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ORIGINAL ARTICLE

INTERNATIONAL LAW AND PRACTICE

International economic law and the quest for universality

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Abstract

The quest for universality in international economic law has met many obstacles. This article begins from the proposition that there are various ways to conceive of universality in international law, for example whether the rules are accepted widely among states (omnipresence) or whether they are broadly coherent (generality). Homing in on trade and investment law, the article assesses how each of these areas has functioned as a testing ground for these different conceptions. An in-built quasi-universality characterizes international trade law with the WTO as a seemingly centralized universal institution. Such universality, however, has often been achieved through differentiation of rights and obligations (e.g., the Enabling Clause and regional trade agreements). In investment law, attempts at universalization through the construction of centralized institutions have failed. Nevertheless, certain common standards have emerged in this fragmented regime. There is also a debate around the use of the MFN clause as a universalizing tool and renewed efforts to universalize investment law are afoot. More generally, it is clear that there is little appetite for codification of international economic law, and that states wish to control its content through the conclusion of treaties. In the final analysis, this article asks whether it is time to conceive of universality differently, and particularly whether equity and collective preferences should be a more central part of the quest.

Keywords: customary international law; international economic law; investment law; universality; WTO law

1. The pursuit and meanings of universality in international economic law

This contribution seeks to show how the quest for universality has met with different obstacles in international economic law. It will highlight various ways to conceive universality and show that universality has, at times, been problematic in the international legal system, especially in the area of international economic law.

Universality in the context of international law can mean, for example, that legal rules apply to all states.¹ In other words, law is *omnipresent*. It is accepted by, valid for, and binding on all states.² Alternatively, universality can be a way of appraising whether international law constitutes a coherent legal system.³ This means evaluating if it contains the characteristics of a system or if it is simply a mix of norms having little in common. In this context, universality implies *generality*.

*The author would like to very warmly thank Jason Rudall, Researcher at the Faculty of Law of the University of Geneva, for his invaluable assistance in the preparation of this lecture given at the European Society of International Law's Annual Conference at Manchester University on 15 September 2018.

¹See B. Simma, 'Universality of International Law From the Perspective of the Practitioner', (2009) 20 *European Journal of International Law* 265, at 267; see also R. Jennings 'Universal International Law in a Multicultural World', in M. Bos and I. Brownlie (eds.), *Liber Amicorum for the Rt. Hon. Lord Wilberforce* (1987), 39 at 40–1.

²Simma, *ibid.*, at 267.

³*Ibid.*

As yet another alternative, universality can refer to an ambition to create a global public order.⁴ This is quite different from a conception of international law that facilitates co-operation among states and is rather like cosmopolitan law, as Immanuel Kant might have conceived.⁵ From this perspective, international law is seen as a value-oriented system promoting collective interests on a global scale. As is becoming evident, there are many ways in which international law may be conceived as universal. The last-mentioned form of universality – which embodies an ambition to create a global public order – has not prospered in international economic law.⁶

Broadly speaking, universality can only be achieved if there is agreement on the essential features of a regime and, at the same time, some room for variance and deviation is left.⁷ So some trade-off between *omnipresence* and *generality* is necessary. Multilateral treaties constitute one type of vehicle for promoting universality. Reservations to treaties are a way in which international law has dealt with a lack of consensus on given issues while attempting to propagate universality. Reservations must be compatible with a treaty's aim and purpose but they allow a treaty to enter into force where the parties do not fully agree. As a result, greater universality, as omnipresence, is sought through sacrificing the unity of the treaty.⁸ In other words, universality in form has often been at the expense of fragmentation in substance in international law, that is, at the expense of universality as generality. In some areas of international law, however, the practice of reservations in multilateral treaties has not been common. International economic law is one of those areas.

Another normative vehicle is customary international law, which also has particular features that facilitate its universal character. As Article 38(1)(b) of the ICJ's Statute provides, custom attempts to be universal in the sense that it is meant to reflect 'a general practice accepted as law' and could be equated with universality as omnipresence. There are three 'exceptions' to the strict universality of customary international law. These include the position of new states, the persistent objector doctrine and the emergence of regional custom. However, these 'exceptions' actually reinforce the universal aspiration of customary international law.⁹ As for the first, new states are expected to comply with existing custom, although they have been able to contest some customary rules and refine others.¹⁰ This has allowed customary international law to extend its reach over time as new states have emerged. As for the second, the persistent objector doctrine allows those states who explicitly and constantly object to a given customary norm not to be bound by it when it comes into force. That said, in practice, persistent objectors are a rare phenomenon.¹¹ As for the third, regional custom can form in particular geographical areas. However, as with the persistent objector doctrine, it rarely occurs in practice.¹² Once again, these 'exceptions' to strict universality allow the emergence of quasi-universal customary law.

The pursuit of universality in international economic law has a long and tumultuous history. It is the product of the increased cross-border commercial and political activity in the nineteenth century and thereafter, in the European states of the time, with some relying on the colonial

⁴See A. von Bogdandy and S. Delavalle, 'Universalism and Particularism as Paradigms of International Law', (2008) 3 *International Law and Justice Working Paper* 1.

⁵C. Tomuschat, 'International Law: Ensuring the Survival of Mankind on the Eve of a New Century: General Course on Public International Law', (1999) 281 *Recueil des Cours* 63.

⁶See, e.g., E. Petersmann, *International Economic Law in the 21st Century: Constitutional Pluralism and Multilevel Governance of Interdependent Public Goods* (2012).

⁷M. Prost, *The Concept of Unity in Public International Law* (2012), at 37.

⁸See C. Redgwell, 'Universality or Integrity? Some Reflections on Reservations to General Multilateral Treaties', (1993) 64 *British Yearbook of International Law* 245.

⁹L. Helfer and I. Wuerth, 'Customary International Law: An Instrument Choice Perspective', (2016) 37(4) *Michigan Journal of International Law* 563, at 570.

¹⁰See, e.g., J. D'Aspremont, 'La décolonisation et le droit international de la succession', in G. Distefano, G. Gaggioli and A. Héche (eds.), *La Convention de Vienne de 1978 sur la succession d'états en matière de traités: Commentaire article par article et études thématiques* (2016), vol. I, 1783, at 1790–3.

¹¹M. Byers, *Custom, Power and the Power of Rules* (1999), at 181.

¹²See, e.g., *The Asylum Case (Colombia v. Peru)*, Judgment of 20 November 1950, [1950] ICJ Rep. 6, at 266.

relationships they had established.¹³ Since 1945, there have been various attempts to achieve the goal of universality. The creation of the Bretton Woods institutions aimed to establish a universal system of economic relations after the Second World War. They only became quasi-universal in the 1990s. The promulgation of the New International Economic Order in the 1970s by a United Nations declaration¹⁴ and the Charter of Economic Rights and Duties of States¹⁵ were intended to change the way the global economy was governed with a view to orienting the benefits derived therefrom towards the needs of developing countries. However, the adoption of the Declaration and the Charter at the time revealed the tensions that existed in this area between various groups of states.¹⁶ The New International Economic Order has not been successful in its attempt to change the economic order from a universal perspective,¹⁷ although it had a delegitimizing effect on certain concepts and principles, and influenced the shaping of others. The continuing impact of the normative discourse centring on the New International Economic Order can be seen in various areas of international law.¹⁸ The notion of permanent sovereignty over natural resources, provisions on technology transfer, as well as the sharing of benefits from the exploitation of the seabed and ocean floor beyond national jurisdiction, are all cases in point.¹⁹ These examples illustrate the normative power of legal developments in prompting further development, whether that be through discussions, institutions or legal rules.

The Cold War, decolonization, and changes in economic relations are among the events that led states to want to protect their interests through institutional and normative mechanisms – regional or multilateral but not universal – as well as through a myriad of bilateral treaties. These developments show that states have privileged pragmatic solutions in international economic law, not necessarily on the basis of pursuing universality, but rather for a myriad of practical, security and/or economic reasons.

This article will focus on the challenges of, and opportunities for, universality in international economic law.²⁰ In particular, I will zoom in on the areas of international trade law and international investment law. These areas highlight the various ways universality can be shaped in international legal regimes. Our journey through these areas of trade and investment law will expose the various paths – inadvertently or otherwise – towards universality over time. As will be seen, those paths may be contrasted between the investment and trade law fields, and have most noticeably involved varying levels of institutionalization. Overall, I will consider universality from a normative standpoint, focusing on the reach and opposability of rules, mechanisms and institutions. In each of these areas, the pursuit of universality has at times been a success and other times a failure. Interestingly, the main vehicles for universality in both fields have been international treaties. Very few principles of a customary nature have emerged in the international economic law field.

First, I will consider the few customary principles in international economic law that there are, and show that codification attempts by the International Law Commission (ILC) have been rare in this area. Second, I will turn to appraise the in-built universality offered by the World Trade Organization (WTO), it being treaty-based and containing various flexibility tools that allowed

¹³See A. Anghie, 'The Evolution of International Law: Colonial and Postcolonial Realities', (2006) 27 *Third World Quarterly* 739.

¹⁴Declaration on the Establishment of a New International Economic Order, UN Doc. A/RES/S-6/3201 (1974).

¹⁵Charter of Economic Rights and Duties of States, UN Doc. A/RES/29/3281 (1974).

¹⁶N. Gilman, 'The New International Economic Order: A Reintroduction', (2015) 6(1) *Humanity Journal* 1.

¹⁷E. Engle, 'The Failure of the Nation State and the New International Economic Order: Multiple Converging Crises Present Opportunity to Elaborate a New Jus Gentium', (2003) 16 *St Thomas Law Review* 187.

¹⁸I. Venzke, 'Possibilities of the Past: Histories of the NIEO and the Travails of Critique', (2018) 20 *Journal of the History of International Law* 263, at 296.

¹⁹*Ibid.*

²⁰Issues of financial and monetary law are not covered. On these issues see, e.g., S. Zamora, 'Is There Customary International Economic Law?', (1989) 32 *German Yearbook of International Law* 9, at 29–31.

the WTO treaty package to be accepted. Third, I intend to contrast the approach taken in the field of international trade law with that in international investment law. In the latter field, I will explore how multilateralism has been used as a tool in the quest for universality. In the final section of this contribution, I will offer several concluding remarks as well as insights for the future of universality in international economic law.

2. The rarity of customary principles in international economic law

There are very few customary law rules and principles in international economic law.²¹ One of the cornerstones of international economic law, however, is of a customary nature, namely the principle of sovereignty over natural resources and related economic activities. One of its manifestations – the right of a state to nationalize – has been considered as resulting from customary international law.²² There is also a customary limitation on state immunity in respect of economic transactions. This was codified in the UN Convention on the Jurisdictional Immunities of States and Their Property of 2004.²³ Another customary rule has been formulated around the minimum standard of treatment for foreigners.²⁴ However, investment disputes have demonstrated that the content of this minimum standard is rather unclear.

The work of the ILC reveals that international economic law is not really a priority for codification. Where certain aspects of international economic law have been considered by the ILC, the result has not been a codification in the form of rules. For example, in the 1970s the ILC studied the question of the Most Favoured Nation (MFN) clause. However, after asking states to comment on the draft articles on MFN they had proposed, the General Assembly noted the complexity of the codification and progressive development of international law around MFN clauses and decided to give states more time to determine their positions on how to proceed.²⁵ A convention on the topic has never come to fruition. Moreover, in the draft articles proposed by the ILC, the MFN clause was simply defined by the ILC as ‘a treaty provision whereby a State undertakes the obligation towards another State to accord most-favoured nation treatment in an agreed sphere of relations’.²⁶

A Study Group established by the ILC took up the issue again between 2009 and 2015, examining contemporary issues around the MFN clause. It was decided that the topic was ripe for appraisal given the evolution of MFN as a cornerstone of the WTO and that ‘... controversies had arisen in the context of bilateral investment agreements over the extension of MFN from substantive obligations to dispute settlement provisions’.²⁷ The Study Group concluded that MFN clauses remained unchanged in terms of their character since the time of the 1978 draft articles, and that while the latter were used in the interpretation of such clauses, they did not provide all the answers to the interpretative issues around MFN clauses. Noting that ‘[t]he central interpretative issue in respect of the MFN clauses relates to the scope of the clause and the application of the *ejusdem generis* principle’,²⁸ the Study Group decided to focus on the issue of dispute settlement. However, it also said that ‘[w]hether MFN clauses are to encompass dispute settlement

²¹See H. Ascensio, *Droit international économique* (2018), at 18–31; see also Zamora, *ibid.*, at 40 (notably on the reasons for the paucity of customary law rules and principles in international economic law).

²²*Texaco Overseas Petroleum Company / California Asiatic Oil Company v. Government of the Libyan Arab Republic (Compensation for Nationalized Property)*, (1978) 17(1) ILM 1, at para. 59.

²³Convention on the Jurisdictional Immunities of States and Their Property, UN Doc. A/RES/59/38 (2004), Art. 10.

²⁴*Case Concerning The Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain)*, Judgment of 5 February 1970, [1970] ICJ Rep. 1, at para. 33.

²⁵See ILC, ‘Analytical Guide to the Work of the International Law Commission – Most Favoured Nation Clause’, available at legal.un.org/ilc/guide/1_3.shtml (accessed 5 September 2018).

²⁶Draft Articles on Most-Favoured-Nation Clauses with Commentaries, 1978 VILC, Vol. II (Part Two), Art. 4.

²⁷ILC, Final Report of the Study Group on the Most-Favoured-Nation Clause, UN Doc. A/CN.4/L.852 (2015).

²⁸*ibid.*, at para. 214.

provisions is ultimately up to the States that negotiate such clauses²⁹ and '[e]xplicit language can ensure that an MFN provision does or does not apply to dispute settlement provisions. Otherwise the matter will be left to dispute settlement tribunals to interpret MFN clauses on a case-by-case basis'.³⁰

The ILC opted to discontinue work on another international economic law issue that had come within its purview. Between 2007 and 2010, a working group of the ILC examined all aspects of and state views on shared natural resources, including oil and gas. In 2010 the working group concluded that the ILC should not consider cross-border oil and gas issues in its work on shared natural resources given that a majority of States '... believed that the question was not only essentially bilateral in nature, but also highly technical, involving diverse regional situations'.³¹ The ILC endorsed the recommendation of the working group and the work on this topic was abandoned.³² The ILC has, thus, not been very active in the area of international economic law.

The same can be said for the Institut de droit international (IDI), although it recently engaged with investment law issues. The IDI has, for example, reported and adopted a resolution on 'Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties' and set up commissions on 'Corruption and Foreign Investment' as well as the 'Equality of Parties before International Investment Tribunals'.³³ In the context of its work on the MFN clause, the IDI observed that it 'could become crucial for guaranteeing the equality of competitive opportunities between investors of different countries, preventing discrimination against foreign investors on grounds of their nationality', but also cautioned that it was 'connected and limited by the *eiusdem generis* principle, according to which the clause can only attract matters belonging to the same subject matter or the same category of subject matters it is related to'.³⁴ Moreover, the IDI concluded that 'there was a preference for a more restrictive use of the MFN clause'.³⁵ While it was generally agreed the clause was concerned with treatment, it also took note of the doubts around whether MFN also applied to dispute settlement options. The IDI ultimately recommended that:

[i]f the treatment is deemed to include access to arbitration or the extension of an [umbrella clause], it is necessary to stick to the provisions of the treaty, from which the obligations originate. Thus, an investor could not invoke an [umbrella clause] which is not provided for in a treaty.³⁶

Furthermore, it noted that '[i]n assessing the MFN status of treatment, a prior interpretation of the treaty should therefore be made in order to ascertain the intention of the States'.³⁷

Codification endeavours via the ILC or the IDI ultimately reveal little appetite for the recognition and/or codification of customary international economic law. It may indeed indicate a realization that it is impossible for this area of law to be truly universal in terms of omnipresence and

²⁹*Ibid.*, at para. 215.

³⁰*Ibid.*, at para. 216.

³¹Shared natural resources: feasibility of future work on oil and gas, UN Doc. A/CN.4/621 (2010), at para. 15.

³²Report of the International Law Commission on its Sixty-second Session (3 May–4 June and 5 July–6 August 2010), UN Doc. A/65/10 (2010).

³³See Institut de Droit International, '18th Commission: Legal Aspects of Recourse to Arbitration by an Investor Against the Authorities of the Host State under Inter-State Treaties', (2009) 73 *Annuaire de l'Institut de Droit International* 543; First Commission of the Institut de Droit International, 'Corruption and Foreign Investment', available at www.idi-iiil.org/en/commissions/ (accessed 5 September 2018).

³⁴*Ibid.*, at 46.

³⁵*Ibid.*, at 54.

³⁶*Ibid.*

³⁷*Ibid.*

generality without treaty support. Even in such a situation, however, other legal techniques may be necessary to catalyze universality, as in the case of the WTO.

3. In-built universality of the World Trade Organization

The WTO has an in-built quasi-universality that has been constructed over time, but which largely materialized in the 1990s and 2000s. The move from the GATT 1947 to the WTO in 1995 was indeed a successful milestone on the road to universalization in international trade law. That said, this was not an easy road before the 1990s. In the immediate aftermath of the Second World War, a centralized institution to regulate trade – the International Trade Organization – was proposed in the Havana Charter, which was signed by 56 states on 24 March 1948.³⁸ However, the International Trade Organization never came into being. This was largely because the US President never proposed the approval of the Havana Charter to Congress and, subsequently, no other state ratified the Charter either.

Despite the failure to create an international organization for trade, the GATT 1947 came into effect, albeit with only a handful of signatories. It would take until the mid-1990s for an international organization for the regulation of trade to formally come into existence with the creation of the WTO at the Eighth Round of negotiations under the GATT. Even today, however, we cannot say that the WTO is a fully universal organization. It only has 164 members and accommodates various features that go against the grain of universality, which I will elaborate upon shortly. That said, it is true that if the universality of the WTO were to be measured by the percentage of all trade covered by its members, which represents 98 per cent of the world's trade, universality is almost reached.

At first sight, the WTO is a centralized universal institution but it is not constituted by hierarchical structures.³⁹ The objective was and continues to be that of trade liberalization through the observance of a number of principles within a multilateral framework, and various procedures and mechanisms have been used to build universality. States, having learnt from the protectionist movement that occurred between the two world wars, decided to make the principle of non-discrimination, including the provision of the most-favoured nation treatment, the cornerstone of the multilateral system. Another technique of maintaining universality during the Uruguay Round was the principle of the single undertaking. It also applies vis-à-vis new WTO members. According to this principle, each aspect of any negotiation is part of the broader package and cannot be agreed separately. In other words, nothing is agreed until everything is agreed. Reservations are not permitted. Similarly, adoption by consensus plays a critical role in the operation of the WTO. This all points to a sort of 'imposed' universality in the system.

That being said, there are many aspects of the WTO system that fly in the face of universality. These features qualify its universality. For instance, the WTO's legal system is largely based on commitments that are essentially individual or bilateral in nature.⁴⁰ Country-specific schedules are negotiated on a state-to-state level and are then multilateralized according to the MFN principle. In this context, we have to make a distinction between the general framework of the WTO system and specific commitments made by states. The framework of the WTO system is in this sense universal, but it operates in a more specific manner. For example, all tariff reductions are bilateral but negotiated in the knowledge that they will work *erga omnes*.

³⁸For the text of the Havana Charter see United Nations Conference on Trade and Employment, Final Act and Related Documents, UN Doc. E/CONF.2/78 (1948).

³⁹See P. Kuijper, 'WTO Institutional Aspects', in D. Bethlehem et al. (eds.), *The Oxford Handbook of International Trade Law* (2009), 80.

⁴⁰See J. Pauwelyn, 'A Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?', (2003) 14(5) *European Journal of International Law* 907. See also H. Ruiz-Fabri, 'About the Sense and Direction of Multilateralism in International Trade Law', in H. Hestermeyer et al. (eds.), *Coexistence, Cooperation and Solidarity, Liber Amicorum Rüdiger Wolfrum* (2012), 281.

The GATT and WTO have constituted an ‘interface mechanism’ that permits international trade between countries having different economies.⁴¹ The system of international trade is premised on the fact that the economies of its membership will vary in their nature. This premise is reflected in the architecture of the system itself, namely that each member of the WTO has a tariff schedule and a schedule of commitments on services.⁴² China’s membership of the WTO, for example, illustrates how the system has dealt with a variety of economic models. In this case, it did so by allowing China to have a long and detailed protocol of accession with an in-built transitional period so that the rules of the WTO system could be moulded to the particularities of China’s economy.⁴³ China, on the other hand, has claimed that it has been subjected to many more restrictions, notably with respect to transparency, than those countries that were already members. Today the system is under pressure, most particularly with respect to the treatment of Chinese state-owned enterprises (SOEs) and the subsidy regime.

Regionalism offers another perspective on the built-in universality of the WTO. Indeed, it has been said that:

[i]t is only possible to qualify the WTO as a universal organization . . . catching the complex and composite essence of its legal system [as] a Janus face, [which] looks in two opposite directions at the same time, multilateralism and regionalism.⁴⁴

This means that there is a disregard of the main principle of the WTO system, namely non-discrimination. There would appear to be something of a consensus that this principle is to be applied in a flexible, pragmatic, and economically realist way.⁴⁵

The non-discrimination principle is indeed mitigated by the space given to regionalism in the multilateral trade system. Article XXIV of the GATT gives members the option of creating regional customs unions and trade zones subject to certain conditions. The purpose of this provision was regional liberalization which, by deepening market access, was seen as complementary to the multilateral trading system. This is recognized, for example, in the preamble of the Understanding on the Interpretation of Article XXIV of 1994, which provides that states recognize the ‘contribution to the expansion of world trade that may be made by closer integration between economies of the parties to such agreements’.⁴⁶ Article XXIV is thus an exception to the core principles of non-discrimination, most-favoured nation and reciprocity in general under the GATT, but it was drafted in such a way as to make regionalism subject to the conditions that it contributes to the general liberalization of trade, and meets the objectives of trade creation rather than endorsing trade diversion.⁴⁷

The relationship between regionalism and universalism has not always been an easy one in the life of the WTO. While Article XXIV of the GATT allows for the formation of regional trade agreements, the oversight mechanisms of regional trade agreements at the universal level, such as the Committee on Regional Trade Agreements, have not been wholly successful. Moreover, tensions have arisen between regional efforts and the multilateral system in various ways.

⁴¹See J. Jackson quoted in J. Trachtman, ‘Comments on Dani Rodrik FT Op-ed, 5 August 2018, “The WTO has become Dysfunctional”’, 6 August 2018, *International Economic Law and Policy Blog*, available at worldtradelaw.typepad.com/ielpblog/2018/08/trachtman-comments-on-dani-rodrik-ft-op-ed-august-5-2018-the-wto-has-become-dysfunctional.html (accessed 30 April 2019).

⁴²*Ibid.*

⁴³*Ibid.*

⁴⁴A. Fabbri, ‘Universalism and Regionalism in International Trade Law: Is the WTO a Truly Universal Organization?’, in *Scritti in memoria di Maria Rita Saulle* (2014), Vol. I, 559, at 572.

⁴⁵*Ibid.*; Ruiz Fabri, *supra* note 40, at 287.

⁴⁶WTO, ‘Understanding on the Interpretation of Article XXIV GATT of 1994’.

⁴⁷See J. Viner, *The Customs Union Issue* (1950), at 44.

These tensions are particularly evident in the context of dispute settlement and several WTO cases illustrate the types of conflicts that may arise.⁴⁸

New challenges in this context are also emerging for the multilateral system with the so-called mega-regional trade agreements. They may be perceived as posing a threat to the universal system, especially in light of the current climate of negotiations in the WTO. They may also be providing a potential for a new form of internationalism with interactions between them, i.e., between large mega-regional groupings, challenging the WTO's universal model. Overall, if complementarity with regionalism was the original trend when the international trade system was built, competition between universalism and large groupings, which gives new content to regionalism, would appear to be the emerging practice. There is a need to think in new terms to leverage the advantages and reduce the costs presented by the competition to WTO inbuilt universality. WTO bodies, both political and judicial, should think hard about how to give sufficient space and freedom to regionalism while establishing a new complementarity with free trade agreements.

A second major mitigation of the non-discrimination principle is the explicit differentiation between members that is made in the WTO Agreements. This takes into account economic differences. Under Part IV of the GATT, special and differential treatment of developing countries is a feature of the in-built inclusivity of the system. These special dispensations, for example, allow developing countries to take longer periods of time to implement trade agreements and commitments, permit measures to increase trading opportunities for developing countries, oblige other WTO members to protect the trade interests of developing countries, and to support developing countries in building capacity to comply with trade requirements. These special and differential treatment provisions were made an integral part of the WTO agreements following the Doha Declaration of 2001.⁴⁹ Following the Bali Ministerial Conference in 2013, a mechanism was established to appraise the implementation of special and differential treatment provisions of the WTO Agreements.⁵⁰ This is in the form of special sessions of the Committee on Trade and Development. Such special and differential treatment constitutes a unique feature for facilitating universality in the WTO system. It allows developing countries to exercise their membership differently. To the extent that it encourages a more inclusive membership of the system, it has a broadly similar function to reservations in treaties in other areas of international law.

These features of the multilateral trade system speak to a conception of universality with particularity and differentiation. They are intended to facilitate acceptance of the system as such, in favour of universality in generality. The most recent example of universality with differentiation in the international trade system is evidenced by the WTO Agreement on Trade Facilitation. It entered into force on 22 February 2017 having been ratified by two-thirds of the WTO membership. It is intended to render export and import processes more efficient, but it is the first time in WTO history that the obligation to implement the Agreement is related to the capacity of the country to do so.⁵¹ Further, it contains special and differential treatment for least developed and developing countries. Further still, a Trade Facilitation Agreement Facility has been set up to assist developing and least developed countries to get the assistance they require to benefit fully from the Trade Facilitation Agreement.⁵²

As I have illustrated, there is universality as generality in international trade law that has been in-built with certain fundamental flexibilities. Nevertheless, the universality of international trade law has not been without its problems. The means for building universality can be used for

⁴⁸See L. Boisson de Chazournes, *Interactions between Regional and Universal Organizations: A Legal Perspective* (2016), at 113–41.

⁴⁹WTO, 'Special and Differential Treatment', Ministerial Declaration of 14 November 2001.

⁵⁰WTO, 'Monitoring Mechanism', Ministerial Declaration of 18 December 2006.

⁵¹WTO, 'Trade Facilitation', available at www.wto.org/english/tratop_e/tradfa_e/tradfa_e.htm (accessed 5 September 2018).

⁵²*Ibid.*

deconstructing universality. This has been evident, for example, in difficulties with the consensus requirement at the WTO⁵³ or the oversight of regional trade agreements. Attempts to pursue a strict conception of universality have not been successful.

Such strong universal features can even present a systemic threat. Institutional tensions, particularly in the area of dispute settlement, are prevalent now more than ever before with the stalemate on the appointment of Appellate Body members, which has in part to do with the consensus requirement. In this context, the US is blocking the appointment of Appellate Body members. This could well lead to the entire WTO system seizing up and eventually dying.⁵⁴ Similarly, the turn to regional trade agreements as the multilateral trade rounds have failed in recent years represents a further systemic threat to the WTO. The survival of the multilateral trading system itself may depend upon the pursuit of an even more flexible approach to universality.

4. Multilateralization as a path towards universality: The case of investment law

International investment law, in contrast to international trade law, is characterized by decentralization. The system is constituted by a web of bilateral investment protection treaties and a few regional conventions. Despite several attempts, centralized multilateral codification in the field of investment law has been largely unsuccessful. The OECD attempted with its member states in the 1960s a Draft Convention on the Protection of Foreign Property, but this was never formally adopted.⁵⁵ The OECD tried again in the 1990s with the negotiations around the Multilateral Agreement on Investment.⁵⁶ While a draft text was produced, the negotiations on this attempt at a multilateral treaty ultimately failed. As a result, the framework of international investment law is mainly bilateral and *ad hoc* in nature.⁵⁷ The Convention on the Settlement of Investment Disputes between States and Nationals of Other States (ICSID Convention) is a particular case in this context as the aim was to adopt a convention that would establish dispute settlement facilities.⁵⁸ It thus does not contain substantive norms.

Nevertheless, states have been concluding bilateral investment treaties since the 1960s, and prior to that they concluded Friendship, Commerce and Navigation treaties. Today there exist around 3,000 Bilateral Investment Treaties (BITs). That said, some regard this decentralized approach through bilateral treaties to be a substitute for an unsuccessful multilateral approach.⁵⁹ Indeed, it has been argued that the defining trend of investment law since the Second World War has been what is called bilateral 'treatification'.⁶⁰ Others consider that the lack of a centralized regime and single multilateral treaty has facilitated the emergence of a successful system. In particular, it is easier for a system of this nature to evolve incrementally as willing states experiment

⁵³See, e.g., C. Ehlermann and L. Ehring, 'Decision-Making in the World Trade Organization: Is the Consensus Practice of the World Trade Organization Adequate for Making, Revising and Implementing Rules on International Trade?', (2005) 8(1) *Journal of International Economic Law* 51.

⁵⁴J. Pauwelyn and R. Hamilton, 'Exit from International Tribunals', (2018) 9(4) *Journal of International Dispute Settlement* 679.

⁵⁵Resolution of the OECD Council, 12 October 1967, (1968) 7(1) *ILM* 117.

⁵⁶OECD Negotiating Group on the Multilateral Agreement on Investment (MAI), *The Multilateral Agreement on Investment: Draft Consolidated Text*, OECD Doc. DAF/FE/MAI(98)7/REV1 (1998).

⁵⁷See J. Sharpe, 'Control, Capacity and Legitimacy in Investment Treaty Arbitration', (2018) 112 *AJIL Unbound* 261; J. Pauwelyn, 'At the Edge of Chaos? Foreign Investment Law as a Complex Adaptive System. How it Emerged and How can it be Reformed?', (2014) 29 *ICSID Review* 372.

⁵⁸1966 Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 575 *UNTS* 159.

⁵⁹See A. Reinisch and A. Bjorklund, 'Soft codification of international investment law', in A. Bjorklund and A. Reinisch (eds.), *International Investment Law and Soft Law* (2012), 305, at 310.

⁶⁰J. Salacuse, 'The Treatification of International Investment Law', (2007) 13 *Law and Business Review of the Americas* 155.

with different approaches to investment protection and dispute settlement.⁶¹ It is in this sense that the present system has been characterized as a ‘dynamic laboratory’.⁶²

Going beyond these considerations, the network of international investment agreements has several distinctive characteristics. First, it demonstrates universality as omnipresence. Almost all countries have signed at least one BIT and many countries are party to numerous BITs. But the system is atomized in that it is constituted by thousands of independent agreements and lacks coherence as well as any real systemic co-ordination.

Over time, certain common standards have, however, emerged. In this context, states have developed model BITs that are used as a basis upon which to start the negotiations of new BITs with other states.⁶³ In fact, some of the common standards that feature in the model BITs and finally negotiated BITs can be traced back to the above-mentioned 1967 Draft OECD Convention on the Protection of Foreign Property.⁶⁴ Some perceive that a multilateralization of investment law is occurring in this way, particularly through the propagation of bilateral treaties.⁶⁵ It has been argued that bilateral investment treaties do not stand in isolation. Instead, it is evident that there are numerous overlapping elements, connections and similarities in this architecture. As such, a coalescence of meaning around certain standard clauses, the recourse to treaty-shopping and the developing body of jurisprudence from investor-state arbitration have helped to create a situation that is tantamount to a universal system.

Others consider that interpretation can be a vehicle for universalization. In a decentralized investment system, interpretation may be seen as the key to the avoidance of conflicting outcomes. Given the lack of any centralized co-ordination, dispute settlement is particularly exposed to conflict and incoherence. While investment treaties contain similar standards, the precise wording of these standards can vary from one BIT to another. As such, if consistent interpretation is sought, it will be important to factor this variation in when interpreting BITs.⁶⁶ This may be through a process known as ‘soft codification’ and some argue that this is already taking place.⁶⁷

I will now focus on two specific areas where multilateralization and perhaps universalization have been pursued in international investment law. These are the MFN clause and the transparency regulation. Both reveal how difficult and contested the pursuit of universality can be.

It has been argued that another way in which investment law may be further universalized in the future is through the MFN clause that is present in many international investment agreements today. MFN clauses were introduced first in Friendship, Commerce and Navigation treaties to offer protection against discrimination. They are used to guarantee a certain standard of treatment to the nationals of one state that is no less favourable than nationals in another state. MFN clauses have an economic rationale. Ensuring that all investors have the same rights and obligations helps to promote inward investment, amongst other benefits.⁶⁸ In a similar way, the national treatment standard in a BIT serves to ensure that foreign nationals are not treated any less favourably than treatment accorded to nationals.⁶⁹

⁶¹See K. Kizer and J. Sharpe, ‘Reform of Investor-State Dispute Settlement: The US Experience’, in J. Kalicki and A. Joubin-Bret (eds.), *Reshaping the Investor-State Dispute Settlement System: Journeys for the 21st Century* (2015), 172, at 174.

⁶²Sharpe, *supra* note 57.

⁶³See M. Clodfelter, ‘The Adaptation of States to the Changing World of Investment Protection through model BITs’, (2009) 24(1) *ICSID Review* 165.

⁶⁴See OECD Draft Convention on the Protection of Foreign Property, *supra* note 56; see also A. Newcombe, ‘Developments in IIA treaty-making’, in C. Lévesque and A. de Mestral (eds.), *Improving International Investment Agreements* (2013), 15, at 19.

⁶⁵S. Schill, *The Multilateralization of Investment Law* (2009).

⁶⁶Reinisch and Bjorklund, *supra* note 59, at 314.

⁶⁷*Ibid.*

⁶⁸D. McRae, ‘Introduction to the Symposium on Simon Batifort and J. Benton Heath, “The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization”’, (2018) 112 *AJIL Unbound* 38, at 42.

⁶⁹*Ibid.*

That said, there has been a debate over the kinds of standards of treatment the MFN clause applies to, which concerns the extent to which the MFN clause may play a multilateralizing function in international investment law. In this context, the *eiusdem generis* principle is relevant.⁷⁰ However, some now say that MFN clauses extend substantive treatment that is more favourable and applied by the host state in other international treaties to which it is a party, even if the standard is not included in the directly applicable BIT.⁷¹ For these scholars, MFN clauses constitute the ‘essential pieces of the multilateral structures that underlie international investment law’.⁷² It is argued that the conventional wisdom has been that an MFN clause is ultimately intended to import substantive standards and that the interpretation of investment treaties must follow ‘multilateral rationales’.⁷³

These considerations have raised a debate about the scope of the MFN and whether an MFN clause should apply to a narrower set of standards. Some tribunals suggest that only the narrower approach is to apply.⁷⁴ In this narrower approach, the MFN clause does not extend to the importation of substantive standards of another BIT. Moreover, recently negotiated treaties show that limitations on the use of MFN clauses are increasingly present, which indicates that states intend the scope to be narrow and are seeking to influence the way MFN clauses have been interpreted.⁷⁵ As a result, it has been argued that it cannot automatically be assumed that substantive standards of treatment can be imported by way of an MFN clause.⁷⁶ These scholars advocate for a bottom-up approach whereby the terms of the treaties themselves must be the focus. A liberal MFN practice could be interpreted as bypassing treaty negotiations and might be considered as contrary to the intention of the parties between whom a given treaty applies. This vision is in contrast to a top down approach that has occasionally been accepted and which presumes it is in the nature of the MFN clause to incorporate substantive standards of treatment.⁷⁷

Overall, the extent to which the MFN clause can be used as a tool to propagate universality in investment law is questionable. It is important to make a comparison with the WTO. While MFN is a cornerstone of the multilateral trade system, it operates differently in the WTO context. It is accepted by all member states. In addition, it can work as a tool to this end in the WTO system because the benefits are granted to all member states. Multilateralization is not the result of MFN clauses being interpreted broadly in the trade system. It is because Article I of the GATT explicitly extends to all WTO members in the field of trade in goods.⁷⁸ In the GATT/WTO context, members know from the start that MFN applies on a multilateral treaty level. Article I of the GATT is broad in nature, covering as it does ‘any advantage, favour, privilege or immunity’.⁷⁹ In trade, its rationale is to be found in the desire to avoid discrimination against trading partners. As a result, states cannot grant another state a special favour, such as lowering customs duty or speeding up customs procedures on a particular product. Instead it must lower trade barriers or open up a market to all WTO members. There are, as mentioned earlier, however, certain exceptions to this general principle.

A recent attempt at multilateralization in the field of investment law has been in respect of transparency. This reveals that there is not much interest in a multilateral instrument, and that

⁷⁰See work of the ILC and IDI discussed, *supra* notes 27, 33.

⁷¹S. Schill, ‘MFN Clauses as Bilateral Commitments to Multilateralism: A Reply to Simon Batifort and J. Benton Heath’, (2017) 111(4) *American Journal of International Law* 914, at 925.

⁷²*Ibid.*, at 922.

⁷³*Ibid.*

⁷⁴Turkey – Turkmenistan Bilateral Investment Treaty of 2 May 1992 (*İçkale İnşaat Limited Şirketi v. Turkmenistan*), ICSID Case No. ARB/10/24 (2010).

⁷⁵See S. Batifort and J. Heath, ‘The New Debate on the Interpretation of MFN Clauses in Investment Treaties: Putting the Brakes on Multilateralization’, (2017) 111(4) *American Journal of International Law* 873.

⁷⁶*Ibid.*

⁷⁷*Ibid.*

⁷⁸McRae, *supra* note 68, at 42.

⁷⁹M. Waibel, ‘Putting the MFN Genie back in the Bottle’, (2018) 112 *American Journal of International Law* 60.

efforts to that end may be fraught with difficulty.⁸⁰ The Mauritius Convention on Transparency in Treaty-based Investor-State Arbitration is intended to ensure transparency in the settlement of investor-state disputes that are treaty-based. However, there are only five states who have so far ratified the Convention.⁸¹ Three was the number required to trigger its entry into force, which occurred on 18 October 2017. At the time of writing, the Convention only applies to two BITs, that between Switzerland and Mauritius and that between Switzerland and Gambia, three of the five states that have ratified the Convention.⁸² For it to have any real impact, it will need to be ratified by more states. That said, the Convention has been signed by 23 states⁸³ and it has generally been viewed favourably given its narrow scope and ‘opt-in’ approach to the compulsory application of its rules. In this sense, it appears to reflect the decentralized nature of investor-state arbitration and the will of states to keep it that way,⁸⁴ a sort of universality *à la carte*.

It is evident that there is a palpable inertia in the system with respect to universality as generality. Given the difficulty in achieving universality in international investment law, we might wonder why it has been sought through various initiatives since the Second World War. Universality in investment law through the resort to international arbitration is often thought to distance investment protection from political influences that may be present in the host states. In this way, it is said that universality has come to represent legitimacy, neutrality and objectivity.⁸⁵ One should be aware that this conception has been considered as being one-sided and not taking sufficient account of other institutional design approaches, which would also help in the realization of the desired values.⁸⁶ That said, besides the ICSID Convention endeavour, the failures with the pursuit of universal approaches might indicate that states are reluctant to move in this direction. They seem to be opting for narrower approaches, regional and sub-regional, when it comes to the negotiation of treaties, rather than universal.

At the same time, there are recent attempts to universalize investment law once again. First, for example, the United Nations Commission on International Trade Law (UNCITRAL) has mandated a working group to appraise potential reform in investor-state dispute settlement.⁸⁷ This mandate permits the working group to evaluate concerns about investor-state dispute settlement and to assess whether reform is needed. Moreover, the mandate allows the working group to propose solutions in the event that reforms are required. The plurality of institutional processes has emerged as a key feature. Although, it is important to point out that states have expressly noted this should be a government-led process.⁸⁸ Second, on 20 March 2018 the Council of Ministers

⁸⁰L. Boisson de Chazournes and R. Baruti, ‘Transparency in Investor-State Arbitration: An Incremental Approach’, (2015) 2(1) *Bahrain Chamber for Dispute Resolution International Arbitration Review* 59.

⁸¹As of May 2019: Cameroon (18 June 2018), Canada (12 June 2016), Gambia (28 September 2018), Mauritius (5 June 2015), Switzerland (18 April 2017): United Nations Commission on International Trade Law, ‘Status, United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (New York, 2014)’, available at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html (accessed 28 February 2019).

⁸²The Convention entered into force for Gambia on 28 March 2019. It therefore also applies to the BIT that exists between Switzerland and Gambia.

⁸³United Nations Commission on International Trade Law, *supra* note 81.

⁸⁴See E. Duffy, ‘The Mauritius Convention’s Entry into Force: High Hopes with Little Impact’, 18 May 2017, *Blog of the Groningen Journal of International Law*, available at grojil.org/2017/05/18/the-mauritius-conventions-entry-into-force-high-hopes-with-little-impact/ (accessed 5 September 2018).

⁸⁵See J. Paulsson, ‘Universal Arbitration: What We Gain, What We Lose’, (2013) 79 *Arbitration* 184; I. Shihata, *Towards a Greater Depoliticization of Investment Disputes: The Roles of ICSID and MIGA* (1993); J. Yackee, ‘Pacta Sunt Servanda and State Promises to Foreign Investors Before Bilateral Investment Treaties: Myth and Reality’, (2009) 32 *Fordham International Law Journal* 1550.

⁸⁶S. Puig and G. Shaffer, ‘Imperfect Alternatives: Institutional Choice and the Reform of Investment Law’, (2018) 112 *American Journal of International Law* 361, at 375.

⁸⁷See Report of the UN Commission on International Trade Law of its Fiftieth Session, UN Doc. A/72/17, at 264; A. Roberts, ‘Incremental, Systemic, and Pragmatic Reform of Investor-State Arbitration’, (2018) 112 *American Journal of International Law* 410.

⁸⁸*Ibid.*

authorized the European Commission to negotiate on behalf of the EU a convention establishing a multilateral court for the settlement of investment disputes.⁸⁹ It is apparent that new thinking on universality in this context is emerging in various spheres, including more flexible conceptions of universality that accommodate plurality. But how far it will go is an open question.

5. Concluding remarks

While there is evidence for some types of universality in international economic law, both in terms of universality as generality and universality as omnipresence, it is also evident that it is manifested differently across international trade and investment law. Moreover, there are grave challenges to universality in both the trade and investment regimes. It is tempting to conclude that attempts at universalizing international economic law have never really worked, except in-built universality in an institutionalized form. But that would only tell part of the story.

Universality is facing more of a challenge than it has done in a generation. In this context, it would seem necessary to adjust what international economic law must strive to achieve. If inclusivity is the ultimate goal, there are narrower means to be thought about. The various initiatives – special and differential treatment for developing countries as well as exceptions for regional trading groups for example – in the trade field have permitted a broadly inclusive centralized institution to exist. But surely this can only be characterized as a qualified universality as generality given the flexible approach that is taken to the core universal principles of the system, such as non-discrimination and MFN. This may be one way of conceiving universality. Ultimately, we must be aware that universality can manifest itself in a plurality of approaches, just as has been the case in other areas of international law.

If institutionalization is the goal for universality in international investment law, perhaps we may draw inspiration from UNCITRAL and leave space for pluralism. UNCITRAL is a legal body of the United Nations which has a wide (rotating) membership and specializes in commercial law reform. UNCITRAL sets out to formulate modern, fair, and harmonized rules on commercial transactions. It develops conventions, model laws and rules which are applied around the world. It has been able to promote universal rules, such as the UNCITRAL Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, and the UNCITRAL Model Law on International Commercial Arbitration of 1985. Time will tell whether UNCITRAL's ventures into international investment law are different. The recent mandate given to the UNCITRAL working group on investor-state dispute settlement leaves states very much at the centre of any reform. Additionally, the multilateral UN Convention on Transparency in Treaty-based Investor-State Arbitration, negotiated under the auspices of UNCITRAL, is slow in gaining ratifications. But these recent attempts also appear to be taking different – more incremental – approaches to universality, including plurality and experimentation features.⁹⁰

Through the noise of various attempts at universality, the signal is that states want to remain in control. Any universality present in international economic law has been the result of political and economic choices made by states. As a general rule, states have been very reluctant to give up their sovereignty within universal schemes. Even if the WTO looks from the outside like a universal system, scratching the surface of the institution reveals more of a qualified universality. With investment law, there are certain common standards and some schools of thought about the multilateralizing function of the MFN clause, but bold attempts at centralization and

⁸⁹See Press Release of the Council of the European Union, 'Multilateral investment court: Council gives mandate to the Commission to open negotiations', 20 March 2018, available at www.consilium.europa.eu/en/press/press-releases/2018/03/20/multilateral-investment-court-council-gives-mandate-to-the-commission-to-open-negotiations/ (accessed 25 February 2019).

⁹⁰See Puig and Shaffer, *supra* note 86; Roberts, *supra* note 87.

institutionalization have failed. The lesson from the WTO seems to be that a widely accepted treaty and an institutional structure binding states together is necessary to achieve such objectives.

Among the many conceptions of universality in international law, it may be time to conceive of universality differently in international economic law, resetting expectations and reflecting carefully the rationales for universality. The pursuit of a more equitable system may be one of these rationales, and this may involve making more space for collective preferences, also called non-trade issues, in universalization efforts. If this is achieved, universality may be easier to realize. However, for the time being, it is apparent that we are not any closer to this outcome.