ENVIRONMENTAL DISCRIMINATION IN INTERNATIONAL INVESTMENT LAW

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One emerging tension between environmental law and international investment law stems from the differential treatment of foreign investors required by environmental regulation which may violate the non-discrimination clause in investment treaties. This article identifies three groups of environmental differentiations: impact-based, jurisdiction-based and treaty-based. Impact-based differentiation refers to the polluter/non-polluter distinction, which includes the differential treatment of private actors based on their relative environmental impacts, location, size, public opposition, and administrative feasibility. However, foreign investors with similar environmental impacts may be subject to differential treatment for other reasons, including (1) jurisdiction-based differentiation, meaning the multi-jurisdictional environmental governance in the host state leads to different environmental standards enacted by federal, state, and local authorities; and (2) treaty-based differentiation, arising from states' obligations under international environmental treaties to accord differential treatments to private actors based on their nationalities. All three types of differentiations may violate the non-discrimination clause in investment treaties. The article proposes a real tension *test to reconcile the tension between environmental protection and non-discrimination through a three-step analysis. In its conclusion, this article applies the* real tension *test to the recent* Bilcon v. Canada *case as an illustration of the test's application in arbitration practice.*

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I. Introduction

In 2007, a steel company Arcelor brought a lawsuit against France before the European Court of Justice (ECJ).[1] Arcelor claimed that the European Emission Trading Directive, which was transposed into French law, violated the principle of equal treatment under European community law. Under that Directive, the greenhouse gas trading scheme applied to the steel sector without including the aluminum and plastic industries in its scope.[2] In 2008, the court released its decision, acknowledging that, in principle, the three sectors were comparable sources of greenhouse gas emissions.[3] In rejecting the respondent's argument that the steel and aluminum sectors were not comparable because the steel industry emits more greenhouse gases, the court ruled that "the quantity of CO_2 emitted by each sector" is not "essential for assessing their comparability."[4] However, the court finally found that the differential treatment between the three sectors was justified by the novelty and complexity of the EU Emissions Trading Scheme.[5]

Additionally, in 2015, an international investment arbitral tribunal held that an environmental impact assessment (EIA) conducted by the Canadian government violated the non-discrimination standard under the North American Free Trade Agreement (NAFTA).[6] U.S.-based Bilcon made investments in a quarry and maritime terminal at Whites Point in Nova Scotia, Canada. The project failed the EIA after a Canadian joint federal-provincial review panel (JRP) determined that the project was inconsistent with community core values.[7] Bilcon claimed that Canada violated the non-discrimination clauses under NAFTA through its differential treatment of Bilcon's project as compared to other similar domestic and foreign projects.[8] Canada replied that Bilcon's project was not comparable to other

1. Case C–127/07, Société Arcelor Atlantique et Lorraine v. Premier Ministre, 2008 E.C.R. I–09895, ¶ 20.

2. *Id.* ¶¶ 5, 19, 21.

3. *Id.* ¶¶ 34.

4. *Id.* ¶ 37.

5. *Id.* ¶¶ 60–61.

6. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

7. *Id.* ¶¶ 12, 20, 35.

8. *Id.* ¶¶ 11, 618–19.

projects because of its large size, sensitive zoning area, consistent and large-scale blasting, effects on certain maritime species, and strong public opposition.[9] Nonetheless, the arbitral tribunal held that these projects were comparable and that Canada's differential treatments constituted a violation of the national treatment clause under NAFTA.[10]

Arcelor and *Bilcon* are but two examples of the increasing number of cases in recent years in which multinationals challenge states' environmental regulations before international tribunals as a violation of the non-discrimination standard. The challenges arise as a result of state actions to either meet international environmental obligations, as in *Arcelor*, or take unilateral action, as in *Bilcon*. These cases involve a wide range of respondent states, including developed countries, such as the United States, Canada and France,[11] as well as developing

9. *Id.* ¶¶ 658–681.

10. *Id.* ¶¶ 685–731. One arbitrator, Donald McRae, issued a dissenting opinion, arguing that JRP's actions did not constitute a violation of non-discrimination clauses. Bilcon of Del., Inc. v. Canada, Case No. 2009–04, Dissenting Opinion of Professor Donald McRae, ¶ 53 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1288. Canada filed a notice of application to the Federal Court of Canada to set aside the arbitral award. However, on May 2, 2018, the court dismissed this application since it found no "true jurisdictional error on the part of the Tribunal." Attorney General of Canada v. Bilcon of Del., Inc., Case No. T-1000-15, 2018 FC 436, Judgment and Reasons, ¶ 6 (2018), https://pcacases.com/web/sendAttach/2432.

11. *See* S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408 (NAFTA Arb. Trib. 2000) (concerning a U.S. investor's claim that Canada's ban of the export of the polychlorinated biphenyl (PCB), a highly toxic substance, violated the national treatment clause in the North American Free Trade Agreement (NAFTA)); Methanex Corp. v. United States (Can. v. U.S.), Final Award on Jurisdiction and Merits (NAFTA Arb. Trib. 2005), https://www.state.gov/documents/organization/51052.pdf (concerning a Canadian investor's claim that a California ban on a gasoline additive MTBE had violated the national treatment clause in the NAFTA); Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award (Mar. 31, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf (concerning a U.S. investor's claim that Canada violated the national treatment clause in the NAFTA because of its export controls on logs); Case C–127/07, Société Arcelor Atlantique et Lorraine v. Premier Ministre, 2008 E.C.R. I–09895 (concerning the foreign investor's claim that the EU Emission Trading Scheme (ETS) Directive violated the equal treatment principle, because it only subjected steel industry to the regulation, leaving the aluminum and plastic industries untouched); Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287 (concerning a U.S. in-

countries, including Lithuania, Costa Rica, and Moldova.[12] The challenged environmental regulations range from the construction of a local nature park[13] to the sweeping Emission Trading System in Europe.[14]

This article identifies three types of environmental differentiation in international investment arbitration: (1) impact-based differentiation, referring to differential treatment between private actors based on their relative environmental impacts, affected by the investor's location and size, the local community's attitude, and administrative feasibility; (2) jurisdiction-based differentiation, referring to multi-jurisdictional environmental governance in the host state that leads to different environmental standards enacted by federal, state, and local authorities; and (3) treaty-based differentiation, arising from states' obligations under international environmental treaties to accord differential treatments to private actors based on their nationalities.

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vestor's claim that Canada violated the national treatment and most-favored-nation treatment clauses under NAFTA by disapproving the U.S. investor's EIA application); Windstream Energy LLC v. Canada (Can. v. U.S.), Case No. 2013–22, Award (Perm. Ct. Arb. 2016), https://pcacases.com/web/sendAttach/2036 (concerning the U.S. investor's claim that Canada violated the national treatment clause and the most-favored-nation treatment clauses of NAFTA by enacting a moratorium to offshore wind projects, which halted the U.S. investor's offshore wind projects, leaving inland wind projects and other renewable energy projects untouched).

12. *See, e.g.,* Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf (concerning a Norwegian investor's claim that Lithuania violated the most-favored-nation treatment clause under the 1992 Lithuania-Norway BIT by rejecting the Norwegian investor's construction project because of the project's proximity to a cultural and environmental sensitive old town); Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award (May 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1053.pdf (concerning a German investors' claim that Costa Rica violated the national treatment clauses under the Costa Rica–Germany BIT by expropriating the German investors' properties to build a nature park); Bogdanov v. Republic of Mold. (Russ. v. Mold.), Arbitration No. V091/2012, Final Award (SCC Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3254.pdf (concerning a Russian investor's claim that Moldova violated the national treatment clause under the 1998 Moldova–Russia BIT by imposing environmental tax on the Russian investor's paint–manufacturing company).

13. *Unglaube*, ICSID Case No. ARB/08/1, Award.

14. *Société Arcelor Atlantique et Lorraine*, 2008 E.C.R. I–09895.

The article proposes an integrated methodology—a *real tension* test—as a means of reconciling the tensions between the non-discrimination standard and environmental differentiations. The test divides various kinds of tensions into two categories: real tension and fake tension. A real tension exists only if the environmental differentiation is necessary to achieve a rational environmental policy. If a real tension exists, the environmental differentiation should be regarded as non-discriminatory.

The article proceeds in four parts. Part II analyzes the evolution, content, and application of the non-discrimination standard in international investment law. Part III conducts a thorough study of case law and defines three types of legitimate differential environmental measures that may violate the non-discrimination standard, including: impact-based, jurisdiction-based, and treaty-based differentiation. Part IV introduces a *real tension* test for reconciling the tension between environmental regulation and the non-discrimination standard. Part V applies the *real tension* test to the *Bilcon v. Canada* case to illustrate its application in investment arbitration practice.

II. The Non-discrimination Standard in International Investment Law

The non-discrimination standard prohibits different treatment of like persons in similar circumstances without justifiable grounds.[15] Three treaty provisions reflect the non-discrimination principle in international investment law: the national treatment (NT), most-favored-nation (MFN) treatment, and prohibition of arbitrary and discriminatory treatment provisions.[16] The first two standards bar discrimination on the basis of nationality, while the last prohibits all forms of discrimination, including those based on race, religion, political affilia-

15. Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶ 184 (Aug. 27, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf.

16. Christopher F. Dugan et al., Investor-State Arbitration 397 (2008); *see also* Federico Ortino, *Non–Discriminatory Treatment in Investment Disputes*, *in* Human Rights in International Investment Law and Arbitration 344 (Pierre-Marie Dupuy, Francesco Francioni & Ernst-Ulrich Petersmann eds., 2009) (analyzing the principle of non-discrimination on the basis of nationality, its importance for foreign investors, and how it is implemented through arbitral judgments).

tion, or disability.[17] This Part analyzes the evolution of the non-discrimination standard, its basic elements, and its application in international investment arbitration.

A. *Non-discrimination as an Evolving Standard*

The obligation of equal treatment of foreigners has a long history in international economic law. As early as the Middle Ages, governments protected foreign merchants through non-discrimination clauses—including the NT and the MFN clauses.[18] Regimes incorporated national treatment standards into trading treaties beginning in the nineteenth century.[19] Such obligations have historically been and continue to be a prominent standard in international trade and investment law in the twentieth and twenty-first centuries.[20]

When a number of developing countries in the 1970s proposed a "New International Economic Order" limiting the international protection of foreign investors, they insisted that national treatment was the most foreign investors can demand from a host state. This theory is also known as the Calvo doctrine.[21] Developing countries abandoned the Calvo doctrine around 1990 under the trends of investment liberalization and globalization.[22]

Nowadays, investment treaties provide national treatment as part of a larger constellation of protections accorded to foreign investors and their investments.[23] Despite their prominence, the non-discrimination clauses, including the NT and

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17. RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 191, 195 (2d ed. 2012).

18. AUGUST REINISCH, STANDARDS OF INVESTMENT PROTECTION 30–31 (2008).

19. *Id.* at 31.

20. *Id.* at 31.

21. Wenhua Shan, *From "North-South Divide" to "Private-Public Debate": Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law*, 27 NW. J. INT'L L. & BUS. 631, 632 (2006). The Calvo doctrine was originally designed by the Argentine jurist Carlos Calvo. For an overview of the doctrine and its current implications, *see generally* Alwyn V. Freeman, *Recent Aspects of the Calvo Doctrine and the Challenge to International Law*, 40 AM. J. INT'L L. 121 (1946); Bernardo M. Cremades, *Disputes Arising out of Foreign Direct Investment in Latin America: A New Look at the Calvo Doctrine and Other Jurisdictional Issues*, 59 DISP. RESOL. J. 78 (2004).

22. DOLZER & SCHREUER, *supra* note 17, at 5.

23. *See* examples provided in Section B of this Part.

the MFN clauses, usually employ vague and broad language, providing little guidance for the interpretation of these clauses in specific cases.[24] Early tribunals borrowed wisdom from World Trade Organization (WTO) law, holding that investors are comparable under the non-discrimination clauses only if they are in a competitive relationship.[25] However, recent arbitration practice and scholarship show reluctance to apply WTO norms directly to the interpretation of international in-

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24. However, recent years have seen a trend of clarifying non-discrimination clauses in investment treaties. *See, e.g.*, Agreement on the Promotion and Reciprocal Protection of Investments, Est.-Mold., art. 4(4), June 18, 2010, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1151 ("Measures that have to be taken for reasons of public security and order or public health shall not be deemed as less favourable treatment within the meaning of this Article."); Investment Agreement, Chile-H.K., art. 4 n. 4, Nov. 18, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5413 ("For greater certainty, whether treatment is accorded in 'like circumstances' . . . depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."); Investment Agreement for the COMESA Common Investment Area art. 17(2), May 23, 2007, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3092 ("For greater certainty, references to 'like circumstances' . . . requires an overall examination on a case-by-case basis of all the circumstances of an investment . . . and the examination shall not be limited to or be biased towards any one factor."); Agreement for the Promotion and Reciprocal Protection of Investments, Iran-Slovk., art. 11, Jan. 19, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3601 (providing "General Exceptions" to the requirement that the treaty not be applied in a manner that discriminates between investments or investors).

25. *See, e.g.,* S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶ 240 (NAFTA Arb. Trib. 2000) ("The concept of 'like circumstances' invites an examination of whether a non-national investor complaining of less favorable treatment is in the same 'sector' as the national investor."); Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 171 (Dec. 16, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf ("In the Tribunal's view, the 'universe' of firms in like circumstances are those foreign-owned and domestic-owned firms that are in the business of reselling/exporting cigarettes."); United Parcel Serv. of Am. Inc. v. Canada, ICSID Case No. UNCT/02/1, Award on the Merits, ¶¶ 98–99 (May 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0885.pdf ("[T]here are inherent distinctions between postal traffic and courier shipments that require the implementation of different programs for the processing of goods imported as mail and for goods imported by courier. The Tribunal is convinced that [they] require different customs treatment because of their different characteristics.").

vestment obligations.[26] The next two sections discuss the contemporary non-discrimination regime in international investment law.

B. *Three Branches of the Non-discrimination Standard*

Three types of clause in investment treaties reflect the non-discrimination standard: national treatment, most-favored-nation treatment, and non-discriminatory treatment.

National treatment requires that the host state accord a foreign investor and its investment no less favorable treatment than that accorded to the state's own investors and investments in like circumstances.[27] For example, Article 1102 of NAFTA provides that:

> 1. Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

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26. *See, e.g.*, Methanex Corp. v. United States (Can. v. U.S.), Final Award on Jurisdiction and Merits, pt. II, ch. B, ¶ 6 (NAFTA Arb. Trib. 2005), https://www.state.gov/documents/organization/51052.pdf (asserting WTO and GATT interpretations could provide guidance, but were not binding precedent); Nicholas DiMascio & Joost Pauwelyn, *Nondiscrimination in Trade and Investment Treaties: Worlds Apart or Two Sides of the Same Coin?*, 102 AM. J. INT'L L. 48, 88 (2008) ("One conclusion is that trade and investment tribunals apply significantly different national treatment tests that are tailored to the objectives and political economies of their respective disciplines.").

27. *See, e.g.*, Agreement on the Promotion and the Reciprocal Protection of Investments, Alb.-Cyprus, art. 4, Aug. 5, 2010, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3145 [hereinafter Albania-Cyprus BIT] ("Once a Contracting Party has admitted an investment in its territory in accordance with its laws and regulations, it shall accord to such investment made by the investors of the other Contracting Party treatment no less favourable than that accorded to investments of its own investors or of investors of any third State whichever is more favourable to the investor concerned."); Agreement on the Reciprocal Promotion and Protection of Investments, Alg.-Serb., art. 3, Feb. 13, 2012, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3168 [hereinafter Algeria-Serbia BIT] ("Each Contracting Party shall in its territory accord investments of the other Contracting Party with equal treatment that it accords to investments of its own investors or to investors of any third State, whichever is more favourable.").

> 2. Each Party shall accord to investments of investors of another Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[28]

Most-favored-nation treatment (MFN) prevents discrimination between foreign investors of different nationalities. Generally, MFN clauses provide that a foreign investor and investment should not be treated less favorably compared with an investor or investment in like circumstances from any third country.[29] The MFN and NT standards employ very similar language, except that the MFN clause prohibits discrimination between foreign investors while the NT clause prohibits discrimination between a foreign investor and a domestic investor. Due to their similarities, parties often include the MFN and NT clauses in the same provision of an investment treaty. For example, Article 3 of the 2008 German Model Treaty provides that:

> (1) Neither Contracting State shall in its territory subject investments owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own investors or to investments of investors of any third State.
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> (2) Neither Contracting State shall in its territory subject investors of the other Contracting State, as regards their activity in connection with investments, to treatment less favorable than it accords to its own investors or to investors of any third State.[30]

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28. North American Free Trade Agreement art. 1102(1), Can.-Mex.-U.S. Dec. 17, 1992, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

29. *See, e.g.*, Albania-Cyprus BIT, *supra* note 27, art. 4; Algeria-Serbia BIT, *supra* note 27, art. 3.

30. German Model Treaty Concerning the Encouragement and Reciprocal Protection of Investments art. 3, 2008, http://investmentpolicyhub.unctad.org/Download/TreatyFile/2865. However, sometimes the MFN clauses may appear as a separate provision. *See, e.g.*, NAFTA, *supra* note 28, art. 1103; Free Trade Agreement, China-N.Z., arts. 138, 139, Mar. 7, 2008; Agreement for the Encouragement and Reciprocal Protection of Investments, Alb.-Croat., art. 3(1), May 5, 1998, http://investmentpolicyhub.unctad.org/Download/TreatyFile/9.

In addition to NT and MFN obligations, many international investment treaties also include provisions prohibiting arbitrary and discriminatory impairment of foreign investments.[31] Unlike the NT and MFN standards, this general prohibition is not limited to nationality-based discrimination.[32] Article II(3)(b) of the 1993 U.S.-Ecuador BIT provides a typical example of the discriminatory treatment clause:

> Neither Party shall in any way impair by arbitrary or discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments. For purposes of dispute resolution under Articles VI and VII, a measure may be arbitrary or discriminatory notwithstanding the fact that a party has had or has exercised the opportunity to review such measure in the courts or administrative tribunals of a Party.[33]

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31. *See, e.g.,* Agreement Concerning the Promotion and Reciprocal Protection of Investments, Alb.-Den., art. 2(2), Sept. 5, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/3517 ("Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting Party."); Agreement on the Promotion and Reciprocal Protection of Investments, Cambodia-Croat., art. 3(1), May 18, 2001, http://investmentpolicyhub.unctad.org/Download/TreatyFile/572 ("Neither Contracting Party shall hamper, by arbitrary, unreasonably or discriminatory measures, the development, management, maintenance, use, enjoyment, expansion, sale and if it is the case, the liquidation of such investments."); Treaty Concerning the Encouragement and Reciprocal Protection of Investments, Afg.-Ger., art. 2(3), Apr. 20, 2005, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1 ("Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State."); Agreement on the Reciprocal Promotion and Protection of Investments, Morocco-Rwanda, art. 2(3), Oct. 19, 2016, http://investmentpolicyhub.unctad.org/Download/TreatyFile/5417 ("Neither Contracting Party shall in any way impair, by unreasonable or discriminatory measures, the management, maintenance, use, enjoyment or disposal in its territory, of investments made by investors of the other Contracting Party.").

32. DOLZER & SCHREUER, *supra* note 17, at 195.

33. Treaty Concerning the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., art. II(3)(b), Aug. 27, 1993, S. TREATY DOC. No. 103-15 (terminated May 18, 2018).

C. *The Application of the Non-discrimination Standard*

Non-discrimination standards under investment treaty law mirror customary international law standards.[34] A foreign investor needs to prove that it has been accorded less favorable treatment by a host state.[35] When determining whether a governmental measure is discriminatory, tribunals usually assess three elements: (1) whether the foreign investor and other operators are comparable—*in like circumstances*; (2) whether the treatment accorded to the foreign investor is less favorable than that accorded to such other operators—*less favorable treatment*; and (3) whether rational policies justify the differentiation—*justification on public policy grounds*.[36] The following paragraphs examine these three components separately.

1. *In Like Circumstances*

Although not explicitly stated in every investment treaty, it is well-established under the case law that the non-discrimination principle only protects foreign investors that are *in like circumstances* with a national investor or investor from a third

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34. The tribunal in the *Parkerings* case pointed out the similarity of the examination of national treatment, MFN treatment and non–discrimination in customary international law. The tribunal noted that national treatment clauses and MFN clauses are by essence very similar to each other, and they have similar conditions of application. In terms of non–discrimination in customary international law, the tribunal held that national treatment and MFN treatment are treaty clauses that have the same substantive effect as the international treatment standard, and thus, there is "no reason discretely to address the issue of nondiscrimination: the two aspects, under most-favoured-nation requirements (Article IV of the Treaty) on the one hand and under international customary law on the other." Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 366–67 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

35. *See, e.g., Parkerings*, ICSID Case No. ARB/05/8, Award, ¶ 393 ("It is the Claimant's [investor] burden of proof to show that the foreign investor has been treated more favourably."); Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, ¶ 263 (May 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1053.pdf ("Claimants have been required, at a minimum, to prove facts which, on their face, suggest discriminatory or less favorable treatment. If they are successful in doing so, further examination may be called for.").

36. These three components arise from the investment case law. Jorge E. Viñuales, Foreign Investment and the Environment in International Law 318–19 n. 8 (2012).

country.[37] However, tribunals regularly debate the appropriate interpretation of *like circumstances*. So far, tribunals have adopted three different approaches when determining whether two investors are in like circumstances: the *same business or economic sector* approach, the *cross-sector* approach, and the *Methanex* approach.

Some tribunals take the view that investors are comparable only if they are in a competitive relationship, such as when they participate in the same business or economic sector. In *S.D. Myers*, the tribunal relied on an OECD declaration stating that "likeness" meant "same sector,"[38] and held that the "word 'sector' has a wide connotation that includes the concepts of 'economic sector' and 'business sector'."[39]

The *Pope & Talbot* tribunal also adopted this approach, and found that "[i]n evaluating the implications of the legal context, the Tribunal believes that, as a first step, the treatment accorded a foreign owned investment protected . . . should be compared with that accorded domestic investment in the same business or economic sector."[40] The *Feldman v. Mexico* tribunal also examined the likeness of investors on the basis of *same business or economic sector*. It determined that, in that case, the foreign investor was comparable with domestic investors because all engaged in the same business of exporting cigarettes.[41] However, the tribunal defined the word sector narrowly, noting that the producers of cigarettes are not com-

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37. *See, e.g.*, CMS Gas Transmission Co. v. Arg. Republic, ICSID Case No. ARB/01/8, Award, ¶ 293 (May 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0184.pdf ("Respondent's argument about discrimination existing only in similarly situated groups or categories of people is correct . . . ."); LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 146 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf ("[I]n order to establish when a measure is discriminatory, there must be (i) an international treatment (ii) in favor of a national (iii) against a foreign investor, and (iv) that is not taken under similar circumstances against another national.").

38. S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶ 248 (NAFTA Arb. Trib. 2000).

39. *Id.* ¶ 250.

40. Pope & Talbot Inc. v. Canada (Can. v. U.S.), Award on the Merits of Phase 2, ¶ 78 (NAFTA Arb. Trib. 2001), https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf.

41. Feldman v. Mexico, ICSID Case No. ARB(AF)/99/1, Award, ¶ 171 (Dec. 16, 2002), https://www.italaw.com/sites/default/files/case-documents/ita0319.pdf.

parable with the resellers or exporters of cigarettes.[42] Similarly, the tribunal in *UPS v. Canada* held that the foreign investor in the business of courier and package delivery was not in like circumstances with the domestic investor engaged in mailing services due to the differences between courier and mailing services.[43] The tribunal in *Champion Trading v. Egypt* also adopted a narrow definition of business. In this case, the tribunal found that "like situation[s]" means operating in "the same business or economic sector."[44] It further noted that although the foreign investor and the domestic investor operated within the same industry, they were not similar because only the latter participated in the government's sale and purchase program.[45]

In other investment disputes, tribunals hold that investors in different business sectors are also comparable. In *Occidental v. Ecuador*, the claimant, a U.S. oil company, alleged that Ecuador's refusal to grant the value-added tax (VAT) to oil companies while granting VAT to a number of companies exporting other goods, such as flowers, mining, seafood products, lumber, and bananas, constituted a violation of national treatment.[46] Ecuador argued that companies operating in different business sectors were not comparable.[47] However, the tribunal agreed with the claimant, and ruled that "'in like situations' [it] cannot be interpreted in the narrow sense advanced by Ecuador as the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[48]

The *Menthanex v. U.S.* case illustrates the third approach to examining likeness in the non-discrimination context. In

42. *Id.* ¶ 170–1.

43. United Parcel Serv. of Am. Inc. v. Canada, ICSID Case No. UNCT/02/1, Award on the Merits, ¶¶ 98–99 (May 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0885.pdf.

44. Champion Trading Co. v. Arab Republic of Egypt, ICSID Case No. ARB/02/9, Award, ¶ 130 (Oct. 27, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0148.pdf.

45. *Id.* ¶¶ 154–56.

46. Occidental Exploration & Production Co. v. Ecuador (Ecuador v. U.S.), Case No. UN 3467, Final Award, ¶ 168 (London Ct. Int'l Arb. 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf.

47. *Id.* ¶ 171.

48. *Id.* ¶ 173.

that case, the tribunal adopted a sequential approach when determining a proper comparator: first, try to find an identical comparator, and if there is no identical comparator, find a less similar one. The tribunal noted that: "it would be as perverse to ignore identical comparators if they were available and to use comparators that were less 'like', as it would be perverse to refuse to find and to apply less 'like' comparators when no identical comparators existed."[49] The tribunal ultimately held that the foreign company producing methanol should be first compared to the domestic methanol companies rather than domestic companies producing ethanol.[50]

2. *Less Favorable Treatment*

After finding a proper comparator, the second step is assessing whether the foreign investor receives *less favorable treatment* than its comparator. The *Pope v. Talbot* case provides a useful definition of less favorable treatment. In that case, Canada argued that "'less favorable' treatment" implied treating the foreign investor worse than all other similar Canadian investors.[51] The tribunal rejected this argument, and held that "no less favorable" treatment means the treatment "equivalent to, not better or worse than, the best treatment accorded to the comparator."[52]

A key question arising in the assessment of less favorable treatment is whether discriminatory intent is an indispensable element. Tribunals have so far adopted three different approaches for determining the importance of discriminatory intent in the establishment of less favorable treatment. First, some tribunals take the view that the measure's discriminatory effects are both necessary and sufficient for finding less favorable treatment, without needing to prove discriminatory intent.[53] In other cases, such as *Nykomb v. Latvia*, *Saluka v.*

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49. Methanex Corp. v. United States (Can. v. U.S.), Final Award on Jurisdiction and Merits, pt. IV, ch. B, ¶ 17 (NAFTA Arb. Trib. 2005), https://www.state.gov/documents/organization/51052.pdf.

50. *Id.* ¶ 28.

51. Pope & Talbot Inc. v. Canada (Can. v. U.S.), Award on the Merits of Phase 2, ¶ 39 (NAFTA Arb. Trib. 2001), https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf.

52. *Id.* ¶ 42.

53. For example, in *S.D. Myers*, the tribunal stated that "[i]ntent is important, but protectionist intent is not necessarily decisive on its own. . . . The

Czech, and *Unglaube v. Costa Rica*, the tribunals found treatment discriminatory when "a small and homogeneous group received markedly less favorable treatment than the others, without explanation or justification," and "[n]o evidence of intent was found or was considered to be required."[54]

However, the *LG&E v. Argentina* tribunal took a different approach—that *either* discriminatory intent *or* discriminatory effect can establish discriminatory treatment.[55] The tribunal in the *Corn Products v. Mexico* case adopted a similar view. That tribunal held:

> While the existence of an intention to discriminate is not a requirement for a breach of Article 1102 . . . where such an intention is shown, that is sufficient to satisfy the third requirement [of less favorable treatment]. But the Tribunal would add that, even if an intention to discriminate had not been shown, the fact that the adverse effects of the tax were felt exclusively by the HFCS producers and suppliers . . . would be sufficient to establish that the third requirement of "less favourable treatment" was satisfied.[56]

In addition to these two approaches, a third approach is that discriminatory intent is necessary to establish discrimination. For example, in *Genin v. Estonia*, the tribunal rejected the discrimination claim against Estonia, noting that:

> [T]here is no indication that the Bank of Estonia specifically targeted EIB in a discriminatory way, or treated it less favourably than banks owned by Esto-

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word 'treatment' suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11." S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶ 254 (NAFTA Arb. Trib. 2000).

54. Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, ¶ 263 (May 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1053.pdf.

55. The tribunal held that "a measure is considered discriminatory if the intent of the measure is to discriminate or if the measure has a discriminatory effect." LG&E Energy Corp. v. Arg. Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 146 (Oct. 3, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0460.pdf.

56. Corn Products International, Inc. v. United Mexican States, ICSID Case No. ARB(AF)/04/01, Decision on Responsibility, ¶ 138 (Jan. 15, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0244.pdf.

> nian nationals. Moreover, Claimants have failed to prove that the withdrawal of EIB's license was done with the intention to harm the Bank or any of the Claimants in this arbitration, or to treat them in a discriminatory way.[57]

Similarly, the *Methanex* tribunal explicitly held that "[i]n order to sustain its claim under Article 1102(3), Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors and that Methanex and the domestic investor supposedly being favored by California are in like circumstances."[58]

3. *Justification on Public Policy Grounds*

Rational public policy may justify differentiation between similar investors.[59] For example, in the context of NAFTA Chapter 11, notwithstanding the lack of a provision explicitly permitting justification of differentiations on rational grounds, some NAFTA tribunals interpreted the term *in like circumstances* in the treaty as impliedly allowing such a validation.[60]

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57. Genin v. Republic of Est., ICSID Case No. ARB/99/2, Award, ¶ 369 (June 25, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0359.pdf.

58. Methanex Corp. v. United States (Can. v. U.S.), Final Award on Jurisdiction and Merits, pt. IV, ch. B, ¶ 12 (NAFTA Arb. Trib. 2005), https://www.state.gov/documents/organization/51052.pdf. However, in the same chapter the tribunal stated, "an affirmative finding under NAFTA Article 1102 . . . does not require the demonstration of the malign intent alleged by Methanex." *Id.* pt. IV, ch. B, ¶ 1. One commentator considers this contradiction a fact-driven result: "[t]he better explanation for the *Methanex* tribunal's requirement of intent seems to be that it was case specific; the tribunal's decision was driven by the particular factual allegations of the claimant. These allegations narrowed the scope of the issues before the tribunal to those that were based on the intentional targeting of Methanex by the U.S." Borzu Sabahi, *National Treatment—Is Discriminatory Intent Relevant?*, *in* 1 INVESTMENT TREATY ARBITRATION AND INTERNATIONAL LAW 269, 284–85 (TJ Grierson Weiler ed., 2008).

59. DOLZER & SCHREUER, *supra* note 17, at 202. ("Although most investment treaties do not explicitly say so, it is widely accepted that differentiations are justifiable if rational grounds are shown.").

60. In *S.D. Myers*, the tribunal noted that the "assessment of 'like circumstances' must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest." S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶ 250 (NAFTA Arb. Trib. 2000). The *Pope & Talbot* Award presents a more detailed

Other non-NAFTA tribunals also consider the justification of differentiation on public policy grounds an integral part of the non-discrimination principle.[61]

There is no clear-cut answer among the tribunals with respect to what constitutes a rational policy and how the challenged measure should be designed to achieve that policy. In the cases so far decided, investment tribunals interpret rational public policies broadly, as encompassing a wide range of governmental objectives, including economic development,[62] environmental protection,[63] and cultural polices.[64]

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statement: "[d]ifferences in treatment will presumptively violate [the principle], unless they have a reasonable nexus to rational government policies that (1) do not distinguish, on their face or *de facto*, between foreign-owned and domestic companies, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA." Pope & Talbot Inc. v. Canada (Can. v. U.S.), Award on the Merits of Phase 2, ¶ 78 (NAFTA Arb. Trib. 2001), https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf.

61. In *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, the tribunal held that the non-discrimination standard "requires a rational justification of any differential treatment of a foreign investor." Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶ 693 (July 24, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf (quoting Saluka Investments BV v. Czech Republic (Neth. v. Czech), Partial Award, ¶ 460 (Perm. Ct. Arb. 2006), https://pcacases.com/web/sendAttach/880). Similarly, in *Plama Consortium Limited v. Bulgaria*, the tribunal noted that "[w]ith regard to discrimination, it corresponds to the negative formulation of the principle of equality of treatment. It entails like persons being treated in a different manner in similar circumstances without reasonable or justifiable grounds." Plama Consortium Ltd. v. Republic of Bulg., ICSID Case No. ARB/03/24, Award, ¶ 184 (Aug. 27, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf.

62. The tribunals have seen various economic policies as rational in investment cases, including ensuring the economic strength of a particular domestic industry, *S.D. Myers*, 40 I.L.M. 1408, ¶ 255, removing the threat of countervailing duty actions, *Pope & Talbot Inc.*, Award on the Merits of Phase 2, ¶ 87, and regulation of the solvency of an important local industry, GAMI Investments, Inc. v. United Mexican States (Mex. v. U.S.), Final Award, ¶ 114 (NAFTA Arb. Trib. 2004), 13 ICSID Rep. 147.

63. Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, ¶ 264 (May 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1053.pdf; Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 392 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

64. *Parkerings*, ICSID Case No. ARB/05/8, Award, ¶ 396.

However, the existence of rational policy by itself does not provide complete justification of a differentiation. Some tribunals require a reasonable relationship between the rational public policy and the challenged governmental measure.[65] Other tribunals, however, examine whether the different treatment of the foreign investor is required for the relative public goal using the necessity test.[66]

In sum, the non-discrimination principle in international investment law prohibits unreasonable differentiation between similar investors or investments. This principle, however, is in tension with various environmental differentiations required by domestic and international environmental law.

III. Three Types of Tensions Between the Non-Discrimination Standard and Environmental Regulation

A. *Impact-based Environmental Differentiation vs. the Non-discrimination Standard*

The theory of externalities[67] provides the foundation for the environmental law differentiation between polluters and

65. For example, the *Pope & Talbot* Award required that the difference in treatment must be in a "reasonable nexus" with a rational public policy. *Pope & Talbot Inc.*, Award on the Merits of Phase 2, ¶ 78. The *Parkerings* tribunal adopted a similar approach, noting that "a less favourable treatment is acceptable if a State's legitimate objective justifies such different treatment in relation to the specificity of the investment." *Parkerings*, ICSID Case No. ARB/05/8, Award, ¶ 371.

66. For example, the *S.D. Myers* tribunal held that the differentiation must be necessary to achieve a rational public policy in order to be justified under the NT clause. This is required by Article 104 of the NAFTA, which provides that certain environmental agreements supersede the obligations in NAFTA provided that "where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement." NAFTA, *supra* note 28, art. 104. Similarly, the ECJ in the Arcelor case, following European jurisprudence, stated that "[a] difference in treatment is justified if it is based on an objective and reasonable criterion, that is, if the difference relates to a legally permitted aim pursued by the legislation in question, and it is proportionate to the aim pursued by the treatment." Case C–127/07, Société Arcelor Atlantique et Lorraine v. Premier Ministre, 2008 E.C.R. I–09895, ¶ 47.

67. From an economic perspective, certain scarce resources, such as clean air and water, are unpriced in the market, so their costs are external to firms. As a result, firms do not bear the cost of the pollution as they do for

nonpolluters. The distinction results in the polluter-pays principle in environmental law, which indicates that the polluter should bear the costs of pollution abatement.[68] Accordingly, the host state may distinguish polluting foreign investments from other similar non-polluting investments by subjecting the former to additional environmental charges, taxes, or other restrictive regulations. This distinction, although reasonable under environmental law, might violate the non-discrimination standard under international investment law.

There is no clear rule as to whether and to what extent tribunals should consider the polluter/non-polluter distinction when assessing *in like circumstances* in international investment law. This question is especially challenging because the differentiation between polluters and non-polluters is a complicated and dynamic process affected by various factors, such as a firm's size and location, opinions of local community, and administrative feasibility.

1. *Location and Size*

Similar investors may face different environmental requirements due to varying levels of environmental sensitivity in project locations. Another basis of the differentiation between otherwise similar investments is the size of an investment. Large and small polluters may be treated differently under host state environmental regulation laws.[69]

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labor, capital and raw materials. Polluters consequently do not have a reliable cost-based incentive to reduce pollution. It is because of this market failure that environmental regulation is called for. The basic idea of environmental regulation is that governments use the visible hand to differentiate between polluters and non-polluters and make the former pay for their pollution. *See* Wallace E. Oates, *An Economic Perspective on Environmental and Resource Management: An Introduction*, *in* THE RFF READER IN ENVIRONMENTAL AND RESOURCE POLICY xv, xvi (Wallace E. Oates ed., 2d ed. 2006) (providing examples of externalities in the environmental context and explaining why a market-based system cannot be relied upon to adequately regulate environmental resources).

68. PHILIPPE SANDS & JACQUELINE PEEL, PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW 228 (3d ed. 2012).

69. For instance, in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), the U.S. Supreme Court held that the Environmental Protection Agency could regulate the sources of greenhouse gases which would already need permits for conventional pollutants emissions. This judgment actually allowed the EPA to regulate large industrial polluters and exempted millions

Despite these apparently valid bases for differentiation, the host state's differing treatment of investors based on their locations and sizes may present a violation of non-discrimination. In such cases, tribunals must decide whether the investments are comparable during the discrimination assessment. Tribunals respond differently in these situations.

The *Parkerings* tribunal took the factors of location and size into consideration in the assessment of *in like circumstances*. In *Parkerings*, Lithuania rejected BP's foreign investment construction project but permitted initiation of a similar project by another investor, Pinus Proprius, in part because of the former's proximity to the Old Town.[70] The tribunal noted that, although both BP's and Pinus Proprius's projects could have a negative impact in the archaeological preservation and environmental protection of the Old Town, BP's project was more controversial due to its larger size and its proximity with the culturally sensitive area. Consequently, the tribunal determined "the two investors were not *in like circumstances*."[71]

The tribunal in the *Bilcon* case adopted a different approach. The *Bilcon* case concerns Canada's unfavorable environmental assessment (EA) of a mining quarry and marine

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of small-scale carbon emitters. Adam Liptak, *Justices Uphold Emission Limits on Big Industry*, N.Y. TIMES (June 23, 2014), https://www.nytimes.com/2014/06/24/us/justices-with-limits-let-epa-curb-power-plant-gases.html. Adopting a contrary approach, the Chinese sustainable mining regulation explicitly differentiates between small, medium and large-sized coal enterprises, and requires governments to shut down small coalmines which fail to meet certain environmental standards. The regulation prescribes that "[o]n one hand, the construction of modern large-scale coal bases shall be accelerated, large-scale coal enterprises and enterprise groups shall be fostered and the recombination, combination and reorganization of medium and small coal mines shall be promoted; on the other hand, those small coal mines that are not rationally distributed or that do not meet the work safety conditions or that waste resources or destroy the ecological environment shall be closed according to law." Some Opinions of the State Council on Promoting the Sound Development of the Coal Industry (promulgated by the Chinese State Council, June 7, 2005).

70. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 363, 365 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

71. *Id.* ¶¶ 392, 395–96.

terminal project conducted by U.S.-based Bilcon.[72] Bilcon argued that it was discriminated against as compared with domestic investors, because during the EA of its project Canada did not take into account the "likely significant adverse effects after mitigation" standard of assessment required by the Canadian Environmental Assessment Act (CEAA).[73] In the likeness assessment, the U.S. investors and Canada presented different opinions with respect to the proper comparator. Bilcon argued that all projects subject to Canada's environmental assessment were comparable.[74] Canada countered that Bilcon's position was "irrespective of the specific factors at play in the EA process."[75] Canada argued that Bilcon's project was unique because of, *inter alia*, its non-industrial location,[76] its long-period and large-scale blasting,[77] and its large-size maritime terminal.[78] However, the tribunal rejected Canada's argument, holding that "all enterprises affected by the environmental assessment regulatory process" should be considered as in like circumstances.[79]

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72. *Id.* Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶¶ 12, 20, 35. (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

73. *Id.* ¶ 687.

74. *Id.* ¶ 609.

75. *Id.* ¶ 654.

76. *Id.* ¶¶ 659, 670, 674, 678.

77. *Id.* ¶ 665.

78. *Id.* ¶ 674.

79. *Id.* ¶ 695. Nonetheless, it seems that the factors of locations and size were not totally meaningless to the tribunal, at least to the extent of facilitating a decision. The tribunal held that:

> While that broad proposition [that all enterprises affected by the environmental assessment regulatory process should be considered to be in like circumstances] might be correct, adopting it would commit this Tribunal to a more abstract and sweeping proposition than is necessary to decide this case. The Tribunal finds, that on examination of their particular facts, many of the comparison cases brought forward by the Investors qualify as "sufficiently" similar to sustain an Article 1102 comparison for the purposes of this case. . . . A number of them specifically involved quarry and marine terminal export projects that had the potential to affect a local community. At least three of them involved assessments that included the marine terminal component of a project that was connected to a quarry and took place in an ecologically sensitive coastal area. . . . The Tribunal finds that these three cases, *Belleoram*, *Aguathuna* and *Tiverton*, are definitely among those in which domestic investors

2. *Public Opposition*

Public participation is an important factor in environmental governance. The Rio Declaration on Environment and Development (Rio Declaration), produced in 1992 at the Earth Summit, provides that "[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level."[80] Although the Declaration is not yet general international law,[81] multiple international environmental treaties recognize the concept of public participation. These agreements include including the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention),[82] and the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention).[83] Many interna-

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were accorded more favorable treatment than Bilcon in circumstances that are sufficiently "like" to sustain a comparison under Article 1102." *Id.* ¶¶ 695–96.

80. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, Principle 10, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992) [hereinafter *Rio Declaration*]. It further provides that each individual shall have "the opportunity to participate in decision-making processes," and that states shall provide citizens "[e]ffective access to judicial and administrative proceedings, including redress and remedy." *Id.*

81. The International Court of Justice (ICJ) in the *Pulp Mills* case refused to view the public consultation in an EIA as an obligation of general international law. In this case, the ICJ for the first time acknowledged that there may be an obligation under general international law to undertake an EIA where there is a potential transboundary significant adverse impact. Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 14, ¶¶ 204–05 (Apr. 20). However, the court had no requirements with respect to the scope and content of an EIA, and apparently denies public consultation in an EIA as an obligation under general international law. *Id.* ¶¶ 215–17.

82. The Aarhus Convention recognizes Principle 10 of the Rio Declaration. Former United Nations Secretary-General Kofi Annan considered the Aarhus Convention "the most ambitious venture in environmental democracy undertaken under the auspices of the United Nations." TIM STEPHENS, INTERNATIONAL COURTS AND ENVIRONMENTAL PROTECTION 249 (2009). The Aarhus Convention provides that the Parties shall ensure the public participation in environmental decision-making, including decisions on specific activities, environmental plans and policies, and legislative and administrative process. Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters arts. 6–8, June 25, 1998, 2161 U.N.T.S. 447 [hereinafter Aarhus Convention].

83. The Espoo Convention requires each party to "take the necessary legal, administrative or other measures" to establish "an environmental impact

tional development banks also incorporate public participation into the environmental assessment of the investment projects they fund.[84]

In the context of international investment arbitration, it may well be that local people oppose a foreign investment due to its adverse impact on environment. The host state facing such local opposition might accord the foreign investment less favorable treatment than that accorded to other investments which face no or less opposition. The key question in this context is whether an investment subject to public opposition is in like circumstance with an investment welcomed by the local community.

In the *Parkerings* case, the tribunal held that the public opposition to BP's project was a legitimate ground for Lithuania's refusal to fund BP's project while supporting Pinus Proprius's similar project, noting that:

> [T]he Municipality of Vilnius was faced with numerous and solid oppositions from various bodies that relied on archaeological and environmental concerns. In the record, nothing convincing would show that such concerns were not determinant or were built up to reject BP's project. Thus the City of Vilnius did have legitimate grounds to distinguish between the two projects.[85]

However, the *Bilcon* tribunal took an opposite approach. Canada argued that Bilcon's project faced strong local community opposition, and thus was not in like circumstances with

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assessment procedure that permits public participation." Convention on Environmental Impact Assessment in a Transboundary Context art. 2(2), Feb. 25, 1991, 1989 U.N.T.S. 309 [hereinafter Espoo Convention]. It also provides that "[t]he Party of origin shall provide, in accordance with the provisions of this Convention, an opportunity to the public in the areas likely to be affected to participate in relevant environmental impact assessment procedures regarding proposed activities and shall ensure that the opportunity provided to the public of the affected Party is equivalent to that provided to the public of the Party of origin." *Id.* art. 2(6).

84. David A. Collins, *Environmental Impact Statements and Public Participation in International Investment Law*, 7 MANCHESTER J. INT'L ECON. L. 4, 8 (2010).

85. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 396 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

other domestic projects.[86] The tribunal dismissed this argument, holding that the differences between the two investments with respect to public opposition could not justify the host state's failure in carrying out the analysis of "likely significant adverse effects after mitigation."[87]

3. *Administrative Feasibility*

Another circumstance impacting environmental differentiation is administrative feasibility of environmental regulation. Environmental protection often calls for a large-scale and complicated regulatory project that is difficult to complete within a short time period. When an environmental regulation targets a large number of investments, environmental policymakers may implement the regulation step-by-step.[88] However, those foreign investors impacted in the first step of implementation may feel discriminated against compared with investors reached later in the process.

In the *Arcelor* case, as mentioned above, the claimant argued that the ETS Directive discriminated by according differential treatments to the steel sector and the chemical and aluminum sectors.[89] However, the court found that the ETS Directive was a novel and complex scheme, the implementation of which could have been disturbed by involving too many participants. Accordingly, the court held, involving only the steel sector as the first step of the Directive was within the discretion of the community legislature.[90] Noting that the European Community legislature had broad discretion in the exercise of public power when making public choices or undertaking complex evaluations,[91] the court held that the legislature may use a step-by-step approach to restructure or establish a complex system.[92]

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86. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶ 704 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

87. *Id.*

88. A typical example is the EU Emissions Trading Scheme in the *Arcelor* case, which will be discussed in the following paragraphs.

89. Case C–127/07, Société Arcelor Atlantique et Lorraine v. Premier Ministre, 2008 E.C.R. I–09895, ¶ 27.

90. *Id.* ¶¶ 60–61.

91. *Id.* ¶ 57.

92. *Id.*

Step-by-step regulation appears not only in the large-scale ETS Directive that affects the whole of Europe, but also in the expropriation of properties on a much smaller scale. In *Unglaube*, the Costa Rican government identified the properties of approximately one hundred land owners for expropriation in order to establish a natural park.[93] However, the respondent began expropriation proceedings against only sixty of these properties, including that owned by the claimant, while leaving the rest of the properties untouched.[94] The claimant argued that its property was discriminated against compared with the untouched properties.[95] However, the tribunal stated:

> [T]he fact that the Claimant Marion Unglaube's property has been included within the initial group of properties to be expropriated, does not, in the view of the Tribunal, create an inference of discriminatory treatment . . . . [T]here were reasonable grounds . . . to establish certain priorities among the 100 or so properties involved, rather than beginning expropriation of all of them at once.[96]

In conclusion, both the *Arcelor* tribunal and the *Unglaube* tribunal found that step-by-step regulation does not violate the nondiscrimination standard.

4. *Conclusion*

The cases discussed above show that the differentiation between polluters and non-polluters under environmental law is affected by various factors, such as location, size, public opinion, and administrative feasibility. Whether these factors constitute different circumstances that deny the likeness between two investments depends on the factual and legal background of each case.

Similar investments with disparate environmental impacts due to their different sizes and locations may receive different treatment under environmental law. Even though two investments have the same degree of environmental impact, they

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93. Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award, ¶ 265 (May 16, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1053.pdf.

94. *Id.*

95. *Id.*

96. *Id.* ¶¶ 265, 267.

may also receive different treatment for various reasons. For instance, host states may treat two investments with the same environmental impact differently because of different levels of public opposition. In addition, circumstances with step-by-step environmental regulation, a foreign investment that is already subject to the regulation may claim that it receives less favorable treatment than similar investments not yet affected by the regulation. The tribunals in these cases adopt different approaches in deciding whether these various bases of differential treatments provide adequate justification under the non-discrimination standard.

B. *Jurisdiction-based Environmental Differentiation vs. the Non-discrimination Standard*

Environmental governance is often multi-jurisdictional, involving diverse legislative, executive, and judicial authorities from national, regional, and local levels.[97] Environmental regulation at state level may be different from that at federal level.[98] Such differences also appear at local levels when local governments enact their own environmental standards based on their particular situations.[99] In the context of international investment law, conflicts arise where an investor claims it received discriminatory treatment in comparison with a similar investor subject to a different environmental jurisdiction.

The *Merrill & Ring* case discusses a circumstance where federal environmental law was stricter than state environmen-

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97. *See, e.g.*, RICHARD J. LAZARUS, THE MAKING OF ENVIRONMENTAL LAW, 32-38 (2004) (Discussing the fragmentation of authority and decentralization of lawmaking in the United States environmental law.)

98. For example, in the United States, environmental law-making is decentralized between federal and state levels. This decentralization has both advantages and disadvantages for environmental protection. *See, e.g.*, Daniel C. Esty, *Revitalizing Environmental Federalism*, 95 MICH. L. REV. 570, 599-613 (1996) (describing debates around environmental federalism).

99. For instance, in *Metalclad v. Mexico*, the foreign investor engaged in the construction of a hazardous waste landfill successfully received construction permits from the federal and state environmental authorities, but was later rejected by the local government for environmental reasons. Metalclad Corp. v. United Mexican States, ICSID Case. No. ARB(AF)/97/1, Award, ¶¶ 37–69 (Aug. 30, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0510.pdf.

tal law.[100] In this case, the claimant was an American forestry company operating in British Columbia, Canada. While the provisional timber export regime regulated a vast majority of log producers within British Columbia, the claimant, among the minority, was subject to the stricter federal regulation.[101] The claimant argued that it received less favorable treatment than those under the provisional regulation.[102] The tribunal dismissed the claim, holding that the claimant is only comparable to log producers regulated by the same legal regime.[103] The tribunal firmly ruled that: "the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority."[104]

However, it remains unclear what constitutes *the same jurisdictional authority*, especially in environmental cases where the regulator is not a traditional jurisdictional authority.[105] For example, in *Yuri Bogdanov*, Moldova enacted environmental charges on hazardous products exported from the seven free economic zones (FEZs) in its territory.[106] This charge was higher than the charge for domestic producers outside the FEZs.[107] The claimant, a foreign investor producing paints and varnishes subject to the new environmental charges, argued that Moldova discriminated against it compared with two groups of comparators: domestic producers located outside all the seven FEZs, and other companies in the same FEZ whose harmful products were charged by the Moldovan government

100. Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, ¶¶ 27-32 (Mar. 31, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf.

101. Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, ¶¶ 26-33 (Mar. 31, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf.

102. *Id.* ¶ 67.

103. *Id.* ¶ 82.

104. *Id.* ¶ 89.

105. *See, e.g.*, Bogdanov v. Republic of Mold. (Russ. v. Mold.), Arbitration No. V091/2012, Final Award (SCC Arb. 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3254.pdf (foreign investor governed by special rules within a free economic zone); Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶ 704 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287 (foreign investors regulated by a joint review panel for environmental assessment).

106. *Bogdanov*, Arbitration No. V091/2012, ¶¶ 64–73.

107. *Id.* ¶ 128.

at a lower rate than paints and varnishes.[108] The tribunal rejected the claimant's argument, holding that domestic producers outside the seven FEZs were subject to different economic rules from producers in FEZs.[109] The tribunal also rejected the argument because of the narrow scope of possible comparators.[110] The tribunal ruled that the proper comparator should be producers *in* the seven FEZs.[111] This approach is consistent with *Merrill & Ring*, if one assumes that the seven FEZs as a whole were subject to "the same regulatory measures under the same jurisdictional authority."[112]

In *Bilcon*, the claimant's project was rejected by both federal and provisional governments of Canada based on an environmental assessment report made by a joint review panel.[113] Canada cited the *Merrill & Ring* case, and argued that the proper comparator should be other projects subject to the same joint Canadian-provincial review panel.[114] The tribunal refused to confine the national treatment analysis to "such a narrow range of possible comparators,"[115] allowing for the possibility that the proper comparator would be all enterprises subject to the same environmental assessment regulatory process, but holding only that the cases cited by the investors were "'sufficiently'" similar for the required comparison.[116] Thus, the *Bilcon* tribunal's decision was only partly consistent with the *Merrill & Ring* tribunal's decision, as the comparators and the foreign investors were subject to the same regulatory measures but *not* governed by the same jurisdictional authority.

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108. *Id.* ¶¶ 127–133.

109. *Id.* ¶¶ 220-1.

110. *Id.* ¶ 220.

111. *Id.* ¶ 223.

112. Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, ¶ 89 (Mar. 31, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf.

113. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶ 5 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

114. *Id.* ¶ 649.

115. *Id.* ¶ 691.

116. *Id.* ¶ 695.

C. *Treaty-based Environmental Differentiation vs. the Non-discrimination Standard*

International environmental treaties may require states to distinguish investors within their territories based on those investors' nationalities.[117] The following paragraphs discuss three kinds of nationality-based differentiation in international environmental law and potential conflicts with the non-discrimination standard under investment law.

1. *Differentiation Between Parties and Non-Parties*

A fundamental principle of international law is that a treaty applies only to the signatory parties.[118] Article 34 of the Vienna Convention provides that "[a] treaty does not create either obligation or rights for a third State without its consent."[119] This is referred to as the "general rule" under the final draft of the International Law Commission and the Vienna Convention, and is a corollary to the sovereignty and independence of states.[120] For the same reason, environmental treaties create international legal rights and obligations only between the agreeing parties. The different rights and obliga-

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117. These circumstances have seldom been addressed by the literature. *But See* Jacob Werksman, Kevin A. Baumert & Navroz K. Dubash, *Will International Investment Rules Obstruct Climate Protection Policies?*, 3 INT'L ENVTL. AGREEMENTS: POL. L. & ECON. 59, 71-4 (2003) (discussing five scenarios that CDM rules under the Kyoto Protocol may result in discrimination between investors based on their nationality, including (i) differentiation between parties and non-parties, (ii) differentiation between the complying parties and noncomplying parties, (iii) differentiation between foreign investors from Annex I parties and foreign investors from non-Annex I parties, (iv) differentiation between foreign and domestic investors, and (v) discrimination and the trade in CDM credits.); Kate Miles, *Arbitrating Climate Change: Regulatory Regimes and Investor-State Disputes*, 1 CLIMATE L. 63, 70 (2010) (discussing how low-carbon investment incentives could be viewed as discriminatory against certain investors); A°SA ROMSON, ENVIRONMENTAL POLICY SPACE AND INTERNATIONAL INVESTMENT LAW 238-40 (2012) (discussing how preferential treatment of parties to international environmental treaties may conflict with non-discrimination provisions in investment treaties).

118. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 598 (6th ed. 2003).

119. Vienna Convention on the Law of Treaties art. 34, *opened for signature* May 23, 1969, 23 U.S.T. 3227, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980).

120. BROWNLIE, *supra* note 118, at 598.

tions undertaken by parties and non-parties to an environmental treaty may result in different treatment of foreign investors.

First, a party to an environmental agreement must fulfill certain environmental obligations which are not undertaken by non-parties. For example, the Basel Convention provides that the parties should observe environmentally sound waste management, and that the parties may enter into bilateral or multilateral agreements on hazardous waste management with other parties or with non-parties, provided that such agreements are "not less environmentally sound."[121] Suppose Country A and Country B are both parties to the Basel Convention, and Country A also concluded a higher-standard waste management treaty with Country C. In such circumstances, foreign investors engaged in waste management in the territory of Country A may be subject to different treatments: those trading with Country B will enjoy a lower waste management standard than those trading with Country C.

Additionally, international environmental agreements may accord privileges to their parties that cannot be enjoyed by non-parties.[122] For example, Article 4(5) of the Basel Convention prohibits the export of hazardous wastes to a non-party or the import of hazardous wastes from a non-party.[123] Similarly, Article 4 of the Montreal Protocol bans the import of the controlled substances listed in the Annexes with non-parties.[124] Although the Kyoto Protocol does not explicitly say so, some scholars noted that Clean Development Mechanism (CDM) rules may not allow investors from countries which are

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121. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal art. 11, *opened for signature* Mar. 22, 1989, 1673 U.N.T.S. 57 [hereinafter Basel Convention].

122. See the examples provided in the following sentences. This is reasonable because those privileges are an opportunity granted exclusively to countries who also commit to the treaty obligations. These privileges effectively serve as an incentive to join the agreements.

123. *Id.* art. 4(5). An exception is that the party has entered into a bilateral, multilateral or regional agreement or arrangement with the non-party regarding transboundary movement of such wastes that does not derogate from the environmentally sound management of such wastes. *Id.* art. 11.

124. Montreal Protocol on Substances that Deplete the Ozone Layer art. 4, *opened for signature* Sept. 16, 1987, 1522 U.N.T.S. 3 [hereinafter Montreal Protocol].

not party to the Protocol to participate in the CDM projects.[125] In these circumstances, the privileges granted only to the parties to the environmental treaties may result in different treatments accorded to foreign investors.

2. *Differentiation Between Compliant and Non-compliant Parties*

The non-compliance procedures, which accord different treatment to compliant and non-compliant parties, aim to reduce the violation of the soft environmental treaties.[126] Various multilateral environmental agreements establish non-compliance procedures which provide penalties for non-compliant parties, including additional obligations, suspension of privileges, trade sanctions, and liabilities.[127] For example, the Kyoto Protocol establishes its non-compliance procedure in Article 18, which requires approval by the conference of the parties for "appropriate and effective procedures and mechanisms to determine and address cases of non-compliance," while any procedures and mechanisms entailing binding consequences "shall be adopted by means of an amendment to this Protocol."[128] In 2007, the Compliance Committee found that Greece failed to comply with its obligations under the Protocol, and accordingly, the Compliance Committee suspended

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125. *See* Werksman, Baumert & Dubash, *supra* note 117, at 72 ("In terms of fairness, some Parties and stakeholders believe that countries, such as the United States, with no intention of joining the Protocol should not benefit, directly or through its companies from the Protocol's market mechanisms.").

126. SANDS & PEEL, *supra* note 68, at 163.

127. According to a U.N. Environmental Program study, the non-compliance procedures in MEAs usually consist of four parts: first, gathering the performance review information of the Parties through a reporting system; then using multilateral procedures to determine the non-compliant Parties; third, adopting response measures to the non-compliant Parties, including incentives such as technical and financial assistance to support compliance, and disincentives like penalties for non-compliance; and last, settling disputes between Parties through the dispute settlement mechanisms. UNITED NATIONS ENV'T PROGRAMME, COMPLIANCE MECHANISMS UNDER SELECTED MULTILATERAL ENVIRONMENTAL AGREEMENTS 9–13 (2007).

128. Kyoto Protocol to the United Nations Framework Convention on Climate Change art. 18, Dec. 11, 1997, 2303 U.N.T.S. 162 [hereinafter Kyoto Protocol].

Greece's eligibility to participate in the flexible mechanisms under the Protocol.[129]

As a result, the Protocol parties may deny flexible mechanism projects owned by those foreign investors whose home states fail to comply with the Protocol obligations.[130] However, such unfavorable treatment of foreign investors based on their nationalities might conflict with the non-discrimination standard under international investment law. Foreign investors from non-compliant parties to the Protocol may claim that they face discrimination because similar investors from compliant parties can participate in flexible mechanism projects they cannot.

In some environmental treaties, the non-compliance procedures encourage that parties sanction a non-compliant party through trade restriction and suspension of privileges under the treaty.[131] For example, the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) recommends that parties suspend trade with a party

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129. VIÑUALES, *supra* note 36, at 264 ("A failure by Greece to establish a system capable of estimating emissions and absorption by sinks, as well as to report such information, was found to be in 'non-compliance' of Greece's obligations under the Kyoto Protocol. As a result, the Enforcement Branch of the Compliance Committee, inter alia, suspended Greece's eligibility for participation in the flexible mechanisms set up by the Protocol, including emissions trading (Article 17)."). *See also* Enf't Branch of the Compliance Comm., Question of Implementation: Greece, Preliminary Finding, ¶ 18, U.N. Doc. CC–2007–1–6/Greece/EB (Mar. 6, 2008) ("In accordance with section XV, the enforcement branch applies the following consequences: . . . (a) Greece is declared to be in non-compliance. . . . (c) Greece is not eligible to participate in the mechanisms under Articles 6, 12 and 17 of the Protocol pending the resolution of the question of implementation."); Enf't Branch of the Complaince Comm., Question of Implementation: Greece, Final Decision, ¶ 5, U.N. Doc. CC–2007–1–8/Greece/EB (Apr. 17, 2008) ("The consequences set out in paragraph 18 of the preliminary finding shall take effect forthwith, and the consequences set out in paragraph 18(c) of the preliminary finding shall be applied taking into account the guidelines adopted under Articles 6, 12 and 17 of the Protocol.") Greece filed a compliance plan on July 16, 2008 and a revised compliance plan on October 27, 2008. In 2008, Greece was found to be in compliance and it was declared eligible to assess the Kyoto mechanisms. Meinhard Doelle, *Early Experience with the Kyoto Compliance System: Possible Lessons for MEA Compliance System Design*, 1 CLIMATE L. 237, 250-1 (2010).

130. Werksman, Baumert & Dubash, *supra* note 117, at 72.

131. Examples include the CITES and the Montreal Protocol. See the discussion in the following paragraphs.

that is not compliant with its obligations under the treaty.[132] Currently there are twenty nine countries suffering one or more type of trade suspension under CITES.[133] Resolution 10.3 of CITES also recommends that parties refuse export permits from the parties that fail to nominate a Scientific Authority in accordance with Article IX of the Convention.[134] Similarly, under the Montreal Protocol on Substances that Deplete the Ozone Layer (Montreal Protocol), the Fourth Meeting of the Parties adopted an indicative list of potential measures for circumstances of non-compliance with the Montreal Protocol.[135] One of these measures is suspension of specific rights and privileges under the Protocol, including those concerning industrial rationalization, production, consumption, trade, transfer of technology, financial mechanism, and institutional arrangement.[136]

Although these economic sanctions directly impact the non-compliant state, they may indirectly affect the foreign investors trading with that state. For example, the host state of foreign investments may be a party to an environmental treaty and enact a ban on trade with a non-compliant party. This trading ban will harm foreign investors which import from or export to that non-compliant state, while those domestic or foreign investors not trading with that non-compliant state remain unaffected. Such different treatment may violate the national treatment or MFN standard.[137]

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132. *Countries Currently Subject to a Recommendation to Suspend Trade*, CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES OF WILD FAUNA & FLORA, http://www.cites.org/eng/resources/ref/suspend.php (last updated Nov. 15, 2018).

133. *Id.*

134. *Resolution Conference 10.3: Designation and Role of the Scientific Authorities*, CONVENTION ON INT'L TRADE IN ENDANGERED SPECIES OF WILD FAUNA & FLORA, https://www.cites.org/eng/res/10/10-03C15.php (last visited Nov. 26, 2018).

135. UNITED NATIONS ENV'T PROGRAMME, HANDBOOK FOR THE MONTREAL PROTOCOL ON SUBSTANCES THAT DEPLETE THE OZONE LAYER 762 (12th ed. 2018).

136. *Id.*

137. Although currently there is no investment disputes based on such argument, there are similar cases concerning the host state's violation of non-discrimination through adoption of import or export ban. In *S.D. Myers v. Canada*, the U.S. investor argued that Canada violated the national treatment under the NAFTA because of Canada's ban on the export of PCB waste from Canada to the US. The arbitral tribunal upheld this claim. S.D.

3. *Differentiation between Industrialized and Developing Parties*

Investment mechanisms in environmental treaties, such as the CDM under the Kyoto Protocol and the multilateral fund under the Montreal Protocol, may require states to treat foreign investors differently on the basis of their home countries.

The CDM is one of the most innovative aspects of the Kyoto Protocol[138] for stimulating the flow of climate-friendly investment from industrialized to developing countries. Under this mechanism, industrialized Annex I countries that invest in developing non-Annex I countries for emission reduction projects receive tradable certificates on emission reductions (CERs) that offset their own reduction commitments.[139] Private sectors authorized by the industrialized countries may develop and run the CDM projects, which must be approved by the host developing countries certifying that the project contributes to their sustainable development.[140] According to Article 12 of the Kyoto Protocol, the CDM is designed to achieve dual goals: assisting non-Annex I parties in achieving sustainable development;[141] and contributing to Annex I parties' compliance with their reduction commitments.[142] By November 30, 2018, there were 7,806 CDM projects registered and the potential supply of CERs to the end of 2018 is over 4.1 billion.[143]

The rules regulating CDM projects in the Kyoto Protocol, however, potentially conflict with the non-discrimination principle of international investment law. As discussed above, according to the Kyoto Protocol only the foreign investors whose

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Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408 (NAFTA Arb. Trib. 2000). Similarly, in *Pope & Talbot v. Canada*, U.S. investors claimed Canada's export regulation violated the national treatment standard under NAFTA. This argument was dismissed by the tribunal. Pope & Talbot Inc. v. Canada (Can. v. U.S.), Award on the Merits of Phase 2 (NAFTA Arb. Trib. 2001), https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf.

138. SANDS & PEEL, *supra* note 68, at 287.

139. Kyoto Protocol, *supra* note 128, art. 12(3).

140. *Designated National Authorities*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://cdm.unfccc.int/DNA/index.html (last visited Nov. 26, 2018).

141. Kyoto Protocol, *supra* note 128, art. 12(2).

142. *Id.* art. 12(3)(b).

143. *Project Activities*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, https://cdm.unfccc.int/Statistics/Public/CDMinsights/index.html#reg (last updated Oct. 30, 2018).

home countries are Annex-I countries may participate in the CDM projects.[144] As a result, the host state must differentiate between foreign investors on the basis of their nationalities. Although this limitation accords with the objective of assisting industrialized country in fulfilling their reduction commitments, it may constitute a violation of the MFN standard in an investment dispute.

The multilateral fund in the Montreal Protocol, which assists developing countries in fulfilling their commitments to reduce the production and consumption of certain controlled ozone-depleting substances,[145] may face similar problems. It is also an important financial incentive that encourages hesitant developing countries to join the Montreal Protocol.[146] Under Article 10 of the Montreal Protocol, the multilateral fund finances incremental costs related to substituting ozone-depleting substances with new technology in developing countries.[147] The multilateral fund only supports investments in new technologies by local corporations in developing countries, not transnational corporations.[148] Thus the host developing state may finance adoption of new technologies by domestic investors and refuse to do the same for foreign investors in similar situations. Such differentiating treatment may also constitute a violation of NT under investment treaties.

In conclusion, some environmental treaties allow or require that host states accord less favorable treatment to foreign investors whose home states are non-parties or non-compliant parties to environmental treaties, or whose home state is a developed and industrialized state. It is still uncertain whether such treaty-based differentiation is justifiable under the non-discrimination standard of international investment law.

IV. Towards An Integrated Methodology of Reconciling Non-discrimination and Environmental Differentiations: A *Real Tension* Test

Previous parts of the article addressed how three types of environmental differentiations under national and interna-

144. Kyoto Protocol, *supra* note 128, art. 12(3).
145. Sands & Peel, *supra* note 68, at 272–73.
146. *Id.* at 273.
147. *Id.*
148. Romson, *supra* note 117, at 49.

tional law are in tension with the non-discrimination principle under international investment law. This part suggests an integrated methodology for reconciling non-discrimination and environmental differentiations under international investment arbitration.

The tension between the non-discrimination principle and environmental differentiations, although reflected in various forms, is divisible into two types: real tension and fake tension. A real tension exists if an environmental goal can only be achieved through differentiation. In other words, real tension exists where it is impossible for the host state to achieve the dual obligations of environmental protection and non-discrimination simultaneously. In these circumstances, the host state's compliance with the non-discrimination principle inevitably results in failure to achieve an environmental objective, or, in the alternative, achievement of the environmental objective requires violation of the non-discrimination principle.

The *Parkerings* case, for example, concerned a real tension between non-discrimination and environmental differentiations. Lithuania, pursing environmental protection of the Old Town, had no option but to reject the environmentally harmful Norwegian construction project while permitting a similar but less harmful Dutch project.[149] If Lithuania permitted both Norwegian and Dutch projects in the Old Town, in accordance with the non-discrimination obligation, it would fail its environmental goal. The *Arcelor* case also reflects a real tension. To ensure the proper functioning of the novel EU ETS system, there were no alternatives aside from subjecting only the investments in the steel sector to the emissions trading system, while leaving chemical and aluminum sectors untouched, since incorporating too many participants would have disturbed the "novel and complex scheme."[150]

There are also *fake tensions* where there are no inevitable conflicts between environmental regulations and the non-discrimination principle, either because the so-called environmental regulation is nothing but a disguised investment re-

149. Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf.

150. Case C–127/07, Société Arcelor Atlantique et Lorraine v. Premier Ministre, 2008 E.C.R. I–09895, ¶ 60.

striction, or because the conflict could have been avoided in alternative ways. Tensions may be fake for three reasons: (1) the differentiation does not further a rational environmental policy; (2) the environmental objective cannot be achieved through the differentiation; or (3) the environmental objective can be achieved through alternative means without harming the foreign investor.

The first type of fake tension occurs when differentiation does not serve a rational environmental policy. Two subcategories exist here. First is when the differentiation does not serve an environmental policy at all, and the host state's so-called environmental differentiation is nothing but a disguised investment distortion. For example, in the *S.D. Myers* case, the tribunal found that Canada's export ban on the hazardous polychlorinated biphenyl (PCB), which resulted in less favorable treatment of foreign investors than similar domestic investors, was not motivated by an environmental objective, but rather by a protectionist intent to favor domestic industry.[151] For this reason, although the tribunal generally agreed to incorporate environmental concerns into the assessment of the non-discrimination principle, it set aside such concerns upon concluding "there was no legitimate environmental reason for introducing the ban."[152]

The second sub-category concerns cases where the host state pursues an *irrational* environmental policy. According to the existing case law, tribunals generally conclude that the host state's environmental policy was rational.[153] The only exception is the *Bilcon* tribunal, who determined that Canada's protection of the community core values was not a "rational government policy" because it was "at odds with the law and

151. S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶¶ 193–95 (NAFTA Arb. Trib. 2000).

152. *Id.* ¶ 195.

153. *See, e.g.*, S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶ 255 (NAFTA Arb. Trib. 2000) ("Canada was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention."); Parkerings-Compagniet AS v. Republic of Lith., ICSID Case No. ARB/05/8, Award, ¶ 392 (Sept. 11, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf. ("The historical and archaeological preservation and environmental protection could be and in this case were a justification for the refusal of the project.")

policy of the [Canadian Environment Assessment Act]."[154] However, this approach is questionable because the host state may adopt an environmental policy which conflicts with existing domestic law, but is consistent with international environmental law.[155]

The tension between non-discrimination and environmental differentiations may also be fake if the host state's rational environmental objective cannot be achieved through the differentiation in question. For example, in *Arcelor*, the tribunal noted that the objective of the emissions trading scheme was reduction of greenhouse gas emissions "at the lowest cost."[156] According to economic logic, for the emissions trading system to function properly, "there must be a supply and demand for allowances on the part of the participants in the scheme," and "the wider the scope of the system, the greater will be the variation in the costs of compliance of individual undertakings, and the greater the potential for lowering costs

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154. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶ 724 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

155. A violation of national law does not necessarily result in a violation of international law. In the *ELSI* case, the ICJ held that "[w]hat is a breach of treaty may be lawful in the municipal law and what is unlawful in the municipal law may be wholly innocent of violation of a treaty provision." Elettronica Sicula S.p.A. (ELSI) (It. v. U.S.), Judgment, 1989 I.C.J. Rep. 15, ¶ 73 (July 20). It further explained that:

> [T]he fact that an act of a public authority may have been unlawful in municipal law does not necessarily mean that that act was unlawful in international law, as a breach of treaty or otherwise. A finding of the local courts that an act was unlawful may well be relevant to an argument that it was also arbitrary; but by itself, and without more, unlawfulness cannot be said to amount to arbitrariness. . . . Nor does it follow from a finding by a municipal court that an act was unjustified, or unreasonable, or arbitrary, that that act is necessarily to be classed as arbitrary in international law, though the qualification given to the impugned act by a municipal authority may be a valuable indication. *Id.* ¶ 124.

See also Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 3 and its commentaries, U.N. GAOR, 56th Sess., supp. No. 10, U.N. Doc. A/56/10 (2001), *reprinted in* [2001] 2 Y.B. Int'l L. Comm'n 31, U.N. Doc. A/CN.4/SER.A/2001/Add.1 ("The characterization of an act of a State as internationally wrongful is governed by international law. Such characterization is not affected by the characterization of the same act as lawful by internal law.").

156. *Société Arcelor Atlantique et Lorraine*, 2008 E.C.R. I–09895, ¶ 32.

overall."[157] If the tribunal had stopped the analysis here, it may have found that the challenged differentiation in the ETS Directive, which brought only the steel sector into the emissions trading system while leaving other sectors untouched, would not promote the achievement of the objective, because the wider the scope of the system, the greater the potential for achievement of the goal of the scheme. Thus, the tension between environmental differentiation in the ETS Directive and the non-discrimination principle would be fake. However, the tribunal did not do stop their analysis there, but rather continued and found that the ETS Directive was a novel and complex scheme whose implementation may have been disturbed by involving too many participants.[158] Therefore, involving only the steel sector as the first step was justified.[159]

The third type of fake tension involves a host state's environmental policy, where the policy may be achieved through alternative means without harming the foreign investor. For instance, in *S.D. Myers*, the U.S. investor claimed that Canada's different treatments of the U.S. investor and domestic investors through an export ban constituted a violation of the national treatment under NAFTA.[160] The tribunal found that the purpose of Canada's export ban ensuring the economic strength of the domestic industry—a legitimate objective.[161] However, the tribunal noted that there were two alternative measures which could have achieved the same objective without violating the foreign investor's right.[162] The tribunal also held that "[t]he fact that the matter was addressed subsequently and the border re-opened also shows that Canada was not constrained in its ability to deal effectively with the situation."[163] The tribunal concluded that Canada's different treatment of the U.S. investor and similar domestic investors violated its NAFTA obligations.[164]

157. *Id.* ¶ 33.

158. *Id.* ¶¶ 60–61.

159. *Id.*

160. S.D. Myers, Inc. v. Canada (Can. v. U.S.), 40 I.L.M. 1408, ¶¶ 130–33 (NAFTA Arb. Trib. 2000).

161. *Id.* ¶ 255.

162. *Id.*

163. *Id.*

164. *Id.* ¶ 256.

Real tension and fake tension are reconcilable through different methods. The proper method for reconciling a real tension between non-discrimination and environmental differentiations is justification of the discriminatory treatment as necessary to ensure environmental protection. In other words, if states can only achieve environmental protection through less favorable treatment of a foreign investment in comparison with other similar investments, discriminatory treatment should be regarded as a non-discriminatory act in international investment law. This would ensure that the host state's legitimate environmental regulation would not be hampered by its obligation to treat similar investors in identical manners. However, where a tension is fake—potentially because there is no rational environmental policy, or because the challenged measure cannot achieve such a policy, or simply due to the fact that the policy can be achieved through alternative ways—the discriminatory treatment must be a violation of the non-discrimination principle. Otherwise, the host state may escape its non-discrimination obligation under the cloaking of a fake "environmental protection" program.

This article suggests applying a *real tension* test in international investment arbitrations that involve a tension between non-discrimination and environmental differentiations. First, the tribunal should assess whether the tension is real through three steps: (1) whether there exists a rational environmental policy; (2) whether the challenged environmental differentiation can achieve the environmental policy; and (3) whether there is any alternative method for realizing the environmental policy without harming the foreign investor or investment. Second, the tribunal should apply appropriate methods to reconcile the tension. If there is a real tension, the host state's environmental differentiation is justified. If the tension is fake, the environmental differentiation constitutes a violation of the non-discrimination clause.

V. The Application of the *Real Tension* Test: A Case Study of *Bilcon v. Canada*

This section illustrates the application of the real tension test through an analysis of the recent *Bilcon v. Canada* case. In the case, the U.S. investors Clayton and Bilcon proposed the development of a quarry and marine terminal at Whites Point

in Nova Scotia, Canada.[165] The Canadian government rejected this project after an environmental assessment by a Canadian joint federal-provincial review panel (JRP). The U.S. investors argued, among other things, that the JRP environmental assessment violated Article 1102 (National Treatment) and Article 1103 (Most-favored-nation Treatment)[166] of NAFTA. They asserted violation arising from JRP's failure to investigate mitigation measures before making a decision on likely significant adverse environmental effects, while the JRP considered such mitigation measures in the environmental assessments of other similar domestic and foreign projects.[167] This case is paradigmatic, as it presents many controversial issues typical in cases where a complainant alleges that environmental differentiations are violations of the non-discrimination clause.

The first paradigmatic issue is that various factors, such as the sensitive location and the large size of the investment, as well as strong opposition from the local community, impacted the challenged environmental assessment.[168] The parties disagreed about whether these factors constituted different circumstances that would deny the likeness of the comparators. Although both the claimant and the respondent agreed that "in like circumstances" does not require identical or most like circumstances, they had different understandings of what circumstances were relevant in assessing "in like circumstances."[169]

From Canada's point of view, "it is the circumstances *underlying* the way in which Canada treats two investors that are determinative of whether or not treatment was accorded in like circumstances . . . including consideration of a State's policy objectives in according the treatment in question."[170] Canada contended that the treatment accorded to the Whites

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165. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶ 5 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

166. Due to the similarity of the elements of Article 1102 and Article 1103, this article focuses on the examination of Article 1102 only.

167. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶¶ 618–19 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

168. *Id.* ¶¶ 658-81.

169. *Id.* ¶¶ 608, 655.

170. *Id.* ¶ 655.

Point project was not "in like circumstances" with that accorded to the other EA proponents which the claimant regarded as comparators.[171] Specifically, Canada argued that the claimant's analysis did not consider the "specific factors at play in the EA process for the other projects."[172] It noted that the Whites Point project differed from other projects because of its large size, sensitive zoning area—an ecotourism rather than industrial area—consistent and large-scale blasting, effects on certain maritime species, and strong public opposition.[173] Canada also highlighted other differences, including that the terms of reference of the Whiles Point project did not mandate suggestion of the potential mitigation measures by the JRP,[174] and that the information provided by Bilcon during the EA lacked in quality and responsiveness.[175]

Moreover, a joint panel under both provincial and federal jurisdictions made the challenged environmental assessment.[176] The parties contested whether the comparator should be the projects subject to the same joint jurisdictions—Canada said yes, while the U.S. investors said no. Canada cited *Merrill & Ring*'s proposition that "treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors . . . just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments."[177] Canada argued that the same logic should apply in the *Bilcon* case, where the treatment was "accorded concurrently by two jurisdictions."[178] It further contended that neither EAs conducted by different state entities, nor EAs under different provincial jurisdictions, were comparable.[179] Canada elaborated that "treatment needs to be compared to that accorded by the same government to domestic

171. *Id.* ¶ 654.
172. *Id.*
173. *Id.* ¶¶ 658–81.
174. *Id.* ¶ 683.
175. *Id.* ¶ 684.
176. *Id.* ¶¶ 15-7; 32-33.
177. *Id.* ¶ 649 (quoting Merrill & Ring Forestry L.P. v. Canada, ICSID Case No. UNCT/07/1, Award, ¶ 82 (Mar. 31, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0504.pdf).
178. *Id.*
179. *Id.*

investors."[180] Thus, with respect to *Bilcon*, Canada argued that the only proper comparators were those projects subject to a joint federal-provincial review panel.[181]

The U.S. investors objected, and asserted that Canada's approach would limit the scope of possible comparators to the extreme—as only about 0.3% of environmental assessments under the CEAA occurred as a panel review or mediation.[182] The U.S. investors argued that considering the shared federal-provisional jurisdiction over the environmental assessment in Canada, the proper comparators should be all applicants seeking approval under the environmental assessment scheme.[183]

Since the environmental assessments challenged in the case apply generally to projects in various economic sectors, it seems problematic that the proper comparator should be in the same business or economic sector with the Whites Point project. The U.S. investors contended that the term "in like circumstances" requires a comparison between the claimant and "domestic investors engaged in similar economic activities and/or regulated by the same general legal framework."[184] The U.S. investors cited the *Occidental* case, in which the claimant complained of less favorable treatment for a foreign oil producer compared to domestic exporters of other products.[185] There, the host state, Ecuador, argued that the proper comparators must consist only of oil exporters.[186] The *Occidental* tribunal agreed with the claimant, observing that "the purpose of national treatment is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken."[187] Following the *Occidental* analysis, the U.S. investors argued that the tribunal "should consider all enterprises af-

180. *Id.* ¶ 655.
181. *Id.* ¶ 690.
182. *Id.* ¶ 688.
183. *Id.* ¶¶ 609, 614.
184. *Id.* ¶¶ 607–608.
185. *Id.* ¶ 693.
186. *Id.*
187. Occidental Exploration & Production Co. v. Ecuador (Ecuador v. U.S.), Case No. UN 3467, Final Award, ¶ 173 (London Ct. Int'l Arb. 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf. For the *Bilcon* tribunal's discussion, see Bilcon of Del., Inc. v. Canada, Case No. 2009–04, ¶ 693.

fected by the environmental assessment regulatory process to be in like circumstances with Bilcon."[188]

Under the test proposed here, the tribunal must address three questions:

(1) Does it constitute discrimination that a less-polluting investment received the investigation of the mitigation measures, while a more-polluting investment did not receive such investigation?

(2) Does it constitute discrimination that the investment suffering no significant public opposition received the investigation of the mitigation measures, while the investment suffering strong public opposition based on community core values did not receive such investigation?

(3) Does it constitute discrimination that the investment subject to provincial environmental assessment received the investigation of the mitigation measures, while the investment subject to a JRP process did not receive such investigation?

To answer these questions, a tribunal must assess whether, in each question, there is a real tension between the national treatment obligation and the environmental differentiations. If there is a real tension, Canada's different treatment of the U.S. investors would be justified. However, if the tension is fake, Canada would be in violation of the national treatment clause under NAFTA. The following paragraphs examine the first question as an example, analyzing the tension between the national treatment obligation and the protection of community core values.

With respect to the first of the three issues highlighted above, the U.S. investors argued that the JRP's failure to consider mitigation measures constituted a violation of national treatment because similar domestic investments received the consideration of mitigation measures in their environmental assessments.[189] A tension between the national treatment obligation and the protection of community core values appears in this analysis.

Determination of whether this is a real tension occurs through three distinct steps. First, is the pursuit of community core values a rational environmental policy? Second, can Ca-

188. *Bilcon*, Case No. 2009–04, ¶ 695.
189. *Id.* ¶ 618.

nada achieve its policy of community core values through refusal to investigate mitigation measures? Third, can Canada achieve the policy of community core values through alternative ways that are harmless to foreign investors? The following parts analyze these questions in sequence.

A. *Is the Pursuit of Community Core Values A Rational Environmental Policy?*

The challenged JRP report decided that the "overriding consideration in assessing the project" was community core values.[190] It noted that the community had an "'exceptionally strong and well defined vision of its future' that precluded the development."[191] For this reason, the report decided that "[t]he imposition of a major long-term industrial site would introduce a significant and irreversible change to Digby Neck and Islands, resulting in sufficiently important changes to that community's core values to warrant the Panel assessing them as a Significant Adverse Environmental Effect that cannot be mitigated."[192] The claimants contended that the Panel's consideration of community core values was unreasonable for two reasons. First, it granted to local opponents a veto over the project, which was against the environmental assessment process under the laws of Canada or Nova Scotia.[193] Second, Bilcon was provided no notice that community "core values was a factor the Panel was going to consider, let alone a predominant one."[194] The Tribunal agreed with the claimants' arguments and held that "[t]he 'community core values' approach adopted by the JRP was not a 'rational government policy'; it was at odds with the law and policy of the *CEAA*."[195]

Different from the tribunal's methodology—that the host state's environmental policy is irrational if the policy is inconsistent with the host state's domestic law—the real tension test argues that the rationality of an environmental policy depends on its consistency with international environmental law. In this case, Canada's pursuit of community core values was possibly

190. *Id.* ¶ 20.
191. *Id.*
192. *Id.* ¶ 20.
193. *Id.* ¶ 23.
194. *Id.* ¶ 24.
195. *Id.* ¶ 724.

consistent with the international policy of promoting public participation in environmental assessment, acknowledged in principle 10 of the Rio Declaration[196] and the Aarhus Convention.[197] The Espoo Convention also emphasized public participation in environmental impact assessments in a transboundary context.[198] Branches of the World Bank Group, such as the Multilateral Investment Guarantee Agency (MIGA) and the International Finance Corporation (IFC), and regional development banks, such as the European Bank for Reconstruction and Development (EBRD) and the Asian Development Bank (ADB), also incorporate public participation into the environmental assessments of the investment projects they fund.[199] Specifically, the IFC requires that not only public consultation, but also "[b]road [c]ommunity [s]upport" for the project be a condition of financing when there is a significant adverse impact on local community.[200] Therefore, an application of the real tension test leads to a conclusion that the protection of community core values is a rational governmental policy consistent with international environmental policy.

B. *Can the Policy of Community Core Values Be Achieved by Canada's Refusal to Investigate Mitigation Measures?*

Having determined that Canada's pursuit of community core values is a rational governmental policy consistent with the international policy of promoting public participation in environmental assessments, the next step is examining whether the policy of community core values is achievable through Canada's refusal to investigate mitigation measures. The answer here is no.

Public participation in environmental assessments must be achieved through ensuring citizens' access to adequate and understandable information outlining the potential environmental effects of the project. For example, the Aarhus Convention rests on three pillars that ensure public participation in environmental assessments. The first pillar is access to envi-

196. *Rio Declaration*, *supra* note 80, Principle 10.
197. Aarhus Convention, *supra* note 82, arts. 6–8.
198. Espoo Convention, *supra* note 83, art. 2(2).
199. *See* Collins, *supra* note 84, at 9-17 (discussing the guidelines of several international development banks).
200. *Id.* at 11.

ronmental information, which allows citizens to take advantage of the second and third rights: public participation in environmental decision-making and access to justice in environmental matters.[201] The requirement of ensuring public access to environmental information derives from Principle 10 of the Rio Declaration, which states that:

> At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.[202]

The adequate and understandable information regarding the potential environmental effects of the Whites Point project, which the citizens should be able to access, includes the potentially significant environmental effect after mitigation measures. Such mitigation measures, as suggested by the U.S. investors, include adopting restorative measures that decrease the harmful effects of the project on the environment, as well as compensating the local community.[203] Without investigating and making public the expected environmental effects after mitigation measures, Canada could not ensure the community's adequate access to environmental information and thus could hardly achieve its protection of community core values.

C. *Can the Policy of Community Core Values Be Achieved Through Alternative Ways That Are Harmless to Foreign Investors?*

Since the second condition has not been satisfied, there is no need to examine the third condition: whether there exists an alternative way to achieve the environmental policy without harming foreign investors. However, in this case, there did exist an alternative way. The JRP could assess the likely significant environmental effects after the mitigation measures, dis-

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201. STEPHENS, *supra* note 82, at 249.

202. *Rio Declaration*, *supra* note 80, Principle 10.

203. Bilcon of Del., Inc. v. Canada (Can. v. U.S.), Case No. 2009–04, Award on Jurisdiction and Liability, ¶ 21 (Perm. Ct. Arb. 2015), https://pcacases.com/web/sendAttach/1287.

close this information to the community, and consider the community's comments on the environmental effects after mitigation. If the community overwhelmingly disagreed with the construction and operation of the Whites Point project, the JRP could recommend rejecting the project to protect the community core values. On the other hand, if the community considered the environmental effects after mitigation acceptable, the JRP could and should take this into account in its environmental assessment.

VI. Conclusion

International investment law and environmental law adopt different methods for determining what circumstances tribunals should consider when assessing discrimination. This article reveals three kinds of legitimate environmental differentiations justified under the non-discrimination clause: impact-based differentiation, jurisdiction-based differentiation, and treaty-based differentiation. The article responds to the current academic debates on how to modify the contemporary rules of international investment law to preserve states' regulatory space in environmental protection. It suggests justifying all three kinds of environmental differentiations through a real tension test: if the host state's environmental policy, which is consistent with international environmental policy, is only achievable through different treatment of similar investments, there exists a real tension between non-discrimination and environmental differentiation. In other words, the real tension concerns an inevitable and inescapable conflict between international investment law, on the one hand, and a domestic environmental regulation in line with international environmental policy on the other. In the case of real tension, the host state's differentiation between similar investments should not constitute a violation of the non-discrimination principle under international investment law.