatory protective policies.¹⁰⁴ By contrast, discriminatory measures cause:

a misallocation of resources by inducing a shift of resources towards those relatively less efficient producers who are favored and away from those more efficient producers who are disfavored.¹⁰⁵

Further, non-discrimination, and in particular MFN, accelerates the trade liberalization process. When a State reduces its tariffs, the reduction is automatically extended to, and benefits, all States.¹⁰⁶ This generalization of trade liberalization is referred to as the “multiplier effect” of the MFN clause.¹⁰⁷ Noted by the WTO Appellate Body in *Canada-Autos*, the adoption of the MFN standard in multilateral negotiations “serves as an incentive for concessions, negotiated reciprocally, to be extended to all other Members on an MFN basis.”¹⁰⁸ However, this poses the problem of the “free rider,”¹⁰⁹ as concessions are generalized even to non-reciprocating third parties, and parties have fewer incentives to exchange concessions in the first place. According to Ludema and Mayda this means that “the theory of trade negotiations

103. *Id.*

104. *Id.*; WORLD TRADE ORGANIZATION, UNDERSTANDING THE WTO 13 (5th ed. 2015) (supporting the proposition that free trade facilitates competition, which drives innovation and fosters economic growth).

105. ROBERT E. HUDEC, *Tiger, Tiger in the House: A Critical Appraisal of the Case Against Discriminatory Trade Measures*, in THE NEW GATT ROUND OF MULTILATERAL TRADE NEGOTIATIONS: LEGAL AND ECONOMIC PROBLEMS 170 (2d ed. 1991).

106. PETER-TOBIAS STOLL & FRANK SCHORKOPF, WTO: WORLD ECONOMIC ORDER, WORLD TRADE LAW 50 (Rudiger Wolfrum & Peter-Tobias Stoll eds., 2006).

107. MICHAEL TREBILCOCK ET AL., THE REGULATION OF INTERNATIONAL TRADE 57 (4th ed. 2013).

108. Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, ¶ 84, WTO Doc. WT/DS139/AB/R (May 31, 2000).

109. Rodney D. Ludema & Anna Maria Mayda, *The Free-Riding Effect of the MFN Clause: Evidence Across Commodities and Countries* 6 (Apr. 2007) (unpublished article), <http://faculty.georgetown.edu/amm223/CrossCountryMFNFreeRiding.pdf> [<http://perma.cc/TDZ9-S5TC>] (defining and explaining the free rider problem and their effects, mathematically, on trade).

under MFN is inconclusive about the importance of free riding, and the empirical evidence is thin.”¹¹⁰ Moreover, while it is possible that trade liberalization could be achieved unilaterally, Bagwell and Staiger explain that unilateralism simply does not work because governments are generally inclined to set tariffs higher than is efficient when determining tariffs unilaterally.¹¹¹ Countries tend to focus solely on domestic welfare implications, which creates a prisoner’s dilemma-type situation.¹¹² As a result, free trade based on comparative advantage, which enables the efficient allocation of resources, is not promoted. Finally, discriminatory policies presuppose that costly administrative border controls are put in place. Schwartz and Sykes underline the information problems that arise from the use of discriminatory tariffs in relation to a product’s exit and entry responses over time.¹¹³ Designing an optimal discriminatory policy is difficult in practice,¹¹⁴ given that the determination of a product’s origins, in order to implement a discriminatory policy, requires a complex, non-transparent and costly system of rules of origin.¹¹⁵ Thus, countries would be better off by endorsing and applying the principles of non-discrimination and Free Trade.¹¹⁶

110. Rodney Ludema & Anna Maria Mayda, *Do Countries Free Ride on MFN?* 5 (Ctr. for Econ. Policy Research, Discussion Paper No. 5160, 2006) <http://faculty.georgetown.edu/amm223/LudemaMaydaJuly06.pdf> [<http://perma.cc/9VSH-EEZE>].

111. KYLE BAGWELL & ROBERT W. STAIGER, *THE ECONOMICS OF THE WORLD TRADING SYSTEM* 24 (2002); *see also* JAGDISH BHAGWATI, *THE WORLD TRADING SYSTEM AT RISK* 50 (1991) (proffering an additional example of when and why governments choose unilateral trade policies). According to Krugman, “[i]f economists ruled the world, there would be no need for a World Trade Organization.” Paul Krugman, *What Should Trade Negotiators Negotiate About?*, 35 *J. ECON. LIT.* 113, 113 (1997).

112. MITSO MATSUSHITA ET AL., *THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY* 203 (2d. ed. 2006).

113. Warren F. Schwartz & Alan O. Sykes, *The Economics of the Most Favored Nation Clause*, in *ECONOMIC DIMENSIONS IN INTERNATIONAL LAW: COMPARATIVE AND EMPIRICAL PERSPECTIVES* 49-51 (Jagdeep S. Bhandari & Alan O. Sykes eds., 1997).

114. *Id.* at 50.

115. Joseph A. LaNasa III, *An Evaluation of the Uses and Importance of Rules of Origin, and the Effectiveness of the Uruguay Round’s Agreement on Rules of Origin in Harmonizing and Regulating Them*, *JEAN MONNET CTR. INT’L AND REG’L ECON. LAW & JUSTICE* (1995), <http://www.jeanmonnetprogram.org/archive/papers/96/9601ind.html> [<http://perma.cc/R6DU-87ML>].

116. *But see* JOSEPH STIGLITZ, *GLOBALIZATION AND ITS DISCONTENTS* ix-x (2003) (expressing skepticism about the universal benefits derived from free trade); Dan

For all these reasons the argument that non-discrimination in trade relates primarily to the function of comparative advantage and economic efficiency, rather than sovereign equality of States, seems undeniable. Nonetheless, the above argument is only partially correct as it fails to capture the full picture. Economic efficiency, even broadly construed, is undoubtedly the primary rationale behind non-discrimination.¹¹⁷ Pauwelyn aptly summarizes the different approaches regarding the rationale for non-discrimination in trade.¹¹⁸ However, it is generally accepted, for example, that the rationale behind the MFN aspect of non-discrimination is both economic and *political*.¹¹⁹ One of the most important political functions of non-discrimination in international trade is to reduce international antagonism generated by discriminatory trade policies, and thus promote international stability and peace. After the First World War, one of the Fourteen Points proclaimed by President Wilson and sought as one of the constitutional principles of the post-war world order, was the “removal, so far as possible, of all economic barriers and the establishment of an equality of trade conditions among all the nations consenting to the peace and associating themselves for its maintenance.”¹²⁰ Moreover, in the aftermath of

Sarooshi, *Investment Treaty Arbitration and the World Trade Organization: What Role for Systemic Values in the Resolution of International Economic Disputes?*, 49 TEX. INT'L L.J. 445, 448 (2014) (pointing out that the WTO focuses on free trade and non-discrimination due to its goal of increasing global wealth at the expense of poorer countries).

117. BAGWELL & STAIGER, *supra* note 111, at 24; BHAGWATI, *supra* note 111, at 51; SIMON SCHROPP, *TRADE POLICY FLEXIBILITY AND ENFORCEMENT IN THE WORLD TRADE ORGANIZATION* 177 (2009) (“[E]conomists have excluded from consideration various important non-economic objectives of cooperating in trade affairs, such as ideational, power-oriented, and constitutionalist explanations for trade contracts”); Schwartz & Sykes, *supra* note 113, at 49-50; Sarooshi, *supra* note 116, at 448-49.

118. Pauwelyn lists three main schools of thought regarding the case for free trade and non-discrimination: (1) avoiding the economic incentives of large countries to impose externalities, (2) counter-balancing the disproportionate political influence of domestic groups favoring protectionism, and (3) dismantling the discriminatory imperial preferences system in place before GATT. Joost Pauwelyn, *The Transformation of World Trade*, 104 MICH. L. REV. 1, 10-12 (2005).

119. Robert Herzstein & Joseph Whitlock, *Regulating Regional Trade Agreements – A Legal Analysis*, in 2 THE WORLD TRADE ORGANIZATION: LEGAL, ECONOMIC AND POLITICAL ANALYSIS 203, 221 (Patrick Macrory et al. eds., 2005); TREBILCOCK ET AL, *supra* note 107, at 57.

120. President Woodrow Wilson, Fourteen Points (Jan. 8. 1918).

the Second World War, U.S. Secretary of State Hull stated that:

I have never faltered, and I will never falter, in my belief that enduring peace and the welfare of nations are indissolubly connected with friendliness, fairness, equality and the maximum practicable degree of freedom in international trade.¹²¹

Furthermore, it would be accurate to argue that non-discrimination in trade is neither connected to, nor stems from, the principle of Sovereign Equality of States. *Tout court*, sovereign equality is concerned with legal capacity, rather than

121. CORDELL HULL, ECONOMIC BARRIERS TO PEACE 14 (1937). For Hull, “unhampered trade dovetailed with peace; high tariffs, trade barriers, and unfair economic competition with war.” JOAN E. SPERO & JEFFREY A. HART, THE POLITICS OF INTERNATIONAL ECONOMIC RELATIONS 3 (7th ed. 2010). That is unsurprising because “[t]he foremost proponent and practitioner of discriminatory trade restrictions was Nazi Germany, which regarded the principle of the most-favoured-nation treatment as a particularly vicious offshoot of a discredited *liberalismus*. It utilized all kinds of trade controls to make the German economy self-sufficient and provide it with the implements for war.” *First Report on the Most-Favoured-Nation Clause*, [1969] 2 Y.B. Int’l L. Comm’n 157, 163, U.N. Doc. A/CN.4/213; see also William J. Davey & Joost Pauwelyn, *MFN Unconditionality: A Legal Analysis of the Concept in View of its Evolution in the GATT/WTO Jurisprudence with Particular Reference to the Issue of “Like Product”*, in REGULATORY BARRIERS AND THE PRINCIPLE OF NON-DISCRIMINATION IN WORLD TRADE LAW: PAST, PRESENT, AND FUTURE 15 (Thomas Cottier & Petros C. Mavroidis eds., 2010) (standing for the proposition that the MFN creates a positive influence on trade liberalization which is a benefit of the wealth and relationships among all nations). Promoting peace was also highlighted in article 1 of the Havana Charter, which started with the phrase “[r]ecognizing the determination of the United Nations to create conditions of stability and well-being which are necessary for peaceful and friendly relations among nations.” Havana Charter for an International Trade Organization art. 1, U.N. Doc. E/Conf. 2/78 (March 24, 1948). The European integration project is also a (successful) paradigm of the construction of a market to serve primarily non-economic, political goals, including the maintenance of peace; see Robert Schuman, French Foreign Minister, Declaration of 9th May 1950, Address Before the European Council (May 9, 1950) (highlighting the preservation of international and European peace as the foundation of the European integration). Cf. the position of Keynes:

I am inclined to the belief that, after the transition is accomplished, a greater measure of national self-sufficiency and economic isolation among countries than existed in 1914 may tend to serve the cause of peace, rather than otherwise. At any rate, the age of economic internationalism was not particularly successful in avoiding war; and if its friends retort, that the imperfection of its success never gave it a fair chance, it is reasonable to point out that a greater success is scarcely probable in the coming years.

John Maynard Keynes, *National Self-Sufficiency*, 22 YALE L. REV. 755 (1933).

substantive rights and obligations. As classically defined by Kelsen, sovereign equality “does not mean equality of duties and rights, but rather equality of capacity for duties and rights.”¹²²

Likewise, had non-discrimination in trade been an expression of sovereign equality, it would have been prohibited under customary law; yet, according to international case law, the ILC, and prominent international scholars, customary international law does not prohibit discrimination in international economic relations. It is well established that “customary international law is to be looked for primarily in the actual practice and *opinio juris* of States.”¹²³ While identical conventional and customary rules could coexist in principle,¹²⁴ a multitude of conventional rules do not demonstrate the parallel existence of such customary norm; “it could equally show the contrary.”¹²⁵

122. Hans Kelsen, *The Principle of Sovereign Equality of States as a Basis for International Organization*, 53 YALE L.J. 207, 209 (1944); *Jesse Lewis v. Great Britain* (U.S. v. Gr. Brit.), 6 R.I.A.A. 85, 89 (1921) (discussing the relationship between sovereign equality and treaty interpretation). According to Professor Waldock, arguing for India before the ICJ in *Right of Passage*, Sovereign Equality of States “underlies the whole application of the Optional Clause.” Oral Argument of Professor C.H.M. Waldock, *Right of Passage Over Indian Territory* (Port. v. India), I.C.J. Pleadings, *Right of Passage Over Indian Territory*, Vol. 4, at 35 (Sep. 24, 1957). Thirlway concluded that reciprocity, while vital, is not universal or inescapable, and is not invalidated by pronouncements that are generally in favor of the equality of States, but rather:

that that principle [reciprocity] operates alongside the principle that judicial jurisdiction is the product of the consent of States; and if there is consent to what might otherwise be unequal, no breach of principle occurs. Just as, in the *S.S. Wimbledon* case, the PCIJ pointed out that one of the attributes of State sovereignty is the right to enter into international engagements which limit the exercise of that sovereignty, so a sovereign State entitled to equality before a court, has the right by consent to renounce some part of its position of equality without compromising the principle of equality itself.

H.W.A. Thirlway, *Reciprocity in the Jurisdiction of the International Court*, 15 NETH. Y.B. INT'L L. 97, 100 (1984) (footnote omitted).

123. *Continental Shelf (Libya v. Malta)*, Judgment, 1985 I.C.J. Rep. 13, ¶ 27 (June 3).

124. “There are a number of reasons for considering that, even if two norms belonging to two sources of international law appear identical in content, and even if the States in question are bound by these rules both on the level of treaty-law and on that of customary international law, these norms retain a separate existence.” *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Merits, 1986 I.C.J. Rep. 14, ¶ 178 (June 27, 1986).

125. *Ahmadou Sadio Diallo (Guinea v. Dem. Rep. Congo)*, Preliminary Objections,

In the case of non-discrimination in international trade, there is no *opinio juris* to support the granting of MFN or National Treatment without an international treaty.¹²⁶ Both MFN¹²⁷ and National Treatment¹²⁸ are purely treaty-based obligations, and thus both derive their binding force from the treaty which embodies them. Article 7 of the ILC Draft Articles on MFN clearly provides that “no State is entitled to most-favoured-nation treatment by another State unless that State has undertaken an international obligation to accord such treatment.”¹²⁹ “There is in customary international law no clearly established general obligation on a state not to differentiate between other states in the treatment it accords to them.”¹³⁰ In *AAPL v. Sri Lanka*, the first ICSID investment treaty arbitration, arbitrator Assante stated in his dissenting opinion that “[i]t bears emphasis that national and most-favoured-nation treatment does not derive from customary law,”¹³¹ while the arbitral tribunal in *Genin v. Estonia* held that “[c]ustomary international law does not, however, require that a state treat all aliens (and alien property) equally, or that it treat aliens as favourably as nationals.”¹³² In the NAFTA context, the tribunal in *Methanex* reached the same conclusion:

2007 I.C.J. Rep. 582, ¶ 90 (May 24).

126. Martins Paparinskis, *MFN Clauses and International Dispute Settlement: Moving Beyond Maffezini and Plama?*, 26 ICSID REV. FOREIGN INV. L.J. 14, 17 (2011).

127. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 186 (2008); Meinhard Hilf & Robin Geiss, *Most-Favoured-Nation Clause*, in 7 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, *supra* note 36, ¶ 21; Meg Kinnear, *A Further Update on Most-Favoured-Nation Treatment – In Search of a Constant Jurisprudence*, in CONTEMPORARY ISSUES IN INTERNATIONAL ARBITRATION AND MEDIATION: THE FORDHAM PAPERS 15, 19 (Arthur W. Rovine ed., 2010); NEWCOMBE & PARADELL, *supra* note 81, at 193; Andreas R. Ziegler, *Most-Favoured-Nation (MFN) Treatment*, in STANDARDS OF INVESTMENT PROTECTION 59, 63 (August Reinisch ed., 2008); Schwarzenberger, *supra* note 2, at 103.

128. NEWCOMBE & PARADELL, *supra* note 81, at 148.

129. *Report of the International Law Commission on the Work of its Thirtieth Session*, *supra* note 92, at 24.

130. 1 OPPENHEIM'S INTERNATIONAL LAW 376 (Robert Jennings & Arthur Watts eds., 9th ed. 1992).

131. *Asian Agricultural Products Ltd. (AAPL) v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (June 27, 1990), 30 ILM 580, 642 (1991) (Assante, S., dissenting).

132. *Genin v. Estonia*, ICSID Case No. ARB/99/2, Award, ¶ 368 (June 25, 2001), 6 ICSID Rep. 236 (2004).

As to the question of whether a rule of customary international law prohibits a State, in the absence of a treaty obligation, from differentiating in its treatment of nationals and aliens, international law is clear. In the absence of a contrary rule of international law binding on the States parties, whether of conventional or customary origin, a State may differentiate in its treatment of nationals and aliens.¹³³

It seems that little has changed since 1923 when the arbitral tribunal in *Eastern Extension Telegraph Co.* eloquently epitomized the law in relation to the customary status of non-discrimination in international trade:

It is perfectly legitimate for a Government, in the absence of any special agreement to the contrary, to afford to subjects of any particular Government treatment which is refused to the subjects of other Governments, or to reserve to its own subjects treatment which is not afforded to foreigners. Some political motive, some service rendered, some traditional bond of friendship, some reciprocal treatment in the past or in the present, may furnish the ground for discrimination.¹³⁴

Weiler's conclusion is that "[c]ustomary international law permits unequal and/or discriminatory results from measures of general application, but it does not permit what might be characterized as arbitrary or discriminatory exercises of administrative, regulatory or judicial discretion."¹³⁵ Quintessentially, but with exceptions regarding the non-discrimination aspect of expropriation,¹³⁶ the international minimum standard of

133. *Methanex Corp. v. United States*, Final Award, 44 I.L.M. 1345, 1454 (NAFTA Trib. 2005). Another NAFTA tribunal stated that "neither Article 1105 nor the customary international law standard of protection generally prohibits discrimination against foreign investment." *Grand River Enters. Six Nations Ltd. v. United States* (Can. v. U.S.), Award, at 53 (NAFTA Arbitral Trib. 2011), <http://www.state.gov/documents/organization/156820.pdf> [<http://perma.cc/ZU47-JS4F>].

134. *E. Extension v. United States* (Gr. Brit. v. U.S.), 6 R.I.A.A. 112, 117 (1923).

135. WEILER, *supra* note 3, at 453.

136. See *Affaire des Biens Britanniques au Maroc Espagnol* (Spain v. Gr. Brit.) 2 R.I.A.A. 615, 647 (1925); *Kulin v. Romania*, 7 Recueil des Decisions des Tribunaux Arbitraux Mixtes Institues par les Traits de Paix 138-40 (1927) (concerning agrarian reform via expropriation of Transylvania by the Romanian state); *Libyan Am. Oil Co. v.*

treatment and denial of justice,¹³⁷ “economic sovereignty reigns supreme” in the field of international economic relations.¹³⁸

IV. CONCLUSION: EXPLAINING THE DISCREPANCY OF THE LEGAL AND HISTORICAL PERSPECTIVES

The various historical episodes of the 19th and 20th centuries point toward a strong yet implicit conceptual connection between the principle of Sovereign Equality and non-discrimination in the realm of international economic relations. The formulation of the latter principle, however, left obligations to grant economic equal treatment outside its scope. In other words, the formulation of Sovereign Equality focused exclusively on equal legal capacity of States. Sovereign Equality remained agnostic or indifferent towards the equality of the content of international obligations in general, and economic non-discrimination in particular.

The following hypothesis has been suggested as a possible explanation: by the time that the principle of Sovereign Equality emerged as a central pillar of public international law, the wave of decolonization and (at a later stage) the end of the Cold War, the rise of neo-liberalism in the international economic system,¹³⁹ and the persistent economic inequalities between the global North and the global South radically changed the historical, political, and diplomatic context. Importantly, the newly-independent developing states found themselves in an international economic system characterized (in principle) by formal legal equality but also sharp factual inequalities regarding their capacity to produce, develop, and compete at the globalized market. It is in that context that the diplomatic efforts of

Gov. of Libyan Arab Republic, 20 I.L.M. 1, 58-59 (1977); Norwegian Shipowners' Claims (Nor. v. U.S.) 1 R.I.A.A. 307, 339 (1922) (concerning liability of the United States for exercising eminent domain of ships belonging to Norwegian citizens).

137. The Claims of Rosa Gelbtrunk and the “Salvador Commercial Company” (U.S. v. El Sal.), 15 R.I.A.A. 455, 456 (1902); PAULSSON, *supra* note 34, at 192-95; PAPANINSKIS, *supra* note 28, at 245-46.

138. GERRY SIMPSON, GREAT POWERS AND OUTLAW STATES: UNEQUAL SOVEREIGNS IN THE INTERNATIONAL LEGAL ORDER 58 (2004) (citing Schwarzenberger, *supra* note 2, at 163).

139. See ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: REIMAGINING THE GLOBAL ECONOMIC ORDER 54 (2011).

developing states in the GATT years, and subsequently within the WTO framework, were characterized by repeated demands for special and differential treatment, rather than adherence to the non-discrimination principle.¹⁴⁰ Sarooshi accurately observes in the WTO context that:

the substantive value of equality embodied in the non-discrimination principle of MFN simply has no credible reality in practice. That is, that states are not in substance—and do not consider themselves to be—equal, so why should they be committed to treat each other as if they were.¹⁴¹

As a result, the purely legalistic manner in which the concept was understood show Sovereign Equality as an empty concept shaped by the general historical and diplomatic context.¹⁴² A strictly legal understanding of the principle of Sovereign Equality, which severs it from economic non-discrimination, is not apolitical; it is a deeply political choice that is determined by, and can only be explained with, reference to the history of the concepts of Sovereign Equality of States and economic non-discrimination.

140. In the Uruguay Round, developing countries submitted requests for negotiation on preferential tariff rates that resulted in developed countries being legally bound to have “special regard to the trade interests” of developing countries and the principle that developing countries’ concessions would be compatible with their development processes. PETROS C. MAVROIDIS, *TRADE IN GOODS: THE GATT AND OTHER AGREEMENTS REGULATING TRADE IN GOODS* 137-47 (2007); JOHN H. JACKSON, *THE WORLD TRADING SYSTEM* 321-25 (2d ed. 1997) (citing the Uruguay Round as an example of how developing countries used diplomacy to take advantage of exceptions in GATT to pursue almost any form of trade policy they wished); see also Lorand Bartels, *The WTO Enabling Clause and Positive Conditionality in the European Community’s GSP Program*, 6 J. INT’L ECON. L. 507, 510-13 (2003) (assessing the system of positive conditionality and special preferences concerning various subjects).

141. Dan Sarooshi, *The Move from Institutions: The Case of the World Trade Organization*, 100 ASIL PROC. 297, 300 (2006).

142. See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA* 566-73 (2005) (construing international law, through an analogy to grammar, as a system of rules for producing legal arguments); see also Dan Sarooshi, *Sovereignty, Economic Autonomy, the United States and the International Trading System: Representations of a Relationship*, 15 EUR. J. INT’L L. 651, 653-56 (2004) (analyzing Sovereignty as an “essentially contested concept” continually subject to contestation and change, which assists in the continual redefinition by societies and states of their identities and in their promotion of new forms of political, social, and legal structures emerging over time).

