Non-discrimination on the Basis of Nationality in International Investment Agreements (IIA's): a Latin American Tax Perspective

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1. Introduction

Non-discrimination is a vital principle in International and Global Law. Within the perspective of International Investment Agreements (IIA's)[1], it encompasses not only the ideal of justice and equality in international relations but also free, global and fair trade which deviates from unjust or prejudicial treatment among different categories of subject.

Modern treaties, especially Foreign Trade Agreements (FTA'S) and Bilateral Investment Treaties (BIT's), address the issue of non-discrimination by incorporating a wide range of protection measures. Such treaties go far beyond the inclusion of National Treatment and Most Favoured Nation Provisions, in order to solve problems of non-discrimination and related issues by means of Fair and Equitable Treatment and Minimum Standard of Treatment clauses, amongst others. Recent trends in dispute-resolution procedures within International Investment Agreements show that concerns regarding all kinds of discrimination or unfair treatments represent an important agenda of arbitration tribunals. In a globalised world, equal treatment should be one of the bases, perhaps the main one, of a global legal system.

However strong the idea of non-discrimination might be, the truth is that within IIA's, Double Tax Treaties (DTT's) address the problem as if non-discrimination were a rule rather than a principle. This premise is evident from a cursory read over Article 24 of the OECD Tax Model and all the commentaries to said provision. It is clear that this article considers the existence of discrimination, for the purposes of DTT's, only in the five accurate cases described within. Other cases of discrimination which do not match the scope of the rule appear to be unprotected, unless other rules are applicable.

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[1] The term "International Investment Agreements" (IIA's) covers an important range of International Treaties aimed at the protection of investors, investments and the formulation of rules which prevent double taxation. It covers treaties such as Bilateral Investment Treaties (BIT's), Foreign Trade Agreements (FTA's) and Double Taxation Treaties (DTT's). See: *The effect of treaties on foreign direct investment. Bilateral investment treaties, double taxation treaties, and investment flows.* Edited by Karl. P. Sauvant and Lisa E. Sachs. Oxford University Press, 2009.

The approach of DTT's to non-discrimination is – considering the problem from the general perspective of IIA's – rather disappointing. Most studies of investments and trade, including Global Administrative Law[2], focus on aiming for equality in treatment and taking a strong position towards any type of discrimination. Within IIA's, BIT's and FTA's are in general very clear with respect to this point. In the end, the purpose is to eliminate legal arbitrages and, by and large, to spread measures which assure competitiveness and fair-and-equal conditions for trade, not to mention the growing concern over consumer protection. In this context, it is paradoxical that BIT's and FTA's take far stronger positions over the problem of discrimination than those taken by DTT's. Ultimately, they are all part of the gender of IIA's and the common situation is that the negotiation of a DTT is accompanied by the negotiation of a BIT or an FTA.

This idea of a "rule" of non-discrimination, rather than a principle, is indeed very controversial, particularly in developing-world countries. History shows that some of them have not entirely adopted the general concept of equal treatment between aliens and locals, even given the existence of international agreements, and sometimes it seems that deep down these countries have the unconscious (or very conscious) idea of "no taxation without discrimination"[3]. Some Latin American countries provide for with holdings of income taxes for overseas payments that exceed 30% or even 35% of the gross payment, especially in sectors which focus on technology transfers. Inflammatory speeches by some of Latin America's governors, as well as regulations still in force which go back to the 1970's and 1980's, reinforce this idea.

Within this context, non-discrimination is, in fact, a problem and non-discrimination rules which are limited to granting reduced protection to taxpayers represent a challenge. In the following chapters, we will present an overview of the problem in Latin America from a case-law perspective, emphasising problems of Nationality.

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2 See: Daniel C. Esty. Good governance at the supranational scale: globalizing administrative law. *The Yale Law Journal* vol. 115, n. 7 (May 2006). See also, among others, Carol Harlow. Global administrative law: the quest for principles and values. *The European Journal of International Law* vol. 17, n. 1, Feb. 2006. This article can also be found in Symposium: Global Governance and Global Administrative Law in the International Legal Order. Gus Van Harten et. al. Investment treaty arbitration as a species of global administrative law. *The European Journal of International Law* vol. 17, n. 1, Feb. 2006.

3 It is very interesting to look at the historical background of International Investment Agreements. See: *International investment agreements*: key issues. United Nations Conference on Trade and Development, 2004. vol. I.

2. Non-discrimination on the basis of nationality in Latin American countries (LATAM): some cases related to Article 24.1 of Model Tax Conventions

The DTT's signed by the LATAM countries generally follow the rule included both in the OECD and UN Tax-Convention Models. Article 24 Section 1 states that "*nationals* of a contracting state shall not be subjected in the other contracting state to any taxation or any requirement connected therewith, which is other or more burdensome than the taxation and connected requirements to which nationals of that other state in the same circumstances, in particular with respect to residence, are or may be subjected". Almost all the treaties also consider this provision as applying to "persons who are not residents of one or both of the contracting states".

Derived from this rule, there are certain cases in Latin America to be considered. For example, Colombia has a provision stating that the withholding-tax system for overseas payments – which comprises a range of withholding taxes that in some cases can reach 33% of the gross payment – is only applicable to foreign, non-Colombian residents in the case of individuals[4]. If we interpret Article 24.1 in the sense that it also considers nationals of an "X" state having a DTT with Colombia, who are non-residents in Colombia, the discrimination is clear. In fact, Colombian nationals who are non-Colombian residents are not subject to such a system; on the contrary, they are subject to far lower withholding taxes. The discrimination against a national of an "X" state who is non-resident in Colombia is, therefore, evident. However, it is important to mention that the OECD would take a different approach to this case[5].

The exclusion of Residency from the general non-discrimination rule based upon Nationality according to Article 24.1 is based upon the fact that the majority of states use residence as the criterion to determine income-tax liability, as residents are usually subject to tax on their worldwide income. In other words, a person who is not resident in a state can be, in principle, discriminated against, bearing in mind that they are only liable to tax with respect to certain types of income and, in general, on income sourced in that state[6]. This premise has also been recognised in Latin American case law, as

[4] Some people think that this rule should be read, nowadays, as if it only referred to non-residents, irrespective of whether or not they are Colombian foreign individuals. However, there is no rule that has abrogated this provision and it can be considered as still being in force.

[5] Commentary n. 8 to article 24 states that "Similarly, paragraph 1 does not apply where a national of a Contracting State (State R) who is also resident of State R is taxed less favourably on the other Contracting State (State S) than a national of state S residing in a third State… as the two persons are not in the same circumstances with respect to their residence".

[6] Sweden – Case HFD 2011 NOT. 99, 30 November, 2011; Netherlands – Case 088/01919, 20th November, 2009 (Supreme Court or Hoge Raad); Netherlands – Case 43.258, 7th of December 2007 (Hoge Raad); South Africa – Case Cohen Brothers Furniture (PTY) Ltd, Aliied Reinsurance

shown, amongst others, in some Mexican and Argentinian decisions[7]. However, Brazil is one case for study since, in some judgements, it is suggested that Article 24.1 implies the prohibition from discriminating also on the basis of Residency. In fact, there is an interesting case in Brazil which involves the DTT between that country and Sweden, in which the point of debate is the possibility for Brazil to apply withholding taxes on dividends to Swedish non-Brazilian residents, taking into account the fact that such withholdings are not applicable to Brazilian residents. In all instances, the position of the different courts has been that this goes against Article 24.1. However, the final decision of the Supreme Court is still pending and perhaps that decision will completely change this view[8].

This Brazilian position, however, is not completely isolated[9] and opens an important discussion, particularly in countries in which withholding taxes for overseas payments are outrageously high and certainly exceed the notion of "income" which rules the "income-tax" system. If a foreigner, however referred to (non-resident, non-national, alien, etc.), is subject to taxes which certainly exceed their income, this situation should be a question to address under double-tax treaties if the country that exerts its power to tax considers a radically different approach to its own persons, whatever their category (residents, nationals, etc.). This approach is based on the idea that one of the purposes behind avoiding double taxation is certainly to avoid an excess of taxation (if not, the prevention of double taxation would lack real meaning), but also because DTT's should not, in our view, deviate from the general purposes of IIA's. In addition, International Tax Law should not abandon the possibility of condemning potential situations of hidden discrimination which, in many cases, have been built on the basis of "national" considerations[10].

Co (PTY) Ltd V. The Minister of Finance and the Commissioner for Inland Revenue, 23 March 1998 (Supreme Court of Appeal); Germany – Case 13 V 2774/03, 22 September 2003 (Finanzgericht Münchenor Tax Court of first instance); New Zealand, Judgement of 16 July, 1973 (Court of Appeal, Wellington).

7 See, for example in Mexico: Juicio de Nulidad n. 12666/98-11_06-3/99-S2-06-02, Decision of 7 September 1999, Tribunal Fiscal de la Federación. See also in Argentina: case Hoechst A.G. v. DGI Rep. Argentina, regarding the DTT subscribed with Germany: Judgements of "Cámara Nacional Contencioso Administrativo Federal" (26.08.1993), and Supreme Court of Justice of Argentina (28.04.1998), case F-670. See also: case Astillero Ministro Manuel Domecq García S.A. also on a controversy derived from the Alemania – Argentina DTT. Tribunal Fiscal de la Nación, Sala C (07.11.1997).

8 Currently, the case is before the Supreme Court. See: Supreme Court of Justice. RE 460320. Volvo do Brasil Veículos Ltda e outro. Case AC2436. The latest news on this trial is that on 30.09.2014 it was suspended.

9 Something similar occurred in Zimbabwe. See: British American Tobacco V. The Commissioner for Taxes, December 14, 1994 (High Court of Zimbabwe).

10 It is not difficult to demonstrate that taxation systems in developing countries are, in some cases,

There are other cases of "hidden" (but clear) discrimination in which the debate on whether they fall under Article 24.1 or not is extremely controversial. Colombia has provisions regulating the so-called "presumptive income" which imply the assumption that taxpayers have a minimum income equal to 3.5% of their net worth in the previous year. In this sense, whenever the real income is less than such presumptive income, taxpayers still have to pay income tax over said presumptive income. However, the law also states that the presumptive-income taxable base can be reduced by the net-worth value of shares possessed in national entities, excluding the possibility of deducting the value of shares possessed in foreign entities. Some academics consider that this provision is only "apparently" discriminatory as it is justified by the fact that national entities are also subject to the presumptive-income tax regime, this measure being a way of preventing the double-economic taxation that would occur if both the shareholder and the company were subject to a tax over the same taxable base. Nevertheless, this argument is very simplistic, as this deduction is given to all taxpayers who participate in Colombian entities, irrespective of whether or not they are subject to presumptive income tax or even regular income tax, amongst other considerations. There might be cases in which the company is not subject to tax at all and its shareholders can still use the prerogative of excluding the net-worth value of the shares they possess in it from the taxable base of their own presumptive income.

The above-mentioned case has been highly controversial in Colombia, although there is no official position on it. In principle, the discrimination implied in the domestic rule does not deal with Article 24.1, as it actually affects the taxation of Colombian-resident entities having investments abroad – a situation apparently not covered by the article. However, assuming a holistic approach, it is arguable that the discrimination also goes against nationals of the other contracting state, even if they are not taxpayers in Colombia. Ultimately, such residents are "subjected" to "requirements connected with taxation in Colombia" (following the wording of Article 24.1) as their wealth is directly incorporated within the tax base of a Colombian resident – something which would not otherwise occur if they were Colombian. From another perspective, DTT's are also, in our view, an instrument to increase (not to decrease) and make feasible the economic flows between contracting states.

This latter case might be comparable to a decision taken by an Italian court stating that the denial of a tax credit to Italian residents investing in foreign companies (in this case, the United States) derived from dividends, was not only against Article 24.1 of the US-Italy Tax Treaty, but also against

still based upon the idea of capital-export and capital-import countries. In my view, it is a consideration which is intrinsically a "national" idea.

the fundamental freedoms of European Union law, bearing in mind that Italian residents investing in domestic companies were entitled to such a credit[11]. Whatever the position over these two cases might be, they once again show the limited scope of Article 24.1.

3. Non-discrimination under the Andean Community Law and other domestic courts

Decision 578 of the Andean Community – which is aimed at avoiding the double taxation of income and wealth taxes for taxpayers in Colombia, Peru, Bolivia and Ecuador – has a non-discrimination clause which goes far beyond the scope of Article 24.1 of the Tax Models. In fact, it is closer to National Treatment clauses included in FTA's and BIT's. According to Article 18 of said Decision, member countries shall not grant residents of the other contracting states less favourable treatment than that granted to their own residents, with respect to the taxes covered by the Decision. The Cartagena Treaty[12], which is the Convention that created the Andean Community, also states in Article 74 that, with respect to domestic taxes of any kind, countries shall grant products which have their origin in other contracting states a treatment no less favourable than that granted to their own products. These provisions have given rise to important decisions taken by both local authorities and tribunals, as well as the Andean Court of Justice[13].

The Peruvian Tax Administration (SUNAT), for example, has said that, according to Article 18 of Decision 578, an individual covered by said Decision can benefit in full from the rules of taxation of income from employment applicable to Peruvian residents, even if they have not complied with the 183-day term as defined by local regulations for consideration as a Peruvian resident[14].

Likewise, The Colombian Tax Administration (DIAN) has stated that the importing of goods from countries which belong to the Andean Community or other countries with which Colombia has a trade agreement incorporating a National Treatment Clause, have to be taxed at the same VAT rate as goods produced or marketed in Colombia, irrespective of the domestic laws incorporating higher tax rates[15].

The power given to the principle of non-discrimination by the Andean Community, however it is ruled[16] (and despite the discredit of said community,

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[11] Corte di Cassazione, Case n. 3119, 17 March, 2000.

[12] Acuerdo de Integración Subregional Andino or "Acuerdo de Cartagena".

[13] Tribunal Andino de Justicia.

[14] Informe n. 183-2010-SUNAT/2B0000.

[15] DIAN, Ruling 051530, 2003.

[16] Either by means of "Non-discrimination", "National Treatment" or "Most Favoured Nation" clauses.

particularly in recent years[17]), is demonstrated in a case in which an Andean country had serious grounds for "discriminating" against or, more accurately, creating rules aimed at non-discrimination against its own domestic products. Colombia has local VAT regulations which differentiate "excluded" from "exempted" goods and services, with the result that excluded goods do not give the right to credit the input VAT, while exempted goods do give that right (zero-rated).

Colombia, subsequently, issued Law488/98, which stated that imports of "excluded" goods would be taxed at a rate equivalent to the "implicit VAT" which had to be assumed by local producers or marketers, as a result of not having the right to credit said VAT. This measure, then, was a way of correcting the local law, as it discriminates against its own national producers or marketers, forcing them to bear higher costs, taking into account foreign producers or marketers of equivalent products which are zero-tax-rated as a result of the export. Notwithstanding the above, the authorities of the Andean Community considered that if Colombia had a list of VAT-excluded items, it had to be consistently applied to both local and foreign products, irrespective of its own local-law deficiencies[18]. Colombia, in the end, had to abrogate its legislation, since it also was considered contrary to the compromises taken within the World Trade Organization (WTO).

In other cases, the Andean Court of Justice has taken very strong positions with respect to cases of "hidden discrimination". For example it has condemned, as has the WTO[19], the imposition of taxes over foreign alcoholic beverages (spirits) by countries whose tax rates are based on the degree of alcohol in each spirit or any other characteristics, if it is proven that similar local spirits with lower taxes do not reach the level of alcohol contained in the foreign spirits or otherwise have different characteristics. In these cases, the Court has understood that higher tax rates based simply on alcohol levels or other irrelevant characteristics might be the result of a kind of euphemism aimed at dodging the evidence of real discrimination against foreign products[20]. The Colombian Council of State has not shared this view up to now and has stated that imposing taxes based on the alcohol degree of spirits does not in itself show discrimination[21].

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17 Venezuela left the Andean Community some time ago, just to mention an example.

18 Tribunal de Justicia de la Comunidad Andina, Process n. 79-AN-2000.

19 See WTO, case DS 396,403 (European Union and United States against Philippines). For more information about world controversies over spirits, see: "Wines and spirits among members' trade concerns": WTO 2008 News Item, 2 July 2008, found at <http://www.wto.org/english/news_e/news08_e/tbt_2july08_e.htm>.

20 See, amongst others: Tribunal de Justicia de la Comunidad Andina, Process 03-AI-97.

21 Consejo de Estado, Section 4th, Ref: 760012331000200100228 01, Judgement of December 6th, 2012 (Guinness UDV Colombia S.A and others v. Department of Valle del Cauca). See also, Ref:

Finally, there are other interesting decisions made by domestic courts which make reference to discrimination on the basis of nationality. The Constitutional Court of Colombia, for example, declared void a provision which allowed the Tax Administration to require migratory authorities to prohibit foreigners from exiting the country, if such persons had not paid their taxes. The Constitutional Court stated that this regulation was against the Constitution, among other considerations, since the measure was not applicable to Colombian nationals, thus violating the principle of equality in taxation[22].

4. Non-discrimination in BIT's and FTA's

It is surprising to see the influence that, in the last few years, BIT's and FTA's have had over tax controversies. These treaties have ultimately included clauses – probably, in many cases, without realising – which certainly have fiscal effects. They have also resulted in a step forward in consolidating a Global Law[23], since the mechanisms of dispute resolution contained within their wording have shifted from a state-state approach (closer to the pure and classic notion of International Law) to an investor-state approach (which is closer to the broader notion of Global Law)[24], amongst other considerations. This shift in perspective has opened up arbitration procedures to many entities, bodies and individuals now able directly to claim for arbitration, even if they lack the support of the competent authorities of their states. In addition, International Arbitration Treaties have spread the competence of international centres for dispute resolutions, such as ICSID[25], which in practice are issuing awards in very important areas, including taxation. Unfortunately, for some Latin American countries the interference of arbitration tribunals with their sovereign powers has resulted in their withdrawal from both IIA's and treaties giving jurisdiction to international arbitration tribunals[26].

23001-23-31-000-2000-03659-01 (18633), Judgement of March 22nd, 2013 (Guinness UDV Colombia S.A and others v. Department of Cordoba).

22 Constitutional Court of Colombia, Judgement C-292-08, Exp. D-6931.

23 See: Gus Van Harten et. al. Investment treaty arbitration as a species of global administrative law. Ob. cit.

24 The OECD approach on arbitration included in the Public Discussion Draft on BEPS Action 14 (Related to "Make dispute resolution mechanisms more effective"), published on 18 December 2014, is again moving away from the latest views of BIT's and FTA's on arbitration. Said OECD approach does not refer to the "taxpayer-state" relationship when talking about arbitration. If BEPS is going to increase the disputes, taxpayers should take a more active role in terms of accessing accurate and prompt dispute-resolution procedures.

25 International Centre for Settlement of Investment Disputes – World Bank.

26 See: R. Polanco Lazo. Is there a life for Latin American countries after denouncing the ICSID Convention? *Transnational Dispute Management* (www.transnational-dispute-management.com), special issue on "Reform of Investor-State Dispute Settlement: in search for a roadmap", issue 1, Jan. 2014. vol. 11.

It is very difficult to establish a trend amongst BIT's and FTA's as there are more than 3000 agreements around the world which do not follow a set model. In addition, with respect to taxes, these agreements include many possibilities which range from treaties which do not mention the tax issue at all (and, therefore, are applied to tax matters to an unlimited degree) to treaties which include general exemption clauses stating the impossibility to applying the treaty to tax matters; within this spectrum, there are treaties which expressly mention the rules which can be extended to said tax matters. However, by and large, said treaties are applicable to tax matters if there is a controversy over expropriation measures.

Nevertheless, all the rules included in these kind of treaties, which in general terms incorporate the compromise of non-expropriation, the obligation to give Fair and Equitable Treatment, the duty of according National Treatment and the obligation to grant Most Favoured Nation Treatment to foreign investors and investments, are closely (if not directly) related to the obligation for states not to discriminate against foreigners.

As a result, BIT's and FTA's have given rise to arbitration awards stating that changes in the regulatory tax framework would be considered as breaches of the duty to grant fair and equitable treatment "in case of a drastic or discriminatory change in the essential features of the transaction"[27]. They have also said that if the ostensible collection of taxes is proven to be part of a set of measures aimed at dispossessing a taxpayer outside the ordinary practices, such measures can be considered expropriatory[28]. Moreover, we find statements regarding general anti-avoidance rules (GAAR's) stating that "to characterise behaviour as violating a broad concept of good faith when a taxpayer adopts behaviour precisely to take advantage of tax benefits created with the intention of inducing the corresponding conduct seems extraordinary. It is hard to see why the taxpayer should be blamed for the generosity of those benefits… The Tribunal is unpersuaded… if there are two options, both of which have the same economic substance, the taxpayer is entitled to choose between these options. In other words, the option is exclusively tax driven"[29].

With respect to the application of non-discrimination rules based on nationality in Latin America, IIA case law has been rich in content, though controversial.

Marvin Feldman v. Mexico[30], for example, was a famous case regarding the application of tax laws by said country to the export of tobacco by a com-

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[27] Toto Construzioni GeneraliS.p.A. v. Republic of Lebanon (ICSID Case n. ARB/07/07/12).

[28] Quasar de Valores SICA S.A. v. Russia. Arbitration Institute of the Stockholm Chamber of Commerce, July 20th 2012.

[29] Ibidem.

[30] ICSID case n. ARB(AF)/99/1.

pany owned and controlled by an American citizen. The claimant alleged that, contrary to the situation of local companies, Mexico refused to rebate excise taxes applied to cigarette exports. The situation was, in general terms, a "de facto" discrimination as the truth was that other similar local exporters were not legally entitled to the rebates either. Even though the law itself did not discriminate, those local exporters had actually been granted such benefits, unlike the treatment given to the claimant. The Tribunal, after several considerations, said that under the North American Free Trade Agreement (NAFTA) it was clear that the Treaty protected not only "de jure" but also "de facto" discrimination and condemned Mexico for its behaviour towards the taxpayer[31].

In Occidental v. Equador, the debate centred on the legitimacy which Equador had to pass an interpreting law stating that oil and gas companies were not entitled to VAT refunds on their exports, since such treatment was only allowed for "producers". According to the law, as oil and gas "is not produced" but "extracted", these kinds of companies had no right to VAT refunds. In the Tribunal's view, amongst other considerations, Equador violated its duty to grant foreigners a treatment no less favourable than that given to its own nationals. The Tribunal found that other local companies in similar situations, such as exporters of flowers, were being refunded with VAT, unlike Occidental. The Tribunal also implied that it was quite obvious that companies engaged in the oil and gas business were primarily foreign[32].

Similar considerations have been taken into account with respect to other measures taken by Equador, which became famous in the oil and gas industry for imposing windfall taxes on these companies. The philosophy of such taxes is to regulate the "extraordinary income" perceived by oil and gas companies as a consequence of the increase in the foreign price of petrol. Equador, therefore, decided to impose a tax of 50%, which then increased to 99%, over said extraordinary earnings. With respect to this situation, some Tribunals have considered this measure as expropriatory and contrary to their obligation to grant National Treatment[33].

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[31] The award states that "Also, given that this is a case of likely de facto discrimination, it does not matter for purposes of Article 1102 whether in fact Mexican laws authorizes SHCP to provide EPS rebates to persons who are not formally IEPS taxpayers and do not have invoices setting out the tax amounts separately, as has been required by the IEPS law consistently since at least 1987 and perhaps earlier."

[32] Final award in the matter of an UNCITRAL arbitration. London Court of International Arbitration Administered Case n. UN 3467, 1st of July, 2004.

[33] See, amongst others, ICSID Case ARB/06/11 (Occidental v. Equador), ICSID Case ARB/08/6 (Perenco v. Equador), ICSID Case ARB/08/10 – Settlement between Equador and Repsol, ICSID Case ARB/06/21 – Decision on provisional measures between City Oriente v. Equador.

5. Conclusions

International law is permanently addressing the ideal of non-discrimination and taxpayers have several tools to challenge unequal or unfair treatments resulting from the issuing or implementing of tax regulations. IIA's have evolved in a way in which it is certainly unacceptable to discriminate against aliens as opposed to nationals.

However, within various IIA's, the approach to the principle of non-discrimination is completely different – perhaps the opposite, up to a certain point. Within the context of DTT's, non-discrimination appears as a rule rather than a principle. This is the result of the wording of Article 24 of Model Tax Conventions, which reduces the hypothesis of discrimination to those accurately described by said rule. In spite of some tribunals having intended to broaden the interpretation of Article 24, it is certainly narrow.

Unlike DTT's, for other IIA's such as FTA's and BIT's, non-discrimination is the common denominator in the different clauses which are usually contained in those treaties. Clauses of National Treatment, Most Favoured Nation and Fair and Equitable Treatment have an implicit or explicit mandate not to exercise discrimination. A rich-in-content case law – even in tax matters and despite said treaties usually excluding tax considerations from their scope –, evidences this fact.