The Concept of Equality in International Trade and Investment Law: A Catalyst for Sustainable Development

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I. Introduction

In 1935, the Permanent Court of International Justice emphasised that the principle of equality may require the extension of different treatment in order ‘to attain a result which established an equilibrium between different situations’. Today, the concept of equality is a well-known aspect of the non-discrimination standard in international human rights law: a situation is discriminatory not only if ‘like situations’ are treated differently but also if different situations are treated similarly. Also current international trade rules may allow for deviation from the prohibition on nationality-based discrimination if the economic position of certain States is considered unequal. This has been realised under the form of exceptions from the non-discrimination standard in the framework of special and differential treatment. However, taking into account this aspect of non-discrimination is largely absent in international investment law. This chapter will focus on rules regarding nationality-based discrimination and argue that equality in the application of international trade and investment provisions forms a part of pursuing the goal of sustainable development. Hence, although the non-discrimination principle is regarded as essential in these fields of law, it can be necessary to derogate from this principle in order to remedy existing inequalities which prevent such sustainable development. At the outset, section II will elaborate on the link between discrimination, equality and sustainable development. Section III will address the interaction of these concepts in the international trade system.

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2 Minority Schools in Albania (1935) PCIJ Ser. A/B, No. 64, 389–90.
Finally, section IV will put forward a number of proposals towards the creation of a more ‘sustainable’ investment law.

II. The link between discrimination, equality and sustainable development

The starting point of this chapter is that sustainable development is not purely a matter of environmental law-making but is a goal which permeates all fields of international law. Moreover, the growth of specific fields of international law such as investment or human rights law, is occurring at such speed and in such a manner that overlap with other areas of law, such as international rules relating to the environment or trade, seems unavoidable. The principle of sustainable development may aid interaction between these *leges speciales*. A good example is the 1992 United Nations Framework Convention on Climate Change which regards economic development as an essential element of any climate change policy. The goal of sustainable development in this context is to reconcile economic development objectives (e.g. promoting and protecting transfer of technology via foreign investment) with environmental (e.g. the reduction of greenhouse gases) and human rights aims (e.g. remediation of structural and historical inequalities).

The sustainable development concept does not define how to restructure international law in order to balance these different objectives, but specific guidelines and principles can be found in sub-areas of international law. For example, the precautionary principle and the ‘common but differentiated responsibilities’ principle have been developed in international environmental law (e.g. via the 1992 Rio Declaration) in order to prescribe State conduct focusing on risk assessment and allowing for the consideration of the different capabilities of developing countries. However, such a balanced approach can only be successful if the guidelines and initiatives in one sub-area do not counteract those in other sub-areas. Hence, the aims of all areas of international law which aspire to promote ‘their’

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