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Developing States' Long Walk to Freedom: an examination of the principle of non-discrimination, substantive equality and proportionality in Investor-State disputes

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Acronyms and Defined Terms

Arbitration:	*Piero Foresti, Laura De Carli and others v. Republic of South Africa* (Case No. ARB (AF)/07/01)
BEE:	Black Economic Empowerment
BEE Act:	Broad-Based Black Economic Empowerment Act No 53 of 2003 (South Africa)
BIT:	Bilateral Investment Treaty
CERD:	United Nations High Commissioner of Human Rights' Committee on the Elimination of Racial Discrimination
Charter:	The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry
Convention:	European Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Nov. 4, 1950, art. 19, 213 U.N.T.S. 221, 234.
DME:	South African Department of Mining and Energy
ECHR:	European Court of Human Rights
ECJ:	European Court of Justice
FDI:	Foreign Direct Investment
GATT:	The General Agreement on Tariffs and Trade
HSDA's:	Historically Disadvantaged Persons
ICSID:	International Centre for Settlement of Investment Disputes
MFN:	Most Favored Nation
MPRDA:	The Mineral and Petroleum Resources Development Act of 2002 (South Africa)
NAFTA:	The North American Free Trade Agreement, 1994

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Abstract

The principle of non-discrimination is widely subscribed to in both Bilateral Investment Treaties and Investor-State arbitration awards. However, when this principle is deconstructed, it appears to be less evident what it entails and accordingly, how it should be applied in practice. This thesis examines how discriminatory treatment is defined under international investment law and seeks to articulate a more coherent test based upon the substantive standard of equality and the proportionality principle. By examining a current Investor-State dispute against the Government of South Africa, it illustrates why it is important to understand the notion of equality, and that investment arbitrations are increasingly raising questions of the conflict between domestic public policy and investment protection for arbitrators to resolve. Underlying this issue are wider questions relating to the fundamental power balances between the parties to Bilateral Investment Treaties. In order to encourage international investment as a whole, these questions should not be ignored but rather addressed by arbitral tribunals.

Le principe de non-discrimination est très présent tant dans les traités bilatéraux d'investissement que dans les sentences arbitrales. Pourtant, l'analyse approfondie de ce principe révèle que sa signification réelle et, par voie de conséquence, son application pratique sont moins évidentes qu'il n'y paraît. Cette thèse étudie la manière selon laquelle le traitement discriminatoire est défini en droit des investissements internationaux et cherche à élaborer un test plus cohérent fondé sur les principes d'égalité substantive et de proportionnalité. En examinant un litige opposant actuellement un investisseur à un Etat, en l'occurrence le gouvernement d'Afrique du Sud, cette thèse souligne l'importance de la notion d'égalité. En outre, elle démontre que les arbitrages en matière d'investissement présentent un risque accru de conflits entre les politiques publiques des Etats et la protection des investisseurs, conflits qu'il revient aux arbitres de trancher. Cette question est peut-être révélatrice de problématique plus large concernant l'équilibre des pouvoirs entre les parties à un traité d'investissement bilatéral.

Introduction

"… I have discovered the secret that after climbing a great hill, one only finds that there are many more hills to climb."[1]

In Nelson Mandela's autobiography, "Long Walk to Freedom", he describes how, upon surmounting one hill, he discovers that there are many more hills yet to climb.[2] This thesis aims to explore one issue that is still perceived as a hill that needs to be adequately scaled in the context of international investment in developing states. Whilst international investment and investor protection have come far in the past decades, new issues are arising in current disputes that could result in host states moving away from international arbitration unless they are adequately dealt with head-on by international arbitrators.

This thesis argues that arbitral tribunals tend to examine the principle of non-discrimination in a formalistic and unsophisticated manner, which accordingly results in an inconsistent application of the principle in the context of international investment disputes. This is problematic insofar as whilst formal equality prioritises investor protection, it pays less attention to state sovereignty and public policy needs. It argues that in order to reassure developing states that their domestic measures are not always at risk of being undermined in favour of investors, arbitral tribunals should rely upon the standard of substantive equality in their test of discrimination regarding measures directed specifically towards groups of marginalized individuals in that host state. For

[1] Nelson Mandela, *Long Walk to Freedom: the autobiography of Nelson Mandela* (London: Abacus, 1994) at 751.
[2] *Ibid.*

now, this affects only a narrow band of international investment arbitrations. However, given that it takes better account of the factual context of the respective discrimination claim, and accordingly results in better justice, it is an important issue that needs to be discussed. In order to ensure that investor protection is not eroded, this thesis further advocates adoption of the proportionality principle, which arbitral tribunals have occasionally resorted to when justifying differential treatment.

The concept of discrimination does not appear to have been adequately explored in international investment law, yet underpins many of the provisions found in multilateral and bilateral treaties, and increasingly arises in numerous Investor-State disputes. This research is premised upon the observation that governments are always obliged to implement certain regulations to protect the domestic public interest. It argues that given certain states' respective political and cultural legacies, such an obligation may be particularly important for the functioning of those societies. To be clear, it does not advocate always prioritising state sovereignty to the detriment of investors' rights, but focuses upon articulating a definition of discrimination that should be applied vis-à-vis measures that seek to create an even playing field between certain groups in society and their competitors (domestic or international). As the crux of this research arises from a particular controversial construction of the underlying power dynamics of international investment agreements, this is examined below.

I.Foreign Direct Investment and the inherent inequality entrenched in Bilateral Investment Treaties

The benefits of Foreign Direct Investment "FDI" in a host state are widely documented.[3] FDI is seen as a means of economic growth, assisting in advancing technology, creating a more competitive business environment and accordingly resulting in increased efficiency.[4] However, there are also costs that the host state has to potentially bear, including the repatriation of profits abroad,[5] the possible harmful environmental impact of FDI,[6] and the allegation that FDI can actually decrease domestic efficiency by making the host state dependent upon foreign investment, so that an increase in economic productivity does not equate to development.[7] Neo-Marxist theorists have developed this dependency theory further, arguing that international investment is a form of neocolonialism, ultimately leading to under-development of the host state.[8] In this sense, FDI is conceptualized as redistributing power and wealth both internally, (insofar as certain domestic groups are considered to benefit more than others from such investment), and externally (insofar as foreign entities gain control over domestic resources).[9]

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[3] Organization for Economic Co-operation and Development, *Foreign Direct Investment for Development* (2002), online: OECD <http://www.oecd.org/dataoecd/47/51/1959815.pdf>.
[4] *Ibid* and Kenneth J. Vandevelde, "The Political Economy of a Bilateral Investment Treaty" (1998) 92:4 Am. J. Int'l. L. 621 at 626.
[5] *Supra* note 3 at 5.
[6] *Ibid.*
[7] *Ibid.*
[8] *Supra* note 4 at 628.
[9] *Ibid.*

Given these questions of power underpinning FDI, it stands to reason that similar issues can be identified in international investment agreements,[10] the tools used to facilitate FDI. The Calvo doctrine of the 19th Century, which was developed in Latin America, propounded the argument that developed nations were only entitled to the same level of treatment that domestic nationals received under the respective national laws.[11] Concerned that customary investment rules were being compromised regarding foreign investor protection, BITs were concluded between foreign investors and States. In undertaking an examination of the economic history leading to the proliferation of BITs, Vandevelde describes how many developing nations were facing severe economic problems in the 1980's. In light of the debt crisis, FDI was perceived as one means to ensure the development of the country.[12] BITs therefore played a symbolic role in illustrating a state's commitment to liberal economics and following the collapse of the Soviet Union they consequentially symbolized a renunciation of Marxist economics.[13] Given that the principle rational of BITs is the protection of foreign investments,[14] an existing tension underlies BITs between the interests of the investor (whereby it requires its investment to be protected from uncompensated expropriation) and the host state (whereby protection is grudgingly offered in order to attract FDI).[15] This conflict led to

[10] International investment agreements are treaties entered into between states setting out each state's obligations in respect of the relevant foreign investment.
[11] Arif Hyder Ali & Alexandre de Gramont, "ICSID Arbitration in the Americas" (2007), *The Arbitration Review of the Americas 2008, a Special Report of Global Arbitration Review*.
[12] *Ibid.*
[13] *Supra* note 4 at 682.
[14] *Ibid* at 626.
[15] *Ibid* at 628.

controversies regarding the standard of compensation payable for expropriations.[16] Nonetheless it cannot be denied that since the 1970's, developing states' necessity for FDI has resulted in an explosion of concluded BITs.[17]

Despite this historical context of BITs, the power relations underlying these investment agreements are nonetheless controversial. This thesis supports authors who argue that as BITs are normally entered into between developed and developing nations, this entails a one-way flow of investment from richer countries to poorer ones despite the so-called "reciprocal" obligations set out in most BITs.[18] There is accordingly an inherent inequality between the party with the ability to invest versus the party eager to attract and retain that investment, and it is argued that this can be played out in the negotiation process, with the result that many BITs fail to include adequate provisions that safeguard the host state's ability to take certain measures to assist domestic growth, such as subsidies for emerging industries.[19] Commentators have noted that such inequality is evident given that BITs result in "…an erosion of sovereignty by one party without a corresponding erosion in the other party."[20] Indeed, it has been noted that BITs are not in

[16] *Ibid*. Vandevelde describes how States argued for prompt, adequate and effective compensation, whereas economic nationalists claimed that they were only entitled to national treatment and Marxist economists argued that no compensation was required at all.
[17] Kenneth J. Vandevelde, "The Economics of Bilateral Investment Treaties" (2000) 41 Harv. Int'l L.J. 469 at 470.
[18] M. Sornarajah, *The International Law on Foreign Investment*, 2d ed. (Cambridge: Cambridge University Press, 2004).
[19]Luke Eric Peterson, "Bilateral Investment Treaties – Implications for Sustainable Development and Options for Regulation", (FES Conference Report organized by Friedrich Ebert Stiftung, 2007), online: FES Berlin <http://www.fes-globalization.org/publications/ConferenceReports/FES%20CR%20Berlin_Peterson.pdf>
[20] *Ibid.*

the developing countries best interests insofar as they "seriously restrict the ability of host states to regulate foreign investment"[21] and conceptually, developing countries collectively are argued not to have any interest in concluding BITs,[22] although this is clearly different on an individual basis. This entrenched inequality clearly does not affect the validity of the BIT, given that both parties have ultimately agreed to its respective terms. Nor does it speak to the benefits of FDI and its correlation to economic development as a whole. Nonetheless, it does put forward a case for developing nations to carefully consider in which domestic fields they wish to reserve their regulatory powers when agreeing to BIT provisions. As will be seen in the case of South Africa in particular, its political history requires it to implement public policies that potentially contravene BIT provisions and yet are arguably for the greater well-being of the country.[23]

Although this account of the power dynamics is considered to be the most realistic, it should not be ignored that there are other accounts of the power relations underlying BITs. Certain authors argue that BITs do not stand for a pure commitment to economic liberalism, and in fact favor host states.[24] They argue that BITs principally embody economic nationalism, whereby "a state's economic policy should serve its political policy"[25] and accordingly that the host state in fact retains a certain amount of discretion

[21] *Supra* note 17.
[22] Eric Neumayer, "Own Interest and Foreign Need: are bilateral investment treaty programmes similar to aid allocation?" EconWPA International Finance (2004), online: EconWPA <http://ideas.repec.org/s/wpa/wuwpif.html>
[23] *Supra* note 19.
[24] *Supra* note 4 at 622.
[25] *Ibid.*

in BIT provisions thereby enabling it to act in the name of public welfare, for example via taxation measures imposed on foreign investors.[26] This perspective sees developing states as retaining more, or at the very least, equal power to developed parties on the other side of the BIT negotiations' table. Still other commentators argue that both parties drive BIT negotiations and that there is not one dominant party setting unilateral provisions.[27] Ultimately, as Sornarajah points out, the different treaty standards contained in BITs and multilateral treaties often reflect the varying bargaining powers and dependencies of the various parties.[28]

This thesis contends that the reality of the international order is that a relatively small amount of states have created "universal standards"[29] whether in private or public international law. If this is accepted, it stands to reason that these standards are likely to be experienced differently by different states – leading to benefits for some and more constraints for others.[30] Given that many developing countries perceive FDI as a means to improve economic growth, they will have to compete for such investment with other developing states. This could have the consequence that rather than anticipating specific needs and potential problems with current "standard" BIT provisions, or even in spite of such problems, States sign BITs in a race to "win" investment. As Schneiderman

[26] *Ibid* at 638.
[27] Srividya Jandhyala, "A Bilateral Analysis of Bilateral Investment Treaties" (2006), online: all academic research <http://www.allacademic.com//meta/p_mla_apa_research_citation/1/7/9/1/0/pages179108/p179108-5.php>.
[28] *Supra* note 18 at 206.
[29] David Schneiderman, *Constitutionalizing Economic Globalization* (Cambridge: Cambridge University Press, 2008) at 135.
[30] *Ibid*.

observes, "[a] vast number of states wish to participate in this regime, despite its discernible tilt, primarily as a means of signaling a ready openness to foreign investment."[31] This thesis attempts to highlight certain problems that may arise as a result of this phenomenon.

II.A road map of this thesis

The scope of this thesis is narrow. It focuses upon examining how the notion of equality has been considered in discrimination claims in investment disputes and argues that this standard is unsatisfactory in the context of arbitrations involving issues of human rights, such as the promotion of marginalized groups of individuals. For the most part, arbitral tribunals appear to favor the concept of formal equality when addressing discrimination claims. They have accepted that this standard sometimes falls short of justice, and so have developed the notion of justified differential treatment. For the avoidance of doubt, this thesis does not examine all the ways in which a respondent state can justify treating investors differently. Rather, it seeks to put forward a new definition of discrimination in certain contexts, which it argues is fairer and helps ensure that all competitors are on an equal footing.

It is important to know what standard of equality to apply because it can lead to widely differing results, as case law arising from domestic jurisdictions has shown.[32] Specifically, a two-fold change to the current test of discrimination is proposed: (i)

[31] *Ibid.*
[32] Beverley Baines, *Equality, Comparison, Discrimination, Status* (Ontario: Irwin Law Inc., 2006).

applying a substantive standard of equality to the respective measure; and (ii) using the proportionality principle to examine whether the measure is legitimate. It is argued that only by examining the alleged discriminatory treatment by reference to the specific context of the case can arbitrators develop a fairer principle of non-discrimination in Investor-State disputes. This would have far-reaching practical effects in international investment law as a whole. A state regulation that is considered as discriminatory under a formal notion of equality might still be considered a *bona fide* measure under substantive equality. Accordingly, the regulation: (i) may amount to a legitimate use of a state's police powers; and (ii) does not necessarily breach certain provisions of a BIT, such as national treatment, Most Favoured Nation or fair and equitable treatment provisions. This would have consequential effects upon whether the payment of compensation would necessarily have to be made to the foreign investor. The chapters of this thesis are divided in the following sections:

Chapter 1:

International investment law lacks a coherent test for discriminatory treatment

This chapter sets out the argument that although the principle of non-discrimination is widely adhered to under international investment law, there is an unsophisticated and inconsistent understanding of what this principle means when it is deconstructed and applied in practice. This chapter examines the relationship between equality and non-discrimination, and the theoretical difference between formal and substantive equality. It analyses (i) certain provisions within BITs; and (ii) arbitral awards involving claims of discrimination, to support the argument that there is a tendency to rely upon formal

equality inherent in the "like circumstances" test that is normally applied. Nonetheless, on occasion arbitral tribunals have recognized that a purely formal approach is not always appropriate. This lack of consistency means that the respective parties to the dispute do not have certainty about how arbitral tribunals will examine their claim.

Chapter 2:

A new conception of discrimination: applying a substantive standard of equality and the proportionality principle

This chapter sets out the crux of this thesis' argument: namely that the traditional conception of equality is inappropriate for all arbitrations, and where state measures treat traditionally marginalized social groups differently, a new test for discriminatory treatment should be applied. This test applies the standard of substantive equality and the proportionality principle. Substantive equality recognizes that not all individuals or entities should be treated equally, and that for equality to have any real meaning in the respective context, different treatment is actively required. The proportionality principle, transposed from the European Court of Human Rights (ECHR) has already been relied upon in investment disputes, and helps ensure that investors are safeguarded from arbitrary treatment. The underlying premise of this chapter is that by applying this test for discrimination, measures aimed at ensuring economic fairness will not be considered as discriminatory. This will ultimately help redress the inherent inequality that is entrenched in BITs, thereby giving greater reassurance to developing states that their policy measures are being respected.

Chapter 3:

The case study of *Piero Foresti v. Republic of South Africa*: applying a formal and a substantive analysis of equality

This chapter examines a current Investor-State arbitration that raises the issues of equality and discrimination, and seeks to illustrate how arbitral tribunals might apply the test of substantive equality and the proportionality principle when examining discriminatory treatment. In 2007, European-based investors in South Africa's mining industry commenced an international arbitration against the South African Government on grounds that the government's affirmative action policies were expropriatory, and contravened the fair and equitable treatment provisions in the relevant BITs. This chapter explores why states with particular social legacies, such as South Africa, should preserve their ability to regulate in the public interest and argues that this conflict between investor protection and public welfare is becoming more and more relevant for arbitral tribunals. Given that BITs do not always include reservations, it is necessary for arbitral tribunals to understand how to examine whether differential treatment is actually discriminatory or in fact justified in light of the relevant context.

III.The importance of this research

The tension between providing certainty to foreign investors by entering into BITs whilst at the same time permitting government policy-making in important social spheres touching upon concerns of public welfare and human rights has potentially significant justice implications: (1) host governments might be more reluctant to regulate domestically for fear of contravening their BIT obligations and being forced to pay

compensation, or alternatively, host governments might be more eager to withdraw from the relevant international dispute settlement forum provided for in the event of a BIT dispute, as seen with the recent actions of Venezuela; (2) investors have the ability to use BITs as a lobbying tool regarding potential social policies; and (3) domestic society fails to benefit from necessary public interest regulations in important social realms, such as the environment, public health and human rights.

Whereas most textbooks acknowledge that non-discrimination is a fundamental principle of international investment law, little has been written regarding what this principle means and how it is applied. Recent cases have suggested that discrimination claims are being raised more frequently along with important and wide-reaching issues of human rights, and accordingly, arbitral tribunals must understand the significance of the theoretical and practical framework underling the principle of non-discrimination and equality.

IV.Methodology

The methodology that is principally relied upon in this thesis is a critical reformist methodology of international investment law. It also applies a comparative case law and treaty law analysis between different domestic and international legal systems. It uses the ongoing Investor-State dispute of *Piero Foresti v. Republic of South Africa*[33] as a case study.

[33] *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (Case No. ARB (AF)/07/1).

Chapter 1: International Investment Law lacks a coherent test for discriminatory treatment

"…every difference in treatment between individuals under the law will not necessarily result in inequality and, as well, that identical treatment may frequently produce serious inequality."[34]

The purpose of this chapter is to argue that although the principle of non-discrimination is widely articulated in international law, arbitral tribunals currently apply an unsophisticated and inconsistent test when examining whether the respective treatment of investors is discriminatory and contravenes certain treaty provisions. It argues that both BITs and arbitral awards favor the notion of "formal equality" by their reliance upon the "like circumstances" test. However, it also observes that arbitral tribunals have recognized that effective state regulation sometimes requires a difference in treatment between foreign investors and other comparators that can be justified in light of important public policy concerns. The consequential result is a body of awards that leaves one with the impression that arbitral tribunals recognize that formal equality is not always appropriate, but that they have not defined an alternative method for determining when different treatment is justifiable, and have not gone a step further and considered substantive equality as an appropriate standard. This chapter briefly sets out the principle of non-discrimination under international law, and sketches the theoretical background underlying the difference between formal and substantive equality. It then explores how the principle of non-discrimination has been upheld in international investment law, specifically in light of: (i) BIT provisions; and (ii) arbitral awards in investment disputes.

[34] Justice McIntyre in *Law Society of British Columbia v. Andrews*, [1989] 1 S.C.R. 143 at para. 26.

I. The principle of non-discrimination under international law

The principle of non-discrimination has been upheld in customary international law,[35] and has been widely articulated in multilateral treaties[36] and BITs.[37] It has even been said to have the status of *jus cogens* or a peremptory norm under international law.[38] Understandably then, it is subscribed to, not only in the field of international investment law, but in international law generally, for example in international trade law and human rights law. Perhaps for this reason, it is difficult to define a principle that must necessarily be applied to a range of areas of law with inherently different objectives.

The concepts of discrimination and equality are two sides of the same coin,[39] or the negative and positive statement of each other.[40] In other words, non-discrimination under international law is an articulation of the principle of equality of treatment.[41]

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[35] Ian Brownlie, *Principles of Public International Law*, 6th ed. (Oxford: Oxford University Press, 2003).

[36] For example, in NAFTA, the ECT and the OECD Draft Multilateral Agreement on Investment.

[37] Working Group on the Relationship Between Trade and Investment, "Views on Modalities for Pre-Establishment Commitments Based on a GATS-Type Positive List Approach" (2002), online: Permanent Mission in India <http://commerce.nic.in/wto_sub/Invest/sub_invest-W150.htm>.

[38] Human Rights & Equal Opportunity Commission, "The Fight Against Racism: principles of non-discrimination and equality" (2000) *International Review of Indigenous Issues in 2000: Australia*.

[39] David M. Beatty, "The Canadian Conception of Equality" (1996) 46 University of Toronto Law Journal 349.

[40] Ann F. Bayefsky, "The Principle of Equality or Non-discrimination in International Law" (1990) 11 Hum. Rts. L.J. 1 - 34.

The origins of the principle of non-discrimination spring from the customary international law rules regarding the protection and treatment of aliens.[42] These were grounded on notions of fairness and the protection of individual rights[43] as well as the payment of compensation for expropriation of alien property. With the increase of trade across borders in the 19th century, aliens required protection, both for their person and their property held abroad.[44] The *Neer* case,[45] which concerned a U.S. claim against Mexico for the loss of life of one of its nationals, is generally seen as the landmark case that articulated a common standard in international law against discriminatory treatment of aliens.[46]

This common standard has been described in terms of the "standard of justice" or the minimum standard of treatment that all nations sought to uphold.[47] Domestic nationals were excluded from the scope of this standard, thus preserving the "reserved domain" of

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[41] A.F.M. Maniruzzaman, "Expropriation of Alien Property and the Principle of Non-Discrimination in International Law of Foreign Investment: An Overview" (1998) 8 J. Transnat'l L. & Pol'y 57.
[42] *Ibid*.
[43] Nicholas DiMascio and Joost Paulweln, "Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?" (2008) 102 Am. J. Int'l. L.48 at 53.
[44] Alireza Falsafi, "The International Minimum Standard of Treatment of Foreign Investors' Property: a Contingent Standard" (2007) 30 Suffolk Transnat'l L. Rev. 317.
[45] *L.F. Neer v. United Mexican States*, 4 R.I.A.A. 60, 3 I.L.R. 213.
[46] The standard is set out as "…outrage, bad faith, willful neglect of duty, an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency." *Ibid* at para. 61 – 62.
[47] *Supra* note 44 at 319.

sovereign states vis-à-vis actions of their own nationals.[48] More importantly, this standard was articulated to remedy the injured state rather than preserving any individual right to recourse, and was therefore premised upon regulating relations between states.[49]

II.Formal equality and substantive equality: a brief theoretical background

Non-discrimination might be an articulation of equality, but this does not explain what equality is, and accordingly what treatment is considered discriminatory when this standard is not met. There are numerous versions regarding what constitutes equality[50] spanning an array of religious, philosophical and political ideas, as well as the discourse on justice.[51] Two of the major models of equality are formal equality and substantive equality.[52]

Formal equality articulates the Aristotelian or classical notion of equality, which provides that "likes should be treated alike".[53] In other words, formal equality or *de jure* equality

[48] *Ibid.* at 320.
[49] *Ibid.* at 321.
[50] Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537.
[51] Semiha Akinci, "The Philosophical Roots of the Concepts of Equality and Justice" in *Education in Creative Existential Planning* (Netherlands: Springer, 2008) 201.
[52] Dr. Marc De Vos, "Beyond Formal Equality" (2005), online The European Commission:<http://ec.europa.eu/employment_social/fundamental_rights/pdf/legnet/bfe07_en.pdf.103 ta <
[53] *Supra* note 39 at 351.

is the requirement that two persons who are in similar circumstances are treated equally, at least in respect of those similarities and different people differently.[54]

The law has traditionally enshrined formal equality based upon the notion that all citizens should be treated equally or in the same manner, at least insofar as they are alike.[55] Constitutions often enshrine such a commitment to formal equality.[56] Many treaties dealing with non-discrimination also enshrine the notion of formal equality.[57] Indeed, formal equality has been said to underpin legal education as a whole.[58] The overall philosophy underpinning "legal justice" predominantly requires a commitment to "horizontal equality" or "legal equality",[59] insofar as judges are required to treat like cases, individuals and groups alike according to the same rules.[60]

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[54] Catherine J. Van de Heyning, "Is it still a sin to kill a mockingbird? Remedying factual inequalities through positive action - what can be learned from the US Supreme Court and the European Court of Human Rights case law" (2008) 3 EHRLR 1 at 3.
[55] *Ibid.* at 5.
[56] The French *Conseil Constitutionnel*, for example, has provided that the French Constitution does not recognize any distinction between French citizens on the formal grounds of origin, race or religion. *Ibid.*
[57] The UN Convention on the *Elimination of All Forms of Discrimination Against Women*, for example, acknowledges that certain positive practical measures need to implemented by parties to ensure equality but emphasizes the formal equality of opportunities rather than equality of outcome. See UN Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) 1979, Article 2(b).
[58] "…this ubiquitous, case-to-case, 'what's like what', formal method of reasoning is the 'bread and butter' not just of adjudication, of constitutional equality law, and of formalistic jurisprudence, but also of legal education" Robin L. West, *Re-Imagining Justice: Progressive Interpretations of Formal Equality, Rights, and the Rule of Law* (Aldershot: Ashgate Publishing Limited, 2003) at 108.
[59] *Ibid.*
[60] *Ibid.*

Those who favor formal equality from an economic perspective, argue that the purpose of law is not to re-arrange power dynamics within or between social groups. They see politics as the appropriate tool for transforming "relative wellbeing".[61] In this positivist camp, equality seeks to serve an economic or utilitarian purpose in law.[62] Formal equality is thus rooted in the goal of "maximizing individual freedom" by "increasing the law's predictability"[63] and accordingly providing individuals with certainty regarding how their behavior will be legally prescribed.[64] This understanding of formal equality is not concerned with power relations in the sense that it does not differentiate between different groups and seeks to put "ends beyond political challenge."[65]

The essence of formal equality in treating "likes alike" is inherently comparative in nature.[66] As Westen observes:

> "To say that an apple is 'like' or 'equal to' an orange means that, despite their many differences, they each possess the feature or features that are relevant to an external criterion, whether those features be weight, surface area, or sugar content; to say that they are 'unequal' means that they do not share the relevant feature, whether it be color, taste, or juice content."[67]

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[61] *Ibid* at 138.
[62] *Ibid* at 149.
[63] *Ibid* at 136.
[64] *Ibid.*
[65] *Ibid* at 139.
[66] *Supra* note 50 at 551.
[67] *Ibid.* at 553.

Thus, the essence of equality is dependent upon determining the external criteria to be compared or in other words, choosing the qualities that must be relied upon in order for such a comparison to be made. For this precise reason, authors have argued that equality is "empty" insofar as it is only a form until substance is given to it via such external criteria.[68] As illustrated by the example of apples and oranges, it is likely that one will always be able to find similarities as well as differences in the respective comparators. It is therefore argued that the notion of formal equality, comparing "like to like" is fundamentally artificial.

Substantive equality or *de facto* equality is a standard of equality based upon identifying and acknowledging existing barriers that prevent certain groups from operating in the same manner as others. Substantive equality therefore promotes different treatment of these groups in order to achieve *de facto* equality, "to treat me equally, you may have to be prepared to treat me differently."[69] Proponents of substantive equality conceptualize equality as a "redistributive right" and a transformative tool, whereby the quality of social relationships and legal structures can be examined and realigned.[70]

A pertinent illustration is the Canadian case of *Symes*,[71] where a businesswoman was not permitted to deduct her childcare expenses under the Income Tax Act, a gender-neutral

[68] *Ibid* at 578.
[69] Online: Equal Opportunity Commission of Western Australia < http://www.equalopportunity.wa.gov.au/ar0506-4.html>.
[70] Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter*, (Toronto: Irwin Law Inc., 2006) at 10.
[71] *Elizabeth C. Symes v. Canada* [1993] S.C.R. 695.

piece of legislation that applied to men and women alike and did not permit the deducting of childcare as a business expense. Symes argued that this provision exacerbated the difficulties of the business environment for women. Justice L'Heureux-Dubé, in her dissenting (although arguably insightful) opinion, acknowledged the black-letter provisions of such legislation, but applied it contextually, stating that the definition of a business expense "ignore[s] the reality of businesswomen…a woman's ability to participate in the workforce might be completely contingent on her ability to acquire child care."[72] In order to achieve "equality" this important social element had to therefore be taken into consideration.

To be clear, substantive equality identifies when "different" treatment is not discrimination. It is contentious as to whether one can ever escape the notion of comparison. Canadian jurisprudence is committed to the notion of equality as a "comparative concept".[73] However, substantive equality is distinguished as being broadly drawn, examining the "condition of others in the social and political setting in which the question arises", as opposed to the narrower comparison of those to whom the law applies, as in formal equality.[74] Accordingly, substantive equality primarily focuses upon the results or effect of the relevant measure, rather than its methods or purpose.[75]

[72] *Ibid* per Justice L'Heureux-Dubé.
[73] *Supra* note 32 at 77.
[74] *Ibid.*
[75] Li Weiwei, *Equality and Non-Discrimination Under International Human Rights Law* (Oslo: University of Oslo, 2004).

In deconstructing the notion of "substantive equality" it is apparent that there are several positions that can be taken.[76] For example, Canadian courts have incorporated substantive equality into their jurisprudence via an adherence to human dignity.[77] This thesis relies particularly upon the theories of Elizabeth Anderson, who describes the notion of substantive equality in terms of power relations.[78]

Anderson's stance is that unequal treatment may be considered unfair and wrong because it entrenches existing power imbalances that deliberately benefit certain individuals in society and deprive others of social or political influence.[79] She states:

> "The proper negative aim of egalitarian justice is not to eliminate the impact of brute luck from human affairs, but to end oppression, which by definition is socially imposed. Its proper positive aim is not to ensure that everyone gets what they morally deserve, but to create a community in which people stand in relations of equality to others."[80]

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[76] Certain egalitarians posit that the purpose of egalitarianism is to assist individuals who suffer unequal treatment as a result of bad fortune or naturally occurring factors, such poor physical endowments. See Elizabeth Anderson, "What is the Point of Equality?", online: (1999) 109 Ethics 287 at 289 <http://www.jstor.org/stable/2989479?seq=3>.

[77] Beverly Baines "Is Substantive Equality a Constitutional Doctrine" in Y. Gendreau, ed., *La doctrine et le developpement du droit/Developing Law with Doctrine* (Montreal: Les Éditions Themis, 2005) at 59.

[78] *Supra* note 76.

[79] Sophie Moreau, "The Wrongs of Unequal Treatment" in Fay Faraday, Margaret Denike & M. Kate Stephenson, eds., *Making Equality Rights Real: Securing Substantive Equality Under the Charter*, (Toronto: Irwin Law Inc., 2006) at 40.

[80] *Supra* note 76.

She defends the theory of "democratic equality", which she articulates as requiring the citizen in a society to be capable of functioning in three ways: "as a human being, as a participant in a system of cooperative production, and as a citizen of a democratic state."[81] As Moreau observes, oppressive power relations can be the indirect effect of social institutions, even if they operate within a framework of formal equality that is not designed to harm or negatively target individuals.[82] Democratic equality is a means of providing the "social conditions for equal citizenship".[83] Building upon Rawl's *Theory of Justice*, Anderson states that although democratic equality does not deal with the natural distribution of natural assets as a matter of justice, how social structures respond to this natural distribution is a concern for justice.[84] This thesis seeks to use the theory of democratic equality on two planes: a domestic one (equality within a host state) and an international one (equality between states).

The importance of examining which standard of equality is applied by arbitral tribunals arises because many BITs, especially the earlier ones, do not specify that certain regulatory powers of a state are protected in relation to certain policy objectives.[85] This leaves arbitral tribunals with the responsibility of interpreting these treaties, and the possibility that a formal standard of equality will not take all relevant factors into

[81] *Ibid.* at 317.
[82] *Supra* note 79 at 41.
[83] *Supra* note 76 at 332.
[84] *Ibid* at 331.
[85] Luke Eric Peterson, *South Africa's Bilateral Investment Treaties Implications for Development and Human Rights* (Geneva: Friedrich Ebert Stiftung, 2006) 10.

account, thereby resolving disputes in favor of investors with a loss of policy regulation for states.[86]

III. BITs and how they enshrine the principle of non-discrimination

The principle of non-discrimination is relevant in two principle ways in respect of BITs: (a) expropriation provisions against discriminatory treatment; and (b) specific investor protection provisions against discriminatory treatment. This section seeks to illustrate that although BITs reiterate the importance of the non-discrimination principle there is no indication, aside from the comparative standard articulated in national treatment and MFN provisions, how this principle should be interpreted in practice. It follows that arbitral tribunals are left with a great deal of discretion in interpreting these provisions.

i.Expropriation provisions against discriminatory treatment in BITs

Expropriation is "…the deprivation by state organs of a right of property either as such, or by a permanent transfer of the power of management and control."[87] A state has a sovereign right to expropriate assets and to regulate activities within its own jurisdiction. It is accepted international law that certain requirements need to be met in order for such an expropriation to be considered legal, namely that the expropriation (1) must be for a public purpose; (2) must be non-discriminatory; (3) must be pursuant to the payment of

[86] *Ibid* at 11.
[87] *Supra* note 35 at 519.

prompt, adequate and effective compensation; and (4) must follow due process.[88] Such conditions of legality are often typically reflected in multilateral treaties[89] and BITs, for example, in Article 5(1) of the BIT between South Africa and the United Kingdom.[90] These requirements apply to each of the three commonly divided categories of expropriation: (1) direct expropriation;[91] (2) indirect expropriation;[92] and (3) measures equivalent or tantamount to expropriation.[93] However, a large gap is evident when one considers that BITs do not define what a "non-discriminatory manner" means.

A particular and contentious species of indirect expropriation is known as "regulatory takings".[94] Its roots lie in the early formation of the United States of America, where the taking of property for State purposes went uncompensated.[95] This was justified by the

[88] *Ibid.*
[89] For example, Article 1110 of NAFTA states that the NAFTA parties may not: "directly or indirectly nationalize or expropriate an investment of an investor of another Party in its territory or take a measure tantamount to nationalization or expropriation of such an investment ("expropriation"), except (a) for a public purpose; (b) on a non-discriminatory basis; (c) in accordance with due process of law and Article 11105(1) [Minimum Standard of Treatment]; and (d) on payment of compensation in accordance with paragraphs 2 through 6" (emphasis added).
[90] This provides: "Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party, except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation…" (emphasis added). South Africa – United Kingdom BIT 1994.
[91] OECD, "'Indirect Expropriation' and the 'Right to Regulate' in International Investment Law" (Paris: OECD Working Papers on International Investment Number 2004/4, 2004).
[92] *Middle East Cement Shipping and Handling Co. v. Arab Republic of Egypt* (ICSID Case No. ARB/99/6, 2002)
[93] *S.D. Myers, Inc. v. Canada* (NAFTA/UNCITRAL, 2000).
[94] Lorenzo Cotula, *The Regulatory Takings Doctrine*, Briefing 3 (Ottawa: International Institute for Environment and Development, 2007).
[95] *Supra* note 91.

argument that certain police powers were a necessary function of government and that accordingly regulations were required in society to protect the environment, health and welfare interests of society without compensation being due to those who were affected by these measures.[96] Although it is stated that such regulations must be non-discriminatory in order to be considered a legitimate exercise of police powers, there is no articulation of what such discrimination entails. This is illustrated by the Model BIT of the United States. Annex B of the BIT provides:

> "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriation" (emphasis added).[97]

It can therefore be seen that (i) for a direct or indirect expropriation to be considered legal it must be non-discriminatory; and (ii) for a government regulation to be considered a legitimate exercise of the police power of the State, with no ensuing compensation, it must be non-discriminatory. Despite such reliance upon the principle of non-discrimination, there is no definition in BITs regarding what this means.

ii. Specific provisions against discriminatory treatment in BITs

[96] *Ibid.*
[97] U.S. State Department, Draft Model Bilateral Investment Treaty 2004, online: Bilaterals.Org < http://www.bilaterals.org/article.php3?id_article=137>

Specifically enshrining the principle of non-discrimination in BITs was a means of assuring foreign investors that their investments would be protected against preferential treatment or a unilateral change in the State's laws.[98] The commonly inserted clauses in BITs that enshrine the principle of non-discrimination are: (i) national treatment provisions; (ii) most favored nation ("MFN") clauses; and (iii) fair and equitable treatment provisions. Unlike expropriation provisions, these clauses are not concerned with whether the level of interference amounts to a taking, but rather focus specifically upon the nature of the interference.[99] National treatment and MFN clauses explicitly require a comparative test to be used to establish discriminatory treatment. Fair and equitable treatment is perceived as an absolute standard.[100] As the scope of such clauses is determined by the signatory parties to the relevant treaty, they do not operate automatically, and the respective parties can negotiate any reservations or exceptions between themselves. Books have been written on each of these provisions. Nonetheless, a brief and therefore simplistic summary of their purpose is set out below.

(a) National treatment provisions

National treatment provisions require the host State to provide foreign investors and investments with treatment no less favorable than they accord in similar circumstances to their own domestic investors and investments. This sets out an implicit comparative and

[98] *Supra* note 44 at 5.
[99] Todd J Grierson-Weiler and Ian A Laird, "Standards of Treatment in International Law: the move towards unification" in Muchlinski, Ortino and Schreuer eds., *The Oxford Handbook of International Investment Law* (Oxford: Oxford University Press, 2008) at 268.
[100] *Ibid* at 268.

"like circumstances" test to be applied. For example, Article IV(1) of the BIT between South Africa and Canada provides:

> "Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favourable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments."[101]

Two points may be noted regarding national treatment provisions in this formulation. First, they normally articulate a "like circumstances" test by providing that a comparison of treatment should be made against nationals in "like circumstances". However, there is no definition regarding what this test entails. Secondly, one way of analyzing this provision is that foreign investors may receive more favorable treatment than domestic nationals but not less favorable treatment. There is thus already a permissible standard of discriminatory treatment entrenched in such provisions, one that is in favor of investors. It is suggested that the better interpretation is that the goal of such provisions is to ensure that the parties are on an equal footing and that foreign investors are not unfairly disadvantaged vis-à-vis national competitors, in keeping with the underlying objective of investor protection.[102]

[101] Article IV(1) of the Canada-South Africa BIT dated 27 November 1995.
[102] Indeed, in Methanex, the arbitral tribunal held that the purpose of national treatment provisions is to protect individual investors from injury. See *Methanex Corp v. United States of America* (NAFTA/UNCITRAL Final Award 9 August 2005)

(b) MFN treatment provisions

MFN clauses are similar to national treatment clauses in that they implicitly provide for a comparative test when examining discriminatory treatment. In other words, they contain an obligation upon the host State not to treat the investor any less favorably than it treats other third parties. For example, Article 3(1) of the BIT between South Africa and Italy provides:

> "Each Contracting Party, within the bounds of its own territory, shall offer investments and returns of investors of the other Contracting Party no less favorable treatment than that accorded to investments of its own investors or investors of Third States." (emphasis added)[103]

As with national treatment provisions however, there is no definition regarding what constitutes discrimination or what test should be applied. Despite being grounded on the notion of protection against differential treatment, MFN provisions have been criticized as potentially enabling one foreign investor to take advantage of the negotiations of another foreign investor, despite any difference in risk undertaken by various foreign parties.[104] Once again, however, its emphasis can be conceptualized as establishing a fair economic environment for all market players.

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[103] Agreement between the Government of the Italian Republic and the Government of the Republic of South Africa on the Promotion and Protection of Investments (June 1997).
[104] *Supra* note 40 at 76.

(c) Fair and equitable treatment provisions

These provisions focus upon the fairness and reasonableness of the respective measure affecting the investment. There is no clear definition regarding what constitutes fair and equitable treatment. For example, Article 3 of the BIT between South Africa and France provides:

> *« Chacune des Parties contractantes s'engage à assurer, sur son territoire et dans sa zone maritime, un traitement juste et équitable conformément aux principes du Droit international, aux investissements des nationaux et sociétés de l'autre Partie et a faire en sorte que l'exercice du droit ainsi reconnu a un traitement juste et équitable ne soit entravé ni en droit ni en fait. »* [105]

It furnishes a broad standard that is often said to coincide with either national treatment provisions or MFN clauses.[106] Much has been written regarding the relationship between fair and equitable treatment and the minimum standard under customary international law.[107] It is controversial whether it furnishes a stand-alone standard, or one that incorporates the international law minimum standard.[108] The NAFTA Notes of Interpretation provide that fair and equitable treatment does not "require treatment in addition to or beyond that which is required by the customary international law minimum

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[105] *Accord entre le gouvernement de la République Française et le gouvernement de la République de l'Afrique du Sud sur l'encouragement et la protection réciproques des investissements,* 1995.
[106] *Supra* note 40 at 13.
[107] Rudolf Dolzer, "Fair And Equitable Treatment: A Key Standard In Investment Treaties" (2005) 39 Int'l Law, 87.
[108] *Ibid*.

standard of treatment of aliens".[109] The US-Rwanda BIT, signed in February 2008 and the first U.S. BIT in Sub-Saharan Africa since 1998, provides that fair and equitable treatment does not require treatment in additional to the customary international standard of minimum treatment, although it specifies an adherence to due process.[110]

As BITs do not explain what fair and equitable treatment is, this has been left to tribunal interpretation. In the *Waste Management* case,[111] the NAFTA tribunal examined the S.D. Myers, Mondev, ADF and Loewen cases and held that discriminatory conduct infringes the standard.[112] Fair and equitable treatment is the most flexible of the three provisions insofar as it can cover a multitude of obligations raised in investment disputes.[113] Indeed, it has been observed that where a provision is missing from the relevant treaty, the arbitral tribunal has effectively been able to rely upon the fair and equitable treatment provision in its place.[114]

IV. Arbitral awards and non-discrimination

[109] NAFTA Free Trade Commission, "North American Free Trade Agreement Notes of Interpretation of Certain Chapter 11 Provisions" (2001), online: Foreign Trade Information Service <http://ctrc.sice.oas.org/trade/nafta/CH11understanding_e.asp>.
[110] Article 5, United States of America – Rwanda BIT dated 19 February 2008.
[111] *Waste Management, Inc. v. Mexico Award* (ICSID Case No. ARB(AF)/00/3) at 154.
[112] "…the minimum standard of fair and equitable treatment is infringed by conduct attributable to the State and harmful to the claimant if the conduct is arbitrary, grossly unfair, unjust or idiosyncratic, is discriminatory and exposes the claimant to sectional or racial prejudice, or involves a lack of due process leading to an outcome which offends judicial propriety..." *Ibid.*
[113] *Supra* note 106 at 268.
[114] *Ibid* at 268 and *Saluka Investments BV (Netherlands) v. Czech Republic* (UNCITRAL, Partial Award, March 2006).

Given that BITs do not define the principle of non-discrimination and do not always set out a relevant test, it is unsurprising that arbitral tribunals have failed to provide a coherent and reliable notion of what constitutes equality in discrimination claims. This section seeks to examine how arbitral awards have dealt with the principle, and in its discussion, a series of potentially controversial assertions arise. First, it contends that the "like circumstances" test may be considered a formal articulation of equality, and that certain problems may be identified with reliance upon this test. Secondly, it argues that arbitral tribunals tend to apply the "like circumstances" test, usually set out in national treatment provisions, to discrimination claims in general, even those based on grounds other than national treatment. Thirdly, it observes that arbitral tribunals have acknowledged that formal equality is not always appropriate and that other factors need to be considered.

i. Formal equality and the "like circumstances" test

The "like circumstances" test of international investment law has its roots in international trade law, which established the standard of "like goods" being treated alike and not in any manner worse than how domestic "like goods" were dealt with.[115] It is argued that this emphasis on treating "like as like" is an articulation of formal equality. Non-discrimination in WTO law is principally concerned with national treatment and MFN obligations, and focuses principally upon discrimination upon grounds of 'nationality' or

[115] Konrad von Moltke *Discrimination and Non-Discrimination in Foreign Direct Investment Mining Issues* (Paris: OECD, 2002) at 4.

'national origin or destination'.[116] Similarly, in international investment law, the "like circumstances" test is specified primarily in national treatment and MFN provisions. It therefore makes sense that tribunals have had to grapple with whether the "like circumstances" test in international investment law should be interpreted in the same way as GATT/WTO jurisprudence regarding "like products".[117] This has been rejected in several awards.[118] Arbitrators in general appear to believe that the "like circumstances" test in investment law is broader, especially as it does not deal exclusively with goods and services[119]

One of the clearest articulations of the "like circumstances" test was specified in *Pope &. Talbot v. Canada* (2000)[120] in relation to national treatment provisions. This award articulated a three-stage test requiring an identification of comparators in similar circumstances; an analysis of whether there is less favorable discriminatory treatment; and whether there is a justification for any less favorable treatment.[121] Although apparently straightforward, in examining the application of this test several problems can be identified, which are also criticisms specific to the standard of formal equality. These are set out below.

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[116] Peter Van den Bossche *The Law and Policy of the World Trade Organization (*Cambridge: Cambridge University Press, 2005).
[117] Supra note 115 at 4.
[118] *Ibid.*
[119] *Ibid.*
[120] *Pope & Talbot v. Canada* (NAFTA/UNCITRAL, 2000).
[121] Rudolf Dolzer, *National Treatment: New Developments* (Paris: ICSID, OECD and UNCTAD, 2005).

(a) The "like circumstances" test is applied to discrimination claims even where not specified in the BIT provision

Investment disputes tend to focus upon discrimination on grounds of nationality, and thus national treatment and MFN provisions.[122] However, there are other forms of discrimination, for example, race, religion, and political affiliation.[123] In undertaking this research, it is observed that commentators appear to have deconstructed the principle of discrimination most thoroughly in relation to national treatment provisions in BITs.[124] Although there are apparently two standards of non-discrimination enshrined in BITs (comparative and absolute), and although the provisions against expropriation are a different species of investor protection to other BIT provisions, it is argued that arbitral tribunals appear to have transposed the "like circumstances" test into a general discrimination test that they apply to provisions other than national treatment.

It is accepted that even where BIT national treatment provisions do not specifically provide for the "like circumstances" test, arbitral tribunals have applied it.[125] The assertion that this test is applied to other BIT provisions is probably less controversial regarding MFN clauses, given their origins in trade law,[126] and the fact that occasionally

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[122] Rudolf Dolzer & Christoph Schreuer *Principles of International Investment Law* (Oxford: Oxford University Press, 2008).
[123] *Ibid.*
[124] See for example, Duga, Wallace, Rubins & Sabahi *Investor-State Arbitration*, (Oxford: Oxford University Press, 2008); and OECD "Making the Most of International Investment Agreements: a Common Agenda" (2005) OECD online: <http://www.oecd.org/dataoecd/5/53/36055356.pdf>.
[125] *Supra* note 121 at 399.
[126] *Ibid* at 414.

MFN and national treatment clauses can be combined in the same provision.[127] In the *Parkerings* case,[128] the arbitral tribunal stated:

> "the essential condition of the violation of a MFN clause is the existence of a different treatment accorded to another foreign investor in a similar situation."[129]

Indeed, certain BITs actually specify the like circumstances test should be applied in the context of MFN treatment.[130]

More contentious is the argument that arbitral tribunals have applied the "like circumstances" test in the context of fair and equitable treatment provisions. As stated above, this standard is considered an "absolute" standard, setting a 'floor' established by international customary law, below which host states should not fall in their treatment of foreign investors.[131] It is contentious whether the fair and equitable treatment standard can be considered synonymous with the principle of non-discrimination. It appears more

[127] For example, Bulgaria-Israel BIT (1993), art. 3; Egypt-Greece BIT (1993), art. 3; Chile-Tunisia BIT (1998), art. 4.
[128] *Parkerings-Compagniet AS v. Republic of Lithuania*, (ICSID Arbitration Case No. ARB/05/08 2007).
[129] *Ibid* at para. 369.
[130] New Zealand – Singapore BIT "Except as otherwise provided for in this Agreement, each Party shall accord to investors and investments of the other Party, in relation to the establishment, acquisition, expansion…protection and expropriation (including any compensation) of investments, treatment that is no less favourable than that it accords in like situations to investors and investments from any other State or separate customs territory which is not party to this Agreement."
[131] *Supra* note 99.

acceptable that non-discrimination is at least one component of fair and equitable treatment.[132] Weiler and Laird observe:

> "…accordingly less favourable treatment to a claimant than another comparable investor, in the absence of sufficient regulatory justification, can certainly be considered neither fair nor equitable, or perhaps even 'arbitrary' or 'discriminatory' impairment (if necessary), and recent arbitral awards, such as that of the *Saluka* tribunal, bear this out"[133] (emphasis added).

Thus, the *Saluka*[134] tribunal examined similar banks in "like circumstances" in order to establish whether there had been discriminatory treatment and a breach of the fair and equitable treatment provisions. Similarly, in *Nykomb*,[135] the tribunal found that the claimant established a *prima facie* case that the Polish government was giving a certain tariff rate to local energy companies but not to *Nykomb*. [136] A comparison of "like circumstances" was made when examining the treaty's "fair and equitable treatment" and "discriminatory impairment" standards.[137] It must be observed however, that arbitral

[132] The OECD states: "[the fair and equitable treatment standard] will also prevent discrimination against the beneficiary of the standard, where discrimination would amount to unfairness or inequity in the circumstances." See OECD, "Fair and Equitable Treatment Standard in International Investment Law" (2004) online: OECD <http://www.oecd.org/dataoecd/22/53/33776498.pdf>
[133] *Supra* note 99 at 268.
[134] *Supra* note 114.
[135] *Nykomb Synergistics Technology Holdin AB v. Latvia*, (Award, 16 December 2003, Energy Charter Treaty/SCC).
[136] *Ibid* at para. 37.
[137] *Ibid* at para 287.

tribunals have also acknowledged that determining what is fair and equitable is very strongly determined by the facts of the case. In *Mondev v. The United States*, it was held that "[a] judgment of what is fair and equitable cannot be reached in the abstract; it must depend on the facts of the particular case."[138] This is an indication that a purely formal approach to discrimination is not always appropriate.

There is not a lot of commentary regarding expropriation and discrimination, for the reason that expropriation examines the extent to which a state's measures interfere with the investment rather than the essential nature of the interference. However, in the context of regulatory measures that might or might not constitute expropriation, it has been observed that the normal test is to examine whether such measures treat foreigners differently than local competitors in "like circumstances".[139] Therefore the "like circumstances" test is not limited to national treatment and MFN provisions of BITs and accordingly it is argued that arbitral tribunals tend to apply a formal standard of equality in discrimination claims in general.

(b) The relevant comparators in the "like circumstances" test are uncertain

The first requirement arising out of the "like circumstances" test is to identify who the relevant comparators should be. In this regard, the case law has not always been clear. The NAFTA jurisprudence provides assistance in showing how arbitral tribunals have traditionally conceptualized the scope of the "like circumstances" test in different ways.

[138] *Mondev v. USA* (Award, 11 October 2002, 42 ILM 2003) 85, at para. 118.
[139] *Supra* note 115.

Although it is understood that arbitral tribunals are not obliged to follow the doctrine of *stare decisis* in making awards, it is suggested that having a test that is applied with both a narrow and wide scope is unsatisfactory for both host states and investors when determining their legal position.[140]

In *Feldman v. Mexico* (2002),[141] the arbitral tribunal found that the national treatment provisions of the NAFTA had been breached by Mexico. In this case, the tribunal defined "like circumstances" to mean domestic competitors in the same economic sector, which in *Feldman* happened to be the export of cigarettes. In the case of *ADF v. United States* (2003),[142] identifying the relevant comparators was perhaps simpler insofar as the arbitral tribunal assumed that entities in direct competition were in like circumstances, in this case, American-owned producers of steel were considered to be in like circumstances with Canadian-owned producers of steel.

In *Occidental v. Ecuador* (2004),[143] however, the arbitral tribunal examined Ecuador's tax system and held that Ecuador had violated the United States-Ecuador BIT by failing to provide national treatment and fair and equitable treatment to Occidental Production and Exploration Company (OECP). In determining which investments were in like

[140] Todd Weiler "Saving Oscar Chinn: Non-Discrimination in International Investment Law" in Norbert Horn ed., *Arbitrating Foreign Investment Disputes Procedural and Substantive Legal Aspects* (The Hague: Kluwer Law International, 2004).
[141] *Marvin Feldman v. Mexico*, Award of 16 December 2002, 18 ICSID-Rev.- FILJ 488 (2003), para. 171.
[142] *ADF Group, Inc. v. United States of America*, ICSID Case No. ARB (AF)/00/1 (Final Award of Jan. 9, 2003)
[143] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. Republic of Ecuador* (ICSID Case No. ARB/06/11)

circumstances, the tribunal did not examine whether OECP received less favorable treatment than Ecuadorian companies in the oil sector, rather, the tribunal considered the relevant comparator to be exporters in general. Thus, the tribunal took a much wider notion of "like circumstances" than the test articulated in *Feldman*. Furthermore, the tribunal rejected the notion that "like circumstances" could be compared to "like products" in trade law, which differed from prior jurisprudence.[144]

In the NAFTA case of *Methanex v. United States* (2005),[145] the arbitral tribunal held that the "like circumstances" test required the foreign investor to be compared to the most closely comparable in the domestic sphere.[146] In other words, Methanex, a manufacturer of methanol, had to be compared to other U.S. domestic manufacturers of methanol that were in the same circumstances to Methanex. The Tribunal did not agree with Methanex, that it should be compared to manufacturers of ethanol because they both produce oxygenates used in manufacturing reformulated gas.[147] Notably, the Tribunal observed that there could be legitimate differences in regulatory treatment between methanol and ethanol, which was why ethanol manufacturers were not in "like circumstances" with methanol manufacturers.[148]

[144] OECD "Making the Most of International Investment Agreements: a Common Agenda" (2005) OECD online: <http://www.oecd.org/dataoecd/5/53/36055356.pdf>.
[145] *Methanex Corp v. United States of America* (NAFTA/UNCITRAL Final Award 9 August 2005)
[146] *Ibid* Part IV, Chapter B, para. 12.
[147] *Ibid* Part IV, Chapter B, para. 28.
[148] *Ibid*.

In the ICSID case of *Enron v. Argentina* (2007),[149] the tribunal examined whether there had been any "capricious, irrational or absurd differentiation"[150] in the treatment of different sectors of the economy. In this case the Claimants argued that the relevant measures adversely affected the largely foreign owned gas sector, whereas the Respondents argued that "…the regulated gas sector is very different from other sectors operating in a competitive market, such as banking, and the entities involved are far from being in a similar or even comparable situation."[151] The Tribunal agreed that there were important differences between the sectors and it could not be said that one specific sector had been singled out.[152]

These cases illustrate that there is no uniform test for "like circumstances" and that the comparators used depend upon the facts of each case. This questions the effectiveness of formal equality, and as argued above undermines the notion of equality itself insofar as the relevant comparators are always different and can range from different sectors to a specific investor of a specific product.

(c) The underlying intention of the measure is not necessarily relevant

[149] *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3.
[150] *Ibid* at para. 282.
[151] *Ibid* at para 280.
[152] *Ibid.*

Formal equality favors the notion of neutrality and objective comparison.[153] The intention behind the measure is therefore irrelevant if it results in a formal difference of treatment.[154] In investment disputes, host states have argued that discrimination requires a discriminatory intent.[155] Arbitral tribunals have held however that discriminatory intent can play a role when objectively proven, but that it is not a prerequisite for a finding of national treatment violation.[156] Again, this is evidence of a formal approach to equality.

In *S.D. Myers*,[157] the arbitral tribunal considered a discriminatory intent as "important" but not "decisive on its own". The arbitral tribunal considered that it was the effect of the measure that was more important, not the "motive or intent."[158] Similarly, in *Occidental v. Ecuador*,[159] the arbitral tribunal found that intent was not essential and what was more important was the formal result of the measure in question. In *Siemens A.G. v. Argentine Republic*, the arbitral tribunal concurred that intent was not determinative or even necessarily required for discriminatory treatment:

> "…intent is not decisive or essential for a finding of discrimination, and that the impact of the measure on the investment would be the determining

[153] *Supra* note 52.
[154] *Ibid.*
[155] *Supra* note 43 at18.
[156] *Siemens A.G. v. Argentine Republic* (ICSID Case ARB/02/08)
[157] *Supra* note 93.
[158] *Ibid.*
[159] *Supra* note 143.

> fact to ascertain whether it had resulted in non-discriminatory treatment."[160]

Using an objective test and examining the result of the measure in question emphasizes the fact that investor protection is the principle priority of the non-discrimination provisions. Even if a measure is not intended to be discriminatory, if it has a detrimental effect on foreign investors and bestows an unfair advantage upon a different group, it could potentially be found to contravene the principle of non-discrimination.

On the other hand, in *Methanex*, the arbitral tribunal did suggest that intent played a role in determining discriminatory treatment:

> "In order to sustain its claim under Article 1102(3) Methanex must demonstrate, cumulatively, that California intended to favor domestic investors by discrimination against foreign investors and that Methanex and the domestic investor supposedly being favored by California are in like circumstances"[161] (emphasis added).

In *LG & E v. Argentina*,[162] the tribunal held that either discriminatory intent or discriminatory effect would be sufficient.[163]

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[160] *Supra* note 156.
[161] *Supra* note 145.
[162] *LG&E International Inc. v. Argentina*, (ICSID Case No. ARB/02/1).
[163] *Ibid.*

In finding that intention is irrelevant in determining discriminatory treatment, arbitral tribunals are focusing upon the formal equality of the respective measure, and whether entities in like circumstances are treated in the same way, rather than whether investors should, for whatever reason, be treated differently. On the other hand, the fact that arbitral tribunals have occasionally found intention to be a relevant suggests that a formal approach to equality is not always appropriate. Indeed, arbitral tribunals have acknowledged that there can sometimes be regulatory policies that justify a difference in treatment.[164]

(d) Different treatment is permissible where comparators are not alike

In *Pope & Talbot,*[165] the arbitral tribunal acknowledged that there could be differential treatment that was justified. Such justifications, at least in the earlier awards, had to be couched in "formal equality" terms. In other words, a difference in treatment could potentially be justified if it could be shown that the relevant comparators were not in "like circumstances", and that the threshold for the formal notion of equality to apply was not even attained.

The case of *Oscar Chinn*[166] concerned river transportation in the Belgian Congo. One company, partly under the Belgian Government's control, was given subsidized transport rates. Mr. Chinn, a British national who operated a competitor business, brought a claim

[164] *Supra* note 94.
[165] *Supra* note 120.
[166] *The Oscar Chinn Case* (1934), PCIJ, A/B 63.

against the Belgian Government on the grounds that the subsidies violated the equality of treatment treaty provisions contained in a Convention[167] between Belgium and the United Kingdom. The Court found that the different companies were not in an equal position, and that this justified the difference in treatment:

> "The special advantages and conditions…were bound up with the position of Unatra as a Company under State supervision and not with its character as a Belgian Company…The inequality of treatment could only have amounted to a discrimination forbidden by the Convention if it had applied to concerns in the same position as Unatra, and this was not the case" (emphasis added).

Similarly, in the *Parkerings* case,[168] the arbitral tribunal found that there had been justified differential treatment based upon the archaeological and environmental concerns attached to the building project. However, the claimant had still to show that there was an investor in "like circumstances" who had been treated more favorably.[169] This emphasizes the idea that only like entities in the same position should be compared for purposes of establishing discrimination, and that if it can be shown that the parties are not in the same position, this may justify a difference in treatment.

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[167] The Convention of Saint-Germain.
[168] *Supra* note 128.
[169] *Ibid.* Online: <http://74.125.95.104/search?q=cache:LhiJ2tBsHWIJ:www.iisd.org/pdf/2007/itn_sep28_2007.pdf>

ii. Justified differential treatment highlights why formal equality is unsatisfactory

It is observed that the third limb of the *Pope & Talbot*[170] test acknowledges that there may be justified differential treatment in certain cases. This is still rooted in a "formal" analysis, hence the fact that different treatment of "like" entities is "justified". Nonetheless this prong of the test illustrates that a strict adherence to formal equality is unsatisfactory and that exceptions are required. This section seeks to show further that arbitral tribunals still apply different criteria in ascertaining whether different treatment is justified, and therefore remains problematic for capturing policy issues directed at regulating social imbalances of power.

(a) Was the measure necessary?

Certain arbitral awards have focused upon whether the respective measure was necessary for implementing the state's regulatory objectives. Thus, in *S.D. Myers*,[171] Canada argued that its domestic PCB waste remediation business could not compete with S.D. Myers, which was more established in the field. It argued that its export ban was premised upon the legitimate need to preserve its domestic ability to deal with PCB waste remediation. The arbitral tribunal agreed that Canada's goal of environmental protection was a legitimate goal under NAFTA. However, it concluded that banning the exportation was not a legitimate means of accomplishing that goal, given that other measures, such as domestic subsidies, could have been used.[172]

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[170] *Supra* note 120.
[171] *Supra* note 93.
[172] *Ibid.*

The requirement that the respective measure must be necessary to implement a legitimate government objective was echoed in *Feldman,*[173] when the tribunal found that the Mexican government had violated its national treatment obligations because it had not shown a "reasonable nexus" between non-discriminatory "rational government policies" and its discriminatory tax treatment of CEMSA.[174] Requiring a measure to be necessary for the pursued objectives is a consideration that goes beyond the threshold question of whether like entities are being treated alike and highlights why formal equality is overly narrow.

(b) Was the measure contrary to the investors' legitimate expectations?

Arbitral tribunals have also recognized that state regulation might justify the difference in treatment if it does not run counter to the investors' legitimate expectations. The *Saluka v. Czech Republic*[175] arbitration was pursuant to the Netherlands-Czech Republic BIT. The arbitral tribunal relied upon *SD Myers* in support of the view that governments have some protection in regulating their "domestic matters in the public interest", although must take into account the legitimate expectations of their foreign investors. Specifically, the arbitral tribunal held that State conduct is discriminatory if: "(i) similar cases are (ii) treated differently (iii) and without reasonable justification,"[176] but that states will not have committed an expropriation "when, in the normal exercise of their regulatory powers, they adopt in a non-discriminatory manner bona fide regulations that

[173] *Supra* note 141.
[174] *Ibid.*
[175] *Supra* note 114.
[176] *Ibid* at para. 313.

are aimed at the general welfare."[177] In this case, however, it was held that there was no reasonable justification for the relevant policy change. The arbitral tribunal pointed out that no matter how reliable a company's due diligence might be, "it could not possibly lead to a reliable forecast as to which policies future governments would adopt should an aggravation of bad debt problem occur..."[178]

The notion of legitimate expectations therefore also plays a role in determining whether the measure provides justified differential treatment. Tribunals will examine whether the investors could reasonably have envisaged the change in governmental measures given the existing circumstances.

In the *Parkerings* case,[179] the Government of Lithuania defended itself in an ICSID case brought by a Norwegian investor who was contracted to building and maintaining parking facilities at the time of Lithuania's transition from a Soviet Republic to a candidate for EU membership. Following legislative changes, the contract was found to conflict with domestic law and was terminated. It was later awarded to a different contractor. It was argued by the claimants, that Parkerings was "entitled to expect that Lithuania maintain a stable and predictable legal and business framework"[180] and that

[177] *Ibid* at para. 255.
[178] *Ibid.* at para. 322.
[179] *Supra* note 128.
[180] Damon Vis-Dunbar and Luke Eric Peterson, *Investment Treaty News, September 28, 2007*, online: <http://www.iisd.org/pdf/2007/itn_sep28_2007.pdf>.

Lithuania engaged in: (1) "grossly unfair and discriminatory conduct"; (2) arbitrary and opaque conduct; and (3) activities that frustrated Parkerings' legitimate expectations.[181]

The tribunal held that Lithuania was not in breach of its obligations under the Norway-Lithuania BIT, and that the investor should appreciate that laws "evolve" over time.[182] It emphasized that Parkerings had entered into its agreement with Lithuania during the country's political transition, and that in this context, changes to domestic legislation had to be expected. It was therefore held that the investor had assumed the "business risks" in investing in such a context. In examining the concept of discrimination, the court emphasized that for discrimination to violate international law, it had to be disproportionate or unjustifiable:

> "Discrimination is to be ascertained by looking at the circumstances of the individual cases. Discrimination involves either issues of law, such as legislation affording different treatments in function of citizenship, or issues of fact where a State unduly treats differently investors who are in similar circumstances. Whether discrimination is objectionable does not in the opinion of this Tribunal depend on subjective requirements such as the bad faith or the maliciousness of the State: at least, Article IV of the Treaty does not include such requirements. However, to violate international law, discrimination must be unreasonable or lacking proportionality, for instance, it must be inapposite or excessive to achieve

[181] *Supra* note 128 at para. 199.
[182] *Ibid.*

> an otherwise legitimate objective of the State. An objective justification may justify differentiated treatments of similar cases. It would be necessary, in each case, to evaluate the exact circumstances in the context."[183]

In examining whether the relevant MFN clause had been violated, the tribunal examined whether the two companies were in "like circumstances", and noted "less favorable treatment is acceptable if a State's legitimate objective justifies such different treatment in relation to the specificity of the investment."[184]

This award gives us a more sophisticated approach in determining what constitutes justified differential treatment in its focus on context and proportionality. Again, this illustrates that there are contextual concerns that arbitral tribunals might need to examine.

(c) Was the measure directed towards the nationality of the investor?

Commentators have argued that an analysis of investment tribunals' decisions relating to the national treatment test shows that the test as to whether the national treatment provisions have been contravened is based upon whether the differential treatment is based upon nationality.[185]

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[183] *Ibid.*
[184] *Supra* note 128 at para. 371.
[185] *Supra* note 121.

Arbitral tribunals have held that differential treatment can be justified when it is not based upon the nationality of the foreign investor. In *Oscar Chinn,*[186] the Permanent Court found that no discrimination existed under the applicable Convention. The Court took a narrow definition of discrimination, holding that it related specifically to measures on grounds of nationality:

> "…the form of discrimination which is forbidden is…discrimination based upon nationality and involving differential treatment by reason of their nationality as between persons belonging to different national groups."[187]

Although this award has been criticized in light of modern Investor-State law,[188] the emphasis on discriminatory treatment being related to the notion of nationality has been echoed in other cases. In *Pope & Talbot, Inc. v. Canada*,[189] Pope & Talbot, a U.S. investor, filed a claim alleging that Canada's implementation of the U.S.-Canada Softwood Lumber Agreement violated its obligations under Chapter Eleven of NAFTA. The arbitral tribunal examined a claim that the regulatory treatment of Pope & Talbot was less favorable than the treatment received by Canadian softwood lumber producers. They articulated a "like circumstances" test and held that Article 1102 of NAFTA prohibited treatment discriminating specifically on the grounds of the foreign investor's nationality. It did not prohibit different treatment based upon some other grounds. Moreover, the arbitral tribunal found that there was a presumption that any regulatory treatment of Pope

[186] *Supra* note 166.
[187] *Ibid* at page 25.
[188] *Supra* note 137.
[189] *Supra* note 120.

& Talbot that was less favorable than the treatment received by Canadian softwood lumber producers was on discriminatory grounds of nationality. However, they held that this presumption could be rebutted by showing that the relevant measure had a "reasonable nexus to rational government policies that do not distinguish on their face or de facto, between foreign-owned and domestic companies and do not undermine the investment liberalizing objectives of NAFTA."[190]

In other words, if the measure that implemented differential treatment could be linked to government policies that did not distinguish on grounds of nationality between foreign-owned and domestic companies, the measure would not necessarily be considered to breach the relevant national treatment provision. This does not mean however, that differential treatment on nationality grounds will automatically be considered discriminatory treatment, as is set out in The Third Restatement of the Foreign Relations Law of the United States.[191]

In *Alexander Genin v. United States*,[192] under the US-Estonia BIT, the claimant shareholders of an Estonian financial institution brought a claim against Estonia, alleging that there had been violations of the fair and equitable treatment provisions and discriminatory and arbitrary treatment by virtue of actions by a State enterprise, the Bank

[190] *Ibid* at para. 74.
[191] "Discrimination implies unreasonable distinction. Takings that invidiously single out property of a particular nationality, would be unreasonable; classifications, even if based on nationality, that are rationally related to the State's security or economic policies might not be unreasonable…" See Restatement of the Law, Third, Foreign Relations Law of the United States, 1987, The American Law Institute.
[192] *Alexander Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia* (ICSID Case No. ARB992, Award June 25, 2001).

of Estonia. In particular, they claimed, inter alia, that revocation of a banking license was violation of the BIT. The tribunal found that this issue needed to be examined in the specific context, "a context comprised of serious and entirely reasonable misgivings regarding EIB's management..."

Therefore, it can be seen that arbitral tribunals have acknowledged that there are occasions where exceptions must be made to formal equality, and that occasionally differential treatment can be justified.

Summary

This chapter seeks to articulate the principle of non-discrimination and how it relates to equality. It sets out a brief theoretical background to formal and substantive equality and observes that formal equality has traditionally been upheld as the necessary standard in legal justice. It examines how non-discrimination is upheld in international investment by analyzing (i) provisions in BITs; and (ii) arbitral awards regarding discrimination claims. It concludes that although BITs enshrine the notion of non-discrimination, they do not set out the meaning of this principle. Arbitral tribunals are therefore required to interpret what "non-discrimination means and tend to refer to formal standards of equality via the "like circumstances" test. This test is too restrictive in appropriately dealing with certain public policy concerns, and arbitral tribunals have on occasion acknowledged that differential treatment can be justified. The problem remains that they do not have explicit criteria to apply. The next chapter argues that arbitral tribunals need

to adopt a specific standard of substantive equality and proportionality to identify discriminatory treatment.

Chapter 2: Applying a substantive standard of equality and the proportionality principle should be the test for discriminatory treatment in certain cases

"With respect to the power of the State to adopt its policies, it can generally be said that the State has the right to adopt measures having a social or general welfare purpose. In such a case, the measure must be accepted without any imposition of liability, except in cases where the State's action is obviously disproportionate to the need being addressed."[193]

Given that Chapter 1 argues that international investment law has an unclear and consequentially unsatisfactory test in relation to discriminatory treatment, this chapter seeks to set out an alternative. From the outset, it should be specified that this applies to a particular context involving measures that on the face of it are either neutral or provide for differential treatment, but whose effects are experienced by a particular minority group in society. Specifically, this chapter argues that arbitral tribunals should reconceptualize the principle of discrimination using two steps: (1) first, discriminatory treatment should be analyzed through a substantive equality lens; and (2) secondly, the proportionality principle should be applied. This chapter examines certain legal systems that have rejected a purely formal approach to equality to support the argument that by applying substantive equality, discrimination is examined in the specific factual context rather than merely ensuring that "likes are treated alike". This is ultimately fairer to both parties in the dispute. The proportionality principle, transposed from jurisprudence of the European Court of Human Rights (ECHR), assists in ensuring that investors are protected from States attempting to use substantive equality as a shield against illegitimate measures.

[193] *Supra* note 162.

I. Substantive equality is an appropriate standard for non-discrimination regarding measures affecting vulnerable groups

The phenomenon of Investor-State disputes is that they cross the public-private divide, raising questions of public and private international law. State regulatory measures involving questions of public policy are often disputed when they conflict with investor protection. In examining policies that are directed at transforming domestic social relationships, it is argued that in order to appropriately address such a conflict, a standard of substantive equality should apply. In other words, if non-discrimination is an articulation of equality, then the standard of equality should be one of substantive equality. As discussed above, substantive equality examines when different treatment is explicitly required to put the parties on an equal footing. It is not "justified differential treatment" discussed in Chapter 1, insofar as it does not characterize different treatment in certain circumstances as discriminatory and then seek to justify such discrimination, for example, on the basis of public welfare or environmental reasons.

For the avoidance of doubt, this thesis does not argue that state sovereignty should always take precedence over investor protection. Rather, it argues that in certain specific contexts, governments should be able to adopt measures that level the economic playing field between foreign investors and groups of individuals who have been historically disadvantaged for a variety of reasons. Examples of traditionally marginalized or oppressed social groups include women, homosexuals, minorities and disabled individuals. Economic fairness is indeed a fundamental concern of BITs insofar as they seek to protect investors from treatment that gives other parties an unfair advantage. Whilst it is true that such fairness in the context of domestic equality has mostly been left

to the domain of human rights law, as seen below, an interesting development in Investor-State disputes is that human rights issues are beginning to be raised in an international investment context. A pertinent example is the ongoing expropriation claim of Glamis Gold in relation to a mining investment.[194] Although the United States, as Respondent, has primarily relied upon environmental justifications for its regulations protecting development of a gold mine, to the potential detriment of certain investments, it has also argued that it is sacred tribal land belonging to Native American Indians.[195] There are accordingly cultural concerns and preservation of religious freedoms of indigenous people at stake. Arbitral tribunals are therefore required to find an appropriate method for dealing with these important public policy concerns that are increasingly encroaching upon investor protection.

Examining the application of substantive equality is best illustrated with an example. Imagine a government provides certain tax subsidies to an emerging industry in a traditionally poor province of the country, without extending such advantages to foreign investors in the same industry. There are no exceptions permitting such treatment under the respective BIT between the host state and investors' home state. The government's motives are to benefit the domestic economy as a whole. Given that such measures are discriminatory under a "like circumstances" analysis, it is unlikely that the government will be able to argue that it is a legitimate exercise of its police powers, although it might ultimately prove that there is a justified reason for treating foreign investors in this

[194] *Glamis Gold Ltd. v. United States of America* (UNCITRAL/NAFTA) online: <http://www.naftalaw.org/disputes_us_glamis.htm>
[195] *Ibid* Statement of Defense of Respondent United States of America, April 2005.

discriminatory fashion. It is therefore likely that such measures will be considered to contravene certain BIT provisions, such as national treatment. If however, these same benefits are given to a group of individuals that have traditionally been oppressed in an historical socio-economic and political sense so that they lack the ability to compete with either domestic or international competitors in an equal manner, this thesis argues that substantive democratic equality would permit such a difference in treatment, and the measures would not be considered discriminatory. As discussed, democratic equality is rooted in the specific context of the case and redressing power imbalances in order to allow certain individuals to operate on an equal footing with others.

Such arguments are not new in international human rights law. In the *Belgian Linguistics Case*[196] relating to linguistic education, the ECHR was required to determine whether certain national legislation in Belgium contravened Article 14 of the Convention. Article 14 is an absolute right and states that the rights and freedoms of the Convention "shall be secured without discrimination on any ground…". In examining whether there was any discrimination, the Court emphasized that certain distinctions in treatment would not be characterized as discriminatory:

> "Article 14…does not prohibit distinctions in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest strike a fair balance between

[196] *Certain Aspects of the Laws on the use of Languages in Education in Belgium v. Belgium 1474/62, ECHR* 1968.

the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention." (emphasis added)[197]

The case of *DH v. Czech Republic*[198] involved the placing of Roma children into "special schools". This was not a result of a specific policy of the Czech Government, but rather a result of cultural issues and an official system of testing that was not adapted to the background of most Roma children. The absence of evidence showing a discriminatory intent resulted in the ECHR rejecting a claim of indirect discrimination. The Grand Chamber of the ECHR later condemned the Czech Republic for indirect discrimination because the "manner in which the legislation was applied in practice" led to a factual segregation of the Czech schools. However, the Grand Chamber acknowledged that Article 14 could require that States treat individuals differently in order to remedy existing inequalities of race or ethnicity and that "a failure to correct inequality through different treatment may in itself give rise a breach of the Article."[199]

Commentators have stated that this is consistent with European literature, which distinguishes between formal equality, requiring individuals who have something in common to be treated equally, and substantive equality whereby it is recognized that existing disadvantages between groups of individuals may need to be remedied with

[197] *Ibid* at para. 293.
[198] *DH v. Czech Republic*, European Court of Human Rights Application No. 57325/00, Judgment of 7 February 2006.
[199] *Ibid.*

differential treatment.[200] Accordingly, rather than focusing upon the intention of the measure and whether there is an intention to discriminate, substantive equality requires an examination of the results of the measure and whether the outcome is fair.[201]

Although international investment law is not obliged to take other legal systems into account, it is argued that it helpful for arbitral tribunals to examine how other judicial bodies have dealt with substantive equality. This thesis examines (i) certain domestic jurisdictions; (ii) public international law; and (iii) international trade law to show why a substantive equality is preferable to a purely formal approach.

i.Certain domestic jurisdictions and the notion of substantive equality

Courts have recognized that a blanket principle of non-discrimination cannot be applied regardless of the specific context of the case, and existing disadvantages. Given states' individual political histories, there are circumstances where unequal treatment is necessary in order to create a state of equality. One example is in relation to newly established countries following the demise of colonization. As Professor Baade observes:

> "Independence would seem an empty gesture or even a cruel hoax to many a new country if it were prevented from singling out the key investments of the former colonial power for nationalization. There is no support in law of reason for the proposition that a taking that meets other relevant

[200] *Supra* note 53.
[201] *Ibid* at 4.

> tests of legality is illegal under international law merely because it is discriminatory."[202]

In examining Indonesian nationalization measures directed specifically at Dutch nationals, a German court held that the colonial context of the nationalization had to be borne in mind, and that in order attain equality, different treatment might be required vis-à-vis the former colonial power:

> "The equality concept means only that equals must be treated equally and that the different treatments of unequals is admissible. For the statement to be objective, it is sufficient that the attitude of the former colonial people to its former colonial master is of course different from that toward other foreigners. Not only were the places of production in the hands of the Netherlands for the greater part colonial companies, but these companies dominated the worldwide distribution beyond the production process, through the Dutch markets."[203]

The rationale for this differentiation in treatment is premised upon the power imbalance entrenched in many newly independent nations and the fact that they might necessarily require *prima facie* discriminatory measures to correct such social inequalities arising out of colonization. Interestingly, this judgment appears to be rooted in formal reasoning as

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[202] *Supra* note 18 at 398.
[203] Martin Domke, "Indonesian Nationalization Measures Before Foreign Courts" (1960) 54:2 Am. J. Int'l L. 305. (*N.V. Verenidge Del Maatschappijen v. Deutsche Indonesische Tabak-Handelsgesellschaft*)

certain arbitral awards discussed above, insofar as it focuses upon "like" entities. It therefore appears an uncomfortable attempt to fit substantive reasoning within a formal framework. As Sornarajah explains, this German court judgment is premised upon the notion that the treatment of 'unequals' may be justifiably different.[204] Importantly for Sornarajah, this justification is on grounds "other than motives of racial hatred" and is therefore appropriate.[205] Where racial motives are the only reason behind a taking, such as with the takings of Jewish property in Nazi Germany, they should be considered illegal.[206] He therefore places an importance on the underlying intention of the measure, and the fact that the measures go towards evening the existing power imbalances. This reinforces applying a substantive standard of equality that examines motive.

Other jurisdictions have taken more obviously substantive approaches to equality, which is argued leads to better and at least more complex notions of justice within society. The development of U.S. laws on segregation is one example, where formal equality underpinning *Plessy v. Ferguson*[207] (1896) upheld public transport legislation that provided for segregation between blacks and whites on the grounds that segregation still provided similar facilities for each group, thus treating likes alike in accordance with formal equality. This was finally challenged in the landmark case of *Brown v. Board of Education* (1954),[208] where the Supreme Court held that the factual circumstances in which people are placed must be taken into account, and that equality must be determined

[204] *Supra* note 18 at 398.
[205] *Ibid.*
[206] *Ibid.*
[207] *Plessy v. Ferguson*, 63 U.S. 537 (1896).
[208] *Brown v. Board of Education* of Topeka, 347 U.S. 483 (1954).

according to context and impact of the measure. As Anderson points out, this case recognized that both "*de facto* racial segregation was harmful to blacks, and that *de jure* segregation was stigmatizing."[209]

The Canadian right to equality is enshrined in section 15 of the Canadian Constitution.[210] Academics who have examined the Supreme Court's jurisprudence in relation to discrimination have concluded that there are decisions articulating different approaches to equality.[211] In the first section 15 claim, *Andrews v. Law Society of British Columbia* (1989),[212] the Supreme Court rejected the notion of formal equality or the 'similarly situated test'. Its approach in this case has been described as "an approach that relies more heavily on classification than on comparison…one in which differential treatment harms by imposing "disadvantage" (classification), not merely by distinguishing (comparison)."[213] Ten years later, in its decision of *Law v. Canada*,[214] involving a claim by a thirty-year old woman that a denial of her survivor's benefits because she was under thirty-five was discriminatory, the Court characterized its approach as one of substantive equality.[215] Commentators have argued that substantive equality in Canadian jurisprudence has four principle features: (i) the contextualization of equality claims; (ii) the equality of results or outcome; (iii) a challenge to oppression or subordination; and

[209] Elizabeth Anderson, "Racial Integration As A Compelling Interest" (2004) 21 Const. Commentary 13.
[210] *Supra* note 39.
[211] *Supra* note 77.
[212] *Supra* note 34.
[213] *Supra* note 77 at 73.
[214] *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497
[215] *Supra* note 77 at 62.

(iv) the fact that it is group oriented.[216] Others have pointed out that equality in Canadian jurisprudence seems centered upon the value of "dignity" to give substance to the notion of equality.[217] The problem with dignity is that it is a vague concept,[218] and accordingly difficult to transpose to an investment context. Nonetheless, this highlights how domestic courts have accepted that formal equality is insufficient to address arising cases that perhaps require different treatment of like entities, and that power dynamics, especially those of oppression need to be taken into account.

Other countries are happy to mix both a formal and substantive approach. The South African Constitution promotes equality and non-discrimination, as effected by the *Promotion of Equality and Prevention of Unfair Discrimination Act*,[219] and the Act provides for both *de jure* equality as well as "equalities of outcomes".[220] Given the arbitration under discussion in this thesis, it is helpful to examine how South African courts have characterized the public interest underlying affirmative action policies, thus illustrating the importance of substantive equality. Article 9 of the 1996 Constitution of South Africa sets out provisions relating to equality. Article 9(2) provides:

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[216] *Ibid* at 79.
[217] Rory O'Connell, "The role of dignity in equality law: lessons from Canada and South Africa" (2008) 6 Int'l J of Constitutional Law 267 at 268.
[218] *Ibid.*
[219] Promotion of Equality and Prevention of Unfair. Discrimination Act, 2000 (Act No. 4 of 2000)
[220] Grete S. Vogt, "Non-discrimination on the Grounds of Race in South Africa – with special reference to the Promotion of Equality and Prevention of Unfair Discrimination Act" (2001) 45 J. Afr. L. 196 at 198.

> "(2) Equality includes the full and equal enjoyment of all rights and freedoms. To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken."

Thus, constitutionally there is recognition that different treatment of previously disadvantaged individuals is required in order to achieve substantive equality, and authors have argued that this notion of "equality" is in fact a value underpinning the entire South African constitution.[221] The highly respected South African Constitutional Court, like the Canadian Supreme Court, has linked it, somewhat contentiously, to notions of human dignity.[222] More importantly, however, the Court has emphasized that in a South African context, equality must be seen as "remedial or restitutionary equality."[223] In the case of *National Coalition for Gay and Lesbian Equality v. Minister of Justice*[224] the Constitutional Court held:

> "Particularly in a country such as South Africa, persons belonging to certain categories have suffered considerable unfair discrimination in the past. It is insufficient for the Constitution merely to ensure, through its Bill of Rights, that statutory provisions which have caused such unfair discrimination in the past are eliminated. Past unfair discrimination frequently has ongoing negative consequences, the continuation of which

[221] *Ibid.*
[222] *Supra* note 214.
[223] *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC) at para. 60 - 1
[224] *Ibid.*

> is not halted immediately when the initial causes thereof are eliminated, and unless remedied, may continue for a substantial time and even indefinitely. Like justice, equality delayed is equality denied."[225]

The European Court of Justice (ECJ) also relies upon a hybrid approach of formal and substantive equality.[226] It appears that with modern political ideology and concerns of social justice, a purely formal approach to equality is considered by many institutions as anachronistic.[227]

ii.Public international law and the notion of substantive equality

In its Advisory Opinion on the Minority Schools in Albania, the PCIJ stated:

> "Equality in law precludes discrimination of any kind; whereas equality in fact may involve the necessity of different treatment in order to obtain a result which establishes an equilibrium between different situations." [228]

Similarly, in the *South West Africa Case*,[229] in his dissenting opinion, Judge Tanaka distinguished between formal equality, treating everyone identically regardless of existing differences, and substantive equality, taking into account relevant and individual circumstances. Judge Tanaka held that "to treat unequal matters differently according to

[225] *Supra* note 223 at para. 60.
[226] *Supra* note 52.
[227] *Ibid.*
[228] *Advisory Opinion on the Minority Schools in Albania*, vol. (ser. A/B) No. 64 1935) at p. 19.
[229] Dissenting Opinion of Judge Tanaka in the *South West Africa Case (Second Phase)* ICJ Reports, Advisory Opinions and Orders, Judgment of July1966 at p. 305.

their inequality is not only permitted but required."[230] Accordingly, differential treatment is permitted under the principle of equality provided that the purpose of the treatment is to achieve equality between the respective groups.[231]

The Committee on the Elimination of Racial Discrimination (CERD) has termed legitimate differential treatment, a "reasonable differentiation" and affirmative action measures as "special measures".[232] These measures are permitted under the CERD Convention provided that the differential treatment is pursuant to a legitimate aim, and are proportionate to such an aim.[233] Of course, examining what constitutes a "legitimate aim" depends upon the relevant circumstances of each case, and in a human rights context, upon the purpose of the respective measure:

> "Differential treatment is only legitimate if the distinction is 'appropriately adapted to the distinctive characteristic of the group or individual' and there is a reasonable, objective and proportionate nexus between the relevant difference and the Convention's objective to achieve equality between racial groups."[234]

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[230] *Ibid.*
[231] *Supra* note 38.
[232] Committee on the Elimination of Racial Discrimination, *CERD General Recommendation No. 30 on Discrimination Against Non-Citizens*, (2004) Gen. Rec. 30. (General Comments).
[233] *Ibid.* at Art. 1(4)
[234] *Supra* note 38.

It therefore appears to be acceptable under international law, that differential treatment may be rooted in substantive equality in terms of transforming social relations between different groups, and accordingly, does not constitute discrimination. There is no single test for examining when differential treatment is in fact required to achieve equality, but in general a measure must not be premised upon racial hatred, and must target substantive inequalities existing between the different groups in order to achieve an "equilibrium". It must have a legitimate aim and must be proportionate between the objective of the different treatment and its effect.

iii. International Trade Law and the notion of substantive equality

Unlike BITs, trade agreements do not focus primarily upon the protection of investment and individual rights but rather upon the liberalization of trade and efficiency of state exchanges. As discussed, international trade law traditionally uses the notion of formal equality when examining discrimination in MFN and national treatment obligations.[235]

Laing describes how prior to World War II, exceptions or "protective" clauses appeared in relation to the non-discrimination or equal access clauses found in certain trade treaties.[236] In particular, he focuses upon Articles XX and XXI of the General Agreement of Tariffs and Trade "GATT" as an example of the circumstances in which parties were able to adopt or enforce *prima facie* discriminatory measures.[237] In particular, as a result

[235] Edward A. Laing, "Equal Access/Non Discrimination and Legitimate Discrimination In International Economic Law" (1996) 14 Wis. Int'l L. J. 246.
[236] *Ibid.*
[237] *Ibid.*

of colonization, developing countries were granted exemptions from certain GATT Articles, to enable them to compete on a more equal footing with developed states.[238] This implicitly recognizes that states could not be treated as being formally equal, when their histories meant that they were not equal.

Laing argues that six categories existed under the GATT whereby "legitimate discrimination" or preferential treatment was permissible in order to facilitate trade and economic regulation: (1) business or trade regulation; (2) frontier traffic, customs unions or free trade areas; (3) protection of life or health; (4) protection of national treasures or natural resources; (5) protection of public morals or public order; and (6) essential national security.[239] He observes that this regulatory action was qualified by provisions that distinguished between what was legitimate discrimination and what was subjective or arbitrary conceptualizations of fairness.[240] Ultimately, he recognizes that legitimate discrimination is required for sovereign states to effectively regulate their respective jurisdictions; and that "the fundamental justification for permitting this conduct [legitimate discrimination] is traceable to the responsibility of each state to provide for its national welfare."[241]

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[238] Phillip Cullet, "Differential Treatment in International Environmental Law" (London: Ashgate Publishing, 2003) at 61.
[239] *Ibid.*
[240] *Ibid* at 339. These qualifications are: (1) limitation of exceptions to measures; (2) prohibition of arbitrary actions; (3) prohibition against disguised restrictions; and (4) necessity.
[241] *Ibid* at 346.

In examining whether domestic regulatory measures are discriminatory, the WTO Appellate Body applies two tests: (i) the "likeness" test whereby the "competitive relationship" between the products is examined; and (ii) an analysis of whether imported products are treated less favorably than like domestic products.[242] Great emphasis is placed upon formal equality in examining the origin of goods and whether discriminatory treatment is directed towards the difference in origin. Even though trade is in goods and services, and therefore is conceptualized as being less likely to involve matters of public concern, this test has been criticized as making "no room for the achievement of legitimate regulatory objectives."[243]

Commentators have observed that despite this focus upon formal equality in the tests for establishing discriminatory treatment, the WTO is concerned with notions of substantive equality in a broader sense, insofar as it is concerned with equality of economic relations between states.[244] For example, in the 2001 ministerial conference, a declaration was adopted providing that measures should be implemented permitting differential treatment, or what is also known as preferential treatment, for developed states, to put them on a more equal footing with developed states.[245]

These jurisdictions assist in showing why substantive equality is preferable to a purely formal equality approach. Although arbitral tribunals are not obliged to take them into consideration, given that they have a serious body of jurisprudence dealing with similar

[242] *Supra* note 75.
[243] *Ibid.*
[244] *Supra* note 238 at 67.
[245] *Ibid.*

issues to those being raised in investment disputes, it makes sense for arbitral tribunals to refer to them.

II.The existing framework of international investment law permits a substantive standard of equality to be applied

From the outset it is acknowledged that it might be impossible to discard the "like circumstances" test altogether, given that it is often specifically provided for in MFN and national treatment provisions. This thesis does not advocate discarding the "like circumstances" test when it is specifically agreed by the parties. However, it argues that when measures addressing social equality are involved, arbitral tribunals should examine whether any identified difference in treatment can be justified by applying this test, thereby using a combination of formal and substantive equality, as in certain domestic jurisdictions. This is a broader standard than arbitral tribunals picking different criteria that suit their purposes.

Where BIT provisions do not specify a "like circumstances" test, for example with fair and equitable treatment and expropriation provisions, arbitral tribunals should rely upon the standard of substantive equality from the outset. This move away from the "like circumstances" test means that the starting premise is examining social conditions and rooting the notion of discriminatory treatment in a contextual analysis.[246]

[246] *Ibid* at 289.

The Vienna Convention provides that a treaty should be interpreted "with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose."[247] Accordingly, there is nothing in the existing framework of BITs that actually prevents the application of a substantive standard of equality, when no other standard is specified. Indeed, the very fact that that international investment agreements permit states to ensure that their regulatory powers are protected, by implementing agreed-upon reservations or exceptions[248] in BITs, acknowledges that there are certain sensitive sectors that parties are entitled to protect, even to the detriment of foreign investors. States have specific political and cultural legacies, which will affect domestic regulation to a large degree. In certain cases, the state will want to retain its powers to regulate in these areas, and ensure that certain vulnerable groups that have traditionally suffered oppression are now protected. Briefly examining certain Canadian and South African reservations and exceptions can illustrate this.

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[247] Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations (1969) vol. II, United Nations: General Rule of Interpretation, art. 31(1).

[248] Reservations under NAFTA may be bound or unbound. Bound reservations permit a government to maintain an existing measure which does not conform to a NAFTA obligation. Governments may amend these measures in future but not so that it distorts trade. Unbound reservations permit governments to maintain the existing non-conforming measures, and in addition to make new ones in the future. They do not refer to any specific measure but to entire sectors. They therefore give governments much greater scope for taking future action under unbound reservations. See Barry Appleton, *Navigating NAFTA: A Concise User's Guide to the North American Free Trade Agreement* (Toronto: Carswell Publications, 1994).

i.Canada's reservations in Chapter 11 of NAFTA

Chapter 11 of the 1994 NAFTA between Canada, Mexico and the United States of America deals with the parties' commitments regarding the treatment within their territories of each other's investors and respective investments. Each party must choose those existing measures which it wishes to exclude from particular articles in the agreement and list these in a series of annexes dealing with particular sectors and types of exemption. Specifically, Article 1108, "*Reservations and Exceptions*" limits the obligations set out in Chapter 11. Article 1108(1) provides that any on-going measure that pre-dates the implementation of NATA on 1 January 1994 is reserved from Chapter 11 obligations on national treatment and MFN treatment, and the obligations regarding certain performance requirements, and senior management and board of directors requirements. Annex I of NAFTA sets out Canada's bound reservations[249] in certain sectors that are historically, politically or economically sensitive, such the energy industry.[250]

Apart from economic concerns however, Canada's historical and cultural legacy has also raised issues of protection regarding its aboriginal people. Annex II-C-1 of NAFTA specifies Canada's reservations in respect of "*Aboriginal Affairs*". This provides that Canada has reserved the right to maintain existing measures or adopt new or more restrictive measures giving preferential treatment to aboriginal peoples that would otherwise contravene the NAFTA provisions relating to national treatment requirements (Article 1102 of NAFTA) or MFN requirements (Article 1103 of NAFTA). Similarly,

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[250] *Ibid.*

Annex II-C-8 relates to "*Minority Affairs*", and reserves Canada's right to adopt or maintain measures giving preferences to socially or economically disadvantaged minorities that would otherwise contravene national treatment or performance requirement provisions of NAFTA.

Therefore, regarding aboriginal people and disadvantaged minority groups, the Canadian Government retains a wide sphere of regulatory powers that are grounded upon treating specific social groups differently from both other Canadian nationals and foreign investors. These regulations are exempt from Canada's investment obligations under NAFTA but only in relation to certain provisions:

> "…these reservations and exceptions effectively remove a wide range of government measures, including at the municipal level, from the coverage of key NAFTA Chapter 11 obligations. It should be noted, however, that even where these reservations and exceptions apply, Chapter 11 provisions on minimum standard of treatment in Article 1105 and expropriation in Article 1110 are applicable to all levels of government."[251]

In other words, such reservations apply to national treatment and MFN standards, but not to the Canada's undertakings regarding expropriation and the minimum standard of treatment. This is important in light of the previous chapter regarding police powers and

[251] Foreign Affairs and International Trade Canada, "International Trade Agreements and Local Government: A Guide For Canadian Municipalities", (2008) online: Department of Foreign Affairs and Local Governments <http://www.international.gc.ca/trade-agreements-accords-commerciaux/ressources/fc>.

indirect expropriation, and the fact that reservations such as those in NAFTA, would still require arbitral tribunals to examine discriminatory treatment on certain occasions.

ii.South Africa's exceptions in its recent BITs

The current ICSID case against the South Africa Government and its affirmative action Black Economic Empowerment (BEE) policies has raised the criticism that South Africa should have reserved its regulatory power regarding these policies in its BITs if they were considered to be such important policies. Indeed, this criticism is given weight by the fact that some of South Africa's later BITs include *'denial of benefits'* clauses. These provide that South Africa is not required to offer to foreign investors any of the benefits that it may offer to its own nationals that are designed to achieve equality. For example, in Article 4 of the BIT between Iran and South Africa dated November 2000, the fair and equitable treatment provisions state:

Article 4 BIS states:

> "The provisions of Article 4 shall not be construed so as to oblige the Republic of South Africa to extend to investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:
>
> 1) Any undertakings it may have assumed with regard to foreign Economic development institutions.
>
> 2) Any law or other measure taken, pursuant to Article (9) of the Constitution of the Republic of South Africa, 1996 (Act 108, 1996) the

purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination." (emphasis added).[252]

Certain commentators have argued that such clauses are still insufficient for the South African government to avoid claims, and what is required is more general 'non-precluded measures' provisions in all of South African BITs.[253] Nonetheless, this illustrates that the South African Government is aware of potentially discriminatory regulatory measures that are required in light of its affirmative action policies. A criticism is therefore that the South African Government should have had the foresight to have reserved these provisions in all of its BITs.

This thesis argues that if states are uncertain as to what standard of equality arbitral tribunals are relying upon in the context of discrimination claims, it is possible to envisage a scenario where they will include exceptions in their BITs to protect their powers in certain regulatory areas. Indeed, this is evidenced in comparing the earlier South African BITs with the current ones that include 'denial of benefits' clauses. Given the difficulty states have in predicting what these regulatory issues might be, it is argued that this could lead to a 'race to the top' whereby states include more and more protectionist measures in BITs. This is arguably not in either party's interest, whether it

[252] Article 4, Iran - South Africa BIT dated November 2000
[253] Matthew Coleman & Kenneth Williams, "South Africa's Bilateral Investment Treaties, Black Economic Empowerment and Mining: a Fragmented Meeting?" (2008) 9 Business Law International 1.

be in terms of efficiency of negotiations, cost, or the flow of investment. Taking a more substantive approach towards differential treatment will assist arbitral tribunals in examining the measure in terms of social welfare and arguably could assuage developing states' fears that their regulatory powers will be undermined by BIT provisions.

III. The test for establishing discriminatory treatment using a standard of substantive equality

Although the above discussion seeks to show that substantive equality is rooted in examining the context in which the measure is implemented and the relevant power dynamics at play, it still does not give a concrete test for arbitral tribunals to apply. Articulating the proposed test in one sentence, it would be, where the purpose and effect of the measure is to even the playing field between a group that has been historically disadvantaged and international investors, it should be permitted, and is not discriminatory treatment.

i. The purpose and effect of the measure must be to put competitors in a position of equality

Although it is not suggested that public policy measures should always take precedence over investor protection, where serious issues of public policy are at stake, such as human rights concerns, and not implementing the measure would lead to a serious imbalance of power for the group affected by the measure, democratic equality moves away from notions of distributive justice to notions of social equality. It focuses upon identifying

and rectifying situations of hierarchy and oppression in any of its forms, including "marginalization, status hierarchy, domination, exploitation, and cultural imperialism."[254]

Examining the purpose of the measure therefore requires an arbitral tribunal to assess the government's motive underlying the measure, and whether the measure is intended to be discriminatory, or whether it is an articulation of democratic equality. It is argued that measures targeting a certain nationality do not necessarily equate to a discriminatory motive, if it can be shown that the measure is not premised upon racial hatred. Examining the effect of the measure requires objective evidence that the measure results in an improvement of the position of the relevant group, so that it is in "equilibrium" with its competitors. It is proposed that the burden of showing that the purpose and effect of the measure is not discriminatory, as with justified differential treatment, should be on the Respondent.

ii. An even playing field

As discussed in Chapter 1, the essential purpose of international investment law is investor protection. In particular, MFN and national treatment seek to prevent unfair advantages being given to third parties or domestic entities to the cost of investor competition. This does not mean that differential treatment whose primary goal is to even the playing field and create an environment of fair economic competition cannot be upheld. It makes sense that ideally the scale would not be tipped in favor of any

[254] *Supra* note 76 at 336.

particular group, but that they would be able to compete on an equal footing. If differential treatment is required in order to establish this even footing, it cannot be discriminatory.

iii. The benefits and disadvantages of applying substantive equality

If States fear that they will have to pay compensation for certain regulatory regimes because they would be considered expropriatory under the current state of investment law, they might decide not to implement such measures, even if this is to the detriment of certain vulnerable groups. Cotula observes how this might also lead to conflicts between states being obliged to conform to their international human rights obligations, which have changed significantly over the past decades, whilst concurrently upholding their investment obligations.[255] Taking a purely formal approach to equality, and focusing upon encouraging and protecting investment might result in a "regulatory chill", which is not in the best interests of society.

Clearly an argument against arbitral tribunals defining discrimination by applying the standard of democratic equality is the potential risk that foreign investments might be subject to arbitrary treatment that escapes censure. There is arguably a valid concern that states can attempt to justify abusive and arbitrary measures as justified differential treatment in the name of public interest. A pertinent example is the blatant expropriations of certain farmlands in Zimbabwe in accordance with the Zimbabwean land reform program. President Mugabe has alleged that these direct expropriations are to counter the negative effects of colonialism in the 1800s, when a minority group of

[255] *Supra* note 93.

white Zimbabweans controlled the most profitable agrarian land of the country.[256] Of course, this is distinct from the South African example discussed below, insofar as they are considered direct expropriations without the provision of compensation.[257] However, such cases[258] highlight the political risk often perceived in Africa, and emphasize why investor protection is required. It is all very well arguing for a state's ability to regulate in the public interest, but as the Zimbabwean case shows, sometimes a state will have less utilitarian motives. This raises a troubling question for arbitral tribunals – how is investor protection to be upheld whilst still taking the notion of public interest into account? This point is addressed in relation to the proportionality principle, which it is argued will help ensure that arbitrary treatment is controlled.

IV.The proportionality principle and regulatory takings

The notion of proportionality is a commonly relied upon principle in many legal systems,[259] given that all legal orders are occasionally faced with decisions requiring a balancing of "ends" versus "means". As well as being used in domestic legal orders, several academics have argued that it is a general principle of public international law.[260] The WTO Appellate Body has relied upon it to interpret provisions of trade

[256] William Shaw, "They Stole Our Land: debating the expropriation of white farms in Zimbabwe" (2003) 41 J. of Modern African Studies 75 at 76.
[257] Augustine Mukaro, "Zim Admits Breach of Law Against Dutch Farmers" (2007) online: Bilaterals.Org < http://www.bilaterals.org/article.php3?id_article=10359>
[258] *Ibid.*
[259] Stefan Zleptnig, "Proportionality: WTO Law: In Comparative Perspective" (2007) 42 Tex. Int' L.J. 371.
[260] *Ibid* at 381.

agreements,[261] and along with the judiciary, it has also been relied upon by the legislature in deciding administrative actions.[262]

The principle of proportionality is fundamentally a balancing test and a means of circumscribing action that is considered disproportionate to the objectives sought. Accordingly, it has been described as providing "…a legal standard against which individual or state measures can be reviewed"[263] and a means of restraining government regulation by setting "material limits to the interference of public authorities into the private sphere of the citizen…"[264] In other words, it is "a trade-off device", [265] although its character is that of a legal principle.

The European Convention on Human Rights ("the Convention") was conceived by the Council of Europe and came into force in 1953.[266] The Convention incorporates the principle of proportionality, and is thus a fundamental principle in European Law, which has been the subject of much study and analysis.[267]

i.The 'fair balance' test incorporated in Article 1, Protocol 1 of the Convention

[261] *Ibid.*
[262] *Ibid* at 383.
[263] *Ibid* at 375.
[264] Jurgen Schwarze, "The Principle of Proportionality and the Principle of Impartiality in European Administrative Law" (2003) 1 *Rivista Trimestrale id Diritto Pubblico* [Quarterly Journal of Public Law] 53.
[265] *Supra* note 251 at 375.
[266] Tom Allen, "Compensation For Property Under The European Convention On Human Rights" (2007) 28 Mich. J. Int'l Law 287.
[267] *Ibid.*

Article 1 of Protocol 1 of the Convention relates to the protection of property. It provides:

> "…No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by the law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties" (emphasis added).

Commentators have observed that there are three elements to this provision.[268] First, any taking must be in accordance with the law and general principles of international law. Secondly, any deprivation of "possessions" must be in the public interest. Thirdly, "…the Court will scrutinize whether the interference in question strikes a proper balance between the demands of the public interest of the whole community and the requirement to protect an individual person or organization's fundamental rights."[269]

In assessing whether a "proper balance" has been struck regarding the respective measure, the Court is inherently incorporating the notion of proportionality or what has

[268] Helen Mountfield, "Regulatory Expropriations In Europe: The Approach Of The European Court Of Human Rights" (2002) 11 N.Y.U. Envtl. L.J. 136.
[269] *Ibid* at 141.

been termed the "fair balance test". It should also be noted that this proportionality principle is said to underlie the whole Convention, not just Protocol 1.[270] The factors that should be taken into account in assessing proportionality of the respective measure evidently differ from case to case[271] depending upon the specificities of the regulation and the relevant public interest that is affected. Such factors include the nature of the interference, the importance of the public interest at stake, and whether any compensation has been paid. Broadly, the proportionality test in ECHR case-law has been said to be satisfied in two ways: (1) either the victim receives a benefit that offsets the detrimental interference, for example, with compensation; or (2) the public interest is so compelling as to justify the invasive measure.[272]

ii.The doctrine of the margin of appreciation

The proportionality principle in ECHR case law works hand in hand with the doctrine of the margin of appreciation. This doctrine, first articulated in *Lawless v. Ireland*,[273] refers to the degree of discretion given to member states in implementing the Convention and allows them to balance their treaty obligations with wider public concerns.[274] It encourages the ECHR to primarily defer to the relevant public authorities' methods of implementing their respective obligations, on the grounds that the State is best placed to know what is in its public interest.[275]

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[270] *Supra* note 266 at 294.
[271] *Supra* note 268 at 141.
[272] *Supra* note 266.
[273] *Lawless v. Ireland (No. 3)* (1961) 1 EHRR 15.
[274] *Ibid.*
[275] *Ibid.*

As Choudhury states, the doctrine permits States "…an extensive 'zone of legality' within which they can freely operate."[276] In *Jacobsson v. Sweden*,[277] the ECHR emphasized the importance of protecting the state's margin of appreciation:

> "…there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realized…In striking the fair balance…the authorities enjoy a wide margin of appreciation."[278]

As discussed below, this thesis argues that the deference shown to states, implicit in the margin of appreciation doctrine, is not relevant for the purposes of elucidating a test for discriminatory treatment in investment disputes.

iii.The role of the proportionality principle in assessing whether a taking has occurred in ECHR jurisprudence

The ECHR's jurisprudence does not appear to be significantly more coherent than the jurisprudence discussed in Chapter 1 when it comes to defining what constitutes a "taking".[279] Nonetheless, commentators have suggested that it has a "sophisticated approach" regarding the difference between regulatory takings, or in ECHR jargon, "deprivations", and legitimate regulatory measures that do not require compensation or

[276] Barnali Choudhury, "Evolution or Devolution? Defining Fair and Equitable Treatment in International Investment Law" (2005) 6. JWIT 297 at 300.
[277] *Allan Jacobsson v. Sweden*, Series A, No. 163 (1989) 12 EHRR 56.
[278] *Ibid.*
[279] *Supra* note 268.

what the ECHR terms "controls of use of property". Specifically, the approach of the Court in examining Article 1 and alleged takings has been described as requiring "a reasonable and foreseeable national legal basis for the taking…"[280]

In determining whether there is a reasonable and legal basis for the taking, the regulatory measure must be found to be proportionate to constitute a "control of use of property". In other words, the goals to be achieved by implementing such regulations are compared to the detrimental resulting effects. Proportionality is examined by analyzing the relevant facts of each case, and the provision of compensation is only one factor that is taken into account. Moreover, even if the regulatory effect amounts to a "control of use", compensation may still be required. As it stated in *Baner v. Sweden*:

> "… the law may provide for compensation in cases where a regulation of use may have severe economic consequences to the detriment of the property owner. The Commission is not required to establish in the abstract under which circumstances Article 1 may require that compensation may be paid in such cases. When assessing the proportionality of the regulation in question it will be of relevance whether compensation is available and to what extent a concrete economic loss was caused by the legislation." [281]

[280] Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* Mar. 20, 1952, art. 1, 213 U.N.T.S. at 262.
[281] *Baner v. Sweden* (1989) 60 DR 128.

If the state can legitimately show that the public interest outweighs the detriment to the individual, a fair balance will be struck without any requirement to compensate the individual.[282] In assessing the legitimacy of the public interest, the state is afforded its margin of appreciation.[283] However, this is tempered by the proportionality principle. In *James v. United Kingdom*,[284] the ECHR emphasized the importance of the proportionality principle in determining whether the measure pursued a legitimate public interest. The ECHR stressed that the proportionality test assessed whether "a disproportionate burden" was imposed on the applicants, and that a lack of payment of compensation could be justifiable "only in exceptional circumstances". The ECHR went on to say however, that Article 1 does not guarantee a right to full compensation in all cases and that legitimate objectives of public interest, such as regulations of economic reform or those designed to achieve better social justice, may permit less than full market value.[285]

Helen Mountfield provides an analysis of three ECHR cases involving issues of regulatory expropriation to illustrate the approach of the ECHR in applying the proportionality principle.[286] These cases are respectively *Fredin v. Sweden*[287] involving a claim of deprivation following Swedish legislation revoking certain permits required for quarrying; *Pinnacle Meat Processors Co. v. United Kingdom*[288] where, following the outbreak of "Mad Cow Disease", a consequent law banning bovine material for animal

[282] Tom Allen, "Human Rights and Regulatory Takings" (2005) 17 Envtl. L. 245.
[283] *Ibid.*
[284] *James v. United Kingdom* (1986) 8 E.H.R.R. 123.
[285] *Lithgow v. United Kingdom*, (1986) vol. 8 E.H.R.R. 329.
[286] *Supra* note 268.
[287] *Fredin v. Sweden*, vol. 192 Eur. Ct. H.R. (ser. A) (1991).
[288] *Pinnacle Meat Processors Co. v. United Kingdom* (1998) App. No. 33298/96.

and human consumption was implemented along with a disputed measure providing for 65% compensation of meat processors' unsold stock by the British Government; and *Pine Valley Developments Ltd. v. Ireland*,[289] involving a disputed refusal to give planning permission after a draft permission had already been granted, thereby reducing the value of the land.

In all three cases, the Court found that there was no deprivation in light of the relevant facts of each case and the public interest motives underling the respective measures. For example, in *Fredin*, the Court held that the legislation had a public interest in protecting nature, and that the revocation of the permit did not mean that the land had no use.

These cases might be considered as illustrating the ECHR's deference to the states' margin of appreciation, given that in all three cases the respective state was found to have acted reasonably, and the regulations did not amount to a deprivation. However, the ECHR did not automatically uphold the state's action but carefully examined the relevant circumstances in each case in order to determine whether the respective measures were unreasonable in light of other alternative measures, the extent of the risks undertaken by the claimants and the importance of the public interest at stake that the respective government measure sought to protect. In particular, the ECHR examined whether the relevant property retained any use despite the regulatory effects of the measure, and whether there were any less intrusive alternatives that could have been relied upon.

[289] *Pine Valley Developments Ltd. and Others v. Ireland* (1991) 14 E.H.R.R. 319.

As seen above, it is true that the ECHR affords states a wide margin of appreciation in determining what is in the public interest and this is an acknowledgement that it is states that should regulate what is in their best national interests. However, given that the *raison d'etre* of the ECHR is concerned with upholding individual rights, it will interfere when the measure is deemed to be too intrusive and disproportionate in comparison to the rights to be protected. It is argued that the proportionality principle therefore strikes a balance between individual risk and sovereignty.

iv.The role of the proportionality principle in Investor-State disputes

Critics will argue that ECHR jurisprudence should not be brought into international investment law, given that it involves a very different species of conflict.[290] Others have observed, "Article 1 of the Convention parallels the expropriation provisions of investment treaties"[291], and for this reason, it makes sense to argue that arbitral tribunals should at least have regard to the jurisprudence relating to Article 1. This thesis argues that by implementing the proportionality principle in conjunction with the standard of substantive equality, arbitral tribunals will have a means of assessing when measures treating foreign investors differently in the name of equality are in fact legitimate and non-discriminatory measures.

[290] *Supra* note 282.

[291] Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement Of The Public Interest Contributing To The Democratic Deficit?" (2008) 41 Vand. J. Transnat'l Law. 775.

Arbitral tribunals have sometimes acknowledged the value in this. In *Tecmed*,[292] the arbitral tribunal relied upon ECHR case law when examining the legitimacy of the public interest motive underlying the disputed regulatory measure. It observed:

> "there must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure."[293]

The tribunal also quoted extensively from the ECHR *James* case:

> "Not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim "in the public interest", but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized."[294]

Certain authors have argued for the margin of appreciation to be incorporated into Investor-State disputes to emphasize the importance of public interest in the arbitration procedure.[295] This thesis does not agree that the doctrine of margin of appreciation should be adopted as well as the proportionality principle. Arguing that public interest motives should be taken into account and weighed up by a tribunal is different to arguing

[292] *Tecnicas Medioambientales Tecmed S.A. v. Mexico*, Case No. ARB (AF)/00/2 (ICSID Award May 29, 2003).
[293] *Ibid* at p. 47.
[294] *Supra* note 284 at para. 69.
[295] *Supra* note 291.

that there should be an automatic deference to the state measure. Adopting the margin of appreciation doctrine would be too extreme in chipping away at these specifically negotiated and agreed upon protection measures enshrined in BITs. In any event, adopting the standard of substantive equality, in the first part of the test, requires an arbitral tribunal to acknowledge and accept the state interest in promoting certain groups of individuals.

In *Azurix v. Argentina*,[296] the tribunal emphasized the fact that arbitral tribunals have different opinions regarding the extent to which the "purpose" of a measure should be taken into consideration when examining whether a taking has occurred. It held that even if the regulation may be legitimate and pursued a public policy interest, it might still be considered "disproportionate" depending upon its effect on the investor. This means that unlike *Saluka* and *Methanex*, regulations will not be deemed to be legitimate, non-compensable regulations simply because of their underlying purpose. The proportionality of the impact upon the investor will be balanced against such motives.

One of the main concerns in relying upon the proportionality principle, especially without incorporating the doctrine of the margin of appreciation, is that it assigns too much power to arbitral tribunals to comment upon and circumscribe State measures, which in turn has an effect of intervening too greatly on national autonomy. For this reason, the Governments of Canada and the United States have chosen to include provisions in their template BITs specifically stating that it is rare for good faith non-discriminatory

[296] *Azurix Corp. v. Argentine Republic* (Case No. ARB/01/12) ICSID Award of July 14, 2006.

measures that are designed to protect legitimate public welfare objectives to be construed as indirect expropriation.[297]

On the other hand, the same argument has been used in favor of the proportionality principle. Choudhury for example, criticizes international arbitration as removing the democratic process from the public, and argues that reliance on the proportionality principle helps redress this problem.[298] Others have argued that the institution itself might not have the capabilities to assess the respective national interests. In the WTO context for instance, critics have stated "the WTO is institutionally not ready for such a fundamental balancing of values and interests (mainly economic versus non-economic), and that such balancing is at the core of the proportionality analysis."[299]

Despite these arguments, it is argued that the proportionality principle provides a check on the self-interested acts of States. Before denying investors their rights, or automatically assuming that a State's actions are in the public interest, the arbitral tribunal is forced to weigh up the legitimacy of the measures relied upon, whether less invasive alternative measures could have been used instead and the motive for such measures.

Summary

[297] Luke Eric Peterson, South Africa's Bilateral Investment Treaties Implications for Development and Human Rights (Geneva: Friedrich Ebert Stiftung, 2006) at 23.
[298] *Supra* note 291.
[299] *Supra* note 251.

This chapter propounds a two-stage test for examining discriminatory treatment. First, arbitral tribunals should examine the alleged discriminatory treatment in the context of democratic equality, and ask whether the purpose and effects of the measure results in an "even playing field" insofar as it aims to achieve a fairer economic climate for vulnerable social groups. Secondly, arbitral tribunals should examine whether the measure is proportionate to the government's objectives for establishing an even playing field. If the answer is "yes" to both, then there will not be discriminatory treatment. In this manner, it is argued that discriminatory treatment will be examined in a clearer and more effective way and consequently will provide greater certainty to the respective parties.

Chapter 3: South Africa's Black Economic Empowerment program and discrimination in investment arbitrations

"Men make their own history, but not of their own free will; not under circumstances they themselves have chosen but under the given and inherited circumstances with which they are directly confronted."[300]

This final chapter analyzes a practical case study, the ICSID arbitration of *Piero Foresti v. Republic of South Africa*,[301] to highlight the problems discussed in Chapter 1 regarding the current test for assessing discriminatory treatment. It seeks to illustrate how a more substantive test set out in Chapter 2, applying the standard of democratic equality and the proportionality principle might be a better way of assessing discriminatory treatment in the context of Investor-State disputes. From the outset, it should be stated that relatively little information regarding this case appears to be publicly available. Nonetheless, this arbitration illustrates how arbitral tribunals are being faced with having to make legal decisions that strike a sensitive balance between investor protection and a state's political goals with consequently wide-reaching social ramifications. It is argued that cases raising this potential conflict between a state's commitment to investor protection and a state's commitment to human rights issues are likely to become more prevalent as developing nations enter into more international human rights treaties and sustainable development concerns continue to become more important in a world of diminishing natural resources.

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[300] Karl Marx, *The Eighteenth Brumaire of Louis Bonaparte*, D. Fernbach ed. (London: Allen Lane, 1852).

[301] *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (Case No. ARB (AF)/07/1)

I.Background to the case: South Africa and Black Economic Empowerment

Following the election of President Mandela and his ANC[302] party in 1994 and the dismantling of *Apartheid*, the South African Government embarked on a course of trade liberalization to enhance international competitiveness.[303] The South African Government has currently signed over 40 BITs.[304]

On the domestic front, the South African Government implemented a program known as Black Economic Empowerment ("BEE") via several pieces of legislation, including the Broad-Based Black Economic Empowerment Act No 53 of 2003 ("BEE Act").[305] The essence of BEE policies is an implementation of affirmative action measures in various sectors of the South African economy to counteract the negative and disadvantageous effects of *Apartheid* vis-à-vis disadvantaged, and predominantly black South Africans, but also women and other minority groups.[306] Although the BEE Act does not specify particular targets, in general it sets out the affirmative action policies that private enterprises need to comply with, and states that "a failure to comply with the BEE

[302] African National Congress
[303] *Supra* note 297.
[304] Zamokwakhe Ludidi Somhlaba, "When We Err in Our Analyses", (28 June 2005) Africa Institute of South Africa, online: <www.ai.org.za/print_monograph.asp?ID=31>. The BEE Commission defined the goal of BEE as being:"…aimed at redressing the imbalances of the past by seeking to substantially and equitably transfer and confer the ownership, management and control of South Africa's forces of production to the majority of its citizens."
[305] This Act does not in itself set any specific targets. Rather it provides a general framework for the implementation of BEE policies throughout the economy. There are other regulatory instruments, such as the Codes of Good Practice published by the Minister of Trade and Industry which define the main concepts and means of assessment for scorecards. See *Supra* note 253.
[306] *Ibid.*

legislation severely limits the ability of an enterprise to engage in any economic activity that is within the fiat of the state."[307] The individuals whom the BEE policies aim to protect are described as historically disadvantaged persons ("HSDAs").[308]

i.The Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA")

One industry to be affected by BEE policies is the South African mining industry via the MPRDA. Prior to this legislation coming into effect, mineral rights in South Africa were based upon property law[309] and were vested privately, rather than with the State. Since the coming into force of the MPRDA, all mineral and petroleum resources are now considered the 'common heritage'[310] of all South Africans and the State is the custodian of such rights.[311] Mining companies have a 'limited real right' in land, which gives them a right to undertake certain activities against payment of royalties to the State.[312]

In a nutshell, mining companies are obliged to apply to the South African Department of Mining and Energy (DME) within a set period of time, for a right to convert their former

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[307] *Ibid.*
[308] This is defined as: "any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect; any association, a majority of whose members are persons contemplated in paragraph (a); any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes". See Chapter 1, Definitions of the *Mineral and Petroleum Resources Development Act 28 of 2002*.
[309] *Supra* note 253.
[310] Article 3 of the *Mineral and Petroleum Resources Development Act 28 of 2002*.
[311] *Ibid.*
[312] *Supra* note 253.

holdings "old order rights" into "new-order" rights, licensed by the State.[313] Certain commentators have argued that this is a direct expropriation insofar as they believe that the old order rights are less valuable than the new order rights.[314] As part of the conversion process, the DME is required to take into account the progress of applicant companies in meeting targeted social, labor and development objectives set out in a mining charter.[315] Applications for prospecting and mining rights must demonstrate how such activities will expand the opportunities for HSDAs.[316] Similarly, certain permits have to be granted by the DME for various activities, including mining, exploration and reconnaissance. These rights can only be granted if they will further the objectives of the MPRDA.[317]

ii.The Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry 2002 ("the Charter")

The Charter, which sets the "framework, target and time-table"[318] for HSDA's in the mining industry was signed on 11 October 2002. The Charter sets out the criteria that enterprises are obliged to meet in order to convert their old rights under the MPRDA.[319] These range from general undertakings, such as creating "an enabling environment for

[313] *Ibid.*
[314] *Ibid.*
[315] *Ibid.*
[316] *Supra* note 304.
[317] *Ibid.*
[318] Article 100 of the *Mineral and Petroleum Resources Development Act 28 of 2002*.
[319] *Supra* note 253 at 74.

the empowerment of HDSAs"[320] to specific targets, such as a commitment to 40% HDSA participation (including 15% women) in management within five years.[321] A "scorecard" was also developed to assist in applying the Charter to the MPRDA requirements. More contentious in this arbitration, is paragraph 4.7 of the Mining Charter:

> "In order to increase participation and ownership by HDSA's in the mining industry, mining companies agree: to achieve 26 per cent HDSA ownership of mining industry assets in 10 years by each mining company"[322] (emphasis added)

The scorecard provides that mining companies should ensure 15% HDSA ownership in 5 years (by 2009), which should rise to 26% HDSA ownership in 10 years.

II.Alleged discrimination claims arising out of *Piero Foresti, Laura De Carli and others v. Republic of South Africa* (Case No. ARB (AF)/07/1) "the Arbitration"

On 8 January 2007, a claim was registered at ICSID against the Republic of South Africa. Italian nationals who own South Africa's principal granite mining companies (Marlin, Kelgran and R.E.D. Graniti) have claimed violation of the terms of the Italy-South Africa BIT. Furthermore, its Luxembourg-based holding company, Finstone, (PTY) Ltd SA

[320] Article 4, Undertakings, of the Broad-Based Socio-Economic Empowerment Charter for the South African Mining Industry.
[321] BEE Scorecard, online: Productivity SA (Section 21 Company) <www.npi.co.za/beescorecard/webbeescorecard.asp>
[322] *Supra* note 253.

alleges breach of the Belgium and Luxembourg – South Africa BIT.[323] Marlin has reportedly not implemented the BEE policies in its operations, nor has it applied for the conversion of its "old order" mining rights into "new order" mining rights.[324]

Specifically, it appears that the foreign investors claim, *inter alia*:

(1) that there has been an expropriation of their old order rights with the MPRDA coming into force.[325] The claimants' lawyer, Peter Leon, has reportedly stated that "[t]he MPRDA extinguished these common law mineral rights, which were property rights, and substituted them with a statutory entitlement to <u>less valuable</u> old order rights (emphasis added);"[326] and

(2) that the fair and equal treatment provisions of the respective BITs have been breached:

> "…the requirement that they comply with the Mining Charter is a breach of the fair and equitable treatment provisions of the Italian BIT (Article 2(3)) and the Benelux BIT (Article 3(1)) and that in particular the requirement that they transfer 26 per cent of their equity <u>discriminates</u>

[323] Luke Eric Peterson, *Investment Treaty News, November 30, 2007*, (2007) International Institute for Sustainable Development, online: <http://www.iisd.org/pdf/2007/itn_nov30_2007.pdf>.
[324] Brendan Ryan, "Offshore Investors May Sue SA Government" (15 September 2005), MiningMX online: <www.miningmx.com>.
[325] *Supra* note 253.
[326] *Ibid.*

against them in favor of a particular class of South Africans, namely HSDAs (emphasis added)."[327]

Commentators who have worked on the Arbitration have stated that the MPRDA is a measure that "at a minimum limits rights of ownership", and that "any argument that the MPRDA is not expropriatory but is rather a valid exercise of police powers is likely to fail because the MPRDA is discriminatory" (emphasis added).[328] They further state that given the discriminatory nature of the MPRDA, "there has been a breach of the fair and equitable treatment standard."[329]

As discussed, regulatory expropriation is a contentious subject in international investment law.[330] In examining whether a measure is a legitimate exercise of the South African Government's police powers, the arbitral tribunal will have to examine several factors, including whether the measure is discriminatory, the public purpose of the measure, and the necessity of the measure.[331] Similarly, discrimination is only one aspect to the fair and equitable treatment standard, and therefore establishing a breach of these provisions will be very fact specific. This section purports to solely examine the potential claims of discrimination, and the almost implicit assumption that the BEE legislation is discriminatory so that any claims of regulatory takings or non-discrimination under the respective BITs will automatically fail.

[327] *Ibid.*
[328] *Ibid.*
[329] *Ibid.*
[330] *Supra* note 93.
[331] *Supra* note 253 at 81.

i.Formal equality and the potential discrimination claims in this case

From the outset, it is argued that based on the known claims and facts of the Arbitration, it appears difficult for the investors to argue that they have been subject to discriminatory treatment using a formal equality analysis. This is because formal analysis compares "like with like" and here, all holders of "old order rights" are obliged to conform to the MPRDA and Charter requirements, including all domestic holders of "old order" rights, as well as foreign investors. Indeed, it has been reported that local South African mining companies support the empowerment program,[332] and that local court action in relation to the legislation has not been for claims of expropriation.[333]

It is possibly for this reason that the investors have chosen to rely on fair and equitable treatment provisions of BITs as opposed to national treatment provisions. As already discussed, this is considered a more flexible BIT provision insofar as it does not explicitly provide for a comparative test but generally includes discriminatory treatment. Indeed, certain authors have suggested that this is becoming a "trend" whereby non-discrimination awards are not based upon discriminatory provisions i.e. national treatment of MFN provisions.[334] This thesis, based on the research in Chapter 1, argues

[332] J Michael Judin, "The International Centre for Settlement of Investment Disputes – Piero Foresti, Laura De Carli and others v. Republic of South Africa (Case No. ARB (AF)/07/1)" (2007) *Briefing Note for Goldman Judin Inc attorneys*, Johannesburg, at 2.
[333] *Ibid.*
[334] *Supra* note 98.

that this would make little difference given that arbitral tribunals appear to apply a "like circumstances" analysis even in the context of fair and equitable treatment provisions.

Certain commentators have argued that the MPRDA must be discriminatory insofar as it distinguishes between foreign investors and HSDAs, and gives HSDAs advantageous treatment over both foreign investors and other domestic nationals who are not considered to fall within the definition of HSDA.[335] Only HSDAs can be appointed as managers, and 26% of shares in mining companies must be sold to HSDAs by 2010. These same commentators argue that the CERD Convention, assuming that it applies, would still not justify such "positive discrimination" insofar as it was never intended to justify positive discrimination of a host state's nationals to the detriment of foreign investors.[336] Therefore, they state that the BEE policies are discriminatory, and accordingly there is an illegal expropriation and a breach of the fair and equitable treatment standards under the relevant South African BITs.[337]

Although the Claimants argue a breach of the fair and equitable treatment provisions of the respective Italian and Benelux BITs, it is possible that the arbitral tribunals will conceive of the claim in terms of discriminatory treatment, given that it is the South African Government's affirmative action policies and their ensuing effects that are at the crux of the claim. If this claim of discriminatory treatment is examined by applying a standard of formal equality, as discussed above, the arbitral tribunals would have to: (i)

[335] *Supra* note 253 83.
[336] *Ibid.*
[337] *Ibid.*

identify comparators in "like circumstances"; (ii) examine if they have been treated differently; and (iii) examine if a difference in treatment is justified.

As discussed in Chapter 1, identifying comparators in the same "like circumstances" is problematic and arbitral tribunals have taken different positions in relation to drawing the boundaries of the relevant comparator group. If arbitral tribunals decide that all national competitors in the mining industry should be compared, as stated above, it is unlikely that the claimants will be able to show that they have been treated differently from domestic enterprises in the mining industry, which are also subject BEE policies and have on occasion been denied licenses for not complying with the essence of the BEE Act.[338] On the other hand, it is always conceivable that an arbitral tribunal could compare foreign investors with HSDAs in "like circumstances" in the same industry, or HSDA's that are trying to emerge in the industry. This is a clear group of individuals who can be seen to actively benefit from BEE in a way that is not granted to foreign investors. Accordingly, in applying the second limb of the test and comparing whether they have been treated differently to foreign investors (or other domestic investors for that matter), the answer is likely to be "yes". The South African Government's BEE policies are especially designed to assist HSDA's in gaining economic power and treats them differently to foreign investors.

[338] The Free Market Foundation of Southern Africa, online: <http://www.freemarketfoundation.com/ShowArticle.asp?ArticleType=regulation&ArticleID=1200>.

Assuming that the Claimants are able to identify a comparator in "like circumstances", and then show that there is *prima facie* discriminatory treatment, the South African Government would have the burden of proof in showing that any differential treatment is justified. As discussed in Chapter 1, this would require the South African Government showing that the Claimants are not truly in "like circumstances" with HSDAs, and that therefore a difference in treatment is acceptable. As discussed in the *Oscar Chinn* case,[339] the South African Government could potentially prove this by arguing that the difference in treatment was not on the basis of the Claimant's nationality.

If a broader approach to justified differential treatment is taken, the arbitral tribunal could examine, among other things, the underlying alleged discriminatory intention of the measure, whether the legitimate expectations of the investor have been affected given the political environment, the necessity of the legislation and the legitimacy of the public policy underlying the measure. As illustrated in Chapter 1, there is no certainty in what criteria, if any, an arbitral tribunal might choose to apply in considering justified differential treatment. For example, if the arbitral tribunal takes a narrow view of the South African Government's motives it might consider the polices to be discriminatory on the basis of a difference of treatment in nationality, specifically favoring certain South Africans over other nationals. If it takes a broader view, considerations of South Africa's political history might apply, and BEE policies might be considered to be justified differential treatment. Accordingly, they would not amount to either regulatory expropriation or a breach of fair and equitable treatment. This uncertainty is

[339] *Supra* note 166.

unsatisfactory both from the perspective of the South African Government and both domestic and foreign investors.

ii.Substantive equality and the potential discrimination claims in this case

It is argued that if the discrimination claims in this Arbitration are examined from the perspective of democratic substantive equality and proportionality, then they will not be considered to be discriminatory, and will accordingly not contravene South Africa's investment treaty provisions. This thesis does not advocate giving complete priority to state regulations at the cost of investor protection, as it argues that this would be a potential slippery slope for an abuse of state powers. Rather, arbitrators should focus upon whether the relevant measure is directed towards economic fairness, placing both parties on an equal footing, and secondly, whether the measures are proportionate in light of this goal to transform social imbalances. This will distinguish between legitimate regulation that is not discriminatory and discriminatory treatment that is unfair to foreign investors.

It is argued that by consciously adopting a substantive approach to equality when examining whether the respective differential treatment is justified, arbitral tribunals are forced to examine the respective regulations in a contextual perspective. As the law currently stands, it is unclear what criteria arbitral tribunals will apply, or whether they will adhere to the black letter treaty law over the context of the claim being raised.

(a) Examining the notion of democratic substantive equality in the Arbitration

Democratic substantive equality does not mean that the arbitral tribunal needs to encroach upon a state's sovereignty by deciding how to the distribute resources within that State's jurisdiction. Rather, it means that arbitral tribunals cannot ignore a State's political motivations to regulate the social relationships within its territory, when they are asked to examine domestic regulation. Although arguments could be made that the BIT provisions are in place precisely to prevent investors being held to adverse domestic standards, and that international investment tribunals do not have the same legitimacy as domestic courts in regulating social relationships within a state, it is argued that the reality is that arbitral tribunals are going to have to continue to assess matters that encroach upon a state's sovereignty and raise public law issues on both a domestic and international plane. A pertinent example relates to a similar program of affirmative action that exists in Malaysia following race riots in Malaysia in the 1960's. These policies favor ethnic Malays for employment and procurement contracts, and have recently been the source of controversy amongst some of its trading partners.[340] The EU has said that these policies are discriminatory and protectionist, and they similarly are a point of disagreement for the U.S in trade talks negotiations with Malaysia, signaling a potential investment dispute in the making.[341]

It is argued that in light of South Africa's particular history of apartheid, affirmative action policies such as those contained in BEE should not be considered discriminatory

[340] *Supra* note 323.
[341] *Ibid.*

treatment but rather a means of realigning socio-economic disadvantages that have historically existed within the country. The notion of discrimination implies an unreasonable distinction, but in this particular context, implementing measures that seek to restore a social equilibrium in a society that had entrenched racist policies, cannot be considered as unreasonable.

The practice of apartheid in South Africa, carried out from 1948 to around 1994, is widely recorded and only recent history. The National Party, founded by Afrikaner nationalists and elected in 1948, dominated the South African political scene until the late 1990s with its policies of racial segregation:

> "Known as 'apartheid' (separateness), the NP's alternative system was designed to maintain white 'civilization' and uplift the Afrikaner *volk* in the post-war context of 'industrialization, urbanization and popular struggle'."[342]

This philosophy was implemented by a series of strategic policies and legislation to ensure racial segregation, made more complex by the fact that there were different ideologies and Christian biblical notions regarding the extent to which apartheid should be practiced.[343] The population was characterized into major groups of White, Colored, Asian/Indian and African. Mixed marriages between these groups were banned in

[342] Alan Lester, Etienne Nel & Tony Binns, *South Africa Past, Present and Future Gold at the end of the Rainbow? (*England: Pearson Education Limited, 2000) at 171.
[343] *Ibid.*

1949.[344] The Population Registration Act 1950 sought to 'fix' racial groups, controlling each group's legal rights to location, education, mobility and occupation.[345] The Promotion of Bantu Self-Government Act No. 46 of 1959 divided Africans into 'ethnically' discrete groups, established "Homelands" for each of these groups and abolished parliamentary representation for Africans.[346]

It is argued that the arbitral tribunal should bear this recent political history in mind when examining the purpose and effects of BEE, and whether the treatment under the MPRDA is specifically targeting foreign investors in a discriminatory manner. Against the backdrop of apartheid, it appears difficult to argue against the fact that apartheid created a severely imbalanced society and that positive affirmative action measures might be required to correct this imbalance of power. As in the *Parkerings* case,[347] South Africa is in a period of political transition which investors should be prepared for, and indeed have anticipated.

Substantive equality is rooted in examining the context of the disputed measures and questions whether there is equality of outcome in fact, rather than merely in law.[348] Rather than automatically requiring a comparison as formal equality does, its starting

[344] *Ibid* at 173.
[345] *Ibid* at 172.
[346] Apartheid Documents, online: About.Com <http://www.africanhistory.about.com/od/apartheidlaws/g/No460f59.htm>
[347] *Supra* note 128.
[348] Beverley Baines, *Is Substantive Equality A Constitutional Doctrine* (Montreal: Les Editions Themis, 2005).

point is the social conditions surrounding the dispute in question.[349] As seen in the cases discussed throughout this thesis, investment can have serious impact upon domestic policies and this arbitration also raises issues of South Africa's international human rights' obligations and the potential conflict with its international investment agreements.[350] Thus, it is argued that substantive equality would require arbitral tribunals to recognize the public policy issues underlying the BEE regime and the fact that the South African Government has to take positive measures to assist previously disadvantaged groups in order to put them on an equal footing with their competitors.

(b) Examining the proportionality principle in this Arbitration

This is not to say that all uncompensated takings directed at assisting minority groups should be considered legitimate. Indeed, the more difficult question is whether foreign investors should have to pay the price for resolving a social imbalance that was not of their making. The Claimants have raised this, arguing that that their investments were made *post-Apartheid,* and so they did not benefit from the *Apartheid* regime prior to their investments being made.[351] A finding that such measures are within the legitimate police powers of the State for example, rather than indirect expropriation could mean that no compensation is payable to investors. It is argued that the burden lies upon the foreign investors to show that loss was suffered, and that the burden lies upon the South African Government to show that the necessary measures were proportionate to the aims sought.

[349] *Ibid* at 41.
[350] *Supra* note 19.
[351] *Ibid.*

Of course, compensation should primarily turn upon the investors being able to prove that they have in fact suffered a loss as a result of BEE. It is unclear from the known facts, how the Claimants intend to establish that they have suffered loss. It does not necessarily follow that having to sell 26% of shares in mining companies to HSDAs equates to a loss, even if this sale is to a more restrictive group than the open market.

The burden of showing that the BEE measures are proportionate to the aims to be achieved should fall to the Government of South Africa. As seen above, this does not solely turn upon the public interest at stake, but also requires the arbitral tribunal to take account of whether there were less intrusive measures that could have been relied upon to achieve the same goals, whether compensation was paid and the effect of the measure upon the investment. If the South African Government is successful in discharging this burden, then (i) regulations that are *prima facie* discriminatory can amount to a legitimate use of the State's regulatory police powers; and (ii) regulations that are *prima facie* discriminatory can be argued not to contravene the fair and equitable treatment provisions.

Summary

This chapter illustrates the problems arising out of the current test of discrimination in investment disputes. Relying upon a formal standard of equality is inappropriate for arbitrations involving issues of human rights and important public policy concerns. Although these potentially might be considered as justified differential treatment, the point of this thesis is that such measures should not be characterized as discriminatory to

begin with. It seeks to compare the traditional test of discrimination with the one proposed in this thesis, to show how different outcomes might be achieved. Fundamentally it argues that in applying a substantive test of equality along with the proportionality principle illustrates that BEE measures are not discriminatory but necessary for the advancement of South African society.

Conclusion

The motives for undertaking this thesis research were based upon trying to understand the underlying power relations in international investment. It was an attempt to identify possible areas in the law that could curb or prevent FDI by making states either more reluctant to enter into BITs or less inclined to adhere to their international obligations in respect of compensation for expropriations. In researching this subject, a fundamental problem that was identified, was how to effectively strike a balance between state regulation and investor protection, thereby encouraging and promoting FDI to the satisfaction of all the parties to the respective international investment agreements. This thesis is not intended to be a one-sided piece of research, promoting developing state sovereignty at the cost of investor protection. Nonetheless, it suggests that in not being sensitive to specific issues arising in certain developing states, investors risk having their long-term protection undermined, which is in neither party's interest and ultimately will detract from FDI as a whole.

The benefits of international investment should not be under-estimated in a world where trade relations are increasing, and globalization is rapidly shrinking boundaries. FDI is generally thought to develop economies, leading to increases in technology, know-how, employment and capital. At the same time, given that BITs are usually premised upon a flow of capital from a developed state to a developing host state, it is argued that there are fundamental imbalances of power within these agreements. Developing states might appoint sophisticated legal counsel to draft their BITs, they might be aware of the

importance of including exceptions within these BITs regarding their sensitive sectors, and they might even restrict certain investments entering or profits leaving their country. Ultimately, however, it is difficult to argue that they can overcome the crux of the problem - that they are competing for investment with other developing countries and that protectionist economies are less attractive for investors than liberal ones.

This thesis focuses upon the principle of discrimination in examining the above issues. This is a very important principle and is adhered to in general international law as well as being a pillar of international investment law, given that investor protection fundamentally requires fair and non-discriminatory treatment. Accordingly, a regulation that is a legitimate exercise of a State's police powers cannot be discriminatory. It is also settled international law, that a legal expropriation cannot be discriminatory. Nonetheless, little appears to have been written regarding the meaning of non-discrimination. It appears to be taken for granted that international investment law provides for a coherent test for identifying discriminatory treatment. This thesis has sought to show that this is not the case.

BITs enshrine specific provisions against discriminatory treatment, namely, national treatment provisions preventing more favorable treatment being given to domestic competitors; MFN provisions preventing more favorable treatment being given to other third party investors; and an absolute standard of fair and equitable treatment provisions preventing arbitrary and unjust treatment. It is therefore argued that the purpose of these provisions is rooted in fairness, and allowing investors to compete on an equal economic

footing with other competitors. Although certain provisions in BITs set out a "like circumstances test", they do not enunciate the meaning of non-discrimination, nor what this test should entail. It is therefore left to arbitrators to fill in the holes and decide what standard of equality to apply to the meaning of non-discrimination.

In examining a variety of arbitral awards in investment disputes, it appears apparent that arbitral tribunals rely upon a formal notion of equality, in treating "likes alike", even if the claim is not based upon a breach of national treatment or MFN BIT provisions. Formal equality specifies that "likes" should be treated in the same manner, and those who are unalike, treated differently. The problem is that depending upon the criteria chosen, it is almost always possible to categorize the same entities as being alike or unalike.

The *Pope & Talbot v. Canada* case stipulated that the "like circumstances" test involves three limbs: an identification of comparators in "like circumstances", an examination of whether there is less favorable treatment between the comparators, and finally whether there is a justified reason for any differential treatment. Based upon the analysis undertaken, it appears that there are numerous problems with this test. Arbitrators have not applied the same criteria for identifying comparators, they are divided about whether the underlying motive of the measure needs to be taken into account, and justified differential treatment is often established upon showing that the comparators are not in "like circumstances". When arbitral tribunals have introduced more substantive criteria into the third limb of the test, these are haphazard elements insofar as different tribunals

have relied upon different criteria ranging from an examination of whether the investors' legitimate expectations have been undermined to the motives underlying the measure.

This thesis argues that discrimination needs to be conceptualized in a different manner by applying a two-fold test: that of substantive equality and proportionality. Specifically, democratic substantive equality requires different treatment of marginalized or vulnerable groups in society, to ensure that they are treated in a fair manner. Such difference in treatment is not considered discriminatory. In terms of trade and investment, the focus would be upon the economic fairness of the respective group affected by the measure, and whether they are able to compete in a fair and even manner with their competitors. It is difficult to explain how parties to BITs might not be in favor of fair economic competition. The specific discrimination provisions of BITs, be they national treatment, MFN or fair and equitable treatment provisions are directed towards protecting investors from unfair treatment. However, it seems to be a fundamental tenet of justice that the scales should not be tipped in the other direction either, and that foreign investors should not carry out practices that give them unfair advantages over vulnerable competitors who have no means of reaching an equitable platform upon which to compete.

This thesis acknowledges that a broader concept of what constitutes discriminatory treatment, potentially leaves open a door for states to sneak in arbitrary and illegitimate measures in the name of democratic equality. Indeed, President Mugabe of Zimbabwe has already attempted to do so, claiming that the direct and uncompensated expropriations of certain farmlands is a reaction to the oppressions of British colonial

rule. To address this problem, this thesis advocates that arbitral tribunals adopt the proportionality principle as articulated by the ECHR. This proportionality principle requires a balancing of the liberties at stake against the costs and objectives of the respective measures. It implicitly requires an examination of whether less intrusive measures could have been adopted, the legitimacy of the measures, whether the investment retains any value, whether compensation was provided and the underlying motive. It therefore provides foreign investors with adequate protection.

Accordingly, it is suggested that a new test for examining discriminatory treatment involves two questions: (1) is the purpose and effect of the measure to even the playing field between a group that has been historically disadvantaged and international investors; and (2) is the measure proportionate to the aims to be achieved? This test focuses upon examining the alleged discriminatory measure in the relevant context of the case, and the social relations that the state is trying to regulate. It does not accept that only identical comparators should be examined, but accepts that in certain narrow situations, differential treatment is required for a fairer economic environment. At the same time, it acknowledges that states voluntarily agree to BITs, and that investor protection should not be sacrificed given that this would undermine FDI completely.

This issue underpins a larger issue of equality – that of equality between states. Developing states in particular have colonial histories that, although should not excuse their human rights records, often do play a contributing role. Protection of minorities and sensitive groups is widely practiced in developed countries, such as Australia and

Canada. The same protection needs to be extended to similar groups in developed states. These human rights concerns will inevitably encroach upon the international investment plane, as globalization continues to spread. Having a sophisticated understanding of how to conceptualize discrimination cannot therefore be underestimated. This is not only about economics. Politics and history also play a role, and the inherent imbalance of the international legal order requires an acknowledgement that there are issues that need to be further explored to reassure these states that their concerns are being taken into account. As Nelson Mandela's biography concludes:

> "I have taken a moment here to rest, to steal a view of the glorious vista that surrounds me, to look back on the distance I have come. But I can only rest for a moment, for with freedom comes responsibilities, and I dare not linger, for my long walk is not ended."[352]

[352] *Supra* note 1.

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