International Journal of Law, Humanities & Social Science ©
Volume 2, Issue 5 (August, 2018), P.P. 53-67
ISSN (ONLINE):2521-0793; ISSN (PRINT):2521-0785

MAKING A CASE FOR THE CONVERGENCE OF THE TRADE AND INVESTMENT REGIMES: ADVANCING FACTORS SUPPORTING THE PARADIGM SHIFT

Abubakar Isa Umar, [1]

[1](LL.M, MCIArb (Lond), Ph.D,University of Portsmouth)

Abstract: *Elementarily, at least within the business environment, any discussions regarding an economic activity posit international trade and investment to be connected. Even to the discerning economist, businessman or policy maker, transfer of goods from one point to the other, provisions of services and direct investment ought to, rationally, be covered in one and the same agreement. However, this has not been possible under international law despite evident historical reasons approving such. International law manages trade and investment independently of each other. The separation of trade and investment has both historical and economic undertones that eventually led to the development of bifurcation in the legal regimes that regulate them. Though some commentators argued that the objectives of the two regimes are different, reality dictates otherwise, as both are seen to be ultimately deeply concerned with efficiency and the liberalization of economic activities; as such the investor and/or trader are not oblivious of the protections provided by the regimes of international trade and international investment law. So should the chicken come home to roost? For example, the principle of non-discrimination is at the heart of international economic law and is present in both regimes but has, at the same time, been interpreted and applied incoherently and inconsistently in both, significantly more in investment law than in trade law. As such, this article introduces varying justifications for the convergence of the two important regimes of international economic law. The main idea is to see whether these factors can aid in the convergence thesis advocated. The conclusion reached is that these convergence factors provide enough grounds and justifications for the future convergence of the regimes of trade and investment.*

Key Words: Trade, Investment, Paradigm Shift

Research Area: Social Science

Paper Type: Research Paper

1. INTRODUCTION

In any study that involves comparing two legal regimes with a view to developing a coherent interpretation for both of them, the fundamental thing will first be any lessons that could be learned by one regime from the other in an attempt to answer similar questions. Developing a common thread that will bring a coherent interpretation for both will then follow this. The regimes of trade and investment are fundamental pillars of international economic law that shared a common origin though they have sadly since parted ways due to the fragmentation occurring in the larger field of international law. It is acknowledged that despite their common origin and other fundamental similarities, important differences due exist between these regimes. However, the changing terrain of investment treaty arbitration and the successes and failures of the World Trade Organisation (WTO) necessarily point to the increasing need for convergence of the two regimes. This article primarily set out to briefly advance the argument for the increasing need for the convergence of the regimes of

trade and investment law so as to do away with the negative effects of the present divergence of the otherwise twin pillars of international economic law.

The article accomplishes the above under five headings. In all the headings, the central theme is about making a case for convergence of trade and investment by providing justifications for doing so, namely, one, justification based on the need of sustainable development interpretation, two, justification based on interpretive discrepancies, three, justification based on shared history and commonality of legal terrain, four justification based on movement between actors, and five, justification based on jurisdictional overlap and lack of legal reasoning in arbitral awards.

2. JUSTIFICATION BASED ON NEED FOR SUSTAINABLE DEVELOPMENT INTERPRETATION, ARTICLE 31(3)(C) VIENNA CONVENTION TO THE RESCUE

While it is acknowledged that there are several convergence bases for the WTO agreements and the international investment law regime, the rules against protectionism and discrimination ensuring equal treatment of foreign and domestic products remain the major converging points of the regimes of international trade and investment arbitration. It points to the fundamental philosophy and importance of the success of the objectives of both the WTO and the investment regime and convert these into genres of supporting equal conditions of competition and opportunities.[1] Non-discrimination has come out as a distinct feature of treaty based international economic law generally, employed to deal with inequalities in the realm of social and economic development. [2] The principle of non-discrimination is found in all the fields of international economic law from investment protection generally to the protection of intellectual property rights to liberalization of trade in goods and services. Though the tests embodied in the non-discrimination obligations in trade differ from that in investment, both regimes clearly have rules that regulate measures that differentiate directly – *de jure* and also prohibit indirect – *de facto* discriminatory measures. Although they apply different standards and even interpret same or different standards differently, the rationale underlying non-discrimination claims under trade and investment are very similar.[3] The most common standards embodying the non-discrimination principle in trade and investment are the national treatment (NT) and the most-favoured-nation (MFN) treatment. A good number of BITs also contain the Fair and Equitable Treatment (FET) standard, a clause that also explicitly prohibits discrimination; in fact non-discrimination is one of the major elements of the FET.[4] The non-discrimination principle maintains its superiority over all the standards because of the way it permeates these and other substantive standards of treatment in both trade and investment.

The economic rationale binding the trade and investment regimes together uses the non-discrimination principle to protect any foreign market actor accessing the domestic

[1] Anselm Kamperman Sanders, *The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property,* (Edward Elgar Publishing, 2014) 12.
[2] T. Cottier and M. Oesch, *International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland* (Berne/London: Stamfli Publishers/Cameron May, 2005), 346-381.
[3] Nicolas F. Diebold, 'Standards of Non-Discrimination in International Economic Law', International and Comparative Law Quarterly, 832.
[4] Patrick Dumberry, *The Fair and Equitable Treatment Standard, A Guide to NAFTA Case Law on Article 1105,* (Wolters Kluwer 2013) 209, Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment,* (Kluwer 2009) 250, 288-289.

market by ensuring the foreign actor enjoys equal, competitive limitations when compared to similar domestic actors.[5] For all these, there seem to be no clear reasons for the application and/or interpretation of different protection standards to regulate these regimes of international economic law.[6]

However, though various international tribunals have applied the non-discrimination obligations, the inconsistencies in the interpretation of the standards mirroring the principle have left parties feeling uncertain as to the consequences and implication of the application of the non-discrimination obligation.[7] This may be as a result of the fact that no clear and agreed tool exists for the interpretation. In the next sub-head, the article will address, briefly, the features and application of the principle of non-discrimination in the treaty-based standards. Though intermittent references will be made to all the relevant standards, the sub-head will restrict the analysis to the standard of national treatment (NT) only, which remains the main domain of non-discrimination in investment treaty arbitration.

Since the main aim of both trade and investment law is economic growth, it will serve both trade and investment arbitral tribunals well to make the issues of sustainable development, otherwise sustainable investment and trade to be the main focus in their interpretation of the non-discrimination principle as depicted in the standards of national treatment, fair and equitable treatment and most-favoured nation treatment. This position is achievable in the sense that sustainable development concerns remain the focus and interest of both States and investors in the areas of trade and investment. This can be done in a number of ways.

First, States concluding any international investment agreements – IIAs need to have sustainable development in focus, a process that has already commenced in the new generation IIAs as in the recent UNCTAD Reports and will increasingly be the trend in the years to come in light of the UN 2030 Agenda on Sustainable Development Goals (SDGs) as a follow-up to the Millennium Development Goals (MDGs) 2015.[8] This will then ensure that States act mainly in public interest and also sees to it that investors operate within certain guiding principles that ensure that sustainability remain the watchword. Such IIAs will then definitely include relevant investment rules that will assist private investors to have a direct line access to arbitration without the necessity of going through any dispute settlement mechanisms set out in the relevant IIA.

Secondly, host States negotiating future IIAs have better latitude to redesign their treaty outlook so as to take care of sustainable development concerns in the negotiation and design processes. Host States will do well to accommodate such areas of sustainable development goals as the environment, human rights and social development that they have already committed themselves to under various enabling international instruments.

The failure of the multilateralisation of investment at the Havana conference should not be the last word towards harmony between the two historically linked but currently contending regimes of international economic law. Presently, new treaties are being

[5] This rationale could also be seen as the egalitarian or legal egalitarianism rationale.
[6] Nicolas Diebold (n3).
[7] Herein lies the essence of the Austinian Philosophy of legal positivism, showing law as it is and not as it ought to be, thereby subscribing to the notion of legal predictability.
[8] See generally, *Transforming our World: The 2030 Agenda for Sustainable development*, UNGA A/Res/70/1.

negotiated and designed with attention being focused mainly on the sustainable development goals they set out to achieve. These new treaties will, of course, offer investment tribunals tools of interpretation that are no different from what they are used to but are streamlined to ensure coherence, consistency and harmony of interpretation of the non-discrimination standard. This type of interpretation will only be possible because of the sustainable development objectives contained in the newly negotiated and designed treaties. This seems to have already started with the Morocco-Nigeria BIT[9] signed recently.

Further to the provisions of Article 31(3)(c), it is trite that judges, while interpreting any legal provisions can rely on or make reference to other existing rules as long as such are relevant. Here, it is submitted that sustainable development is aptly suited to serve as a useful interpretative tool, especially where it is already part of the treaty being interpreted either as a preamble or present as a substantive part of the treaty. It has the hermeneutical function to be effective both as a customary principle and as a conventional rule. Its functionality and flexibility as a notion affords the arbitrator a high degree of freedom on the way to apply it based on the choices that need to be made. Apart from the natural functionality and applicability of sustainable development as an interpretative tool, the concept is very much applicable outside conventional reference. This is so because Article 31(3)(c) clearly established that 'any relevant rules of international law applicable in the relations between the parties' must be taken into account in the interpretative process. This means that either as a principle of customary international law or as an extraneous conventional rule, the concept of sustainable development is applicable in treaty interpretation in as much as it is relevant for such an interpretation and is also applicable in the relations between the parties. In practice, this has however remained unclear, not straightforward and sometimes even problematic.

So far, the above types of treaties have been taking root for some time. The prototype of the international sustainable development centre seems to have influenced the negotiation and design of the Norwegian BIT, the US 2004 models and the Netherlands draft model BIT. The most recent and outlandish has been the Nigeria and Morocco BIT referred to earlier. Its contents are far-reaching and extensive especially as sustainability of investment is concerned. These newly negotiated BITs, apart from incorporating sustainable development issues, also produce a more balanced investment treaty taking care of the investors through the protection of their investment and the host State through the recognition of their sovereignty in providing the regulatory framework for such investments to succeed. This represents a far cry from current BITs that States argued are imbalanced since their interpretation seems to give investment tribunals the necessary impetus to be more concerned about investment protection rather than host State development imperatives.

Though existing IIAs must be arbitrated based on their present content and context, however, it is hereby submitted that arbitral tribunals still have the discretion to interpret in a sustainable development friendly way thereby ensuring the sustainability of the investment under consideration. The arena is not free from such cases that have rendered this postulation not only hypothetical but also real. The *Methanex* tribunal decision is relevant here.

Apart from the call for arbitral tribunals' to interpret existing IIAs in a sustainable development friendly way, one cannot fail to notice the background provided by soft law instruments in this regard. A lot of these soft law instruments have been at the forefront of

[9] Morocco-Nigeria BIT (December 2016).

providing the foundation for the recognition of environmental, hence sustainable development concerns by drawing attention to their importance. Agenda 21 is one of such soft laws, though despite it and several others, lots of room exists for improvement to see that current investment regulatory framework did promote sustainability. Now an informed analysis on how the Vienna Convention can be applied is apt here.

The way IIAs are drafted, especially IIAs drafted in the form of BITs containing extensive and unclear terms, necessitates the need for their interpretation with a view to getting to the root of what their meaning entails. It is argued that the more imprecise the contents of a particular treaty, the more applicable or need for the application of the Vienna rules because of its inherent provisions to allow the incorporation of external provisions in order to aid interpretive procedure.[10]

It is trite that in any treaty, the logical starting point for any interpretative process has always been the meaning or meanings that can be attached to the terms of the treaty as words hardly possess only a singular meaning.[11] Agreed, interpretation is not amendment and as such the import of the Vienna rules is to simply find out what the ordinary meaning of the terms of the treaty in question that will most closely result in the parties' intention is. It is following from this that the Vienna rules is further employed by an interpreter in resolving conflicts of norms in interpretation when he or she has to choose between two or more contending interpretations.[12] It is not only in resolving contending interpretations that the rules are applied but following the argument that IIAs contain clauses that have multiple meanings; it is now accepted into reckoning that they possess inherent ability to harmonize investment/trade protection and issues of sustainable development concerns.[13] For example, the discussion of the interpretation of the non-discrimination standard of FET, the terms 'fair' and 'equitable' are so fluid and unclear when interpreted literally. So Article 31 VCLT views interpretation as a 'single combined operation' rather than simply an exercise wherein other means of interpretation will necessarily be employed in case the literal rule fails to provide a clear meaning.[14]

In assembling the elements of Article 31 VCLT, it is agreed that the object and purpose of a treaty and the context in which the treaty's provisions appear, are most relevant in the interpretation of the treaty. They are fundamental in the reconciliation of investment/trade protection and sustainable development. However, the argument of employing the purpose of a treaty in its interpretation has not been without criticisms. Since IIAs are fundamentally about investment protection, some will argue that their object and purpose forbids rather than supports any deliberations of sustainable development concerns.

[10] Generally, see Katharina Berner, 'Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn', in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified,* Stefen Hindelang and Markus Krajewski (eds), (OUP 2016) 183.

[11] Richard Gardiner, *Treaty Interpretation,* Oxford University Press, (2008) 164, see also G. Schwarzenberger, 'Myths and Realities of Treaty Interpretation, Articles 27-29 of the Vienna Draft Convention on the Law of Treaties' Va J Intl L 13.

[12] Though some arguments exists as to the desirability or workability of applying the Vienna rules in complex conflicts of norms situations. This will provide a ground for some recommendations in the article; it is outside the realm of this article to further the discussion here. Suffice it to state here that the rules do not provide a gateway for States from the principle of *pacta sunt servanda.*

[13] Katharina Berner (n 10) 185.

[14] See generally on this point, Panos Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration, Normative Shadows in Plato's Case,* (Brill Nijhoff 2015), Richard Gardner (n 11).

However, this criticism seems to miss the point, since the object and purpose of a treaty are not necessarily always one-dimensional and if they are, that will not be enough to restrain the tribunal from applying sustainable development concerns in its interpretation.[15] Suffice it to say, as explained earlier, a look at a treaty's object and purpose necessarily entails taking the treaty as a whole from its preamble to the entire substantive provisions. This emphasis becomes necessary here because of the erroneous argument that it is the preamble that represents the entire content of the treaty and that the preamble usually mentions only investment protection. So both the preamble and substantive provisions are important in treaty interpretation; for example, where a particular treaty refers to 'economic development' in its preamble, the tribunal can interpret such broadly to include 'long term sustainable development' rather than a narrow interpretation that limits it to short term economic development.[16] So a good reading of both the preamble and substantive provisions of a treaty and any other attachment therein will show that the treaty aims at more than investment protection. And assuming that a treaty's aim is only for investment protection that is not to say that, as argued above, it cannot be interpreted by invoking sustainable development. That interpretation would be narrowing the treaty's object and purpose, which is not what Article 31(3)(c) VCLT envisaged.[17]

Article 31(3)(c) VCLT as a principle of systemic integration, is clearly suitable for not only integrating sustainable development into investment agreements, but also because of its broad application of the context in which the treaty occurs, it can safely be used to interpret any provisions, especially the non-discrimination provisions as contained in the relative standards. This is so because the reference to 'other rules' under the article is beyond those rules applicable to the subject matter of the treaty but also includes all those rules that are relevant and will assist in the understanding of the relative terms of the treaty.[18] So for example in a BIT, the arbitral tribunal, further to the provisions of Article 31(3)(c), may make reference to the provisions of another treaty binding between the parties before it or to the rules of customary international law in its findings.[19] There is no doubt that other rules of international law applicable necessarily relate to the presence or appearance of the concept of sustainable development.[20]

[15] Katharina Berner (n 10) 185.

[16] Diane Desierto, 'Development as an International Right: Investment in the New Trade-Based IIAs' (2011) 3 Trade L & Dev 296, 320.

[17] For example in a situation where there is a conflict between a Host State and a foreign investor regarding the Host State's action that was purely informed by sustainable development concerns, and there was ambiguity as to whether the relevant investment protection standard prohibits such action, here, a narrow object and purpose interpretation will portray the Host State's action is not prohibited as the protection standard merely set out to protect against measures directly connected to the 'narrow' object and purpose – at least this was the unconventional reasoning in *Lemire* v *Ukraine*, ICSID Case No ARNB/06/18, Decision on Jurisdiction and Liability (14 January 2010), Katharina Berner (n10) 186.

[18] See Gardner (n 11) and Merkouris (n 14) for an analysis of other rules and the parties they apply to – State parties to the treaty under consideration.

[19] Article 31(3)(c) VCLT is said to have crystallised into a rule of customary international law though customary international rules application to interpretation in multilateral treaty using Article 31(3)(c) VCLT is not as easy to apply as under the BITs.

[20] The tribunal here may refer to or take account of a range of sustainable development and environmental agreements like the 1992 Rio Convention on Biological Diversity, the 1985 Vienna Convention for the Protection of the Ozone Layer, or even Human Rights treaties.

3. JUSTIFICATION BASED ON INTERPRETIVE DISCREPANCIES

It is not an overstatement to say that the non-discrimination principle featured in all the standards referred to above. International investment agreements (IIAs), mainly the bilateral investment treaties (BITs), protect and ensure the liberalization of investment flow through some fundamental guarantees against discrimination and any unfair conduct by host States.

The principle of non-discrimination is included in most modern IIAs using the nationality of the investor (covered by such standards as the national treatment and the most-favoured-nation treatment standards), and such absolute standards like the principle of 'fair and equitable treatment', and guarantees against expropriation.[21] Though these standards depict the availability of the principle of non-discrimination in the two major fields of international economic law, both the definition of the principle and its interpretation/application using those standards remain problematic. Since these investment norms are seen as instruments of 'judicial integration', the responsibility of the arbitral tribunal in the interpretation and application of the standards is of the utmost importance.[22] Arbitral tribunals, the WTO Panels and Appellate Bodies (ABs) have all given different interpretations to the elements of 'likeness', 'less favourable treatment' and 'regulatory purpose' leading to a varying understanding of the non-discrimination principle in international economic law.[23] Unfortunately, these varying and inconsistent interpretations occur despite the similarities in the fundamental economic philosophy in both trade and investment regimes.

In order to assess the effect of these varying and inconsistent interpretations, raw literature abounds from the complex network of over 3,000 IIAs from which there were more than 380 investor-State disputes that have resulted in an interesting body of arbitral jurisprudence of over 180 decisions on both procedural and substantive aspects of international investment law.[24] From current arbitral jurisprudence and decisions, this article argues that there still exists a vast gap of inconsistency in the way in which arbitral tribunals interpret these standards of treatment, especially the national treatment standard, even in the same IIA, hence the need to look elsewhere for harmony in interpretation beyond the insistence of arbitral tribunals on investment protection only to the detriment of the Host State's other more fundamental concerns like sustainable development. [25] Ahead of showing how these tribunals, in the interpretation of investment agreements can utilize the concept of sustainable development, a synthesis of some cases where the inconsistencies were much pronounced may serve as a necessary foundation.

Due to the nature of the national treatment provision as an ambiguous, relative right of the foreign investor, the argument centred on the extent the Host States are supposed to go in the protection of the foreign investors or their investment or the relative level of protection to be given.[26] Cumulatively seen, the interpretation of these arbitral decisions depends on the

[21] See generally Federico Ortino, *Non-Discrimination Treatment in Investment Disputes* in *Human Rights in International Investment Law and Arbitration*, (OUP 2009), 344.
[22] Federico Ortino, *Basic Legal Instruments for the Liberation of Trade* (2004) 24-27.
[23] See Nicolas Diebold, (n 3).
[24] See UNCTAD, www.unctad.org
[25] See Federico Ortino, (n 21), 345 on this particular point.
[26] See Jose E. Alvarez, 'The Emerging Foreign Direct Investment Regime', (2005) 99 Proceedings of the Annual Meeting (American Society of International Law) 95.

examination of the facts and circumstances of each case.[27] Effectively, this leaves lots of discretion for independent arbitrators interpreting the non-discrimination obligation in national treatment and opens a wide door to inconsistency and incoherence.

International investment law is still considered to be in its developmental stage. The cases available on the interpretation of the principle of non-discrimination as contained in the national treatment standard in IIAs point to high levels of inconsistency in the interpretation of the meaning and function of the notion underlying the utility of this standard. No doubt, investment tribunals have differed in their comprehension of various aspects of the standard, from the nature of the relationship between parties to be compared, the relevance of discriminatory intent and the discriminatory measure and the policy objective establishing the different treatment under consideration. In reality, the tribunals failed in all the three parameters usually applied in trying to understand these standards, necessarily paving the way for the need for a fresh look at interpretation here.

The construction of the national treatment standard in investment treaties left it unlocked for regulatory measures to be evaluated at either the likeness or the justification stage. First, on the basis of likeness, two different arbitral tribunals seem to have taken diametrically opposing views. While the tribunal in *Occidental Exploration* v. *Ecuador*[28] took a much wider reading of the concept of likeness by comparing a foreign oil exporter with a domestic flower exporter, the tribunal in *Methanex Corporation* v. *USA*[29] took a much narrower, stricter reading of likeness by comparing only identical investors. In *Methanex*, the UNCITRAL tribunal, in its attempt to understand 'like circumstances', was quite reluctant to employ the concept of direct competition relative to the companies under consideration under the guise that the NAFTA text did recognise or employ the phrase 'direct competition'.[30] On the other hand, the ICSID tribunal in *Occidental* expansively applied 'like circumstances' to all domestic producers irrespective of the line of commercial activity they are engaged in. The *Occidental* arbitral decision and its reasoning is supported to the extent that the non-discrimination principle under international investment law, at least historically, has never been about competing business.

The *Occidental* and *Methanex* tribunals have been both criticised and praised. Criticised for their failure to add some economic rigor to their analysis of the test for likeness just like the WTO did in its assessment of National Treatment; which also necessitates a look at the likeness comparator. What these tribunals did was simply to limit the tests to be based on equality of competitive opportunities. On the other hand, some others, for judiciously integrating a shared standard of competing products under the GATT into a spread out, celebrated the tribunals.

The ICSID tribunal in *Loewen* v. *United States*[31] argued in a way that no comparator in like circumstances exists that could be used to determine the violation of the principle of non-discrimination. On the other hand, the UNCITRAL tribunal in *Sergei Paushok v. The Government of Mongolia*[32] argued that any test for discrimination to determine likeness will

[27] *S.D. Myers Inc v. Canada*, UNCITRAL (21 Oct 2002).
[28] *Occidental* v. *Ecuador*, ICSID Case No. ARB/06/11, Award (1 July 2004).
[29] UNCITRAL (3 August 2005).
[30] *Methanex*, para.33.
[31] ICSID Case No. ARB(AF)/98/3, Award (26 June 2003).
[32] UNCITRAL, Award (28 April 2011).

necessarily involve an assessment of the sector or sectors the investors operate, which in this case happened to be the Mongolian gold sector. It is noted here that the tribunal seems to be borrowing from the WTO notion of sector that is something squarely connected to competitive and substitutable products as developed under the jurisprudence of the trade regime.

In the interpretation of the MFN standard, no less confusion exists in the way of arbitral tribunals dealing with interpretation. In *MTD v Chile*[33], the ICSID tribunal for example applied the MFN in a kind of a bizarre way by using it to bring an obligation to award permits to the investor, itself construed as an extension of the FET standard found in Chile's BIT with Denmark. Another ICSID tribunal in the case of *Maffezini* v. *Spain*[34], in quite an expansive and inclusionary reading, ordered that the broad definition of the MFN standard as contained in the Argentina-Spain BIT, apart from substantive rights, also involved dispute settlement procedures that allow foreign investors to resort to investor-State dispute settlement that has not been expressly provided by the relevant treaty in consideration but which had, however, been granted in another IIA to which the host State is a party. The *Siemens v Argentina*[35] tribunal followed the line of thinking of the *Maffezini* tribunal. The *Siemens v Argentina* tribunal clearly allowed the claimants to apply the MFN standard in the relevant treaty to invoke the investor-State dispute settlement mechanism in another instrument for the simple reason that there was no valid reason not to do so. However, the ICSID tribunal in *Plasma Consortium v Bulgaria*[36], in a strict, narrow reading of the MFN provision, ruled that whenever the IIA is silent on the extent of the MFN standard in respect to the coverage of procedural matters contained in other treaties, then the tribunals should not regard such an extension to be applicable. This is in stark contrast to the decision of the tribunal in *Maffezini*. It is easy to appreciate the tension in the two contrasting decisions. The expansive, inclusionary reading of *Maffezini* and the narrow, strict reading of *Plasma* clearly represent the argument of this article of the inconsistency in arbitral decision making which may variously appear to support the interests of investors or States depending on the composition of a given tribunal. Although the doctrine of *jurisprudence constanté* is fast developing, no doctrine of *stare decisis* exists in the jurisprudence of investment arbitration, as such investment tribunals are in no way compelled to follow the decisions/reasoning of previous tribunals thereby setting a de facto precedent in contradistinction to applying the Vienna rules. They are absolutely free to make their own decisions, applying legal reasoning as they deem fit based on the arguments canvassed before them in relation to the applicable treaty.

From the above cases, it need not be said that investment arbitration lacks the necessary coherence and consistency to ensure the legitimate expectation of both States and investors. The system is flawed with these inconsistent decisions, incoherence and as such lack of predictability in arbitral decision making. The argument of this article in answering the question, '*how can Sustainable Development help in reducing the inconsistent interpretations in these fields of international economic law?'* is that both investment tribunals and WTO Panels and ABs would be better suited with a framework that will ensure that their decisions are predictable based on the enabling framework they work with, that

[33] ICSID Case No. ARB/01/7, Award (25 May 2004).
[34] ICSID Case No. ARB/97/7 (27 Jan 2000).
[35] ICSID Case No. ARB/02/8 (Feb 2008).
[36] ICSID Case No. ARB/03/24 (8 Feb 2005).

their decisions are coherent, safeguarding the legitimate expectations of the parties and as such are probable. If these are to be achieved, sustainable development seems to be the best possible alternative. As noted in 1.1 (a) above, arbitral tribunals can use sustainability issues as their framework for the interpretation of these applicable non-discrimination standards regardless of the type of BIT under consideration.

4. JUSTIFICATION BASED ON LEGAL REASONING IN ARBITRAL AWARDS

Arbitrators rendering an award run a herculean task trying to please the parties before them, and at the same time justify their decisions on the balance. This sub-head deals with arbitrators' reasoning and what informed their awards. A lot of factors seem to be responsible for the attacks against arbitrators. Host States remain the major critics of these arbitral tribunals. These States argued that tribunals are biased against the State in the majority of awards, effectively stifling their regulator capacity, which in turn usually leads to a regulatory chill.[37] The host States further accused the arbitrators of rendering awards that mainly have the interest of the investors not the host States at heart. This is said to do a lot with the background of the arbitrators and their relationship with the disputing parties. Here we are not talking of arbitrators' bias due to corruption, but their training, educational qualification, jurisdiction, culture and even origins are all at play, and the effects of all these have led to contending arguments on the quality of their decisions.

There is the argument that arbitrators are mostly from the West; educated in the legal tradition there, acquired their skills there and mostly defend investors from the West. Though they are required to render awards based on the principle of utmost good faith, this has not always been the case. Some awards seem to be delivered mainly with the investors not the host States in mind.[38] This is necessary as the investors, at whose pleasure they serve, mainly retain their services.[39] Their argument before investment tribunals is towards a favourable interpretation of investment treaty standards so as to protect investment, stifle regulation and ensure hassle free repatriation of profits. So as investors become satisfied with the entire system of investment arbitration, more claims surely showed up and more arbitral panels established.[40]

---

[37] Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypothesis of Bias in Investment Treaty Arbitration', (2016) 53 Osgoode Hall Law Journal 540.

[38] Filip De Ly et al, 'Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?', (2005) 6 J. World Investment & Trade 59 at 69, Ibironke T Odumosu, 'The Antinomies of the (Continued) Relevance of ICSID to the Third World', (2007) 8:2 San Diego Int'I LJ 345, Olivia Chung, 'The Lopsided International Law Regime and Its Effect on the Future of Investor-State Arbitration' (2007) 47:4 Va J Int'I L 953, Ercus Stewart, 'Arbitration in the Developing World' (Paper delivered at the Cortina 2008 CPE Legal Conference, 7 January 2008) available online: <cpeconferences.com/wp-content/uploads/2013/01/Paper-Stewart-Cortina08.pdf> at 3, 8, Gus Van Harten, 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypothesis of Bias in Investment Treaty Arbitration', (2016) 53 Osgoode Hall Law Journal 540.

[39] It is recognised that recent empirical studies have shown that in the majority ISDS, host States have won the case against foreign investors, balancing the above argument against arbitrators' Western outlook and bias, see – Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration'*:* < http://papers.ssrn.com/so13/papers.cfm?abstract id=1406714>, see also Rachel L. Wellhausen, 'Recent Trend in Investor-State Dispute Settlement', (2016) 7, Journal of International Dispute Settlement 128-129.

[40] See M. Sornarajah, 'Power and Justice: Third World Resistance in International Law', (2006) 10 (19) Sing Y B Int'l L 32, M. Sornarajah, 'The Climate of International Commercial Arbitration', (1991) 8 (47) J Int'l Arb

Secondly, since the majority of arbitrators are from the west and hence whenever they sit with others especially from the developing world, they tend to dominate the landscape by way of their intimidating presence and polished mannerisms against their less exposed, less educated counterparts.[41] Their outlook is western, their drive is the huge professional fees they charge, which makes them less willing to see the necessity of good faith only interpretation of treaties. The cultural background of these arbitrators also greatly involved their practice, necessitating tension with arbitrators from developing countries with a different training, skills and mindset. All things considered, foreign investors are not oblivious of the above attributes of some of the arbitrators and usually make their choice selectively, careful to drive the maximum benefit.

However, counter arguments do exist to all of the above submissions. Reacting to the claim of bias against arbitrators' background by developing States, Jan Paulsson posits that though historical anxiety exists about such arbitrators' bias in investment-related arbitration, "the dice are loaded no longer"[42], he argued that it is high time developing States come to terms with "international arbitration as it is: a neutral means for the resolution of conflicts… to be mastered rather than complained about".[43] Susan Franck, who undertook numerous empirical researches on this subject, has shown that in reality, in the majority of Investor-State Dispute Settlement (ISDS), host States have won the case against them.[44] She argued that governments 'can and did win investment disputes', with governments more likely to succeed in arbitration (57.7%) than foreign investors (38.5%), with the foreign investors only getting a fraction (about US$10 million) as against what their typical claims (about US$343) are.[45] Her conclusive argument was that no reliable evidence exists to show that "the outcome of investment treaty arbitration was not reliably associated with the development status of the respondent State, the development status of the presiding arbitrator, or some interaction between those two variables".[46]

5. JUSTIFICATION BASED ON SHARED HISTORY/COMMONALITY OF LEGAL TERRAIN: CONVERGENCE FACTORS

Commonality of the legal terrain of both trade and investment is quite true despite the fact that there is the existing view that the separation of the two regimes seems to be airtight. From the trade angle, it is evident that foreign investment in the services sector is regulated extensively within the WTO against the vital role of that sector as a proportion of global foreign direct investment (FDI) flows. The regime incorporate a number of shared micro norms notably their restrictions against State discrimination in the form of both NT and MFN. Both disciplines essentially guarantee competitive opportunity between foreign and domestic goods, services and investors. States parties are now paying attention to managing

47, for an incisive analysis of the arguments regarding arbitrators' influence and biases in relation to who they represent and other germane issues.

[41] Some writers see this as a kind of arbitral terrorism or arbitral mafiosism. See generally Malcolm Langford et al, 'The Revolving Door in International Investment Arbitration', (2017) 20 Journal of International Economic Law 301-331.

[42] Jan Paulsson, 'Third World Participation in International Investment Arbitration' (1987) 2 (21) ICSID Rev. Foreign Investment L J 19.

[43] Jan Paulson, 34.

[44] Susan Franck, 'Predicting Outcomes in Investment Treaty Arbitration' (2015) 65 Duke Law Journal.

[45] Susan D. Franck, 'Empirically Evaluating Claims About Investment Treaty Arbitration' (2007) 86 N C L Rev 31, Susan Franck, 'Development and Outcomes of Investment Treaty Arbitration' (2009) 50 (2) Harvard International Law Journal 447.

[46] Susan Franck, 'Development Outcomes', 487.

potential conflicts between investment treaty norms and WTO law and have even moved on to review their commitments by inserting flexibilities for State regulation vis-à-vis foreign investors and their investment. Interestingly, these States do this by drawing on the WTO model to guide these reform efforts. In a lot of FTAs, full WTO exceptions are simply incorporated into investment chapters by reference, for example in the Australia-ASEAN-New Zealand Free Trade Agreement.[47]

6. JUSTIFICATION BASED ON JURISDICTIONAL OVERLAP

A measure can fall within the jurisdiction of both regimes and can even be adjudicated simultaneously. This entwined relationship between the two regimes can be seen in the *Softwood lumber* dispute between the US and Canada that triggered both WTO and NAFTA claims. The convergence between the two systems is further evident in the complex *'Soft drinks'* dispute between Mexico and the US that triggered NT claims both by the US as a State party in the WTO and also by a scope of US investors under NAFTA Chapter 11. It should be noted that the fact that these proceedings have been completed does not stop the likelihood of overlapping litigation or parallel proceedings.

Further to the above, the very prospect of the above parallel proceedings is driven by economic logic and reality, especially the manner in which cross-border trade and foreign investment is increasingly inter-dependent.

7. JUSTIFICATION BASED ON MOVEMENT OF ACTORS

One area that deserves attention considering the possibility of the convergence of the trade and investment regime is the movement of actors across the two fields of international economic law. It is an area that merits deep introspection especially by the critics to the idea of systematic convergence as is advocated in this article.

The multilateral nature of international trade law as depicted in the WTO show the Panels and Appellate Board having a sophisticated dispute settlement mechanism usually populated by professionals experienced in trade disputes. It has been observed that these members at various times in their professional calling have straddled to the other side of the divide to offer their professional services based on their calling. Members of the Appellate Board have had occasions to participate as arbitrators in investment disputes – a case in point is that of the late Justice Florentino Feliciano whose professional calling saw him not only chairing the Appellate Board of the WTO but also serving as a member of the Panel of Arbitrators and Panel of Conciliators at the ICSID, member of the Panel of Arbitrators at the International Centre of Commerce (ICC), rendering various decisions such as the *Amco Asia Corporation* v. *Republic of Indonesia*[48], *Southern Bluefin Tuna Cases*[49] etc. Other arbitrators have also had occasions to participate in WTO Panels and AB decision-making processes. In both instances, it is argued that the two regimes relied on the relative knowledge, experience, expertise and pedigree of such experts, hence the need for their appointment to serve. Now the issue here is, why have confidence in the experts to adjudicate in disputes while denying the system that appoints them the necessary need to converge? It is submitted that having confidence in the system should be relative to having confidence in the professionals that

[47] AANZFTA (2009).
[48] ICSID Case No.ARB/81/1, Annulment Proceedings 1985-1986; Award Rendered 16 May 1986 (annulling prior ICSID decision).
[49] Australia/New Zealand v. Japan (2000).

serve the system. It is the system that develops them and gave them the status and enabling environment to succeed. It seems hypocritical for the systems to have confidence in their appointees but not in themselves. It is to the benefit of the systems that the two regimes of international economic law converge for the better. Arbitrators and trade adjudicators can share the platform together, the experiences acquired will serve each other and the lessons gained will go a long way towards stabilising the system, ensuring consistency, coherence and predictability. It is the shared history, commonality in legal terrain, jurisdictional overlap, interdependence between legal regimes of trade and investment in their cross-border relations and cross-fertilisation between trade and investment that give these actors the wherewithal to be able to navigate the contours of the two regimes.

Necessarily, the arguments they proffer in their decision-making processes definitely always take care of the background of the dispute, any constituent jurisprudential underpinning, relevant documents and the submissions of the parties.

The multilateral development of the trade law regime has a lot to offer the investment arbitration regime in terms of its jurisprudence, legal nature, exceptions and most importantly the dispute settlement mechanism – DSU of the WTO. It is evident no one is calling for a hardcore convergence or collapse of one regime into the other sweepingly, rather this is advocating a gradual, harmonious, sustainable development friendly interpretation of the investment/trade non-discrimination protection standards that are at the core of the substantive provisions of the two regimes. Achieving this is a sure way towards relative convergence.

8. CONCLUSION

As argued under the preceding heads, tribunals, in the interpretation of treaties and especially in the interpretation of the non-discrimination standards, have been at best inconsistent, a situation more prevalent in the investment treaty arbitration. This is an area that may call for learning from the trade jurisprudence. The WTO, from the its jurisprudence and Panels and AB decisions, despite the system's own manifest problems, showed a more advanced and settled jurisprudence with its dispute settlement mechanism and a look at some of its decisions will show how sustainable development was applied by the WTO and how Article 31(3)(c) was employed in the interpretative processes, clearly sheathing the sword of criticism and providing potential learning curves for the investment regime. Hence the WTO can serve as a solution to the problems of the discrepancies and incoherence that are visible in the interpretive process in the investment field. Now the case for sustainable development can then emanate from the WTO, which has already found sustainable development to be suitable and applicable. Though there is the argument that sustainable development is a pseudo *lex specialis* that is rooted in environmental law[50] and as such unsuitable for application elsewhere, support from various judicial authorities and recent State action in the conclusion of modern treaties may have laid that to rest. The root and relevance of sustainable development in environmental disputes can be extrapolated to the entire fields of trade and investment. Sustainable development can serve as a tool for convergence rather than as a mechanism for resolving environmental related disputes only. Convergence clearly has a multiplier effect because if the two regimes, trade and investment are to converge, that will

[50] Dire Tladi, *Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments* (PULP 2007) for a comprehensive analysis of sustainable development as a *lex specialis* that has its root first and foremost in environmental law before its advancement to other areas, and other areas of legal practice.

definitely reduce the manifest inconsistencies, incoherence and contradictory findings especially prevalent in investment treaty arbitration.

REFERENCES

Alvarez J. E., (2005), 'The Emerging Foreign Direct Investment Regime', Proceedings of the Annual Meeting, American Society of International Law.

Berner K., (2016), 'Reconciling Investment Protection and Sustainable Development: A Plea for an Interpretative U-Turn', in Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified, Stefen Hindelang and Markus Krajewski (eds), OUP

Chung O.,(2007), 'The Lopsided International Law Regime and Its Effect on the Future of Investor-State Arbitration' 47:4 Va J Int'I,

Cottier T. and Oesch M., (2005), International Trade Regulation: Law and Policy in the WTO, the European Union and Switzerland,: Stamfli Publishers.

De Ly F. et al, (2005), 'Who Wins and Who Loses in Investment Arbitration? Are Investors and Host States on a Level Playing Field?' J. World Investment & Trade

Desierto D., (2011), 'Development as an International Right: Investment in the New Trade-Based IIAs' , Trade L & Dev.

Diebold N. F., 'Standards of Non-Discrimination in International Economic Law', International and Comparative Law Quarterly

Dumberry p., (2013), The Fair and Equitable Treatment Standard, A Guide to NAFTA Case Law on Article

Franck S. D., (2007) 'Empirically Evaluating Claims About Investment Treaty Arbitration' N C L Rev

Franck S., (2009), 'Development and Outcomes of Investment Treaty Arbitration', Harvard International Law Journal.

Franck S., (2015) 'Predicting Outcomes in Investment Treaty', Duke Law Journal.

Gardiner R., (2008), Treaty Interpretation, Oxford University Press

Harten G. V., (2016), 'Arbitrator Behaviour in Asymmetrical Adjudication (Part Two): An Examination of Hypothesis of Bias in Investment Treaty Arbitration', Osgoode Hall Law Journal 540.

ICSID Case No.ARB/81/1, Annulment Proceedings 1985-1986; Award Rendered 16 May 1986).

Langford M. et al, (2017) 'The Revolving Door in International Investment Arbitration', Journal of International Economic Law.

Lemire v Ukraine, ICSID Case No ARNB/06/18, Decision on Jurisdiction and Liability (14 January 2010), Katharina Berner (n10) 186.

Newcombe N. and Paradell L., (2009) Law and Practice of Investment Treaties: Standards of Treatment, Kluwer.

Occidental v. Ecuador, ICSID Case No. ARB/06/11, Award (1 July 2004).

Odumosu I. T., (2007) 'The Antinomies of the (Continued) Relevance of ICSID to the Third World',San Diego Int'I LJ.

Ortino F., (2009), Non-Discrimination Treatment in Investment Disputes in Human Rights in International Investment Law and Arbitration, OUP.

Paulsson J., (1987), 'Third World Participation in International Investment Arbitration', ICSID Rev. Foreign Investment L J.

S.D. Myers Inc v. Canada, UNCITRAL (21 Oct 2002).

Sanders A. K., (2014), The Principle of National Treatment in International Economic Law: Trade, Investment and Intellectual Property, Edward Elgar Publishing.

Sornarajah M. (1991), 'The Climate of International Commercial Arbitration', J Int'l Arb,

Sornarajah M., (2006), 'Power and Justice: Third World Resistance in International Law', Sing Y B Int'l L.

Stewart E., (2008) 'Arbitration in the Developing World' (Paper delivered at the Cortina 2008 CPE Legal Conference.

Tladi D., (2004), Sustainable Development in International Law: An Analysis of Key Enviro-Economic Instruments (PULP 2007Federico Ortino, Basic Legal Instruments for the Liberation of Trade).

Wellhausen R. L., (2016), 'Recent Trend in Investor-State Dispute Settlement', Journal of International Dispute Settlement.