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Address Trento Student Law Review
c/o University of Trento, Faculty of Law
Via Verdi 53
38122 Trento (Italy)
Email trentostudentlawreview@unitn.it
Website https://teseo.unitn.it/tslr

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ROSSELLA BORELLA
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Care lettrici, cari lettori,

ho il piacere di presentarvi il Volume 6 Numero 1 della *Trento Student Law Review*. Questo numero segna l'inizio del lavoro di una nuova generazione di *editors*, che con grande entusiasmo e seguendo le orme dei suoi predecessori, si impegna a proseguire questo ambizioso progetto. Desidero esprimere gratitudine alla precedente generazione di aspiranti giuristi per la passione e gli insegnamenti trasmessi. Il loro impegno e dedizione continuano a essere fonte di ispirazione e guida per il futuro della TSLR.
Il cambio generazionale dimostra il valore e la necessità di una rivista giuridica come questa, capace di affrontare i temi più attuali e sfidanti del nostro tempo.

Gli articoli presentati in questo numero offrono una visione approfondita su argomenti critici, trattati con rigore accademico e prospettive innovative. Gli autori contribuiscono con analisi che mirano a stimolare il dibattito e a promuovere una maggiore comprensione delle sfide giuridiche contemporanee.

In particolare, nel primo articolo Setsen Kiyoutes esplora l'evoluzione e le ambiguità del reato di *"Picking Quarrels and Provoking Trouble"* in Cina, utilizzato per sopprimere il dissenso e limitare la libertà di espressione.

Il secondo articolo analizza i *Deferred Prosecution Agreements* come strumenti legali per le aziende per evitare la piena responsabilità penale. Con un'attenta analisi Mauro Fragale e

Valentina Grilli evidenziano i vantaggi e le criticità di tali accordi e propongono modifiche legislative per migliorarne la trasparenza e l'applicazione.

In seguito, Beatrice Pattaro esamina la trasformazione delle organizzazioni mafiose nell'era tecnologica, con un focus su come la tecnologia e le nuove forme di comunicazione rendano più difficile identificare le attività mafiose.

Nel quarto articolo Enrico Zonta valuta la proposta di Direttiva dell'UE sulla *Due Diligence* Sostenibile delle Imprese e le sue implicazioni giuridiche extraterritoriali, interrogandosi se rappresenti un esercizio legittimo di giurisdizione extraterritoriale o un'eccessiva intrusione nella sovranità di altri Stati.

Infine, Camilla Mantese approfondisce lo standard del *Most-Favored-Nation Treatment* nel diritto degli investimenti internazionali, con un'analisi della sua storia, evoluzione e ruolo nella promozione della parità di trattamento tra investitori stranieri e nazionali.

La *Trento Student Law Review* desidera esprimere la più sincera gratitudine agli autori per i loro preziosi contributi e per essersi affidati alla nostra redazione, e ancora all'Università di Trento e alla nostra Facoltà di Giurisprudenza per il continuo supporto.

Per concludere, ringrazio di cuore il nuovo direttivo, tutti gli *editors* e i collaboratori per il loro lavoro instancabile e la dedizione nel rendere possibile questa pubblicazione.

L'impegno collettivo garantisce che la nostra rivista continui a essere una fonte preziosa di conoscenza e dibattito giuridico.

Vi auguro una lettura stimolante e fruttuosa.

Cordiali saluti,

Rossella Borella
Direttrice

Preface

ROSSELLA BORELLA
Editor-in-Chief

Dear Readers,

I am pleased to present to you Volume 6, Issue 1 of the *Trento Student Law Review*. This issue marks the beginning of the work of a new generation of editors, who, with great enthusiasm and following in the footsteps of their predecessors, are committed to continuing this ambitious project. I wish to express my gratitude to the previous generation of aspiring jurists for the passion and teachings they have imparted. Their commitment and dedication continue to be a source of inspiration and guidance for the future of the TSLR. The generational shift demonstrates the value and necessity of a legal journal like this, capable of addressing the most current and challenging issues of our time.

The articles presented in this issue offer an in-depth view of critical topics, treated with academic rigor and innovative perspectives. The authors contribute with analyses aimed at stimulating debate and promoting a greater understanding of contemporary legal challenges.

In particular, in the first essay, Setsen Kiyoutes explores the evolution and ambiguities of the crime of *"Picking Quarrels and Provoking Trouble"* in China, used to suppress dissent and limit freedom of expression.

The second article analyzes *Deferred Prosecution Agreements* as legal instruments for companies to avoid full criminal liability. With a careful analysis, Mauro fragale and Valentina Grilli highlight the

advantages and criticism of such agreements and propose legislative changes to improve their transparency and application.

Subsequently, Beatrice Pattaro examines the transformation of mafia organizations in the technological era, focusing on how technology and new forms of communication make it more difficult to identify mafia activities.

In the fourth essay, Enrico Zonta evaluates the Eu Directive proposal on *Corporate Sustainable Due Diligence* and its extraterritorial legal implications, questioning whether it represents a legitimate exercise of extraterritorial jurisdiction or an excessive intrusion into the sovereignty of other States.

Finally, Camilla Mantese delves into the standard of *Most-Favored-Nation Treatment* in international investment law, analyzing its history, evolution, and role in promoting equal treatment between foreign and national investors.

The *Trento Student Law Review* wishes to express its most sincere gratitude to the authors for their valuable contributions and for entrusting our editorial board, and to the University of Trento and our Faculty of Law for their continued support.

To conclude, I extend my heartfelt thanks to the new board, all the editors and collaborators for their tireless work and dedication in making this publication possible.

The collective commitment ensures that our journal continues to be a valuable source of legal knowledge and debate.

I wish you a stimulating and fruitful reading experience.

Sincerly,

Rossella Borella
Editor-in-Chief

A Comparative Study of the Legal Evolution and Cognate Offenses of “Picking Quarrels and Provoking Trouble”

SETSEN KIYOUTES*

Abstract: In recent years, the discussion on “picking quarrels and provoking trouble” has become increasingly close in Chinese society and attracted the attention of legal scholars as well as deputies to the National People's Congress (NPC). Indeed, since 1997, when this offense was first criminalized in mainland China, it has been regulated and refined by the Amendment (VIII) to the Criminal Law of the People's Republic of China and also by several related judicial interpretations. However, its regulation is still ambiguous and open-ended, with its boundaries easily blurring with other crimes and leading the academia and social communities to believe that it has evolved into a new "pocket crime", frequently employed by a judiciary that lacks oversight, suppresses dissent and restricts freedom of expression. Therefore, it is crucial to study, from both legal and historical perspectives, analogous social control laws existing in mainland China across different periods and legal frameworks in order to reveal their social impact and pave the way for the establishment of the rule of law. In this direction, this paper adopts an empirical and comparative approach to the analysis of the legal evolution of “picking quarrels and provoking trouble”, starting from its legislative origins and background, while, on the other hand, focusing on the most controversial issues concerning this crime and the discussion on its survival or abolition.

Keywords: Legal History; Comparative Law; Public Order Offenses; Chinese Law; Socialist Legal System.

1. *Introduction*

The legal control of public order and morality is not unique to the modern socialist legal system but it has been a significant instrument for the enforcement of moral norms throughout Chinese history. Accordingly, this paper explores the various offenses against public and social order in the history of the Chinese legal framework and their chronological evolution, mainly focusing on the crime of "Doing What Ought Not to Be Done".

2. *The History of Social Management Laws: the Feudalist-Imperialist Period and the Genesis of the Concept*

The offense known as "Doing What Ought Not to Be Done (不应得为)" has existed in different periods of time, although it has also been referred to as "不应为" (bù yìng wéi) and "不当得为" (bù dāng dé wéi), in a form that slightly changes the order of the words but keeps the meaning untouched. In any case, if literally translated and understood as "不应,不当", the expression means "should not" or "improper", while "为" refers to a thing or an action[1].

* Law Student at the University of Oxford and the University of Trento, currently working as a Research Editor at the Istituto di Diritto Cinese. His research interests

In the General Code of the Tang Dynasty (A.D. 618-907) where the crime was first prescribed, its legal interpretation is as follows: "It is a situation that is not in the law or command but is not morally justified"[2]. Moreover, in the Ming Dynasty (1368-1644), the Code of Ming's judicial interpretation explained that "What is not ethical and clean is what should not be done, and if you do it, it is a crime"[3].

In the mainstream view of scholars of Chinese legal history, instead, the idea that doing something improper should be punished comes from the Book of Documents, specifically recorded in the version that Dazhuan quoted in volume 648 of the Taiping Yulan[4], an encyclopedic book of the Song dynasty. It quotes the contents of a law dating back to the Zhou dynasty, which is generally regarded to be more than a thousand years old: "those who do things that should not be done, are not moral, and who recite inauspicious words should be punished with the penalty of ink on face"[5]. Additionally, in the subsequent Han dynasty the following cases and reflections are recorded one after another in the historical "Book of Han", finished in 111 C.E.

Immoral people like robbers and murderers are the cause

are: sociology and law, legal history and technology law. This paper was developed by the namesake prototype presentation at the 2023 Annual Conference of the Italian Society of Law and Economics.

[1] In particular, in this offense, "为" refers to something that violates Confucian ideology and morality.

[2] Tang Code, vol. 27, at 450.

[3] Code of Ming, vol. 26, at 48.

[4] See Hu Meng et al., vol. 648, *Taiping Yulan,* at 983, 1st ed.

[5] See Shude Cheng, *Legal examination of the nine dynasties,* at 105, China Book Council, 1978. It is necessary to outline that this may not be an accurate historical source for the period and that it may have been a later source or the result of an error. However, the canonical texts that once recorded the above passage were lost due to war and political reasons.

> of the people's suffering. They should not be allowed to be redeemed by money to offset their crimes; hiding and conniving at criminals should be crimes that are not in accordance with the law, and there are those who believe that such provisions should be dispensed with if the punishment is too severe, but if it is decreed today that such crimes can be redeemed by money, and such facilities are provided to the offenders, how should they be taught to behave in a disorderly manner?[6]
>
> The Lamented King of Changyi had ten singers and dancers headed by Zhang Xiu, they were not his concubines nor did they bear him children, as ordinary citizens nor were they officials to whom they belonged, they should have gone home after the death of the Lamented King, Taifu Bao took the liberty of keeping them in the name of the Lamented King, which is something that should not be done[7].
>
> A man named Tian Yannian submitted a petition saying "Merchants hoard ritual objects for use in tombs and sell them for exorbitant profits when people are in dire need, this is not what merchants should do as courtiers and request the prefect to confiscate these items[8].

The three abovementioned passages, written in different sections of the Book, record the same concept, namely the principle of refraining from improper or inappropriate actions. However, the cases at that time did not show a systematized measure of punishment and treatment, suggesting that the consequences were not as clearly defined as the ones outlined in the Han dynasty's Law (Code)[9]. It is more likely that this was due to the Confucian doctrine, which was established as the political guiding principle of the Han dynasty: it may have been quoted as case law or integrated into the

[6] Ban Gu; Ban Zhao, vol. 78, *Book of Han dynasty: Xiao Wangzhi*.
[7] Ban Gu; Ban Zhao, vol. 63, *Book of Han dynasty: Tahe five sons of Emperor Wu*.
[8] Ban Gu; Ban Zhao, vol. 90, *Book of Han dynasty: Cruel officials.*
[9] See Tang Code (cited in note 2).

Confucian classical Book of Documents[10].

2.1.*"Doing What Ought Not to Be Done" Legislation in the Tang Dynasty - Maturity*

The crime of "Doing What Ought Not to Be Done" was first formally included in the Miscellaneous Laws of the Tang Dynasty as a provision in the Law. The article states as follows:

> There are numerous things that should not be done and for those who do them, forty strokes with a small bamboo stick (if the crime is not included in the law but is considered something that should not be done); those with serious circumstances, eighty strokes with a large bamboo board.
>
> Judicial interpretation: the number of minor offenses is so great that the law cannot provide for them all, so they are interpreted by analogy with other similar laws. If the offense cannot be found in any similar provision in the law at all, the penalty will have to be imposed by the use of the word "Doing What Ought Not to Be Done", and discretion will be exercised[11].

From the above articles and judicial interpretations it could be understood that in the Tang law, in order to apply the offense of "Doing What Ought Not to Be Done" to punish a certain act, the following points had to be satisfied: 1) the case must involve a minor offense; 2) there is no provision in the relevant legal documents for such an act to be punishable, so that a conviction cannot be made on

[10] The Book of Documents is a compilation of records of conversations between kings and courtiers from ancient China. In collating the laws of the Zhou dynasty, it cites the section on punishment from the Rites of Zhou - criminal law part, a historical book describing the politics of the Zhou dynasty.

[11] Tang Code (cited in note 2).

the basis of the offense in the law; 3) no similar provision can be found in the relevant legal documents, so that a judgment of conviction cannot be made on the basis of the relevant offense in the analogous statute; 4) there is also no provision in the relevant documents relating to such an act, but the act does violate an ethical obligation or the basic order of life.

In the extant historical materials, there are two case documents on the article of the Tang law on "Doing What Ought Not to Be Done". The first one is the case of Yang Si, the director of Shanglin Garden, who committed the crime of expressing his opinion when "he should not have done so" from Longjin *fengsui* jurisprudence.

> Yang Si, who was in charge of the Shanglin garden, asked for permission to build a new palace in the garden for the monarch's recreation…The jurisprudence held that the current garden architecture was frugal but not unsuitable, that there was no need to start work on a new palace, that Yang Si was a flatterer, and that his proposal would tarnish the image of the monarch since the faint-hearted rulers of history, only knew how to spend resources on self-indulgence. He asked for advice on matters that he should not have asked for advice on, just like doing what the law says should not be done. He should have been demoted as a warning to the Chaotang (the place where the officials meet, here refers to all officials)[12].

This is a very typical case of what should not be done. Yang Si, as the official in charge, did not have the right to directly order the construction of the palace, but only to ask for instructions on whether it should be done. His action was not a crime under the law, but it was considered to be an act that would have tarnished the perfect image of the monarch. The king was the subject of a petition and he

[12] Zhang Zhuo, vol. 2, *Long Jin feng shui jurisprudence: Director of the garden related second case.*

should have considered the consequences of the action. Therefore, in this case it is possible to understand that he was punished merely because of moral considerations.

The other example is the case of Guo Wei's wanton flogging of a soldier. From a legal interpretation of the Tang Code:

> Guo Wei, as an officer in the garrison, had behaved in a loose manner and whipped the soldiers, which was a very bad incident in terms of reason, and should be severely punished. However, as the law does not provide for officer discipline and assault on a soldier, the sentence was imposed using the crime of Doing What Ought Not to Be Done. The sentence should have been heavier, but as he had confessed his guilt, he was given a lighter sentence of 40 strokes with a small bamboo stick[13].

From the above two cases, it is inevitable to see that the norm of "Doing What Ought Not to Be Done" was already mature in the Tang Dynasty, while strictly limiting its field of application and achieving a relatively good balance. It is also clear from Guo Wei's case that the change in attitude towards sentencing at trial was already extremely similar to the modern view of leniency in law.

2.2. *Ming/Qing Doing What Ought Not to Be Done - Development*

The Ming and Qing laws actually inherited the "Doing What Ought Not to Be Done" law from the Tang Dynasty, and there were almost no fundamental differences and changes in the sentencing and provisions. Indeed, the "Doing What Ought Not to Be Done" law in the Code of Ming stipulates the following: "Anyone who does

[13] See Junwen Liu, vol. 2, *Legal interpretation of the Tang Code*, at 311, China Book Council, 1996.

something that should not be done, small bamboo board beaten forty times, not in other legal provisions, the circumstances are serious, with a large bamboo board beaten eighty times"[14].

In the law of the Qing Code, which includes miscellaneous crimes, the "Doing What Ought Not to Be Done" provisions are as follows: "anyone who does something that should not be done will be beaten with forty strokes of the small bamboo board, and eighty strokes of the large bamboo board for serious cases. If the law does not specify, according to the seriousness of the crime case sentencing"[15].

Due to the expansion of the Qing Dynasty, a multifaceted empire, including Mongolia, was established where the frontier areas were once again united with the mainland under a single country[16]. With a large number of Chinese immigrants, the original traditional legislation and customary law used to regulate the Mongolian local summary of the Mongolian Law; its development of the Frontier Management Sector Regulations were no longer effective to regulate the social transformation resulting from these contradictions and conflicts. For this reason, at that time, the "Doing What Ought Not to Be Done" clause in the Qing law was used extensively. This was perhaps the first time in Chinese history that the law was widely used to address and regulate social issues. A clear example of this new trend may be observed in the gambling case of Ordos's Badari in 1735, the first year of the Qianlong era. This is the confession of Samubalasi:

> "I am a subordinate of Alabtanzo Niru, and my sister Nomimusu is the wife of Ordos's Badari. In the third month of the thirteenth year of the Yongzheng's reign, because the order that different Jasagh people are not allow mixed together, Badali let my sister Nomimusu stay at my home, and he returned to the

[14] Code of Ming, (cited in note 3) at 11.

[15] Qing Code, Criminal Laws, *Miscellaneous Crimes.*

[16] See Johanna Waley-Cohen, *The New Qing History*, at 193-206, Radical History Review, Issue 88, 2004.

> hometown, wanting to bring the carriage and animals, then taking his wife with him. In the first month of this year, Badari again said that he did not find the carriage and animals, came to my house on foot and stayed there for a while. It's true that he lives in my house, but I have no idea where he gambles."

The case ruled that: "Samubalasi knew that for the sake of not allowing him to let other Jasagh people stay, repeatedly ordered to prohibit, and against the ban to stay Ordos's Badari, is a fault." Therefore, Samubalasi was flogged 40 lashes according to the law of Doing What Ought Not to Be Done[17].

It has to be noted that the background of this case was the intention to rule and divide the Mongolian land, with a strong demarcation of the pastoral boundaries of each ministry and a division of the population, which was strictly prohibited from communicating with each other. Such conditions extended to the Mongolian tribes, such as those in the South, North, and West of the territory, which were to remain isolated from one another. Furthermore, the people from the frontier were not allowed to leave the country. At the same time, the prohibition stipulated that "when a People from the frontier left the country, he should present himself at the banner's Administrative divisions of Mongolia office. In case of non-compliance, the negligent banner-keeper, deputy banner-keeper, seneschal, jawans, and chiefs would be punished together"[18].

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[17] See Wanjun Zhang, vol. 36, *"The incompatibility of different genera": the application of the law of "not to be" in the mixed areas of Mongol and Han in the Qing Dynasty*, at 82, Yinshan Journal, 2023.

[18] Frontier Management Sector Regulations, vol. 34, *Border protection: oversight of Mongols outbound* available at https://upload.wikimedia.org/wikipedia/commons/3/35/SSID-13367353_%E6%AC%BD%E5%AE%9A%E7%90%86%E8%97%A9%E9%83%A8%E5%89%87%E4%BE%8B_%E7%AC%AC13%E5%86%8A.pdf (last visited May 2, 2024).

In the aforementioned case, the defendant Samubarasi did not participate in gambling and did not violate the prohibition of crossing the border. However, by hosting people from another Jasagh without authorization, he actually contributed to the crime of crossing the border while also violating the new ban on intermarriage. Therefore, since there was no specific standard for the punishment, he was punished with the law of "Doing What Ought Not to Be Done".

3. *"Nullum Crimen Sine Lege" of the Western Legal Tradition*

In the Nineteenth century, all Asian countries were in the stage of awakening by Western civilization's business or war machine. In contrast to the Qing Dynasty, the Japanese government abolished the *Shogunate*, re-establishing the rule of the Emperor, and began the so-called Meiji Restoration, a process of major social change which promoted a comprehensive study of Western institutions and technology. Japan, as a member of the old Chinese legal system, was also influenced by the Tang Dynasty's concept of "Doing What Ought Not to Be Done", and Japanese law featured a similar clause with the exact same name[19]. This article first appeared in the Yanglao Code in 757 A.D.

The Code of Shiritsu Kouryou states that: "Anyone who does something that is not in accordance with the law shall be beaten thirty times with a small bamboo board and seventy times with a large bamboo board if the circumstances are serious"[20]**.** Moreover, the Code of Kaiteiritsurei refers to the "Doing What Ought Not to Be Done"

[19] See National Diet Library, *Chronology of Japanese History from the End of the Shogunate to the Meiji Period,* available at: https://www.kodomo.go.jp/yareki/chronology/index.html (last visited May 2, 2024). *Also,* Song Chengyou, *A New History of Modern Japan*, at. 74-124, Peking University Press, 2006.

[20] Prepared by Cabinet Records Administration (1980). *Also see* H. Shobo, vol. 54, *The Complete Classification of Laws and Regulations*, at 111, Criminal Law Division, 2008.

rule in the following manner:

> 289. Whenever two or more people break a law that should not be broken, the leader shall be sentenced to thirty days of forced labor and the accomplice to twenty days; if the leader is sentenced to seventy days of forced labor and the accomplice to sixty days. If there is a difference in the severity of the offense, the penalty is determined by the severity of the offense, not by whether the offender is a leader or an accessory.
>
> 290 Anyone who destroys a statue of Buddha and commits that offense should not be treated with severity.
>
> 291 Anyone who commits the crime of obstructing the whole because of his words shall not be dealt with severely[21].

In Japan's early reforms, compared with the completely classical version, the Code of Shinritsukouryou's "Doing What Ought Not to Be Done" "distinguishes criminals from masters and subordinates, and emphasizes multiple "situations that should not be taken seriously", further weakening the offense. In 1882, the Penal Code was promulgated in the fifteenth year of the Meiji Restoration and the principle of *nullum crimen sine lege* was established in Japanese law. At that point, the "Doing What Ought Not to Be Done" rule had completely disappeared[22].

At the same time, the Qing Dynasty had lost many wars, especially after the defeat of the Sino-Japanese War of 1894. The Westernization Group who "learned from the foreigners in order to gain command of them" failed by learning Western technology. The reformists who believed that the government needed comprehensive

[21] See *Ibid.*

[22] See Xinyu Chen, *Inheritance and Change -Centering on the Changes of "No Justification" and "Should Not Be" under the Japanese Transitional Penal Law*, at 116, Tsinghua Law, 2008.

reforms gradually began to emerge and led the Hundred Days Reform[23]. Although it was repressed by the government, due to the social environment and natural disasters, its supporters were still permitted to participate in governmental reforms, despite facing successive setbacks such as the coup d'état, the Boxer Rebellion and the Eight-Power Allied Forces. It was during this period that the new criminal law of Qing emerged, influenced by Japanese criminal law and legal thinking and did not continue the structure of the traditional "Qing Law". "Doing What Ought Not to Be Done" was completely abandoned in this Code because of the introduction of "statutory crime and punishment", a Western concept absorbed by Japanese law, despite it not being officially applied until the collapse of the Qing Dynasty consequent to a wave of revolutions. The Republic of China, which inherited the name of China's ruling power in the ensuing chaos, did not go to the trouble of revising the law, but chose to essentially inherit it: the main body of the Daqing Criminal Law and the concept of Nullum crimen sine lege[24].

4. *The Socialist Period*

It is convenient to start this section with a quote from Professor Haruo Nishihara: "I am not bothered by the fact that socialist criminal jurisprudence unexpectedly determines the scope of crime 'from above', even though socialism was originally supposed to be based on 'the people'"[25].

[23] The "Hundred Days's Reform" was a 103-day failed national, cultural and political reform movement that occurred during the late Qing Dynasty.

[24] See Guofu Zhang, *On the Revision of the Provisional New Criminal Law*, at 123, Journal of Peking University, Philosophy and Social Science Edition, 1985.

[25] See Xinglinag Chen, Haruo Nishihara, *New Developments in Chinese Criminal Law*. Preface. SEIBUNDO Publishing, 2020. Professor Haruo Nishihara, a leading figure in Japanese and Asian criminal law, has maintained academic exchanges with China. In his opinion, this sentence perfectly synthetizes the unique feature of socialist

4.1. *The Early Years of the Founding of the State: Social Order Offenses Based on Counter-Revolution*

Prior to the establishment of New China by the Communist Party, a comprehensive study of Soviet criminal law began during Soviet China, leading to a legal transplantation**.** In 1934, the Central Revolutionary Bases implemented the Regulations of the Chinese Soviet Republic on the Punishment of Counter-Revolution. This law was supposed to be a parody of Article 58 contained in the Soviet Union's 1926 Criminal Code, which defined the crime of counter-revolution as "all those who seek to overthrow or destroy the Soviet government and the rights gained by the democratic revolution of the workers and peasants, and who intend to maintain or restore the rule of the gentry and landed bourgeoisie, by whatever means, are regarded as counter-revolutionary acts and shall be severely punished"[26]**.** This intention was incredibly vague and entirely based on subjective assessments. Furthermore, during the Soviet purges, according to information verified by the State Security Committee on 13 March 1990, 3.7 million people were sentenced by judicial and non-judicial authorities for this provision from the 1930s to 1953, many of whom (around 790,000) were shot[27]**.**

The creation of such a vague provision was closely linked to the state of criminal law practice in the Soviet Union at the time. The 1924 Basic Principles of Soviet Criminal Law provided in its Section 3 that

jurisprudence.

[26] Central Executive Committee, *Regulations of the Chinese Soviet Republic on Punishing Counter-Revolution*, order no. 6 of the Central Committee, 1934.

[27] See Letter from the USSR Prosecutor General R.A. Rudenko, USSR Ministry of Internal Affairs S.N. Kruglov and USSR Ministry of Justice K.P. Gorshenin to the 1st Secretary of the CPSU Central Committee N.S. Khrushchev on the revision of cases against those convicted of counter-revolutionary crimes, document no. 44, 1954.

> In the case of socially dangerous acts not directly provided for by criminal law, the basis and scope of liability and the methods of social defense shall be determined by the courts in accordance with the criminal code and in accordance with the minor nature of the crime. The court shall decide on the basis and scope of liability and the methods of social defense in the case of a socially dangerous act which is not directly provided for by criminal law[28].

The 1926 Soviet Criminal Code, along with the subsequent Criminal Codes of the Soviet Union's constituent republics enacted two years later, established the principle of analogy based on this provision[29]. As an imitation, the Regulations of the Chinese Soviet Republic on the Punishment of Counter-Revolution also established this system, as did the mainstream thinking at the time: any counter-revolutionary crime not covered by these regulations could be punished in accordance with the similar provisions of these regulations (Article 38)[30]. The reason for the creation of such analogy was to allow for greater flexibility in the early years of socialism in order to accommodate the different types of crimes that occurred in society, as demonstrated by the case of the application of "shall not be" in the Mongolian frontier regions mentioned above. The People's Republic of China faced the same problems at the time of its birth, since the law was incomplete, leading to a chaotic social order exacerbated by the ongoing civil war. Thus, in early legislation, the new Chinese criminal lawyers generally favored the continuation of

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[28] Limin Wang, *Chinese Law and Society: An examination of the transplantation of the Soviet model in new China's criminal legislation*, *Peking University Press,* at 445, 2006. Professor Haruo Nishihara, a leading figure in Japanese and Asian criminal law, has maintained academic exchanges with China. In his opinion, this sentence perfectly synthetizes the unique feature of socialist jurisprudence.

[29] See Xiuqing Li, *Examination of the transplantation of the Soviet model of criminal legislation in New China,* at 124-25, 2002.

[30] See Limin Wang (cited in note 25).

the analogical system and the formal rejection of statutory criminalism[31].

Similarly, the Regulations of the People's Republic of China on the Punishment of Counter-Revolution, issued in 1951 after the founding of the state, also contained a continuation of the akin system found in the counter-revolutionary regulations of the old Soviet Republic. Article 16[32] provided that other criminals with counter-revolutionary aims, not covered by these regulations, may be punished in an equivalent manner to similar crimes within the regulations themselves[33].

By the 1960s, the socialist transformation of the "private ownership of the means of production" had largely been completed and Communist China had consolidated power. However, the chaos brought about by the Cultural Revolution disrupted normal economic life and the legal order while the Red Guards' supreme instructions were "Chairman Mao's quotations" rather than the state law. After the break from the revolutionary tide, the crime of counter-revolution faded into the crime of subversion of State power, and the crime of hooliganism, created by the Soviet law, became the new main law of social order in order to reorganize the broken public order.

All of the above-mentioned historical events led in 1979 to China finally enacting its first Criminal Law. Regarding social stability offenses, article 160 defines the crime of hooliganism as a series of bad acts that disrupt public order, including gathering a

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[31] See Jin Biao, *Intermediate People's Court of Wuxi City, Jiangsu Province, Re-thinking the Analogical Reasoning System of China's Criminal Law*, at 22, Law Application, Issue no. 2, 1996.

[32] GuangDong Government, available at https://www.gd.gov.cn/zwgk/gongbao/1951/2/content/post_3352420.html (last visited May 2, 2024).

[33] See Xiuqing Li (cited in note 26).

crowd to fight, provoking trouble, insulting women and other similar activities. Under this article, particular actions are punishable by a term of imprisonment of up to seven years, detention or control, while for the leading members of a hooligan group, the penalty can be up to a term of imprisonment of more than seven years, although the Standing Committee of the Chinese People's Congress has also formulated judicial interpretations that raise the penalty for hooliganism to the death penalty[34]**.** In particular, the application of this crime reached a peak in the last century during the severe crackdown on serious criminal activities, when some purely moral and ethical issues were elevated to legal issues and sentenced as hooligans.

In 1996, for example, a man named Khogjild was taking a break at the factory he worked at when he heard a woman's cry for help coming from nearby. He and his co-worker, Yan Feng, went to check and found a woman who has been raped and killed in a nearby women's toilet. The two then went to a nearby police booth to report the incident. However, because of his reporting behavior and minority status, Khogjild was quickly identified by the police as the murderer. After a first instance trial at the Hohhot Intermediate Court, Khogjild was found guilty of intentional homicide and hooliganism, sentenced to death and deprived of his political rights for life. On 5 June, the Inner Mongolia High Court rejected Khogjild's appeal and upheld the original sentence. In the end, Khogjild was executed on 10 June, despite a serious lack of evidence[35]**.**

In addition, in a Xi'an case that occurred in 1983, Ma Yanqin was a 42-year-old retired and divorced woman with two daughters.

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[34] Supreme People's Court (SPC) / Supreme People's Procuratorate *Answers of the Supreme People's Court/Supreme People's Procuratorate on Several Issues Concerning the Specific Application of Law in the Current Handling of Hooliganism Cases*, 1984.

[35] See *State compensation of more than 2.05 million yuan in the "Huge case", including 1 million yuan for moral damages Pengpai,* December 21, 2020, available at https://m.thepaper.cn/kuaibao_detail.jsp?contid=1290304&from=kuaibao (last visited May 2, 2024).

Ma Yanqin was fond of social events and often held private dances at her home. However, the police arrested her in September 1983 and charged her with a criminal gang of hundreds of hooligans involved in a house party at her home. The court ruled that she had organised numerous hooligan dances, lured young men and women into hooliganism, engaged in illicit sexual relations with dozens of people and allegedly threatened and lured her own two daughters for the hooligans to play with, among other charges. Ma Yanqin was sentenced to death after an unsuccessful request of appeal. In 1985 she was escorted to the Xi'an City Stadium for a public trial meeting and was then taken to the northern suburbs penal colony where she was executed by firing squad[36].

In accordance with the scope of this research, the above two cases show that the crime of hooliganism was used for extremely abusive and pervasive purposes, which led to many tragic and wrongful cases. At the same time, we can still see shades of the "Doing What Ought Not to Be Done" in the crimes of counter-revolution and hooliganism, even though the moral standards have changed, with the new socialist order and morality partially replacing the old Confucian-dominated moral code.

5. *Post-Reform Challenges and Opening Up: a Closer Look*

On 14 March 1997, when the National People's Congress amended the Criminal Law of the People's Republic of China, the offense of hooliganism was abolished and some of its specifications were separated and considered independently as "forcible indecent assault and insult on women", "indecent assault on children" and

[36] See Chinanews, *Details of the rule of law /why the crime of hooliganism is eliminated but not dead*, August 21, 2018, available at https://www.thepaper.cn/newsDetail_forward_2366861 (last visited May 2, 2024).

"public disorder". Finally, the crime of picking quarrels and provoking trouble was established in Article 293 of the Criminal Law in the Provisions of the Supreme People's Court on the Implementation of the Criminal Law of the People's Republic of China for the Determination of Crimes, adopted by the Trial Committee of the Supreme People's Court on December 9, 1997[37]. Nevertheless, the crime is equally vague, compared to other ones diverging from the crime of hooliganism. Thus, such a constatation leads to its recognition as a continuation of the social control crime of hooliganism.

5.1. *"Nullum Crimen Sine Lege"*

The offense of "picking quarrels and provoking trouble" differs from the historical "Doing What Ought Not to Be Done" in the way that it only regulates offenses and moral issues that are not provided by the law. However, in contrast to other offenses in the Criminal Code, which includes four different aspects of criminal behavior, the terminology is obscure and difficult to interpret and there is no standard measure of the seriousness of the circumstances. It goes without saying that the lack of clearly defined criteria makes the application of such measures controversial. Moreover, divergences between jurisdictions in the interpretation of "picking quarrels and provoking trouble" have led to inconsistent judicial decisions and weakened legal certainty and predictability, since citizens should be able to first understand its meaning in order to prevent themselves from breaking the law. Moreover, the current judicial interpretation places:

[37] Procuratorate Daily, *The decomposition of "pocket crimes" reflects three major legislative advances*, September 9, 2008, available at https://web.archive.org/web/20080513212217/http://news.xinhuanet.com/legal/2008-05/09/content_8136391.ht (last visited May 2, 2024).

> Those who use information networks to commit crimes of abusing or intimidating others in bad circumstances and disrupting social order, as well as those who fabricate false information, or spread it on information networks knowing that it is fabricated and false or organize or instruct people to spread it on information networks and cause serious disorder by raising a ruckus, are guilty of picking quarrels and provoking trouble shall be convicted and punished[38].

Judicial interpretations of the Supreme People's Court and guiding cases in recent years further broaden the scope of the offense of "picking quarrels and provoking trouble", departing from the principle of *nullum crimen sine lege*.

5.1.1. *The Equivalence of Crime and Punishment*

The basic penalty for the offense of "picking quarrels and provoking trouble" is imprisonment for a term not exceeding five years, detention or control, and in case of aggravating circumstances, imprisonment for a term which is not less than five years, but not exceeding ten years[39]. The upper limit of this penalty is extremely high and because of the difficulty of determining the aggravating circumstances, sometimes it leads to heavier sentences for minor

[38] See Supreme People's Court Supreme People's Procuratorate, *Interpretation on Several Issues Concerning the Application of Law to the Handling of Criminal Cases Involving the Use of Information Networks to Commit Defamation and Other Criminal Cases*, Legal Interpretation, no. 21, 2013.

[39] See Mingkai Zhang, *Judicial determination of the crime of provoking trouble*, People's Court Newspaper, June 23, 2022, available at https://www.chinacourt.org/article/detail/2022/06/id/6758111.shtml (last visited May 2, 2024).

offenses and lighter sentences for major ones. Unlike the historical Doing What Ought Not to Be Done, as stated earlier, it is unlikely that it will be used in other situations that already have specific legal provisions in place.

The case known as "Zhaoqing graffiti incident" is a typical instance in which a young man, Ding Man, was arrested for painting graffiti on the walls of a street building. Initially, the criteria for determining the offense of "intentional destruction of property stipulated that the economic loss needed to be either of RMB 5,000 or to be considered as a crime. In this case, the prosecutor's office found that Ding Man's graffiti had caused a total of RMB 5,638 in damage to property. However, the defense lawyer pointed out that the price determination issued by the procuratorial authorities was unreasonable, with several of the price determinations differing significantly from the actual loss. As a result, the lawyer suggested that the actual damage did not reach RMB 5,000 and, therefore, the charge of intentional destruction of property was not established. However, the prosecution quickly changed the charge and made it one of "picking quarrels and provoking trouble".

In comparison, the offense of intentional destruction of property is less serious than the one of "picking quarrels and provoking trouble". In fact, according to the criteria for conviction of provocation and nuisance, it is only necessary to cause damage of more than RMB 2,000 to be held criminally liable. On the other hand, Article 275 of the Criminal Law regarding the crime of intentional destruction of property links the imprisonment and its duration to the nature of the damage and eventually to other serious circumstances. Depending on that, the author could be sentenced to imprisonment for up to three years in case of a "large" damage and between three and seven years in case of a "huge" one. Undoubtedly, this legislative approach leads to a result that is often difficult to understand: acts that cause higher damage are considered misdemeanors while the ones that cause lower damage are considered felonies. This is a clear

violation of the principle of equivalence between crime and punishment[40].

"Doing What Ought Not to Be Done" derives from the basic Confucian idea of being careful with punishment. In the past, the basic punishment was a thin or thick bamboo strip. This idea should be reclaimed: for minor offenses, the emphasis should lean towards guidance and correction rather than applying the same punishment used to prosecute immoral, unreasonable and socially unjustifiable behavior.

5.1.2. *The Risk of Abuse*

On January 27, 2022, after learning online that a memorial service for compatriots who died in Xinjiang would be held that night at the Liangma River in Chaoyang District, Beijing, Li Yuanjing and some friends went together to the Liangma River Bridge to participate in the memorial service. However, two days later, they were taken away and summoned by police from the local police station, including more than a dozen young people. Surprisingly, they were released a day later without charge by the police as they had not committed any misconduct during the mourning event. On December 18, 2022, Li Yuanjing was again criminally detained by the Beijing Chaoyang District police on suspicion of "gathering a crowd to disturb the social order". On January 20, 2023, she was formally arrested by the Beijing Chaoyang District Procuratorate on suspicion of "picking quarrels and provoking trouble" and detained at the Chaoyang District Detention Centre in Beijing[41].

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[40] See Pengpai News, *A teenager in Zhaoqing, Guangdong is charged with provoking trouble over street graffiti, and his father runs to apologize and gets an understanding*, October 12, 2018, available at https://www.thepaper.cn/newsDetail_forward_2725056 (last visited May 2, 2024).

[41] See Iris Zhao, *University of New South Wales Chinese student Yuanjing Li arrested for*

Another interesting example, on December 28, 2020, is a case of conviction for speech that was heard in the Pudong New Area Court in Shanghai. It involved the defendant Zhang Zhan's "provocation" case. The court sentenced Zhang Zhan to four years in prison for "picking quarrels and provoking trouble" and her detention is set to last until May 14, 2024, despite insufficient evidence and insufficient presentation of materials[42].

These cases reveal the abuse of the criminal offense of "picking quarrels and provoking trouble. The judiciary often uses it as a tool to suppress dissent and restrict freedom of expression by characterizing mourning events as nuisance acts, thereby unjustly punishing the participants. Such abuse not only infringes on the legitimate rights and interests of individuals but also undermines social justice. "Picking quarrels and provoking trouble", as a social order touting offense, should be used to combat disruptions of public order in common places and should not be abused as a tool to suppress citizens' legitimate actions and freedom of thought[43].

6. *Conclusion*

"Picking quarrels and provoking trouble" played a significant role in a particular historical period when the law was inadequate, as in the case of its historical predecessor Doing What Ought Not to Be Done, which was a crime in the Mongolian frontier regions of the Qing dynasty, used to address several crimes not regulated by clear

participating in anti-zeroing protests after returning to China, 7 February 2023, available at https://www.abc.net.au/chinese/2023-02-08/101936884 (last visited May 2, 2024).

[42] See Radio France Internationale, *State's fear comes from distrust of people, says Zhang Zhan in court,* 30 December 2020, available at 张展在法庭上说：国家的恐惧来自于对人民的不信任 (rfi.fr) (last visited May 2, 2024).

[43] See Zhao Hong, *Administrative Punishment for Provocative Behavior: How to Prevent the General Moralization of Law*, at 81-82, Society Ruled by Law, Issue no. 44, 2023.

laws and employed to maximize the punitive function of criminal law. In particular, it made up for the fact that less serious crimes of wounding and violence could not be punished by the crime of wounding. However, this is not a sufficient reason for the continued existence of such provisions, whose vagueness conflicts so much with the principle of statutory penalties that are inevitably abused in judicial practice. Thus, as legislation continues to deepen and as society progresses, laws that have lost their application to the environment and situation should be naturally eliminated. Different countries and different periods of Chinese history have in fact restricted and eliminated unclear social order provisions such as "picking quarrels and provoking trouble". As in the case of the Meiji Restoration and the revision of the law in late Qing Dynasty in Japan above, and in the later years of Soviet criminal law after the implementation of the 1936 Constitution, the emphasis on legal certainty led to the abolition of the analogy system in the draft of the criminal code and a shift to legalism that should explicitly provide for crimes and penalties. Even though China is currently constrained by its large population and the difficulty of social control, the scope of "picking quarrels and provoking troubles" should be gradually reduced, as in the case of hooliganism, while being divided into more specific offenses. For example, a separate offense of "atrocity" could be created for assault and chase. This would help to distinguish these crimes from other ones that may be less serious. Penalties proportional to the seriousness of the crime can be imposed more effectively, while offenses such as intentional destruction of property and gathering to disturb public order could be expanded[44]. Finally, changing social values and the technological revolution may lead to

[44] See Li Lizhong, *Violence should be treated as crime*, at 34-40, Journal of Political Science and Law, 2020. *Also,* Zheng Ze Shan, *Atrocity Crimes and Injury Crimes in Japanese and Korean Criminal Law*, at 73-75, Research on rule of law, Issue no. 3, 2016.

new forms of problems that were not previously foreseen. However, a targeted expansion of more similar or more targeted crimes could ensure that the law remains relevant and adequate to meet contemporary challenges. Alternatively, the offense could be strictly limited by drawing on the Tang Law of "Doing What Ought Not to Be Done" as a judgment that can only be activated if a conviction cannot be made on the basis of the offense in the statute book.

At the same time, historically, a large number of moral issues and minor crimes have been dealt with by local self-governing organizations such as the village elder, in keeping with the Confucian principle of no litigation[45]. Today, empowering local organizations, such as village committees, to deal with minor disputes and violations of the law may be a way to manage social control more effectively and reduce the burden on the judicial system to deal with minor cases[46]. However, there is also a need to set up sophisticated complaint and monitoring mechanisms to avoid corruption and miscarriage of justice. Additionally, implementing restorative justice for such minor offenses could serve as a solution to repair social relations and guide the offender's understanding, emphasize reconciliation and bring more meaningful solutions to victims, facilitate the reintegration of offenders into society, and reduce criminal discrimination, and the recidivism it causes, that, as above outlined, is still significantly diffused.

[45] See Feng Yujun, *The Formation and Comparison of Chinese and Western Legal Cultural Traditions*, at. 15-18, Journal of Political Science and Law, Issue no. 6, 2019.

[46] See John Braithwaite, *Encourage restorative justice,* at. 690, Criminology & Public Policy, vol. 6, Issue no. 4, 2007.

Impunity for Sale

Are Deferred Prosecution Agreements a Way for Companies to Evade Liability?

MAURO FRAGALE AND VALENTINA GRILLI*

Abstract: Deferred Prosecution Agreements (DPAs) have emerged as a contentious legal instrument, as they allow corporations to negotiate their way out of criminal liability without facing the full weight of a trial. This paper aims to explore the inherent benefits of DPAs – such as the potential for corporate reform, cooperation with law enforcement, preservation of jobs, and economic stability – while highlighting the criticisms, including concerns about accountability, transparency, and the perception of impunity. This article argues that, when appropriately structured and administered, DPAs provide benefits that significantly outweigh their drawbacks, as they offer a practical and flexible solution for addressing corporate wrongdoing where traditional criminal prosecution may be impossible or excessively burdensome. Nevertheless, their current limitations call for legislative amendments aiming at achieving a fairer and more comprehensive legal framework. These changes should address issues such as ensuring transparency in DPA negotiations, establishing clear criteria for DPA eligibility, and enhancing judicial oversight.

Keywords: Deferred Prosecution Agreements; Negotiated Justice; Law Enforcement Cooperation; Impunity Concerns; Legislative amendments.

1. *Introduction*

A Deferred Prosecution Agreement (DPA) is a negotiated settlement between a prosecuting authority and a corporation. The aim of this tool is to hold off prosecuting a corporate offender charged with allegations of wrongdoing under the condition that the company agrees to certain terms and conditions, such as implementing reforms, paying fines, or cooperating in an investigation.

DPAs represent an example of 'negotiated justice', not unlike the plea-bargaining mechanism present in several jurisdictions: in exchange for an early guilty plea, individuals can enjoy a wide array of incentives, such as a lighter sentence or a reduction in the charge[1].

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* Mauro Fragale is a Bocconi University Graduate, having achieved an Integrated Master of Arts in Law. He is currently carrying out his legal traineeship in Modena, focusing on civil and commercial law, privacy, and debt collection. His interests include IP law, Antitrust, and IT & Communication Law, with a particular focus on the recent legal developments at the intersection of technology and the law. Valentina Grilli recently achieved an Integrated Master of Arts in Law at Bocconi University. During her final year of study, she took part in the Willem C. Vis International Commercial Arbitration Moot, which sparked her interest in arbitration. Currently, she serves as a trainee lawyer at a distinguished law firm, specializing in criminal law. Possessing a keen enthusiasm for both criminal law and arbitration, she is committed to making notable contributions to the legal domain.

Following the same logic, settlements in response to corporate wrongdoing – such as Civil Recovery Orders (CROs) and DPAs – allow for negotiation of the trial for legal persons, with a peculiar difference: whereas with plea bargains the defendant pleads guilty to the offense, receiving a definitive criminal sentence, this is not the case with DPAs or CROs, as companies entering such agreements either temporarily avoid criminal conviction, or divert the trial from criminal to civil or administrative[2].

In the last decades, the employment of these innovative legal mechanisms at the intersection of corporate law and criminal justice has surged as a tool in resolving legal challenges faced by legal persons. However, as corporations increasingly opt for DPAs, questions arise in relation to their implications for corporate accountability: indeed, corporations may potentially negotiate their way out of liability, allowing them to escape the consequences of their misconduct.

The aim of this article is to understand whether the positive aspects of this form of 'negotiated justice' outweigh the negative ones, in particular the possibility for corporations to escape a criminal conviction through the payment of a fine. In fact, the promise of a quick and negotiable agreement with the prosecution in lieu of a lengthy criminal trial represents an important incentive for corporations to self-report, repent, and cooperate. However, it is often seen by the general public as a way for corporations to buy their way out of a trial, as the fine allows them to turn a new leaf and receive blanket immunity for their past behavior[3].

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[1] Colin King and Nicholas Lord, *Negotiated Justice and Corporate Crime: The Legitimacy of Civil Recovery Orders and Deferred Prosecution Agreements* at 13 (Palgrave Pivot 2018).

[2] Gennaro F. Vito and Deborah G. Wilson, *The American Juvenile Justice System* at 22 (Sage Publications 1985).

[3] Susan Hawley, Colin King, and Nicholas Lord, *Justice for Whom? The Need for a Principled Approach to Deferred Prosecution Agreements in England and Wales*, in Tina

DPAs and other instruments that allow for 'negotiated justice' can be abused by corporations to 'wipe the slate clean' from their past crimes and keep doing business as usual. Nevertheless, the view represented in this article is that – if implemented correctly and within set boundaries to avoid exploitation – they present features that benefit not only the company, but also public prosecutors, the state, and society as a whole. Examples of such positive aspects are: better distribution of resources, as a potentially multiple-years-long trial is avoided; higher influx of funds as a result of company wrongdoing, due to the fines agreed upon usually being much higher than the criminal penalties resulting from a trial; incentives for the company to cooperate in the subsequent investigations; creation of a 'culture of compliance', as companies generally show abidance to a long-term compliance program to prevent further violations in the future[4].

2. *Legal Framework of Deferred Prosecution Agreements*

Søreide & Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* at 325 (Edward Elgar 2020).

[4] Juliette Jabkhiro, *McDonald's agrees to pay $1.3 bln to settle French tax dispute* (Reuters 2022), available at https://www.reuters.com/business/french-prosecutor-proposes-mcdonalds-pay-1245-bln-euros-settle-tax-dispute-2022-06-16/ (last visited May 2, 2024). A concrete example showing the positive aspects of DPAs is offered by American fast food giant McDonald's, which in 2022 paid more than 1.2 billion euros to avoid a legal investigation over tax evasion accusations. The sum paid amounted to more than two times the amount of tax McDonald's had avoided, resulting in a net gain for the French State; at the same time, McDonald's managed to avoid a lengthy and unpredictable legal case. Another successful employment of negotiated settlements for corporate wrongdoing is represented by French airline Airbus, which in 2020 agreed to pay more than $3.9 billion in penalties to resolve foreign bribery charges with authorities in France, the United States, and the United Kingdom; see also U.S. Department of Justice Office of Public Affairs, *Airbus Agrees to Pay over $3.9 Billion in Global Penalties to Resolve Foreign Bribery and ITAR Case* (January 31, 2020), available at https://www.justice.gov/opa/pr/airbus-agrees-pay-over-39-billion-global-penalties-resolve-foreign-bribery-and-itar-case (last visited May 2, 2024).

In the past, when corporations came under scrutiny for potential criminal wrongdoing, they confronted a binary set of outcomes: they would be either formally charged with criminal offenses, or they would face no charges at all. From the late 1990s onward, federal prosecutors acquired an additional option at their disposal, namely the ability to engage with companies through a legal mechanism known as 'Deferred Prosecution Agreement', thereby introducing a middle-ground approach to resolving such matters[5].

2.1. *Definition and Historical Evolution*

To properly delve into the subject at hand, it is crucial to begin by understanding the concept of 'deferred prosecution' and establishing a clear definition of DPAs. Within the framework of deferred prosecution, a prosecutor who has acquired an indictment against an alleged criminal chooses to defer the commencement of formal legal proceedings. This choice is contingent upon verification of whether the individual, or entity, subject to the indictment, acknowledges their wrongdoing and undertakes the commitment to a program of rehabilitation or remediation[6].

Initially, the practice primarily involved the use of Non-Prosecution Agreements (NPAs). Subsequently, it became apparent that these were ineffective in achieving their intended purposes; thus, DPAs were introduced. Indeed, these are agreements in which a prosecutor defers the initiation of proceedings on the condition that the (alleged) offender acknowledges the wrongdoing, commits to remedial or rehabilitative measures, and adheres to the prescribed obligations[7]. Should these conditions be fulfilled within a

[5] John Gibeaut, *A Matter of Opinion: Speakers Debate Whether Deferred Prosecution Agreements Help Corporations*, 92 American Bar Association Journal, 58 (2006).

[6] Vanessa Blum, *Justice Deferred*, Legal Times 1 (2005).

[7] See, for example, UK Serious Fraud Office (SFO), *Deferred Prosecution Agreements*, available at https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/guidance-for-corporates/deferred-prosecution-agreements/ (last visited

predetermined time frame, the prosecutor may opt to dismiss the charges, effectively granting exemption from criminal prosecution to the accused party. Conversely, in the event of a breach of the agreement's terms, the prosecutor maintains the prerogative to initiate legal action predicated on the original allegations, often leveraging the admissions made by the individual or entity during the course of DPA negotiations[8].

DPAs have a historical trajectory that traces back to the late 19th century in the United States. Early forms of deferred prosecution (also referred to as 'pretrial diversion') were developed primarily for cases involving juvenile and drug offenders[9]. This approach aimed to provide a chance for rehabilitation and reduce the burden on the criminal justice system, especially for first-time offenders. The formal endorsement of DPAs by the Judicial Conference of the United States occurred in 1947, and their prevalence experienced a substantial upsurge during the 1960s[10]. The legal foundation granting the federal government the power to partake in such agreements is rooted in the Speedy Trial Act of 1974, precisely delineated within Section 18 U.S.C. and 3161(h)(2), which refers to instances in which "prosecution is deferred by the attorney for the Government pursuant to written agreement with the defendant, with the approval of the court, for the purpose of allowing the defendant to demonstrate his good conduct"[11].

May 2, 2024) (a UK DPA is defined as "[...] an agreement reached between a prosecutor and an organization which could be prosecuted, under the supervision of a judge. The agreement allows a prosecution to be suspended for a defined period provided the organization meets certain specified conditions").

[8] Blum, *Justice Deferred* at 1 (cited in note 6).

[9] Benjamin M. Greenblum, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 Columbia Law Review 1863, 1864 (2005).

[10] Nick Werle, *Prosecuting Corporate Crime when Firms are Too Big to Jail: Investigating, Deterrence, and Judicial Review*, 128 Yale Law Journal 1366, 1408 (2019).

[11] Speedy Trial Act, 18 U.S.C. §3161(h)(2) (1974).

During the 1990s, there was a notable shift in the utilization of DPAs within the legal landscape: rather than primarily employing DPAs for the resolution of minor infractions committed by natural persons, prosecutors increasingly turned to this mechanism to address complex and substantial cases of corporate misconduct[12]. Indeed, a DPA facilitates the negotiation of a resolution between prosecutors and corporate defendants, encompassing an acknowledgment of wrongdoing, a commitment to instigate reforms, and the provision of a financial penalty[13].

2.2. Ratio *of DPAs: Strategic Tools in Law Enforcement*

The underlying justification for the utilization of DPAs resides in the endeavor to strike an equilibrium between accountability and expediency within the framework of a legal system, with a specific focus on instances encompassing corporate misconduct. The US Department of Justice describes DPAs as "an important middle ground between declining prosecution and obtaining the conviction of a corporation"[14]. In this context, it is remarkable that the adoption

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[12] Peter R. Reilly, *Justice Deferred is Justice Denied: We Must End Our Failed Experiment in Deferring Corporate Criminal Prosecution*, 2015 BYU Law Review 307, 315 (2015). See also Court E. Golumbic and Albert D. Lichy, *The "Too Big to Jail" Effect and the Impact on the Justice Department's Corporate Charging Policy*, 65 Hastings Law Journal 1293, 1303 (2014) (the authors report that the initial noteworthy instance of employing a DPA within the sphere of corporate criminal conduct occurred in 1992, when the Southern District of New York negotiated one with Prudential Securities. This marked a significant turning point in the application of DPAs, as it signaled their introduction to address corporate wrongdoing).

[13] Megan J. Parker and Mary Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime*, 30 Journal of Financial Crime 940, 942 (2022).

[14] United States Department of Justice, *Justice Manual* ss. 9–28.200 (2018), available at https://www.justice.gov/jm/jm-9-28000-principles-federal-prosecution-business-organizations (last visited May 2, 2024). See also, Parker and Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime* at 944 (cited in note 13) (the authors affirm that DPAs offer prosecutors a crucial alternative

of DPAs has proliferated to such an extent within the United States that approximately 80% of all instances involving corporate bribery are presently channeled through this mechanism for resolution[15].

There are numerous advantages associated with DPAs for individuals and corporate entities. First and foremost, deferred prosecution makes it possible to "avoid the stigma associated with formal processing and the resultant change in self-image, associations, and behavior associated with the negative societal reaction to the stigma"[16]. In fact, when an individual or a corporation is subject to a criminal accusation and faces the prospect of a trial, the repercussions extend beyond legal penalties. The societal stigma attached to corporate misconduct can have far-reaching consequences, affecting the company's reputation, shareholder trust, employee morale, and even its ability to secure contracts and partnerships.

Furthermore, DPAs grant prosecutors the authority to compel corporate entities involved in illegal practices to undergo significant transformations[17]. These can encompass: the implementation of structural changes, which may involve restructuring management, enhancing corporate governance, or implementing new oversight mechanisms to prevent future misconduct; adherence to ethical guidelines, in order to ensure that the company operates with integrity and in compliance with the law; and the establishment of internal monitoring mechanisms, that include appointing compliance

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between resource-intensive criminal trials and releasing a corporation due to insufficient evidence. Consequently, DPAs enhance prosecutors' ability to hold corporations accountable for wrongdoing).

[15] Mike Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement*, 49 UC Davis Law Review, 69 (2015).

[16] Vito and Wilson, *The American Juvenile Justice System* at 22 (cited in note 2).

[17] Melissa L. Rorie, *The Handbook of White-Collar Crime* at 286 (Wiley Blackwell 2020 [2019]).

officers or internal monitors responsible for overseeing the adherence by the corporation to the terms of the agreement[18].

Additionally, prosecutors can impose obligations related to reporting, enhancements to corporate compliance programs, and policies, as well as a range of remedial measures, including substantial monetary penalties[19]. In particular, on the one hand, the reporting requirements involve the regular provision of information to prosecutors about the company's compliance efforts, and on the other, the remedial measures serve as both a sanction for past misconduct and a deterrent against future wrongdoing. Finally, prosecutors have the option to appoint an independent monitor who oversees and assesses the corporation's activities for the duration of the agreement[20].

For what concerns the deterrent impact of DPAs, it is proposed that they serve as effective deterrents because they enable prosecutors to seek remedies that extend beyond what could be achieved in a corporate trial[21]. Indeed, while corporate trials primarily focus on legal culpability and penalties, DPAs emphasize proactive measures, structural reforms, ethical standards, ongoing reporting, and restitution to victims. These remedies aim to address the root causes of misconduct, prevent future violations, and promote a culture of compliance within the corporation.

Moreover, it has also been observed that corporations find DPAs attractive because they offer a comprehensive and relatively rapid resolution to allegations of misconduct[22]. Importantly, DPAs

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[18] See *Ibid*.

[19] Mary Miller, *More Than Just a Potted Plant: A Court's Authority to Review Deferred Prosecution Agreements Under the Speedy Trial Act and Under Its Inherent Supervisory Power,* 155 Michigan Law Review, 135 (2016).

[20] See *Id*., at 141.

[21] Cindy R. Alexander and Mark A. Cohen, *The Evolution of Corporate Criminal Settlements: An Empirical Perspective on Non-Prosecution, Deferred Prosecution, and Plea Agreements*, 52 American Criminal Law Review 537, 555 (2015).

[22] DPAs generally expedite the resolution process in contrast to prolonged criminal trials. This expeditiousness holds particular significance for corporations, as it

allow companies to avoid the potentially severe consequences of criminal liability, such as the revocation of licenses or the debarment from government contracts, which can have long-lasting and detrimental effects on a company's operations, reputation, and financial stability[23]. On the contrary, by opting for a DPA, corporations can continue their operations without significant disruption, and this is essential for maintaining employee livelihoods, business relationships, and overall economic solidity.

Finally, corporate settlements – specifically in the form of DPAs – are increasingly recognized as a crucial mechanism for addressing corruption cases. As an illustrative example, Article 37 of the United Nations Convention against Corruption (UNCAC)[24] establishes the potential to incentivize individuals involved in corrupt activities to furnish pertinent information to competent authorities for investigative and evidentiary purposes, in exchange for mitigated penalties of a less severe nature[25]. In this context, utilizing DPAs in the fight against corruption presents several expected benefits: in particular, they offer opportunities to advance corporate governance reform by mandating the inclusion of anti-fraud, anti-bribery, and anti-corruption training programs as integral conditions of the agreement and incentivize companies to voluntarily disclose

permits them to promptly conclude the legal matter and redirect their attention towards their core operations.

[23] Ben Allen, *Deferred Prosecution Agreements – A New Weapon in the Anti-Fraud and Corruption Armoury?*, 66 Governance Directions, 285 (2014).

[24] Art. 37, para. 1-2, United Nations Convention against Corruption (UNCAC) 31 October 2003.

[25] Robert R. Strang, *Plea Bargaining, Cooperation Agreements and Immunity Orders*, in 155th International Training Course Visiting Experts' Papers, Resource Material series No. 92, United Nations Asia and Far East Institute 30, 33 (2014).

instances of wrongdoing and actively cooperate with law enforcement authorities[26].

2.3. *The OECD's Push for Deferred Prosecution*

In 1989, the Organisation for Economic Co-operation and Development (OECD) established an *ad hoc* Working Group with the specific mandate of examining the laws related to the practice of bribing foreign officials among its member countries[27]. Subsequently, the efforts of this Working Group resulted in the formulation of the Recommendation on Combating Bribery in International Business Transactions, which gained ministerial-level approval from the OECD Council in 1994. This comprehensive Recommendation strongly encouraged member states to adopt and enforce "effective measures to detect, prevent and combat bribery of foreign public officials in international business"[28]. Thereafter, the OECD officially endorsed and ratified the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which became effective in February 1999[29]. This Convention seeks to redress

[26] Roberto Martinez B. Kukutschka and Marie Chêne, *Deferred Prosecution Agreements, Plea Bargaining, Immunity Programmes and Corruption* (Transparency International, October 13, 2017) available at https://knowledgehub.transparency.org/helpdesk/deferred-prosecution-agreements-plea-bargaining-immunity-programmes-and-corruption (last visited May 2, 2024).

[27] Dan Hough, *Tackling Corruption: The International Dimension*, in Dan Hough, *Analysing Corruption* at 112 (Agenda Publishing 2017).

[28] OECD, *Information Sheet on the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 2, available at https://www.oecd.org/gov/ethics/2406452.pdf (last visited May 2, 2024).

[29] *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* 15 February 15, 1999, available at https://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-booklet.pdf (last visited May 2, 2024).

the detrimental consequences of corruption, which hinder economic development, distort fair competition, and erode public trust[30].

Nevertheless, the OECD Convention did not address matters related to negotiation and non-trial resolutions. Consequently, in 2009 the Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions was adopted. This Recommendation furnished comprehensive and meticulous guidelines – along with precise measures – aimed at preventing and detecting instances of bribery; it emphasized the importance of corporate liability, safeguarded whistleblowers, and facilitated the restitution of gains acquired through corrupt practices[31].

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[30] Johann G. Lambsdorff, *An Empirical Investigation of Bribery in International Trade*, 10 European Journal of Development Research 40, 44 (1998). See also, Alvaro Cuervo-Cazurra, *Corruption in International Business*, 51 Journal of World Business, 35 (2016) (according to the author, countries characterized by higher levels of corruption tend to experience various adverse effects, including diminished economic growth, reduced investment, decreased effectiveness of public policies, and lower levels of foreign investment).

[31] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* Working Group on Bribery in International Business Transactions (2009), available at https://web-archive.oecd.org/2019-05-10/111174-OECD-Anti-Bribery-Recommendation-ENG.pdf (last visited May 2, 2024) (in particular, Annex II – titled "Good practice guidance on internal controls, ethics, and compliance" – explains: "This Good Practice Guidance - hereinafter "Guidance" - is addressed to companies for establishing and ensuring the effectiveness of internal controls, ethics, and compliance programs or measures for preventing and detecting the bribery of foreign public officials in their international business transactions - hereinafter "foreign bribery" -, and to business organizations and professional associations, which play an essential role in assisting companies in these efforts. It recognizes that such programs or measures should be interconnected with a company's overall compliance framework to be effective. It is intended to serve as non-legally binding guidance to companies in establishing effective internal controls, ethics, and compliance programs or measures for preventing and detecting foreign bribery"). See also Mark Pieth, *The 2009 Recommendation of the OECD on Combating Bribery: Bringing Public Sector and Private Sector Initiatives Together*, in Nicoletta Parisi,

In 2018, as the OECD Working Group on Bribery began the preparation for reviewing its 2009 Recommendation, one of the identified areas for additional attention was the development of fundamental guidelines aimed at standardizing the worldwide utilization of negotiated settlements, commonly referred to as 'non-trial resolutions', within the 44 member states of the Group[32]. The objective of this effort was to create a set of principles that would facilitate a more uniform and coherent approach to deferred prosecution resolutions across these member states. Such standardization was seen as essential to enhance transparency, fairness, and effectiveness in dealing with cases of bribery and corruption on an international scale.

More recently, in 2021, the OECD made amendments to its 2009 Recommendation, incorporating new sections pertaining to critical subjects that have emerged, or that have undergone substantial development within the sphere of anti-corruption efforts. Of notable importance is the inclusion of a new section titled "Non-Trial Resolution"[33]: in paragraph XVIII, it is recommended that member states take measures to guarantee that non-trial resolutions employed for cases related to offenses under the OECD Anti-Bribery Convention adhere to the principles of due process, transparency, and accountability[34]. Specifically, member countries are required to adopt clear procedures and set transparent criteria for utilizing non-trial resolutions, to provide accessible information on the benefits of their usage, and to ensure that they result in clear, effective, proportionate, and dissuasive sanctions for foreign bribery cases.

Marinella Fumagalli Meraviglia, Andrea Santini and Dino G. Rinoldi (eds), *Scritti in Onore di Ugo Draetta* at 531-532 (Editoriale Scientifica 2011).

[32] Drago Kos, *Foreword*, in Tina Søreide and Abiola Makinwa (eds), *Negotiated Settlements in Bribery Cases: A Principled Approach* at xii, xiii (Edward Elgar 2020).

[33] OECD, *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* at 10 (cited in note 31).

[34] See *Ibid.*

To conclude, the OECD's 2021 amendments highlight a well-defined emphasis on promoting deferred prosecution through transparent and accountable non-trial resolutions to combat bribery and corruption.

2.4. *Comparative Exploration of the Subject*

The comparative analysis of legislation related to DPAs inevitably commences from the United States, where this approach was first introduced. Indeed, as discussed above, this instrument received formal approval in 1947, with the legal basis established in the Speedy Trial Act of 1974, Section 18 U.S.C. and 3161(h)(2)[35]. Although the initial iterations of DPAs were tailored for juvenile and drug-related cases, a notable shift occurred in the 1990s, with prosecutors progressively employing this mechanism to address instances of corporate misconduct[36]. After gaining steam within the American legal system, this innovative procedural mechanism was transposed and assimilated into the legal frameworks of numerous jurisdictions across the global spectrum.

In the United Kingdom, the Government disclosed its intention to implement DPAs in October 2012, formally establishing them within the framework of the Crime and Courts Act 2013[37], which obtained royal assent in April 2013. This introduction was seen as a significant advancement in combating serious economic crimes and, in this context, the Deferred Prosecution Agreements Code of Practice laid out clear guidelines for negotiating DPAs, including establishing fair, reasonable, and proportionate terms for the agreements[38]. The

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[35] 18 USC § 3161 (h)(2).

[36] David Uhlmann, *Deferred Prosecution and Non-Prosecution Agreements and the Erosion of Corporate Criminal Liability*, 72 Maryland Law Review 1295, 1303 (2013).

[37] Crime and Courts Act, s. 45 (2013) repealed by S.I. 2014/258, art. 2(a).

[38] Allen, *Deferred Prosecution Agreements* at 285 (cited in note 23) (the author explains that the terms for the DPA typically encompass financial penalties, requirements for future compliance, and efforts to provide redress to victims when feasible).

UK judiciary plays a substantial role in the DPA process, requiring judicial approval at key stages, such as evaluating negotiation progress and final agreement terms. On the one hand, a corporation can only be invited to negotiate a DPA if the prosecutor believes it would serve the public interest; on the other, the prosecutor has the ultimate discretion in determining whether to engage in negotiations and whether to extend a DPA offer to the company at the end of these discussions[39].

While certain similarities exist between the DPA frameworks in the US and the UK, such as the fundamental requirement of cooperation for DPA approval in both jurisdictions, a significant difference stands out. The discrepancy pertains to the extent of judicial oversight in the two countries' DPAs[40]. Specifically, the United States features a comparatively limited level of judicial scrutiny over the terms of DPAs, meaning that a judge does not need to approve the final DPA and that the judicial review often focuses on whether the agreement is within the bounds of legality and fairness, without delving deeply into the specific terms or conditions of the agreement. Conversely, in the United Kingdom, a judge can assess whether the DPA terms are 'fair, reasonable, and proportionate'[41].

Stemming from their inception in the United States, DPAs have been introduced in Singapore by way of the Criminal Justice Reform

[39] King and Lord, *Negotiated Justice and Corporate Crime* at 68-70 (cited in note 1).

[40] Rebecca Mitchell, Edward Imwinkelried and Michael Stockdale, *Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege: English and US Experience Compared*, 8 Journal of International and Comparative Law 283, 284-285 (2021).

[41] Serious Fraud Office, Deferred Prosecution Agreements Code of Practice para 7.2 (February 2, 2014) available at https://www.cps.gov.uk/sites/default/files/documents/publications/dpa_cop.pdf (last visited May 2, 2024).

Act of 2018, under Part VIIA[42]. Singapore's approach to DPA approval closely mirrors that of the UK: in both jurisdictions, the process entails presenting evidence to the court that demonstrates the DPAs' alignment with the overarching principle of serving the 'interests of justice'. Additionally, they both demand a thorough evaluation to ensure that the terms of the DPAs are not only legally sound, but also characterized by being 'fair, reasonable, and proportionate' before they can attain approval[43]. Moreover, DPAs in Singapore were crafted with a specific focus on addressing economic crimes committed by corporate bodies, partnerships, or unincorporated associations.

Canada and Australia also drew inspiration from the UK system in shaping their own legal frameworks. In Canada, the Government introduced legislation to establish a DPA system on 27 March 2018[44], marking a significant shift in its approach to prosecuting economic crime: this new instrument incorporates a certain level of judicial oversight, aligning it more closely with the deferred prosecution models seen in the UK, as opposed to the US system[45]. In particular, the Canadian court's role encompasses a

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[42] Eunice Chua and Benedict Chan, *Deferred Prosecution Agreements in Singapore: What Is the Appropriate Standard for Judicial Approval?*, 16 International Commentary on Evidence 1, 1-2 (2019).

[43] Criminal Justice Reform Act, Bill No. 14 (2018), at sec. 149F (the "Court approval of DPA" section establishes that "(1) When the Public Prosecutor and the subject have agreed on the terms of a DPA, the Public Prosecutor must apply by criminal motion to the High Court for a declaration (called in this section the relevant declaration) that (a) the DPA is in the interests of justice; and (b) the terms of the DPA are fair, reasonable and proportionate").

[44] Budget Implementation Act, Bill C-74, No. 1 (2018), at sec. 404 (the legislation formed an integral component of the amendments made to the Criminal Code and was encompassed within the omnibus budget legislation. More specifically, the modifications to the Criminal Code were located in Division 20 of Part Six of the budget bill).

[45] Norm Keith and Justine Reisler, *The New Canadian DPA Regime: An International Comparative Analysis*, 67 Criminal Law Quarterly 306, 333 (2019) (in the words of the authors, "Canada has implemented a regime with a degree of judicial oversight,

thorough evaluation of the terms within the agreement to prevent any undue leniency or excessive harshness, avoiding any potential misuse of the mechanism. Australia is also likely to introduce UK-inspired DPAs, which would allow for the resolution of criminal proceedings between the Commonwealth Director of Public Prosecutions and corporate entities[46]. The key aspiration is that DPAs will serve as a means to reduce the inherent risks and costs associated with criminal investigations and legal proceedings, while also providing a more effective approach to addressing corporate misconduct[47].

France is another country where DPAs are recognized and employed regularly. In December 2016, the Sapin II Law – known as *Convention Judiciaire d'Intérêt Public* (CJIP) or Judicial Public Interest Agreements –authorized a French variant of DPAs and established the French Anticorruption Agency (AFA)[48]. Under the CJIP arrangements, the traditional adversarial relationship between prosecutors and companies, often characterized as 'prosecutors versus lawyers', is altered: negotiations in this context run in parallel - rather than conflicting - directions. The scope of CJIP is limited to specific offenses, including corruption involving both public and foreign officials, as well as offenses related to aggravated tax fraud and evasion[49]. Under such legislation, the control over the validity of these agreements rests with the President of the *Tribunal de Grande Instance*, who grants or denies validation following a public hearing,

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more in line with the deferred prosecution regimes in the United Kingdom and France, as opposed to the United States").

[46] Liz Campbell, *Revisiting and Re-Situating Deferred Prosecution Agreements in Australia: Lessons from England and Wales*, 43 Sydney Law Review 187, 187-188 (2021).

[47] See *Id*., at 192-196.

[48] Keith and Reisler, *The New Canadian DPA Regime* at 330-331 (cited in note 45).

[49] French National Financial Prosecutor's Office, *Guidelines on the Implementation of the Convention Judiciaire d'Intérêt Public* Director of the French Anti-Corruption Agency (June 26, 2019), available at https://www.agence-francaise-anticorruption.gouv.fr/files/files/EN_Lignes_directrices_CJIP_revAFA%20Final%20(002).pdf (last visited May 2, 2024).

ensuring transparency[50]. If granted, the agreement is made public on the institutional websites of the Ministries of Justice and Economics. Conversely, prosecution proceedings are initiated if the court rejects the DPA, if the company withdraws from the agreement, or if the company fails to fulfill its obligations within the specified time frame.

Finally, several countries – such as Italy and Switzerland – currently lack legislative frameworks for DPAs. Notably, Italy's legislation concerning criminal corporate liability is relatively recent, as it was enacted just two decades ago with the Legislative Decree No. 231/2001[51]. Even if the framework presents a substantial incentive-based structure designed to encourage companies to swiftly restore their compliance with the law before the conclusion of legal proceedings against them, it does not provide for the possibility of entering into DPAs with the Public Prosecutor as a result of a company's cooperative behavior[52]. Similarly, Switzerland does not possess legal provisions that include the possibility of DPAs, notwithstanding the calls from legal scholars and practitioners asking for the introduction of such legislation.

3. *Critiques and Controversial Aspects*

[50] Stefania Giavazzi and Francesco Centonze, *Internal Investigations* at 89 (Giappichelli 2021).

[51] D. Lgs., 8 June 2001, No. 231.

[52] Andrea Puccio, *The Possibility to Enter into a Non-Prosecution Agreement in Case of Internal Investigation and Self-Reporting* (International Bar Association, September 1, 2022), available at https://www.ibanet.org/the-possibility-to-enter-into-a-non-prosecution-agreement-Italy (last visited May 2, 2024) (the author underlines how, in accordance with the stipulations found in Articles 12 and 17 of the Legislative Decree no. 231/2001, *post-factum* remedial actions (such as the adoption of a comprehensive compliance program designed to prevent further transgressions, the restitution of damages arising from the offense, and the willingness to allow for the seizure of unlawfully obtained profits) solely afford the company the opportunity to secure reduced fines in the event of conviction or to avert disqualifying sanctions).

While DPAs allow for a quick non-trial resolution of issues related to corporate criminal liability, constituting an alternative route that presents advantages for both corporations and governments, they also present several problematic aspects. Most of these are linked to the compatibility of such negotiation-based settlements with the basic principles and features of criminal law, such as the right to a fair trial, the theory of deterrence, and the public nature of criminal law[53].

3.1. *Violation of the Right to a Fair Trial and Violation of the Presumption of Innocence*

One of the fundamental principles that govern the criminal law systems of most jurisdictions is the right to a fair trial. This basic precept is enshrined in numerous national constitutions and international instruments alike[54], with several degrees of bindingness, reflecting its near-universal recognition by the international community, especially in matters of criminal law. The basic concept of the right to a fair trial prescribes that a defendant, including a corporate defendant, must be punished justly after the breach, and that the defendant's responsibility has been proven at

[53] Rob Evans and David Pegg, *Campaigners condemn closure of Rolls-Royce bribery inquiry* (The Guardian, February 22, 2019), available at https://www.theguardian.com/business/2019/feb/22/campaigners-condemn-closure-of-rolls-royce-bribery-inquiry (last visited May 2, 2024) (the article explains the criticism against the DPAs concluded by British engine manufacturer Rolls-Royce with authorities in the United Kingdom, the United States and Brazil at the end of a long-running global investigation to establish responsibility over the company's systematic bribery over three continents. Similar critiques were also moved against the DPO entered into by Swedish pharmaceutical giant GlaxoSmithKline and the United Kingdom).

[54] See, for example, Art. 10, Universal Declaration of Human Rights; Art. 14, 16, International Covenant on Civil and Political Rights; Art. 6, of the European Convention of Human Rights; Art. 47, EU Charter of Fundamental Rights; Art. 8, American Convention on Human Rights; and Art. 7, African Charter on Human and Peoples' Rights.

trial beyond reasonable doubt. However, these conditions are not fulfilled when a corporation concludes a DPA with the prosecution, agreeing to pay a fine and to have its own liberty of action restricted: in this case, a burden is imposed on the defendant without its guilt having been proven beyond reasonable doubt[55].

Moreover, the fact that DPAs allow prosecuting offices to exact punishment for corporations without having to actually demonstrate guilt at trial has given rise to the perception that such an instrument conflicts with the presumption of innocence, a second fundamental criminal law tenet deeply linked to the right to a fair trial. In fact, under a DPA, the offending company may be subject to burdens that are basically the corporate analog to restrictions of liberty in the case of a natural person, such as limits to its operations and surveillance by a government agent acting as a monitor, and are thus tantamount to some form of responsibility for the offense. Nevertheless, these 'pseudo-criminal' punishments are imposed on the corporate defendant without going through formal trial proceedings where the criminal guilt of the defendant can be established by the state beyond reasonable doubt from an initial baseline of presumed innocence[56].

3.2. *Weakening of the Deterrent Effect of Law*

A common criticism made against the use of DPAs in the context of criminal wrongdoing has to do with the 'theory of deterrence', the opinion according to which criminal penalties are aimed not only at punishing violators, but also at discouraging other people from committing similar offenses. This principle is an important foundation of the criminal justice system, as the fear of sanctions or punishment can convince would-be wrongdoers to

[55] Roger A. Shiner and Henry Ho, *Deferred Prosecution Agreements and the Presumption of Innocence*, 12 Criminal Law and Philosophy 707, 709 (2018).
[56] See *Ibid*.

refrain from committing criminal acts, thus decreasing overall crime[57].

In the context of corporate misconduct, critics argue that the use of DPAs by prosecution agencies effectively decreases the deterrent effect of criminal law. Such agreements allow companies to evaluate whether they can 'bear the risks' of legally questionable business practices, since they can easily cut a deal with the prosecution to defer the trial indefinitely. Thus, DPAs would amount to a sort of 'get-out-of-jail card' for the biggest corporations in the world[58], or of 'tax on corruption'[59], as businesses can use DPAs to their advantage by breaking the law in order to obtain important contracts and then avoid any prosecution in exchange for a fine. According to this vision, DPAs do not have the same deterrent effect as a criminal conviction or a traditional plea agreement, as they have the consequence of sheltering the offending corporation from third-party scrutiny and are accompanied by less adverse publicity than an admission of guilt[60].

However, others oppose this opinion, claiming that DPAs share the same punitive, deterrent, and rehabilitative effects as a guilty plea: by entering into such an agreement the company acknowledges wrongdoing, agrees to cooperate with investigations, pays a fine, and commits to improve its compliance program. If these conditions are not met, then the company has to face prosecution. Moreover, this instrument acts as a deterrent even though the company is allowed to avoid a criminal conviction and its costly consequences – such as

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[57] Raymond Paternoster, *How Much Do We Really Know about Criminal Deterrence*, 100 Journal of Criminal Law and Criminology 765, 765-766 (2010).

[58] Miller, *More Than Just a Potted Plant* at 141 (cited in note 19).

[59] Simon St-Georges and Denis Saint-Martin, *The Global Diffusion of DPAs: The Not So Functional Remaking of the Rules Against Business Corruption*, in Régis Bismuth, Jan Dunin-Wasowicz and Philip M. Nichols (eds), *The Transnationalization of Anti-Corruption Law* at 469, 479 (Routledge 2021).

[60] Alexander and Cohen, *The Evolution of Corporate Criminal Settlements* at 555-556 (cited in note 21).

loss of business licenses or debarment from government contracts –, because prosecutors are allowed to pursue remedies that go well beyond the scope of those achieved via criminal prosecution[61]. Indeed, the government may demand several forms of punishment as part of the contractual terms, which entail considerable burdens on the company entering the agreement: together with a sizeable fine, a DPA might require rigorous compliance programs, reforms and changes to the corporate board composition, tighter accounting and internal control measures, appointment of an outside monitor, self-investigation and self-reporting requirements, support for any ongoing judicial investigation, and prohibitions on operations in certain markets. Thus, such agreements are not necessarily more lenient than a guilty plea or a conviction, as corporations are on probation for the entire duration of the agreement and are subject to the sometimes-arbitrary conclusion that they have failed to comply with the agreement's terms, thus allowing the prosecution to initiate trial proceedings[62].

3.3. *Lack of Transparency, Consistency, and Judicial Review*

DPAs are often criticized for their perceived lack of transparency, as they tend to be privately negotiated behind closed doors[63], and are often concluded without disclosing the factors that led prosecuting agencies to grant one[64]. While the legislative framework of some countries requires publicity – as is the case in England and Wales, where the conclusion of a DPA requires the approval of a court following a public hearing and the publication of

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[61] See *Ibid*.

[62] Miller, *More Than Just a Potted Plant* at 141-142 (cited in note 19).

[63] Koehler, *Measuring the Impact of Non-Prosecution and Deferred Prosecution Agreements on Foreign Corrupt Practices Act Enforcement* at 64 (cited in note 15).

[64] Great Britain Ministry of Justice, *Consultation Paper CP9/2012: Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations: Deferred Prosecution Agreements*, 18 (May 2012).

the DPA and all relevant documents and information[65] – this is not always the case. As such, the opaqueness of the DPA process makes it difficult to know why a given reform was included in the terms or left on the table, or whether these reforms have actually yielded fruits, thus leaving the public in the dark regarding the harms, goals, and outcomes of an agreement[66].

Moreover, due to the fact that some countries – such as the United States – lack any form of written legal basis for the rules, conditions, and aims of DPAs, prosecutors tend to have excessive discretion in deciding whether to conclude such agreements and their contents[67]. As a consequence, DPAs end up being fully dependent on the single prosecutor that concludes one – who is not necessarily sufficiently well-equipped to mandate corporate reforms, effectively rehabilitate corrupt cultures, and appoint competent monitors –, leading to a diffused problem of consistency that, in turn, diminishes the predictability of the law. Similarly, a consistent preference for DPAs over traditional criminal trials does not allow for the generation of standards and precedents, which in Common Law countries are needed to prosecute similar cases and ensure a uniform application of the law. These factors contribute to fostering uncertainty and variability in the persecution of corporate wrongdoings[68].

In some jurisdictions, more notably the United States, the problems linked to the lack of transparency and consistency are further exacerbated by the minimal role reserved to courts over the

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[65] Crime and Courts Act, Sch. 17 para. 8 (2013).

[66] Miriam H. Baer, *Corporate Criminal Law Unbounded*, in Ronald F. Wright, Kay L. Levine and Russell M. Gold (eds), *The Oxford Handbook of Prosecutors and Prosecution* 475, 489 (OUP 2021).

[67] Great Britain Ministry of Justice, *Consultation Paper CP9/2012: Consultation on a New Enforcement Tool to Deal with Economic Crime Committed by Commercial Organisations* at 18 (cited in note 64).

[68] Parker and Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime* at 945-946 (cited in note 13).

justifications and contents of a DPA. This lack of judicial oversight gives rise to concerns over the inconsistency of the use of such instruments with the rule of law, as abuses of prosecutorial discretion inconsistent with established normative rules cannot be redressed by a judge[69]. In fact, the decision to defer is generally not subject to judicial review unless an applicable statute provides otherwise or a breach of contract occurs; furthermore, the decision of a prosecutor to terminate the agreement and proceed with the previously deferred criminal proceedings is not subject to judicial review[70]. This position has also been confirmed by several court decisions, such as in United States v. Fokker Services, where the D.C. Court of Appeals overturned the decision of the District Court of Columbia to reject a DPA due to its overly lenient negotiated terms, holding that DPAs are not subject to judicial review due to the separation between the executive and judicial powers[71].

3.4. *Evasion of Company Liability and Lack of Individual Accountability*

Another common critique has to do with the fear that companies might exploit DPAs to obtain immunity and redirect responsibility for their wrongdoings towards 'scapegoats'. Indeed, DPAs are often criticized for being nothing more than just 'window dressing', as they inadequately punish corporate defendants, allowing them to avoid criminal liability, and providing them with an instrument that shifts the blame towards their controlled companies or individuals linked to the company[72].

The misapplied use of subsidiaries to evade liability for the parent company is especially sought after by companies when the

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[69] King and Lord, *Negotiated Justice and Corporate Crime* at 75-76 (cited in note 1).
[70] See Greenblum, *What Happens to a Prosecution Deferred?* at 1869-1870 (cited in note 9) and Parker and Dodge, *An Exploratory Study of Deferred Prosecution Agreements and the Adjudication of Corporate Crime* at 947-948 (cited in note 13).
[71] *United States v Fokker Services BV* 818 F.3d 733 (DDC 2016).
[72] Miller, *More Than Just a Potted Plant* at 141 (cited in note 19).

DPA contains exclusions or limitations to their operations and activities. In fact, the company might be incentivized to negotiate with the prosecutor and narrow the scope of application of the DPA to affect the activities of a subsidiary only; alternatively, the subsidiary may enter into a plea agreement on behalf of the holding company, thus allowing the latter to evade any restriction. The 2009 Pfizer case offers a notorious example of this practice[73]: in a press release, Pfizer Inc. announced it had pleaded guilty to resolve criminal and civil liability deriving from the illegal promotion of certain pharmaceutical products, but the guilty plea was actually made by a subsidiary, whereas Pfizer itself only entered a pretrial diversion agreement[74].

Individuals too – especially shareholders and employees – bear the risk of being 'turned in' for the company's wrongdoings in exchange for corporate impunity: as part of the cooperation with the prosecuting authority deriving from the conclusion of a DPA, companies are normally required to relinquish the attorney-client privilege attached to the internal investigations on suspected criminal conduct by the company's own employees, thus granting enforcement agencies access to privileged documents, interviews, and witness accounts[75]. As a consequence, employees are placed in an invidious position, since the government is allowed to gather evidence against them – including their statements to internal company investigators – without worrying about rights against self-incrimination and other constitutional guarantees[76]. In addition, they

[73] *Health Care Service Corporation v Pharmacia & Upjohn*, 05-CV-01699 CRB (D CAL 2012).

[74] Cindy R. Alexander and Jennifer Arlen, *Does Conviction Matter? The Reputational and Collateral Effects of Corporate Crime*, in Jennifer Arlen (ed), *Research Handbook on Corporate Crime and Financial Misdealing* 87, 137 (Edward Elgar 2018).

[75] Mitchell, Imwinkelried and Stockdale, *Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege* at 284-285 (cited in note 40).

[76] Gibeaut, *A Matter of Opinion* at 58 (cited in note 5).

could even be charged with criminal offenses related to the conduct uncovered by an internal investigation[77].

Nevertheless, while charges have been brought against current or former employees in five out of the nine DPAs that have been concluded in England as of 2021, no conviction has ever been obtained against an individual[78]. This means that, ultimately, there is no corporate or individual accountability for the company's wrongdoing, as the company solves its liabilities by entering a DPA, and the subsequent investigations against the company's employees and shareholders only rarely result in them facing prosecution[79].

3.5. *Lack of reparation for damaged individuals*

Lastly, DPAs often fail to redress the damages suffered by individuals as a result of corporate wrongdoing, particularly in the context of bribes. In fact, while the statutes and guidelines regulating DPAs in some jurisdictions – such as the US and UK[80] – may contain clauses aimed at ensuring full compensation for the victims of corporate misconduct, it is not always clearly stated who the victims are and how their loss should be calculated.

Regulators normally identify the victim in the organization that the recipient of the bribe – the 'extorter' – represents and works for and equates the victim's loss to the financial gains obtained by the person who paid the bribe. However, regulators fail to address the loss sustained by the real victims of the bribe, meaning the honest competitors of the corporate bribe payer: in fact, they suffer the most as a result of the bribery, since their dishonest rival is preferred in the attribution of legal tenders. Nevertheless, they often receive little to

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[77] Mitchell, Imwinkelried and Stockdale, *Deferred Prosecution Agreements and Legal Professional Privilege/Attorney-Client Privilege* at 293 (cited in note 40).

[78] See *Ibid*.

[79] Parker and Dodge, *Negotiated Justice and Corporate Crime* at 946 (cited in note 13).

[80] Michael J. Comer and Timothy E. Stephens, *Bribery and Corruption: How to Be an Impeccable and Profitable Corporate Citizen* at 182 (Taylor & Francis 2016).

no compensation for their losses. The contentious matter that complicates the situation even more is that rival companies often fail to realize their victimhood status, as the contracts tainted by corruption are seldom available to the public domain until the bribe payment is uncovered and investigated[81].

Due to the undeniable difficulty in identifying the victims and calculating the losses, DPAs frequently admit the possibility to compensate victims indirectly, meaning through donations or other benefits to relevant non-profit organizations[82].

4. *New Solutions for Enhanced DPA Systems*

Amidst the dynamic landscape surrounding DPAs and the obstacles they entail, there is a growing recognition of the need for innovative solutions to enhance their effectiveness and fairness[83]. As a consequence, in refining DPAs, a suite of solutions tailored to address the intricate challenges inherent in the current systems may be desirable.

First and foremost, the development of specific criteria and guidelines for DPAs is needed: by accounting for the diverse spectrum of offenses and defendants, such criteria would ensure a more comprehensive approach to DPA negotiations. Factors such as the severity of the offense, the level of defendant cooperation, and the impact on victims and communities would be carefully considered, thereby fostering a more effective and equitable DPA process. In tandem with refined criteria, the introduction of an independent evaluation and oversight mechanism seems essential. This may entail the establishment of an autonomous DPA review board, comprising

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[81] See *Id.*, at 182-183.

[82] Jennifer Arlen, *The Potential Promise and Perils of Introducing Deferred Prosecution Agreements Outside the U.S. Public Law & Legal Theory Research Paper Series* at 18 (New York University School of Law 2019, Working Paper No. 19-30).

[83] Alexander and Cohen, *The Evolution of Corporate Criminal Settlements* at 545-553 (cited in note 21).

legal experts, ethicists, and also community representatives. The aim of such a proposed solution is to enhance public confidence in the integrity and fairness of DPAs[84].

Moreover, compliance monitoring mechanisms to ensure the effective enforcement of DPA terms may be included: it would be appropriate to appoint independent monitors to oversee DPA compliance, conduct audits and inspections, and impose sanctions for non-compliance. In this context, establishing a national authority or agency dedicated to this task could hold significant merit. In fact, such an entity would serve as a centralized body tasked with overseeing the implementation and adherence to DPA obligations – also across jurisdictions. Overall, this would represent a proactive step towards strengthening enforcement mechanisms and upholding the integrity of DPAs as a tool for promoting corporate accountability and societal welfare.

Finally, as a safeguard against potential abuses and to preserve the rule of law, it would be advisable to implement judicial review and approval mechanisms within the DPA framework in each jurisdiction that lacks them. This would involve judicial oversight of DPA negotiations, implementation, and modifications, hence ensuring alignment with legal principles and the overarching pursuit of justice[85].

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[84] Lanny A. Breuer, *Speech at the New York City Bar Association* (2012), available at http://www.justice.gov/criminal/pr/speeches/2012/crm-speech-1209131.html (last visited May 2, 2024) (if the public perceives DPAs as lenient or susceptible to manipulation, it undermines trust in the criminal justice system's ability to hold corporate offenders accountable. Moreover, public confidence in DPAs directly impacts their effectiveness as a deterrent against corporate misconduct: indeed, if DPAs are viewed as mere slaps on the wrist or as favoring powerful entities over the interests of justice, their deterrent effect diminishes).

[85] Gaetano Galluccio Mezio, *Diritto e procedura penale degli enti in U.S.A.* at 260-268 (CEDAM 2018) (in this context, the author analyzes the ongoing trend by American courts to (self-)attribute innovative powers of control over this type of out-of-court agreements).

5. *Conclusion*

DPAs represent a legal instrument that has gained recognition and acceptance in various jurisdictions, including the United States, the United Kingdom, and France. These agreements have emerged as a significant mechanism at the intersection of corporate law and justice, particularly regarding the question of whether they enable companies to evade liability. The investigation into DPAs conducted in this paper has revealed that these agreements offer a multifaceted approach, presenting both advantages and disadvantages.

This article leans towards the support of DPAs due to the diverse array of advantages they entail. As seen above, one of the primary benefits of DPAs lies in allowing companies to circumvent the stigma and the severe repercussions often associated with traditional criminal proceedings. Moreover, DPAs mandate and facilitate substantial organizational transformations within corporations. Indeed, as a condition for avoiding prosecution, companies are required to implement comprehensive internal reforms, ranging from corporate governance improvements to robust compliance programs. In addition to these, DPAs impose obligations to report extensively on corporations' compliance measures, progress, and any subsequent violations or lapses. The very structure of DPAs thus serves as a tool to instigate a more vigilant and accountable corporate environment, promoting a culture of compliance.

While DPAs have faced criticism, many of these drawbacks can be effectively addressed. One key aspect that mitigates the apprehension regarding the deterrent effect of DPAs is the acknowledgment of wrongdoing by companies entering into such agreements. In fact, while DPAs allow companies to avoid criminal prosecution, the acceptance of responsibility is a fundamental prerequisite. Furthermore, addressing concerns related to the lack of transparency in DPAs can be effectively managed by implementing a system of judicial review, similar to the robust model present in the

United Kingdom. This judicial oversight provides an essential check and balance system, fostering accountability and fairness in the implementation of DPAs.

It cannot be denied that, within the existing legislation, DPAs present limitations that call for legislative amendments aimed at achieving a fairer and more comprehensive legal framework. For instance, one of these limits is the absence of specific provisions for individual liability: DPAs primarily hold corporations accountable, yet they do not comprehensively address the culpability of individuals involved in corporate misconduct. Similarly, DPAs often focus on corporate-level penalties, reforms, and fines, without providing a mechanism to directly compensate those affected by the misconduct. Consequently, the presence of these limitations underscores the pressing need for more inclusive and rigorous laws that fill any gaps.

In conclusion, the analysis conducted in this paper opens on to asserting that – with effective implementation and continual improvements in legislation – DPAs can serve as a pivotal instrument in promoting corporate responsibility and upholding the principles of justice in the corporate sphere. Therefore, it is paramount that not just legal scholars and practitioners, but also, and especially, economic actors get acquainted with DPAs in order to appreciate the advantages they bring over traditional prosecution, as they offer a semblance of accountability while building a corporate culture of transparency, accountability, and systemic reform.

Rivoluzione Silenziosa: le Mafie nell'Epoca High-Tech

BEATRICE PATTARO*

Abstract: Normally, mafia-style organized crime assumes, in our minds, a well-defined image given by the traditional representations that are still shown to us in films today. But is this still the case today? It is clear that things are changing, that it is increasingly difficult to see those classic forms of organized crime in a world so different from that of 40 years ago. This is because the mafias are differentiating, they are taking on different forms, they are increasingly transparent from a double point of view: it is difficult to trace their movements in the commission of those crimes that are part of a single criminal design, just as it is difficult to trace those classic forms of intimidation because the communications between members of the association, but also with outsiders, they are different. This transparency can only be explained in one way: technology, new forms of communication, have pushed this change to the point of leading the mafias to conform to our behavior. What makes criminal activity go unnoticed are the increasing difficulties in differentiating the behaviors that are now considered habitual and those that, on the other hand, are typical behaviors of mafia associations. It is now clear that a change, a turning point, a moment of reflection is absolutely necessary to be able to look beyond what we are used to doing.

Abstract: Normalmente la criminalità organizzata di stampo mafioso assume, nelle nostre menti, un'immagine ben definita data dalle tradizionali rappresentazioni che tutt'oggi ci vengono mostrate nei film. Ma oggi è ancora così? È chiaro che le cose stanno cambiando, che è sempre più difficile vedere quelle forme classiche di criminalità organizzata in un mondo così diverso da quello di 40 anni fa. Questo perché le mafie si stanno differenziando, stanno assumendo forme diverse, sono sempre più trasparenti sotto un duplice punto di vista: è difficile rintracciarne i movimenti nella commissione di quei reati parte di un unico disegno criminoso, così come è difficile rintracciare quelle forme di intimidazione classiche perché le comunicazioni tra membri dell'associazione, ma anche con gli esterni, sono differenti. Questa trasparenza si spiega solo in un modo: la tecnologia, le nuove forme di comunicazione, hanno spinto questo cambiamento fino a portare le mafie a conformarsi con i nostri comportamenti. A far passare inosservata l'attività criminale sono le sempre maggiori difficoltà nel differenziare i comportamenti che oggi si ritengono abituali e quelli che, invece, sono comportamenti tipici dell'associazionismo mafioso. È, ormai, chiaro che sia assolutamente necessario un cambiamento, un punto di svolta, un momento di riflessione per riuscire a guardare più in là di ciò che siamo abituati a fare.

Keywords: Mafia trasparente; Era digitale; Social Network; Riciclaggio; *Onlife*.

Sommario: 1. Introduzione. – 2. Fenomeno Mafioso: Nuove Esigenze Interpretative. – 3. Attività Criminale e Deviante: l'Intreccio tra Reale e Virtuale. – 3.1. L'Impatto della Società Digitale sul *Modus Operandi* delle Mafie. – 4. Gli Influencer Criminali: il Nuovo Volto della Mafia Online. – 4.1. Il Cyberplace: Quando la Realtà Digitale Diventa un Vero e Proprio Ambiente Criminale. – 4.2. La Comunicazione tra Parole ed Emoji: i Messaggi Criptici dei Criminali. – 5. La Reazione delle Agenzie del Controllo Sociale Formale: le Nuove Tecniche Investigative. – 6. Conclusioni.

1. *Introduzione*

Dare una definizione di criminalità organizzata non è stato mai facile perché gli studi sulla materia ne hanno dato un'interpretazione sotto punti di vista sempre differenti: osservando la struttura interna, a livello di *alien conspiracy*, la mafia come "impresa", la mafia come *network*, la mafia interpretata con il concetto di *governance*, sotto il punto di vista di come si organizza la criminalità.

La nozione di organizzazione mafiosa è stata oggetto di un'evoluzione a livello concettuale e le varie concezioni hanno messo in luce diverse tipologie e interpretazioni del fenomeno.

Un primo filone di studio, che si sviluppa durante lo scorso secolo negli Stati Uniti, si concentra sulla mafia come gerarchia organizzata: internamente il gruppo mafioso ha una precisa struttura gerarchica organizzata, una struttura formale specializzata che consente di portare avanti determinate attività criminali[1].

Gli studi americani hanno anche dato vita ad un filone di pensiero subculturale delle mafie: occupandosi principalmente di mafia italiana, i criminologi dell'epoca osservavano come la mafia fosse il prodotto di una subcultura all'interno della società americana. La mafia in questo modello è vista come una *alien conspiracy*, una

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* Beatrice Pattaro studentessa del quarto anno di giurisprudenza all'Università di Trento. Tirocinante presso il Centro di Scienze della Sicurezza e della Criminalità (CSSC) dove svolge attività di ricerca a supporto dei collaboratori del centro.

[1] Alan Wright, *Organized crime*, a 102-108 (Routledge Taylor and Francis group 2005).

subcultura in cui l'etnicità, l'essere straniero è l'elemento che più da valore all'organizzazione[2].

Adam Smith, invece, fornisce una visione ancora differente legando il fenomeno mafioso ad una matrice economica: l'autore sostiene che sicuramente le mafie appartengono ad una subcultura, ma sono entrate a far parte dell'economia e ciò che caratterizza queste economie illecite è la loro struttura di imprese[3].

Carlo Morselli, studioso di analisi di rete, applica i suoi studi analitici all'osservazione del fenomeno mafioso notando che non c'è una vera e propria struttura, gerarchia, nelle organizzazioni come, invece, molta letteratura criminologica tende a raffigurare: egli nota un *network*, una rete criminale che si inserisce all'interno di una macro-rete, a sua volta inserita in una struttura organizzata[4].

Infine, Federico Varese, occupandosi principalmente di mafie straniere, associa il concetto di *governance*, concetto prettamente economico, al mondo della criminalità organizzata: partendo dal concetto di mafia come impresa ragiona sulla relazione di questa con l'ambiente esterno e come sopravvive alle regole imposte da esso[5].

Si comprende, dunque, che l'utilizzo del termine "mafie" al plurale non è casuale: ci sono varie modalità con cui la mafia si può mostrare e, di conseguenza, interpretare. Si osservi, inoltre, che nel quadro internazionale sono presenti mafie che si differenziano tra loro a livello etnografico: esistono mafie di diversa nazionalità che svolgono attività criminali legate alla reputazione del territorio in cui operano[6].

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[2] Dwight C. Smith, Jr., *The alien conspiracy theory: aka The Elephant in the front parlor*, 3 The European Review of Organized Crime, 2016.

[3] J.R. Otterson, *Interpreting Adam Smith*, at 96-110 (Cambridge University press, 2023).

[4] Carlo Morselli, *Inside Criminal Networks* (Springer 2009).

[5] Niles Breuer e Federico Varese, *The structure of trade-types and governance-type organized crime groups: a network study*, 63 The British Journal of Criminology, 2023.

[6] Ernesto Savona, *Criminalità organizzata*, (Enciclopedia del Novecento II Supplemento, 1998), a https://www.treccani.it/enciclopedia/criminalita-organizzata_%28Enciclopedia-del-Novecento%29/.

Una tappa importante, e che ha fornito le linee guida per adeguarsi e coordinarsi a livello di legislazione interna, è stata la Convenzione delle Nazioni Unite contro la criminalità organizzata transazionale tenutasi a Palermo nel 2000, la quale all'art. 2 fornisce una descrizione accurata di criminalità organizzata[7].

Sul solco di questa definizione, molto forte e che si adegua a contesti differenti, l'Italia ha modificato l'art. 416 c.p. rendendolo conforme alla normativa internazionale, con l. n. 146 del 2006[8]. Il nostro ordinamento, percependolo comunque come insufficiente a coprire tutte le ipotesi di criminalità organizzata, prevede un ulteriore articolo, l'art. 416-*bis* del Codice penale[9].

È sul fenomeno di cui all'art. 416-*bis* c.p. che l'elaborato si vuole concentrare, andando ad analizzarne il cambiamento in relazione all'entrata in scena delle nuove tecnologie: il fenomeno mafioso sta cambiando la sua modalità di espressione, il modo con cui comunica e il modo con cui sviluppa il proprio *script* criminale, divenendo sempre di più una "mafia trasparente"[10].

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[7] L'art. 2 della Convenzione recita come segue*: "gruppo criminale organizzato" indica un gruppo strutturato, esistente per un periodo di tempo, composto da tre o più persone che agiscono di concerto al fine di commettere uno o più reati gravi o reati stabiliti dalla presente Convenzione, al fine di ottenere, direttamente o indirettamente, un vantaggio finanziario o un altro vantaggio materiale*.

[8] GIANFRANCESCO. PALMIERI, *Il gruppo criminale organizzato*, 12 *Giurisprudenza penale web* (2020).

[9] Il comma 3 del citato articolo recita come segue: "*L'associazione è di tipo mafioso quando coloro che ne fanno parte si avvalgono della forza di intimidazione del vincolo associativo e della condizione di assoggettamento e di omertà che ne deriva per commettere delitti, per acquisire in modo diretto o indiretto la gestione o comunque il controllo di attività economiche, di concessioni, di autorizzazioni, appalti e servizi pubblici o per realizzare profitti o vantaggi ingiusti per sé o per altri, ovvero al fine di impedire od ostacolare il libero esercizio del voto o di procurare voti a sé o ad altri in occasione di consultazioni elettorali*".

[10] Marcello Ravveduto, *Le mafie nell'era digitale: Rappresentazione e immaginario della criminalità organizzata, da Wikipedia ai social network*, (Franco Angeli, 1^ edizione 2023).

2. *Fenomeno Mafioso: Nuove Esigenze Interpretative*

La definizione del fenomeno data dal nostro art. 416-*bis* c.p., alla luce anche di considerazioni successive, non si può ritenere inadeguata alla società digitale, una società in cui le tecnologie sono sempre più parte integrante della vita quotidiana[11]. La norma, grazie alla sua formulazione, è precisa nel menzionare, come caratteristiche del c.d. metodo mafioso, la forza di intimidazione del vincolo associativo e la condizione di assoggettamento e omertà che ne derivano. Nello specifico, la prima riguardante la fama criminale del gruppo, le altre riguardanti condizioni di soggezione psicologica e di rifiuto assoluto di collaborare con gli organi dello Stato cui si uniforma l'ambiente sociale generale[12]. La giurisprudenza ha anche affermato che il metodo mafioso non è necessario che si esplichi in vere e proprie minacce o violenze, essendo sufficiente un messaggio intimidatorio "silente"[13].

In vista delle caratteristiche appena riferite, sarebbe auspicabile un adeguamento interpretativo da parte della giurisprudenza all'odierna società digitale. Invero, si può ritenere che il legislatore abbia optato per una formulazione della norma che lascia all'interprete di larghe vedute la possibilità di cogliere in manifestazioni digitali la forza di intimidazione, la condizione di assoggettamento e l'omertà. Posto che, quindi, la formulazione del legislatore lo permette, tocca ora alla giurisprudenza volgere uno sguardo più ampio e moderno alle manifestazioni digitali del metodo mafioso.

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[11] Deborah Lupton, *Digital Sociology*, (Routledge, 1^ edizione 2014).

[12] Gabriele Fornasari e Silvio Riondato, *Reati contro l'ordine pubblico* a 64-77 (Giappichelli Editore Torino 2^ edizione 2017).

[13] Cass. pe., Sez. II, sent. n. 51324 del 18 ottobre 2023, in *CED Cassazione*, 2023; Cass. pen., Sez. II, sent. n. 14697 del 13 gennaio 2022, in *Leggi d'Italia*, 2023; Cass. pen., Sez. III, sent. n. 44298 del 18 giugno 2019, in *Studium juris*, 5, 623.

3. *Attività Criminale e Deviante: l'Intreccio tra Reale e Virtuale*

Come appena affermato, l'interpretazione della norma penalistica sull'associazione per delinquere di stampo mafioso continua a soffermarsi su fenomeni piuttosto "tradizionali" necessitando, invece, di uno svecchiamento guardando alla società digitale. È una questione strettamente legata alle nuove tecnologie, le quali hanno permesso la modifica, nel tempo, dell'espressione delle caratteristiche di base dei sodalizi mafiosi.

Risulterebbe poco accurato, difatti, rimanere nell'idea di una mafia che si sviluppa solo in un contesto offline, perché il mondo in cui viviamo oggi è fatto di online e di interazione tra online ed offline: in questo i mafiosi non sono molto diversi da noi, anzi ci assomigliano, come diceva Giovanni Falcone[14].

3.1. *L'Impatto della Società Digitale sul* Modus Operandi *delle Mafie*

Lo stato dell'arte della ricerca sulla criminalità organizzata di stampo mafioso ci permette di far emergere come, in realtà, non vi sia stato un grosso cambiamento dell'attività criminale nonostante l'avvento delle nuove tecnologie[15]: le attività a cui si dedicano i

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[14] Intervista di Corrado Augias a Giovanni Falcone del 12 gennaio 1992 nel corso del programma tv Babele: "*Gli uomini d'onore non sono né diabolici né schizofrenici. Non ucciderebbero padre e madre per qualche grammo di eroina. Sono uomini come noi. La tendenza del mondo occidentale, europeo in particolare, è quella di esorcizzare il male proiettando su etnie e su comportamenti che ci appaiono diversi dai nostri*". https://livesicilia.it/i-mafiosi-visti-da-giovanni-falcone/.

[15] M. McGuire, *Organised Crime in the Digital Age*, London: John Grieve Centre for Policing and Security, 2012. In questo documento McGuire espone le caratteristiche della criminalità organizzata operante in rete dandone una classificazione. In particolare, egli divide in 3 gruppi principali la criminalità organizzata (gruppi che operano esclusivamente online, gruppi "ibridi", gruppi che operano prevalentemente offline) e inserisce la criminalità organizzata di stampo mafioso nel terzo gruppo, all'interno della sottocategoria delle "gerarchie" sottolineando come

sodalizi criminali di stampo mafioso non sono cambiate nel tempo, ma sono state facilitate sotto diversi punti di vista grazie ai nuovi mezzi di comunicazione[16]. Si può, dunque, arrivare ora alla conclusione che le mafie facciano parte della criminalità c.d. *cyber-assistita*, ovvero quella tipologia di criminalità che è agevolata dalle nuove tecnologie: in queste attività lo strumento tecnologico non è essenziale, ma si presta a metodo di comunicazione o a supporto dell'organizzazione. Il mondo digitale ha sicuramente permesso alla criminalità organizzata di espandersi a livello internazionale in maniera facile e veloce creando canali relazionali in diversi paesi con più attori, più mezzi, sfruttando modalità di pagamento all'avanguardia[17]. La giurisprudenza, per questo motivo, fatica oggi a torvare una corrispondenza tra i tratti delineati come caratteristici delle associazioni per delinquere di stampo mafioso, ex art. 416-*bis* del Codice penale, e le realtà che si presentano attualmente nell'era digitale[18].

Le "mafie silenti" sono la realtà di oggi: mafie che non mostrano alcun ricorso alla violenza potenziale o fattuale e che enfatizzano la loro dimensione inter e intra-organizzativa[19]. La conferma di ciò si ha anche nel momento in cui si analizza la criminogenesi del fenomeno: le relazioni tra i membri dell'associazione nascono e si sviluppano prevalentemente offline andando a creare un organizzazione con un gruppo di comando stabile per poi includere all'interno del gruppo

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le attività non siano mutate, ma sia ampliato il mercato grazie all'utilizzo dello strumento tecnologico.

[16] Andrea Di Nicola, *Criminalità e criminologia nella società digitale* a 74-75, (Franco Angeli1^ edizione 2021).

[17] A. Anselmi, *Onion roting, cripto-valute e crimine organizzato*, in *Rivista diritto penale della globalizzazione*, 2019.

[18] E. Ciccarello, *La posta in gioco di Mafia Capitale: nuove mafie e interpretazione dell'art. 416-bis*, in Meridiana n. 87, *Mafia Capitale*, 2019. Lo stesso sostiene L. PICCARELLA, *La criminalità organizzata cibernetica. Il reato associativo tra mutamento sociale e giurisprudenziale*, in Meridiana n. 106, 2023, at 157-178.

[19] *Id.* at 65-89.

soggetti esterni, con esperienza nel campo informatico, al fine di poter ampliare la propria attività criminale in campi differenti e, appunto, rendersi "invisibili"[20]. Questa possibilità è data, in particolare, dal mondo del mercato finanziario in cui la difficoltà nel risalire, per gli investigatori, agli autori degli investimenti costituisce un trampolino di lancio per le mafie che necessitano di riciclare i proventi derivanti da attività illecite. Ecco che gli investimenti in criptovalute diventano un nuovo modo per passare inosservati quando il collocamento del denaro in attività e immobili è sempre più a rischio di sequestro e confisca[21]. Europol conta un aumento di queste attività notevole negli ultimi anni specialmente nel campo del traffico di beni e servizi, che possono andare dalla vendita di diversi tipi di droghe al commercio di armi[22]. I mercati aperti al commercio di tali tipologie di merci possono essere anche aperti al pubblico, ma più spesso sono situati nel *darkweb* dove l'anonimato e la natura del sito stesso rendono difficoltosa per le forze dell'ordine l'individuazione dei criminali[23].

Soprattutto durante il periodo del lockdown, causato dalla diffusione della pandemia da Covid-19, si è riscontrato un notevole aumento delle attività criminali online notando una forte propensione per i beni che, in quel momento, erano di primaria importanza. Venivano effettuate raccolte fondi false attraverso siti web apparentemente riconducibili a enti ospedalieri o accreditate da falsi patrocini di Istituzioni o Enti Pubblici, ma era anche di particolare interesse il campo della truffa online, in particolare della

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[20] A. Lavorgna, E. R. Kleemans, E. R. Leukfeldt, *Organised Cybercrime or Cybercrime that is Organised? An Assessment of the Conceptualisation of Financial Cybercrime as Organised Crime*, 2016.

[21] A. Cipolla, Antimafia: "*Così la Camorra guadagna con la Borsa e i Bitcoin*" L'allarme lanciato da Giuseppe Borrelli dell'Antimafia: "*La Camorra investe in Borsa e Bitcoin perché meno accessibili alle indagini*", 2 febbraio 2018.

[22] Europol, Serious Organised Crime Threat Assessment (SOCTA) – *Crime in the age of technology*, 2017.

[23] A. L. Roddy, J. R. Lee, M. A. Wallin, R. Liggett, *The Dark Web as a Platform for Crime: An Exploration of Illicit Drug, Firearm, CSAM, and Cybercrime Markets*, 2020.

vendita all'ingrosso di materiale sanitario contraffatto[24]. Le mascherine, per esempio, diventavano fondamentali, la domanda era altissima, ma la disponibilità era limitata: uno scenario perfetto per le mafie cinesi. Mescolano i loro prodotti illegali a quelli legali facendoli transitare dalla Cina tramite società di trasporto regolari e riescono a farle, così, entrare nel mercato europeo. Ma c'è un solo problema: è evidente, alla guardia di finanza, che i prodotti non rispondevano agli standard previsti dalla legislazione europea e che la scritta CE porta i caratteri attaccati (prendendo il significato di "*China Export*")[25].

E se il gruppo mafioso di Zahng Naizhong, l'uomo nero, ha approfittato della situazione a livello sanitario[26], la 'ndrangheta ha visto opportunità di guadagno dalle macerie dell'Ucraina: armi, sfruttamento, business edilizio, traffico di esseri umani, mercato nero e fondi europei. In particolare, il mercato delle armi è quello che frutta più guadagno alla 'ndrangheta, dopo lo spaccio, e in Ucraina la guerra è ancora in corso. È per questo che già si pensa al dopo: dove andranno a finire le armi che sono ora utilizzate per la guerra? Quali guerre andranno ad alimentare[27]? Ancora fresco è il ricordo del caso dell'ex Iugoslavia le cui armi vennero vendute a clan albanesi e serbo-montenegrini. Questi ultimi pensarono, a loro volta, di rivenderli alla 'ndrangheta in cambio dell'autorizzazione a sfruttare la prostituzione di giovani donne provenienti dall'Est europeo in territori controllati dalla 'ndrangheta. Ed è questo lo scenario che si prospetta come più probabile per la situazione della guerra russo-ucraina, assieme al traffico di esseri umani. La tecnologia qui si inserisce nella vendita sul *dark web* delle armi, nelle comunicazioni, nello scambio di informazioni: non solo, perché in parallelo alla guerra fatta di feriti e

[24] Resoconto attività 2020, Polizia postale e delle Comunicazioni – risultati nazionali e nella regione Calabria.

[25] A. Di Nicola, G. Musumeci. *Cosa Loro, Cosa Nostra: Come le mafie straniere sono diventate un pezzo d'Italia*, at 199-214 (Utet Libri Milano, 2021)

[26] *Ibidem.*

[27] A. Nicaso, N. Gratteri. *Fuori dai confini*, at 3-15 (Mondadori Libri Milano, 2022) .

morti, se ne combatte un'altra nel mondo virtuale. Si chiama *cyberwar* e le sue armi sono il *phishing*, le truffe online, i furti di dati e di identità. Gli attacchi arrivano prevalentemente dall'Est Europa, dalla c.d. "*Hackerville*", fruttano soldi facili garantiti da un solo *click*: in Italia gli attacchi sono stati diversi, soprattutto negli ultimi anni, anche a causa dei sistemi di cybersicurezza alquanto arretrati[28].

Prendendo, poi, in considerazione il traffico di droga, mercato che frutta maggior guadagno all' 'ndrangheta, questo non ha subito particolari danni: solamente il primo lockdown ha leggermente segnato una diminuzione delle vendite, le quali sono man mano tornate ai loro livelli pre-pandemia[29].

4. *Gli Influencer Criminali: il Nuovo Volto della Mafia Online*

Curioso, per coloro che hanno la stessa età di chi scrive, è vedere come la realtà che ci circonda e l'ambiente in cui siamo cresciuti siano effettivamente una novità. Non è una riflessione così facile da fare perché, pensando sempre ai sodalizi mafiosi, nelle aule universitarie si studiano questi fenomeni dal punto di vista tradizionale: l'art. 416-*bis* c.p., la forza di intimidazione, l'assoggettamento, l'omertà, il compiere una serie di reati volti al completamento di un piano criminoso, tutte caratteristiche determinate e che non vedono per nulla il coinvolgimento di quella che è l'odierna realtà digitale. In verità, però, è evidente che il mondo sia diverso, che non ci siano più gli stessi modi di esprimersi, che le caratteristiche dell'associazione mafiosa siano sempre le stesse, ma bisogna guardare un po' più in là del solito per riconoscerle veramente. La Fondazione Magna Grecia,

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[28] *Ibidem.*

[29] Europol, Serious and Organised Crime Threat Assessment (SOCTA) – *A corrupting influence: the infiltration and undermining of Europe's economy and society by organized crime*, (Dec 7, 2021) available at https://www.europol.europa.eu/publication-events/main-reports/european-union-serious-and-organised-crime-threat-assessment-socta-2021.

nel primo rapporto intitolato "*Le mafie nell'era digitale*"[30], ha osservato i cambiamenti degli autori nelle organizzazioni criminali di stampo mafioso, concentrandosi in particolar modo sullo scenario italiano. I profili dei membri dell'associazione mafiosa sono, oggigiorno, facilmente delineabili dai loro social network: è TikTok il social con le caratteristiche più adatte, a differenza di Facebook, visto più come un diffusore di news, e di Instagram, in cui si diffondono contenuti più di carattere estetico. Questo "nuovo" social ha avuto il suo boom di notorietà nel 2020: le sue caratteristiche permettono ai boss mafiosi, avvalendosi dell'aiuto delle nuove generazioni nate tra gli ultimi anni '90 e i primi anni '00 (la c.d. "*Google generation criminale*"[31]), di creare contenuti in cui eseguono performance in grado di riflettere esattamente l'identità del *creator*. È importante, in un mondo costantemente connesso come è quello di oggi, crearsi profili sui social al fine di costruire l'immagine che si vuole dare di se stessi e divulgarla ai più: è una pratica ormai comune nel campo della politica[32] e, come abbiamo detto prima, i mafiosi sono molto simili a noi[33].

Non è immediatamente percepibile l'entità del fenomeno se non si pensa a fatti concreti: nella creazione di questi contenuti i boss, ma anche le giovani reclute, utilizzano esattamente quella forza di intimidazione e quell'assoggettamento descritti all'art. 416-*bis* c.p[34]. Il punto cruciale[35], come correttamente evidenziato nel rapporto di cui sopra, è che spesso non si accorgono di mettere in moto questi meccanismi né gli autori stessi di contenuti, né tanto meno si

[30] *Op. cit. supra* a nota 4.
[31] M. Ravveduto, *La Google generation criminale: i giovani della camorra su Facebook*, in Rivista di studi e ricerche sulla criminalità organizzata, vol. 4, n. 4, 2018, at 63-64.
[32] A. Sanpietro, S. Sanchez-Castillo, *Building a political image on Instagram: A study of the personal profile of Santiago Abascal (Vox) in 2018*, in Communication and Society, vol. 33 (1), 2020, at 169-184.
[33] *Op. cit. supra* a nota 5.
[34] M. Ravveduto, 2023, *op. cit. supra*, at 18-31.
[35] *Ibidem.*

accorgono di queste manifestazioni gli utenti esterni: trattandosi di una minoranza sociale che utilizza un linguaggio, spesso dialettale, comprensibile da parte di una cerchia ristretta, in aggiunta al fatto che realizzano contenuti spesso associabili a *trend*, queste chiare manifestazioni fanno passare inosservate le mafie nell'ambiente online.

Questo è un punto di partenza chiave per due ragionamenti fondamentali: il primo si sviluppa su un piano di continuità dell'azione criminale dei mafiosi dall'offline all'online e viceversa; il secondo riguarda l'utilizzo del linguaggio scritto associato a quello visivo, le emoji.

4.1. *Il Cyberplace: Quando la Realtà Digitale Diventa un Vero e Proprio Ambiente Criminale*

Non c'è ancora nel pensiero odierno l'idea di un mondo nuovo in cui attori "digitali" e attori "reali" non sono diversi, ma sono le stesse persone che agiscono semplicemente creandosi nuove opportunità, perché "*a caratterizzare l'interrealtà è lo scambio esistente tra le diverse dimensioni: il mondo digitale influenza quello reale e viceversa; la dimensione pubblica influenza quella privata e viceversa*"[36]. In questo senso il noto filosofo italiano Luciano Floridi conia il termine "*onlife*": la vita di un soggetto, sotto ogni punto di vista, relazionale, sociale, comunicativo, lavorativo ed economico, è il frutto di una continua interazione tra realtà materiale (analogica) e realtà virtuale (interattiva)[37]. È proprio di questa concezione che si nutrono le relazioni e il nuovo modo di esprimersi delle mafie: di una forte interazione tra online e offline, appunto dell'"*onlife*". Una chiara manifestazione di questa (in)consapevolezza è data dal fatto che

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[36] G. Riva, *Nativi digitali. Crescere e apprendere nel mondo dei nuovi media*, at 60 (Il Mulino Bologna, 2014).

[37] E. Mazzotti-Cremit, *Onlife – L'ibridazione della società*, "Internet e il cambiamento in corso" in Architettura, Diritti, Ecologia.

molte forme di violenza, assoggettamento ed intimidazione, che sono perpetrate nel mondo materiale continuano, poi, anche sui social mostrando ai propri *follower* contenuti violenti o minacciosi con palesi riferimenti al destinatario. Più che *cyberspace*, si dovrebbe parlare di *cyberplace*[38]: il territorio, costituito dalle piattaforme dei social network, in cui i contatti online e le reti sociali offline convergono. Questo anche perché è chiaro che i *follower* di questi soggetti sono costituiti da coloro che fanno parte, o perlomeno simpatizzano, per sodalizio mafioso: da tutti questi elementi si può evincere come il confine tra reale e virtuale non esiste, che le pratiche criminali confluiscono in unico spazio, il *cyberplace*, in un'unica realtà, l'*onlife*. Ma c'è di più: la tecnologia, gli algoritmi dei social network, incentivano questo processo perché mostrano allo *user* ciò che più si avvicina alla sua realtà. Le esperienze, le ricerche degli utenti modificano gli algoritmi che andranno, conseguentemente, ad adattare i contenuti del *feed* ai propri gusti: è immediato, dunque, comprendere l'impatto sociale degli algoritmi nei percorsi di vita intrapresi[39].

È proprio in questo spazio che le mafie possono esibirsi, rimanendo nell'ombra, conformandosi alla società odierna: le mafie possono rendersi trasparenti senza paura di essere scoperte. Si rendono esplicite le pratiche di affiliazione che ora non comportano il bruciare santini, ma semplicemente condividere foto, video ed emozioni per far comprendere al clan di essere dalla stessa parte, di condividere lo stesso nucleo di valori[40]. Si cercano tra di loro, si riconoscono come "simili", si credono gli eroi in un mondo al

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[38] M. Ravveduto, *op. cit. supra,* at 14.

[39] T. Bucher, *The algorithmic imaginary: exploring the ordinary affects of Facebook algorithms*, in Information, communication and society, v. 20, 2017, available at https://edisciplinas.usp.br/pluginfile.php/5971608/mod_resource/content/1/bucher2016_facebook.pdf.

[40] M. Danesi, *Forensic Semiotics: A Note on Applying Semiotics to the Study of Crime*, in Language and Semiotics Studies, vol. 5, n. 1, 2019, at 10-11.

contrario senza accorgersi di essere influenzati da un insieme di valori in cui credono di riconoscersi: il modo di vestirsi, le auto, le emoji, la musica[41]. Sì, anche la musica, in particolare il genere trap, interagisce con il mondo mafioso: nel genere trap si narrano le imprese di questi eroi che, non compresi dalla società in cui vivono, perché poveri, esprimono il loro disagio e si trovano a dover vivere di questi crimini, in particolare di spaccio. Anche il genere neomelodico si presta a rendere onorevoli, quasi romantiche, le gesta dei mafiosi: sono i cantanti che ci raccontano le loro memorie di un mondo fatto di valori, onore e omertà. A volte, invece, canzoni famose vengono modificate a favore di ciò che il criminale vuole raccontare: si prendono spezzoni di canzoni, si aggiunge un piccolo video ed ecco che il messaggio criminale è inviato[42].

4.2. *La Comunicazione tra Parole ed Emoji: i Messaggi Criptici dei Criminali*

I *memes*, le *gifs*, gli *stickers*, sono tutte nuove forme di comunicazione che associano alla parola un'immagine. "*I messaggi testuali includono forme linguistiche particolari che hanno l'obiettivo di compensare la mancanza dei codici comunicativi, gestuali, mimici e prossemici*"[43]: ecco gli emoji che, espressivi al punto giusto, ci agevolano nel far comprendere al nostro interlocutore la modalità con cui ci rivolgiamo a lui e, come lo facciamo noi normalmente, lo fanno anche i mafiosi. Infatti, le piattaforme di messagistica più comuni, come Telegram e Whatsapp, permettono ai mafiosi di interagire tra di loro in modo sicuro senza essere scoperti perché sono dotate di sistemi di crittografia che rendono impossibile a terzi intercettare le

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[41] M. Ravveduto, *op. cit.*, p. 65.

[42] *Ibidem*.

[43] G. Riva, *Psicologia dei nuovi media. Azione, presenza, identità e relazioni nei media digitali e nei social media*, (Il Mulino, Bologna 2012).

conversazioni o inserirsi in queste[44]. Telegram, in particolare, è una piattaforma molto usata per la condivisione di materiale illegale e, dunque, anche per le associazioni mafiose luogo sicuro dove poter mettere a punto i propri piani criminali.

Per riaffermare continuamente il proprio potere sarà necessario anche, tra i membri, alle parole associare delle emoji per far capire il peso e la decisione della propria affermazione: il teschio, il coltello, la pistola, la bomba, la goccia di sangue possono essere degli esempi con un significato immediato[45]. Ogni emoji, all'interno dell'associazione, ha un proprio significato specifico, spesso diverso da quello meramente figurativo e che è comprensibile solo da coloro che sono interni all'associazione stessa, come un linguaggio in codice decifrabile solo da chi ha la chiave giusta: come, ad esempio, tutti i simboli provenienti dalla cultura religiosa o dalla cultura dell'hip hop[46]. Ma questi emoji, che prendono un significato dal reale e che ne assumono uno diverso nell'interreale, non sono solo una forma di linguaggio non verbale che si utilizza all'interno dell'associazione, ma anche una forma di comunicazione che serve a minacciare gli esterni: svolgono una funzione di mediazione tra mentalità mafiosa e la cultura locale e nazionale[47].

Anche in questo senso la riflessione sembra banale: è l'abitudine che ci spinge a non vedere il vero cambiamento, è la realtà "legale" che non ci spinge a capire come le mafie si stanno adattando al nostro mondo, che stanno assumendo sempre più la forma di ciò che per noi è la normalità.

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[44] *Telegram: sicurezza, privacy e cifratura*. 18 Jan. 2021, available at https://www.kaspersky.it/blog/telegram-privacy-security/23745/.

[45] M. Ravveduto, *op. cit. supra* at 100.

[46] A. Nicaso, N. Gratteri. *Il grifone*, at 3-32 (Mondadori Libri, Milano 2023).

[47] E. Ciconte, *Dall'omertà ai social: come cambia la comunicazione della mafia*,(Edizioni Santa Caterina, 2017).

5. *La Reazione delle Agenzie del Controllo Sociale Formale: le Nuove Tecniche Investigative*

In relazione alle varie manifestazioni criminali dei sodalizi mafiosi, le tecniche investigative più efficaci per rilevarne le attività è l'ambito del riciclaggio del denaro raccolto dalle altre attività illecite.

È su questa linea che si muovono le tecniche di prevenzione della Direzione Investigativa Antimafia (DIA). Nella relazione relativa al II semestre del 2021 la DIA di era posta degli obiettivi specifici per contrastare l'attività di sfruttamento del sistema finanziario a scopo di riciclaggio[48]. Questa sfida risulta, però, sempre più complicata da affrontare soprattutto con l'emersione della cosiddetta "*financial technology*" (*Fintech*), ovvero il processo di finanziarizzazione dei mercati spinto dall'innovazione tecnologica e dallo sviluppo del digitale, che se da un lato accresce l'interesse della comunità internazionale per i vantaggi che ne derivano all'economia, dall'altro induce gli Stati ad adottare adeguate contromisure per contenere i rischi che gravano sul sistema finanziario[49]. Come risposta la DIA ha pensato alla definizione di linee d'indirizzo operativo legate alla crescita esponenziale delle transazioni finanziarie attuate mediante l'utilizzo di nuove tecnologie come la *blockchain*, per lo scambio di rappresentazioni digitali di valore quali le criptovalute e gli *NFT*. Le cripto-attività, infatti, oggi rappresentano un fenomeno in costante espansione e che travalica i confini continentali attraendo sempre un numero maggiore di professionisti e investitori spinti dall'opportunità di moltiplicare i propri investimenti mediante l'acquisito di criptovalute e di *NFT*, pur se intrisi di elevati profili di rischio. Le piattaforme mediante le quali tutto questo è possibile sono facilmente accessibili da smartphone e consentono l'apertura di veri e propri conti da remoto: sono meccanismi che riscuotono un

[48] Direzione Investigativa Antimafia, relazione del Ministro dell'Interno al Parlamento sull'attività svolta e sui risultati conseguiti, II semestre 2021.
[49] *Ibidem.*

grandissimo successo tra giovani affascinati dalla possibilità di incrementare i propri guadagni mettendo in mostra le proprie abilità tecnologiche, ma anche tra le mafie che, invece, pagano professionisti per avvalersi delle loro abilità al fine di poter incrementare i propri guadagni ed espandere il mercato.

Si conferma, anche nella relazione della DIA per il I semestre del 2022, la permanenza dell'utilizzo delle criptovalute ed *NFT's* come metodo di pagamento in espansione nonostante i limiti legati alla ricorrenza di regole dettate dal solo soggetto che le mette in circolazione e alle precarie garanzie della valuta, del tutto priva di corso legale, minate dalla sua volatilità. In territorio nazionale si osserva come le crescenti potenzialità offerte dalla digitalizzazione e le possibili conseguenze cui è esposto il sistema finanziario hanno formato oggetto di un'apposita comunicazione della Banca d'Italia, pubblicata il 30 giugno 2022, rivolta non solo agli intermediari vigilati ma anche a quanti "…*operano a vario titolo negli ecosistemi decentralizzati anche come utenti*…" per richiamare l'attenzione oltre che sulle opportunità offerte da tali tecnologie anche sui rischi insiti nelle stesse e nell'operatività in cripto-attività[50].

In ultima battuta, si rileva l'approvazione del Decreto del Ministero dell'Economia e delle Finanze recante disposizioni per l'esercizio dei servizi relativi all'utilizzo di valuta virtuale e dei servizi di portafoglio digitale (c.d. *VASP*)[51]. Con questo provvedimento lo svolgimento di tali attività, anche online, viene subordinato al possesso di specifici requisiti e all'iscrizione degli operatori in un'apposita sezione del Registro dei Cambiavalute tenuto dall'OAM (Organismo Agenti e Mediatori) ed ascrive in capo agli stessi l'onere di inviare in via telematica al medesimo Organismo,

[50] Comunicazione della Banca d'Italia in materia di tecnologie decentralizzate nella finanza e cripto-attività, Roma, 30 giugno 2022.
[51] d.l. n. 40 del 17 febbraio 2022.

con cadenza trimestrale, i dati relativi alle operazioni effettuate nel territorio della Repubblica italiana.

Queste ed altre operazioni, riportate in modo dettagliato nelle varie relazioni semestrali della DIA, sono propriamente volte ad aiutare le agenzie del controllo sociale formale a poter intercettare le attività finanziarie sospette ed osservare i successivi movimenti con un occhio di riguardo.

6. *Conclusioni*

In questo elaborato si è cercato di sottolineare come le mafie stiano mutando la propria modalità di manifestazione e stiano divenendo "trasparenti" con l'aiuto delle nuove tecnologie, soffermandosi su due aspetti: da un lato il modo di divulgare la loro cultura e i loro valori che passano inosservati agli occhi dei più e, dall'altro, il mercato e il riciclaggio di denaro che ora sono resi sempre più impercettibili. Il tema è sempre attuale, un mercato che non morirà mai, una mentalità che è intrinseca in una parte della nostra società. Il vero punto è riconoscerlo e imparare a guardare un po' più in là del solito, capire che come cambiamo noi, cambiano anche le mafie: non sono diversi da noi, sono esattamente uguali a noi. La convergenza tra le attività criminali delle organizzazioni mafiose e l'uso sempre più diffuso della tecnologia rappresenta una sfida senza precedenti per le forze dell'ordine, i legislatori e la società nel suo complesso. È evidente che il progresso tecnologico può essere un alleato importante nella lotta contro le mafie, ma solo se accompagnato da strategie di contrasto altamente specializzate e aggiornate. L'implementazione di misure di sicurezza informatica avanzate, la collaborazione internazionale e l'adozione di politiche legislative adeguate sono fondamentali per contrastare l'evoluzione delle attività criminali legate alle mafie. Inoltre, è cruciale promuovere la consapevolezza pubblica riguardo alle nuove minacce emergenti e alle modalità con cui le organizzazioni mafiose cercano di sfruttare la tecnologia. La partecipazione attiva della società civile,

insieme a una maggiore trasparenza e responsabilità da parte delle istituzioni, può contribuire a creare un ambiente in cui le mafie trovino sempre più difficile operare. Per fare tutto questo, però, è necessario fare il primo sforzo: analizzare l'evoluzione delle abitudini dei mafiosi e la fusione della tecnologia nel loro *modus operandi* criminale.

The EU's CSDDD: Lawful Extraterritoriality or Jurisdictional Overreach?

ENRICO ZONTA*

Abstract: The European Union (EU), in the continuous effort to assert itself as a global regulatory power, is attempting to regulate Corporate Sustainability Due Diligence through a Directive proposed by the European Commission in February 2022 (CSDDD), and currently under consideration by the co-legislators. Such Proposal envisages obligations for both EU and non-EU companies falling under its personal scope to identify, mitigate, and bring to an end all adverse effects to human rights and sustainability arising out of the company's own operations, its subsidiaries, and value chain regardless of the location, pending sanctions and civil liability in the EU. Given the far-reaching obligations regulating conduct abroad, it is essential to ascertain whether the EU is engaging in a lawful exertion of extraterritorial jurisdiction, or if the CSDDD Proposal would be too far of a jurisdictional encroachment into other States' sovereignty. After reviewing the relevant triggers of application of the Directive both under international and EU law, it is submitted that the Proposed Directive does not appear to be manifestly violating international law, without prejudice to discussions on the current amendments in the course of the ordinary legislative process.

Keywords: CSDDD; Jurisdiction; Extraterritoriality; International & EU Law; International Corporate Law.

1. *Introduction*

In an increasingly multi-faceted, multi-polar, and interconnected world, the European Union (EU) is emerging as a global regulatory power attempting to set worldwide standards of conduct. With a view towards extending its global leverage vis-à-vis other world powers, the EU has been increasingly using access to the Single Market as a tool to exert its regulatory power towards third countries[1]. As stated by Advocate General (AG) Jacobs, "the EU is based exclusively on law, not on power… over the past sixty years or so, law has made a unique contribution to the European story"[2]. However, this reliance on law can be increasingly seen, according to Scott, as power in its international relations[3]. This trend has been surging given the globalisation, digitalisation, and interconnection of different markets and issues: the 2008 financial crisis, climate change, COVID-19, and Russia's aggression on Ukraine are only a few

*Enrico Zonta is a third-year LLB International and European Law student at the University of Groningen, the Netherlands.
He was a Research Intern at the Department of EU law for 2022-2023 when he wrote this article, under the supervision of
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[1] Lena Hornkohl, 1, *The Extraterritorial Application of Statutes and Regulations in EU Law*, at 3, ELECTRONIC JOURNAL, (2022)

[2] Marise Cremona & Jonathan Scott, *Introduction*, 1, in Oxford University Press eBooks, at 1, (2019).

[3] See *Ibid*.

examples of cross-border instances that have affected and shaped the EU within the last fifteen years. To prevent negative effects in the Union and in view of the current Commission's effort to be geopolitical[4], the EU has resorted to legislation that has extraterritorial application, or at least extraterritorial effects. The difference between extraterritorial application and territorial extension will be discussed in the following sections; notwithstanding such differentiation, the application of EU legislation beyond its territory must, in any case, be consistent not only with EU law, but also with the relevant laws of jurisdiction stemming from international law.

Against this backdrop, this article focuses on the Proposal for a Directive on Corporate Sustainability Due Diligence (hereinafter, 'CSDDD' or 'Proposal')[5]. The contentious and long-awaited European Commission's Proposal of 2022 establishes far-reaching due diligence obligations on companies concerning the protection of human rights and the environment in their own operations, subsidiaries, and along their value chain, including civil liability for any adverse impact resulting from failure to comply.[6] Under the Proposal, both EU and non-EU companies would be subject to the application of the Directive, provided they meet certain criteria relating to their net turnover and number of employees (for EU companies), and net EU turnover for non-EU companies[7].

While the precise delimitation of the application criteria will be further discussed in detail, the relevance of this legislation is

[4] Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions, *The European Economic and financial systems: fostering openness, strength, and resilience*, 32 final, at 1, COM(2021)

[5] Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final (Proposal), COM/2022/71.

[6] Articles 5-11, Proposal (n 5).

[7] Article 2, Proposal (n 5).

represented by the Commission's estimate that around 13,000 EU companies and 4,000 non-EU companies would fall under the scope of the Directive, and therefore would have to comply with its obligations concerning their operations, subsidiaries, and value chain, regardless of where they are located[8]. Given its width in scope, obligations, and impact outside of the EU, it is essential to assess whether this piece of legislation consists in an extraterritorial legislation and, if so, whether it is an assertion of extraterritorial jurisdiction consistent with international law.

To do so, firstly extraterritoriality under international law and EU law will be discussed (Section 2). Following, the CSDDD will be analysed (Section 3), including a brief history of the Proposal (Section 3.1), its personal scope (Section 3.2), and obligations (Section 3.3). Furthermore, an analysis of its effect will be made (Section 3.4) and it will be discussed whether it constitutes a piece of extraterritorial legislation under EU law (Section 4). Section 5 will point out certain considerations on the concept of reasonableness in extraterritoriality, before drawing overall conclusions (Section 6).

2. *Extraterritoriality in International and EU Law*

2.1. *International Law*

Extraterritoriality can be defined as the ability of a State, via its legal, regulatory, and judicial institutions, to exercise authority over actors and activities outside its own territory[9]. This notion stems from the concept of jurisdiction, which is in turn a manifestation of sovereignty. While sovereignty, in relation to States, entails the power

[8] Explanatory Memoranda to the Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937, final, at 16, COM/2022/71

[9] Jennifer Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory area,* Working Paper No. 592010, Corporate Social Responsibility Initiative, at 14, (2010).

to rule over oneself, jurisdiction is, essentially, the extent of that legal power exerted by States[10]. Jurisdictions of States are, in fact, not unlimited: the fundamental principle of international law of sovereign equality of states, namely *par in parem non habet imperio*[11], presupposes that States cannot exert jurisdiction upon another State's territory. This principle was iterated by the Permanent Court of International Justice (PCIJ) in the seminal Lotus case: "failing the existence of a permissive rule to the contrary… [a State] may not exercise its power in any form in the territory of another State"[12].

Jurisdiction as sovereignty presupposes the three powers of the State: legislative or prescriptive (to establish rules), judicial or adjudicative (to establish procedures and adjudicate disputes), and administrative or enforcement (to impose consequences for breaches of the rules)[13]. It is worthy to note that, in the context of the present paper, only prescriptive jurisdiction is relevant – as the enactment of legislation is an act falling within the ambit of prescriptive jurisdiction. Generally, prescriptive jurisdiction – namely, to legislate – needs to be associated with one of the recognised bases of jurisdiction under public international law: territorial principle, nationality principle, passive nationality principle, protective principle, universality principle, and effects doctrine. While a detailed discussion of the abovementioned bases and their status under public international law falls out of the scope of this article, it must be underlined that the precise delimitations and scope of the jurisdictional bases are not clearly established, thereby leaving customary international law uncertain and in development in

[10] Julia Hörnle, *Territorial Sovereignty, Jurisdiction, and the Territorial Detachment of the Internet*, in INTERNET JURISDICTION LAW AND PRACTICE, at 7, (Oxford University Press 2021).

[11] Alex Ansong, *The Concept of Sovereign Equality of States in International Law*, 2(1), in Gimpa Law Review, *14-34,* (2016), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3171769 (last visited May 2, 2024).

[12] Judgment No 9 (Decision No) PCIJ Series A No 10.

[13] Rudolf Binschedler, "*Treaties, Reservations*" at 512, Encyclopedia of Public International Law, Rudolf Bernhardt, 2003.

such regards[14]. It remains uncontended that the territorial principle is the main basis of jurisdiction under customary international law: a State is normally able to assert jurisdiction within its territory[15]. All other assertions of jurisdiction outside one's territory can be considered as 'extraterritorial', and therefore an exception to the leading territorial principle[16]. A developing doctrine instead is the so-called 'effects doctrine', whereby if an occurrence in another State has substantial effects in a third State, the latter is allowed to exert prescriptive jurisdiction on the former occurrence. While its status is contested, it has increasingly been used, especially in competition law instances – where the discerning criteria for applicability is the relevant conduct's effect in the EU's internal market competition, not the location of the companies[17].

Pertaining to extraterritoriality, academic literature has delimited the distinction that can be drawn between 'direct extraterritorial jurisdiction' and 'domestic measures with extraterritorial implications'. Direct extraterritorial jurisdiction entails that a State regulates directly over a conduct occurring abroad that is not triggered by a territorial or other connection. Domestic measures with extraterritorial implications, instead, entail that a State regulates conduct, occurring also abroad, on the basis of its territorial jurisdiction over private actors, including companies.[18] Arguments have been advanced[19] suggesting that exertion

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[14] For an overview of jurisdiction under public international law, see: Cedric Ryngaert, Jurisdiction in International (2015).

[15] Directorate-General for External Policies of the Union (European Parliament), Robert Dover & Justin Frosini, The extraterritorial effects of legislation and policies in the EU and US (2012), https://op.europa.eu/en/publication-detail/-/publication/f1ca25fb-ed09-423f-9381-73bab0789184 (last visited May 2, 2024), at 9.

[16] Nadia Bernaz, *Enhancing Corporate Accountability for Human Rights Violations: Is Extraterritoriality the Magic Potion?*, 117 JOURNAL OF BUSINESS ETHICS 493 (2012), at 495.

[17] For a discussion of the effects doctrine under international law, see: Jason Coppel, *A Hard Look at the Effects Doctrine of Jurisdiction in Public International Law*, 6 Leiden Journal of International Law 73 (1993).

[18] Zerk (n 9), at 15.

[19] Rachel Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma*

of direct extraterritorial jurisdiction may amount to an intrusion into the jurisdiction of another State, and potentially to a violation of the principle of non-intervention in another State's affairs[20]. However, domestic measures with extraterritorial implications tend to be less controversial[21]. Although they still have extraterritorial implications, they may not be such a substantial intrusion as to interfere in another State's affairs. Such a distinction between the two types of measures can also be drawn by the Lotus case; while a State may not, failing the existence of a permissive rule, exercise its power in any form in the territory of another State, "it does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad…"[22]. Therefore, much of the assessment on the legitimacy of the measure, in practice, will depend on its jurisdictional basis, trigger of jurisdiction, its design, and obligations.

While the distinction between the two categories may not always be crystal clear, practice suggests that domestic measures with extraterritorial implications are increasingly being used, such as an import ban on products using unacceptable environmental standards[23], and prohibition of export on local companies investing in projects obtained by corruption are just practical instances of domestic measures with extraterritorial implications[24]. More specifically, there has been an increasing tendency of States to adopt domestic measures with extraterritorial implications regulating the conduct abroad of companies economically present within a State's jurisdiction – the scope of action

raised/created by the use of the extraterritorial techniques, 14 Utrecht Law Review 22 (2018), at 29.

[20] For a discussion on the principle of non-intervention, see: Maziar Jamnejad & Michael Wood, *The Principle of Non-intervention*, 22 Leiden Journal of International Law 345 (2009).

[21] Zerk (n 9), at 15.

[22] *SS Lotus* (n 12), at 19.

[23] For an instance, see: American Clean Energy and Security Act, ACES, H.R. 2454.

[24] For an instance, see: US Department of Justice, Lay-person's Guide to the FCPA, http://www.justice.gov/criminal/fraud/docs/DoJdocb.html (last visited May 2, 2024).

set out in the CSDDD[25]. While the regulation of business' human right conduct abroad is set out in the UN's non-binding Guiding Principles on Business and Human Rights[26], a leading standard of conduct, the existence of an obligation to regulate business' human rights conduct abroad is not settled under international law and is beyond the scope of this article[27]. However, it is worthy to point out that States are faced with a dilemma when deciding whether or not to regulate business' human rights conduct abroad: on the one hand, extraterritorial regulation may incur in violation of other States' exclusive jurisdiction, while, on the other hand, limiting regulation to events wholly within the territorial State may create a regulatory vacuum in transnational behaviours, where the host States of companies' operations are unable or unwilling to regulate[28].

Against the backdrop of regulating business' human rights conduct abroad, as well as in fields other than corporate due diligence[29], resort to 'parent-based' regulation is often used. That entails imposing requirements on the parent company, settled within the regulating State's jurisdiction, which, in turn, has to apply the requirements also to their foreign subsidiaries[30]. This raises the question of how can the traditional jurisdictional principles be applied to legal persons such as multinational companies: while there is no single test on corporate nationality under international law, and much of the rules depend upon

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[25] Bernaz (n 16), at 494.

[26] Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, UN Doc A/HRC/17/31, at 7.

[27] For a discussion of the developments in the business and human rights discourse, see: Irene Pietropaoli, *Business, human rights and transitional justice* (Routledge 1st ed 2020).

[28] Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma raised/created by the use of the extraterritorial techniques* at 23 (cited in note 19).

[29] For an example of parent-based regulation, see the anti-bribery OECD scheme: Keith Loken, *The OECD Anti-Bribery Convention: Coverage of Foreign Subsidiaries*, 33 The George Washington International Law Review 325 (2001).

[30] Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas*, at 14 (cited in note 9).

the respective States, jurisdiction over companies tends to be based on domicile, namely the place of establishment[31]. Furthermore, States generally do not consider foreign subsidiaries of parent companies domiciled within their jurisdiction as their own nationals[32]. The following section will shed light on the EU's approach to jurisdiction over companies, though arguments have been advanced that the exercise of jurisdiction over a parent company's foreign subsidiaries may raise extraterritorial jurisdictional issues[33].

2.2. *EU Law*

Firstly, it must be ascertained, by means of art. 3(5) Treaty on the European Union (TEU), that the EU is bound by international law[34]. Therefore, following the tenets laid out in Lotus, the EU's legislative jurisdiction may be extended to acts which have taken place outside of the Union insofar as prohibitive rules of international law do not stand in the way[35]. When territoriality is not the principle of jurisdiction upon which the relevant EU measure is based, it will then need to be justified under a different principle of jurisdiction[36].

2.2.1. *Extraterritoriality and Territorial Extension*

In the analysis and discussion on the EU's extraterritorial measures, the leading academic reference is the one of Scott, where a

[31] See *Id*. at 22.
[32] See *Ibid*.
[33] Vivian Grosswald Curran, *Harmonizing Multinational Parent Company Liability for Foreign Subsidiary Human Rights Violations*, 17(2) *Chicago Journal of International Law* 407, 413 (2016).
[34] Art. 3(5), TEU.
[35] P. J. Kuyper, *European Community Law and Extraterritoriality: Some Trends and New Developments*, 33(4) The International and Comparative Law Quarterly 1013, 1014 (1984).
[36] Joanne Scott, *The new EU extraterritoriality*, 51 Common Market Law Review 1343, 1345 (2014).

distinction is drawn between extraterritoriality and territorial extension[37]. This distinction is based on the determination of the conduct that effectively triggers the application of EU law and the assessment of whether that trigger is territorial or not. 'Extraterritoriality' – in this context – is defined as "the application of a measure triggered by something other than a territorial connection with the regulating state"[38], while 'territorial extension' is defined as "the application of a measure triggered by a territorial connection, but in applying the measure the regulator is required, as a matter of law, to take into account conduct or circumstances abroad"[39].

This categorisation is consistent with the previous international law distinction between direct extraterritorial jurisdiction – namely, extraterritoriality – and domestic measures with extraterritorial implications – namely, territorial extension. Therefore, a measure that regulates foreign conduct of EU citizens can be an extraterritorial measure – as its trigger of application is EU nationality, and not a territorial connection[40]. By contrast, a measure that regulates conduct abroad on the basis of having legal presence within the EU, is considered as a territorial extension, and therefore not extraterritorial[41]. As discussed below, the concept of territory is increasingly being remodelled and used to fit modern-day developments, to the point that in globalised economic and

[37] Marise Cremona and Joanne Scott, *EU Law Beyond EU Borders: The Extraterritorial Reach of EU Law* at 22-23 (Oxford University Press 1st ed. 2019).

[38] Joanne Scott, *Extraterritoriality and Territorial Extension in EU Law*, 62(1) The American Journal of Comparative Law 87, 90 (2014).

[39] See *Ibid*.

[40] For an example concerning natural persons, see Art. 10 para. 1, EU Dir. 5 April 2011 no. 2011/36 on combating and preventing tracking in human beings and protecting its victims,. For an example concerning legal persons, see EU Dir. 8 June 2011 no. 61/2011 on alternative investment fund managers.

[41] Scott, *Global Reach of EU law* at 24 (cited in note 37).

communicative relations, territorial connections can be established much more often[42].

Such territorial extensions can be established at different levels: transaction-level, firm-level, and country-level territorial extensions[43]. For instance, Council Regulation 1099/2009 that prohibits suffering for the killing of animals at the time of killing, established that such requirement is also applied to animals imported into the EU[44]. The trigger, therefore, is the specific commercial transaction importing the animal into the EU's territory, which extends territorially the scope of EU law to the process of killing the animal. A firm-level territorial extension, instead, is exemplified by the Regulation on standards for ship inspection, by which organisations need to comply with EU law criteria in order to be certified to conduct ship inspections – and empowering the European Maritime Safety Authority (EMSA) to conduct inspections also abroad[45]. In this case, the relevant trigger is the operations of the company on Member States' ships (an extension of territory under the flag principle[46]), that therefore needs to comply with the requirements at a firm level. Furthermore, a country-level territorial extension occurs when access to the EU market is denied for goods originating from countries whose laws are deemed not to be in conformity with EU standards. For instance, in the financial domain, the Regulation on OTC derivatives trading provides that, in order for a third-country OTC service provider to access the EU's market, that third-country's

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[42] Nico Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance*, 33 EUROPEAN JOURNAL OF INTERNATIONAL LAW 481 (2022) at 496, available at https://academic.oup.com/ejil/article/33/2/481/6647799 (last visited May 2, 2024).

[43] Scott, *Global Reach of EU law* at 25 (cited in note 37).

[44] Art. 12, Council Reg. 1099/2009 on the protection of animals at the time of killing [2009].

[45] Arts. 2(c)-4(3), Reg. 391/2009 of the European Parliament and the Council of 23 April 2009 on common rules and standards for ship inspection and survey organisations [2009].

[46] For a discussion of the Flag Principle under international law, see Jörn-Ahrend Witt, *Obligations and Control of Flag States* (2007).

laws must be recognised by the EU to be equivalent.[47] In this case, the territorial trigger is access to the EU's market, which is subject to the recognition of the country's legislation as equivalent to the EU's – therefore, territorially extending the scope of EU law.

2.2.2. *Triggers of Application*

The characterisation of a measure as extraterritorial or territorial extension depends upon the identification of its trigger of application. Scott has identified six triggers for the territorial extension of EU application, namely conduct, nationality, presence, effects, anti-evasion, and transacting with EU persons or property[48]. Only the first four aforementioned triggers are relevant to the analysis of the CSDDD, and therefore the following discussion will focus only on those.

'Conduct' refers to conduct within the EU, with the most prominent example being market access: importation of a product, marketing of a service, or the performance of a commercial act within the Union are triggers of application of EU law[49].

'Nationality', instead, is a trigger by which the EU imposes obligations on natural and legal persons having EU nationality. Art. 54 TFEU provides for the criteria to ascertain whether a company can be defined as having 'nationality' of a Member State, namely if it is formed in accordance with the laws of a Member State and has its registered office, central administration, or principal place of business within the Union[50]. Nationality of a company is a different notion than establishment, which entails having a real and effective activity exercised through stable arrangements, falling short of nationality.

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[47] Arts. 4-9, Reg. 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC derivatives, central counterparties and trade repositories [2012].

[48] Scott, *The New EU Extraterritoriality* at 1348 (cited in note 36).

[49] Hornkohl at 17 (cited in note 1).

[50] Art. 54, Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) [2016]

Nationality, following Scott's definition, is an extraterritorial trigger as such, given that it relies on a consideration which is not the territory. However, it is uncontended as a matter of customary international law that States (in the present case, the EU as empowered by States) can regulate the conduct of their own nationals abroad[51].

Establishment constitutes the main instance of 'presence' for legal persons: a business can be established in the EU even though it is engaged in activities outside of the EU. In addition to establishment, recent developments have led to including the carrying out of economic activity as a 'presence' in the EU[52]. This trigger, particularly relevant to the CSDDD Proposal, entails that the exercise of economic activity in at least one Member State is sufficient to establish obligations on companies. However, arguments have been advanced on the legitimacy of this trigger being dependent on threshold criteria, such as the extension of economic activity or the number of employees, for otherwise the definition of economic presence would be too stretched[53].

The 'effects' trigger is predominantly being used in competition law[54]. However, often not only substantial effects are required to trigger EU law application, but also meeting requirements of EU and worldwide net turnover[55].

Another relevant notion discussed by Scott is that of 'safety valves': these are mechanisms included in legislation using the abovementioned triggers, with the purpose of preventing

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[51] Scott, *The New EU Extraterritoriality* at 1352 (cited in note 36).

[52] Haut Comité Juridique de la Place Financière de Paris, *Rapport Sur L'Extraterritorialitè Du Droit De L'Union Européenne* (May 2022) at 50, available at https://www.banque-france.fr/system/files/2023-10/rapport_46_f.pdf (last visited May 2, 2024).

[53] See *Id.* at 51.

[54] Hornkohl at 21 (cited in note 1).

[55] Arts. 1-3, Council Regulation No 139/2004 of 20 January 2004 on the control of concentrations between undertakings [2004]

jurisdictional overreach and facilitating cooperation[56]. Such mechanisms, denominated 'contingency' and 'contextuality', entail a certain jurisdictional restraint on the EU's part and can be viewed as expressions of the principle of proportionality. Contingency refers to the disapplication of EU law when the foreign conduct has been satisfactorily regulated by the other State, such as with equivalence decisions[57]. Contextuality, instead, refers to the application of EU law being conditional on a case-by-case basis contextual assessment of whether open-ended standards have been met in specific circumstances, such as with the EU's monitoring of derivatives transactions also outside the EU's markets, to identify cases posing systemic risks[58]. As previously stated, the design and triggers of extraterritorial or territorial extension of legislation are, in practice, relevant to the assessment of the legitimacy of extraterritoriality and its acceptability for foreign states: that is why, when there are doubts that the triggers of application of EU law are in conformity with international law, safety valves are frequently incorporated as a red line or emergency break.

2.2.3. *Precedents and Court of Justice's Stance*

A seminal precedent instance of extraterritorial legislation from the EU is the provision within Directive 2013/36 on the Bonus Cap[59]. The EU, in the context of follow-up to the global financial crisis, regulated the maximum bonus remuneration that can be paid to certain staff employed by banks and investment firms at group, parent company, and subsidiary levels – including staff in third

[56] Scott, *The New EU Extraterritoriality* at 1364 (cited in note 36).

[57] See *Id.* at 1366.

[58] See *Id.* at 1367.

[59] Art. 92(2), Directive 2013/36/EU of the European Parliament and of the Council of 26 June 2013 on access to the activity of credit institutions and the prudential supervision of credit institutions and investment firms, amending Directive 2002/87/EC and repealing Directives 2006/48/EC and 2006/49/EC [2013].

countries. Consequently, the legislation would also apply to a third-country employee's relationship with a third-country company being a subsidiary of an EU company, with the trigger of legislation being the economic presence in the EU of the parent company, thereby exemplifying an instance of parent-based regulation[60]. Notably, such a reach was challenged by the UK in front of the Court of Justice of the European Union (CJEU) for not being compliant with customary international law, but the claim was withdrawn following the Opinion of the Advocate General[61]. The latter rebutted the UK's claims on the basis that the Lotus judgement did not contain a general prohibition on extending a State's legislative jurisdiction beyond its territory, and that the existence of a prohibitive rule was not proven by the UK[62]. Against this case's background, the CJEU has been found to be generally permissive towards territorial extension and not having a presumption against extraterritoriality. Although being mindful of the danger that territorial extension can cause to third-country laws[63], the Court also has deferred a margin of discretion to assess its norms' compliance with customary international law to the EU's institutions, given the lack of delimited precision of the principles of customary international law[64].

In conclusion, there does not appear to be any universal practice on extraterritorial application of EU law[65]. Its context varies on the basis of the respective sub-field of EU law and subject matter, and its degree is assessed on a case-by-case basis with regard to the legislation's objective and the design of the instrument. Therefore, the

[60] Scott, *The New EU Extraterritoriality* at 1353 (cited in note 36).

[61] United Kingdom of Great Britain and Northern Ireland vs European Parliament and Council of the European Union, ECLI:EU:C:2014:2394, Opinion of AG Jääskinen, CJEU (2013).

[62] See *Id*. at paras. 36-41.

[63] Scott, *Global Reach of EU law* at 36-37 (cited in note 37).

[64] William S. Dodge, *Extraterritoriality of Statutes and Regulations*, SSRN Electronic Journal (2022) at 11.

[65] Hornkohl at 7 (cited in note 1).

existence of international standards as precedent for certain extraterritoriality is not, in practice, a precondition for extraterritorial exercise of EU law[66].

3. *The CSDDD Proposal*

3.1. *Brief History of the Proposal*

Following the adoption of the 2011 UN Guiding Principles on Business and Human Rights, several States have begun adopting legislation implementing these principles, including EU Member States such as France and Germany. After the European Parliament's requests[67] to introduce due diligence obligations and the Commission's own mandate to do so[68], the EU's executive commenced in 2020 a study to create a mandatory due diligence framework[69]. Such a study was, however, rejected twice by the European Commission's Regulatory Scrutiny Board (RSB) – the Commission's own control organ for legislation – specifically for criticism on excessive regulation of directors' duties and the role of small and medium enterprises (SMEs) in the context of the Proposal[70]. Eventually, after the due modifications, the Commission published the Proposal for a Directive on Corporate Sustainability Due

[66] See *Id.* at 9.

[67] European Parliament, *Report on Sustainable Finance* A8-0164/2018 (2018), available at https://www.europarl.europa.eu/doceo/document/A-8-2018-0164_EN.html (last visited May 2, 2024).

[68] European Commission, *Communication from the Commission Action Plan: Financing Sustainable Growth*, COM(2018) 97 final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52018DC0097 (last visited May 2, 2024).

[69] Directorate-General for Justice and Consumers, Torres-Cortés et al., *Study on Due Diligence Requirements Through the Supply Chain: Final Report* (2020) https://data.europa.eu/doi/10.2838/39830 (last visited May 2, 2024).

[70] Regulatory Scrutiny Board Opinion on Proposal for a Directive of the European Parliament and of the Council on Sustainable Corporate Due Diligence and amending Directive (EU) 2019/1937, (SEC (2022) 95, 26/11/2021).

Diligence on February 23rd, 2022. Subject to ordinary legislative procedure, at the time of writing this Proposal has undergone the Council's agreement on a General Approach in December 2022[71], and the EP plenary vote on amendments on June 1st, 2023[72]. Later on, the Council and European Parliament reached a provisional agreement on the text of the Directive[73], which is tabled for discussion at the time of writing[74]. Considerations on the amended Directive are beyond the scope of the present article.

3.2. *CSDDD's Personal Scope*

The scope of application of the CSDD Directive Proposal comprises two different kind of company, based on the legislation of their formation: first, companies formed in accordance with the law of a Member State; and second, companies formed in accordance with the legislation of a third country.

For what concerns the first kind, EU companies included in the scope of the Directive are more specifically:

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[71] Council of the European Union, *Council adopts position on due diligence rules for large companies* (2022), https://www.consilium.europa.eu/en/press/press-releases/2022/12/01/council-adopts-position-on-due-diligence-rules-for-large-companies/ (last visited May 2, 2024).

[72]European Parliament, *Texts adopted - Thursday, 1 June 2023*, (2023), https://www.europarl.europa.eu/doceo/document/TA-9-2023-06-01_EN.html (last visited May 2, 2024).

[73] Council of the European Union, *Corporate Sustainability Due Diligence: Council and Parliament strike deal to protect environment and human rights* (2023), https://www.consilium.europa.eu/en/press/press-releases/2023/12/14/corporate-sustainability-due-diligence-council-and-parliament-strike-deal-to-protect-environment-and-human-rights/ (last visited May 2, 2024).

[74] Jon McGowan, *Vote On EU Corporate Sustainability Due Diligence Law Scheduled For February 28*, Forbes (2024), https://www.forbes.com/sites/jonmcgowan/2024/02/26/eu-corporate-sustainability-due-diligence-law-vote-scheduled-for-february-28/ (last visited May 2, 2024).

> Companies having a net worldwide turnover greater than €150 million and employing more than 500 employees, and Companies having a net worldwide turnover greater than €40 million and employing more than 250 employees, provided that 50% of their net worldwide turnover was generated in the textile, agriculture, or extraction of mineral resources sector[75].

While Non-EU companies included in the scope of the Directive are "Companies having a net EU turnover greater than €150 million, and Companies having a net EU turnover greater than €40 million, provided that 50% of their net worldwide turnover was generated in the textile, agriculture, or extraction of mineral resources sector"[76].

Uniform rules for employee and net turnover calculations are provided, and companies are subject to the Directive if they fulfil the criteria for the preceding financial year for which statements have been prepared[77]. According to the European Commission's study, such personal scope will cover around 13,000 EU companies and 4,000 non-EU companies[78].

3.3. *Obligations in the Directive*

The Directive establishes obligations on the companies to which it is applicable, namely to integrate due diligence into the companies' policies[79], to thereby identify actual and potential adverse impacts to human rights and environmental standards[80], and consequently take appropriate measures to prevent, adequately mitigate[81], and bring

[75] See n. 5, Art. 2(1) Proposal.
[76] See n. 5Art. 2(2) Proposal.
[77] Explanatory Memoranda (n 8), at 16.
[78] See *Ibid*.
[79] See n. 5Art. 5 Proposal.
[80] See n. 5Art. 6 Proposal; this obligation is applicable to the company's own operations, those of their subsidiaries, and established business relationships.
[81] See n. 5, Art. 7 Proposal.

actual adverse impact to an end[82]. For the purposes of taking such measures, the companies should also establish and maintain a complaint procedure[83], with respect to activities of their own operations, subsidiaries, and value chain, as well as monitoring the effectiveness of their due diligence policies[84] and report publicly on them[85]. Only for companies with more than €150 millions of turnover (EU or non-EU), the CSDDD imposes an obligation to adapt their business model to the Paris Agreement on Climate Change[86].

The proposal also establishes civil liability for companies for failure to comply with art. 7 and 8[87], directors' liability[88], corporate governance obligations for overseeing due diligence,[89] and administrative sanctions for non-compliance[90]. These aspects, mainly related to private law and company law[91], will not be explored in the present article, which focuses on extraterritoriality.

3.4. *Effects of the Directive*

[82] See n. 5, Art. 8 Proposal; the company is required to seek contractual assurances from their established business partners that they will comply with the company's code of conduct, including by seeking contractual assurances from its own partners. The company is further required to temporarily suspend or terminate commercial relations with the business partner in connection to which the adverse impact has arisen.

[83] Art. 9 Proposal.

[84] Art. 10 Proposal.

[85] Art. 11 Proposal.

[86] Art. 15 Proposal.

[87] Art. 22 Proposal.

[88] Art. 25 Proposal.

[89] Art. 26 Proposal.

[90] Art. 20 Proposal.

[91] For a complete review of the CSDD under private international law, see: Emeric Prévost, *Achieving Climate Change Justice: Some Private International Law Issues*, Social Science Research Network (2023), https://ssrn.com/abstract=4450102 (last visited May 2, 2024).

The far-reaching effects of the obligations laid out in the Directive extend far beyond the EU. Firstly, the adaptation of a large corporation's own operations to due diligence requires extensive mechanisms to be put in place – and that would apply not only to the company's operations in the EU but also its operations abroad. Secondly, the extension of the obligation to a company's subsidiary, regardless of where they are located, entails a direct transposition of EU law towards third-country subsidiaries, subject to a wholly different jurisdiction, which would need to comply with EU law pending sanctions or civil liability of the parent company in the EU. Furthermore, the whole value chain (i.e. established business relations)[92] of the parent company and subsidiary are subject to the due diligence obligations, adopting the parent company's code of conduct, and seeking contractual assurances from their business partners for due diligence obligations[93]. This would create a contractual cascade involving several companies, even SMEs, across the EU and foreign jurisdictions – which may end up impacting negatively on small-sized companies that base their activities on supplying large companies caught by the Directive, specifically in less developed countries[94]. While a comprehensive discussion of the merits of the Proposal is outside the scope of this article, the far-reaching effects of the CSDDD need to be emphasized: due to its large and consequential implications, it becomes even more relevant to establish its status in extraterritoriality and discuss whether the EU has engaged in an overreach of jurisdiction.

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[92] Art. 3(f) Proposal.

[93] Luca Enriques & Matteo Gatti, *The Extraterritorial Impact of the Proposed EU Directive on Corporate Sustainability Due Diligence: Why Corporate America Should Pay Attention* (2022), https://blogs.law.ox.ac.uk/business-law-blog/blog/2022/04/extraterritorial-impact-proposed-eu-directive-corporate (last visited May 2, 2024).

[94] Yenkong Ngangjoh-Hodu et al., *The proposed EU Corporate Sustainability Due Diligence Directive and its Impact on LDCs*, (2023).

4. *Is the Scope Extraterritorial?*

For the purposes of establishing whether the measure can be considered extraterritorial, regard must be had to the reasoning of the European Commission. In its explanatory memoranda, the Commission does not justify the application of the measure to EU companies, but it does so for third-country companies – in the context of explaining the different criteria applied to EU and non-EU companies[95]. Specifically:

> The EU turnover criterion for third-country companies creates a link to the EU. Including only turnover generated in the Union is justified since such a threshold, appropriately calibrated, creates a territorial connection between the third-country companies and the Union by the effects that the activities of these companies may have on the EU internal market, which is sufficient for the Union law to apply to third-country companies[96].

In Recital 24 to the CSDDD, the Commission states that "turnover is a proxy for the effects that the activities of those companies could have on the internal market. In accordance with international law, such effects justify the application of Union law to third-country companies"[97]. Therefore, the Commission justifies the application of Union law to third-country companies due to their economic presence in the Union (i.e. the turnover), which is representative of the effects that the activities of the companies have on the Union's internal market. It is, therefore, necessary to establish what is the trigger in the CSDDD that makes EU law applicable – and to evaluate whether this trigger has a territorial connection, rendering

[95] Explanatory Memoranda (n 8), at 15.
[96] See *Ibid*.
[97] Recital 24, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

the measure a territorial extension, or whether the trigger relies on another connection which is not territorial, rendering the measure extraterritorial. The analysis will first be made on third-country companies, and then on EU companies.

Therefore, the trigger of application of the CSDDD to third-country companies is their EU turnover, as – in fact – they are not formed in accordance with the laws of a Member State. The Directive applies both to companies that are established within the Union, and those which are not, but pursue an economic activity there, making their net EU turnover above the thresholds indicated. EU turnover, by itself, can be considered a trigger of 'presence': exercise of an economic activity in at least one Member State suffices to render EU law applicable to that entity. Whether the third-country companies are established in the Union and pass the EU turnover thresholds, or they are not established but have such an economic activity to exceed the EU turnover thresholds, they can be considered present within the Union. Therefore, the trigger of the CSDDD towards third-country companies is their presence in the Union, which can be seen as a territorial connection to EU law. Pertaining to the effects trigger mentioned in Recital 24, it is not clear what effects are being discussed, as the effects doctrine is used mostly in competition law instances[98]. While it cannot be contended that such big companies with such a large EU turnover produce tangible and substantial effects into the Union, effects can be understood, in this case, as an *a fortiori* explanation of the EU turnover criterion. In fact, qualifying the effect such companies have on the EU's internal market by means of an EU turnover threshold demonstrates the EU's – presumed – attention not to exert overreaching jurisdiction. In such a way, only companies with a substantial economic presence would be subject to this EU legislation. The EU turnover criteria may also be seen as a proxy for conduct, namely market access: the high EU turnover of such companies is particularly indicative of a wide access to the EU's

[98] Scott, *The New EU Extraterritoriality* at 1352, cited in note 36.

market and benefit therefrom. Therefore, their conduct in the EU – namely wide access and benefit from the EU's market – suffices to render them subject to prescriptive jurisdiction. As previously mentioned, the blur between these categories of triggers is herewith exemplified.

Pertaining to EU companies, the trigger can be seen in both their EU nationality and their turnover. However, in the present case, the turnover is considered worldwide: it can be assumed that the reason to insert a turnover criterion for EU companies is that of limiting the scope of application of the CSDDD to companies that actually have the means and responsibility to use due diligence – excluding, for instance, SMEs. In fact, worldwide turnover is not a proxy for EU effects, as was the case with third-country companies; the turnover, in fact, may be generated elsewhere, falling short of a territorial connection. Therefore, the trigger must be considered as the fact that such companies are formed under the law of a Member State, therefore having EU nationality. As the companies' EU nationality is the relevant trigger, the measure is extraterritorial within the meaning given by Scott, namely that it relies on another trigger which is not territorial. It remains uncontested that States (in the present case, the EU as empowered by States) can regulate the conduct of their own nationals abroad as a matter of customary international law[99]. All the aforementioned considerations are without prejudice to the controversial status of regulating foreign subsidiaries of a parent company.

As a final note, this territorial extension can be considered as a firm-level extension, since compliance is required for the whole company's operations, subsidiaries, and value chain, and not simply

[99] Hornkohl, *The Extraterritorial Application of Statutes and Regulations in EU Law* at 17, cited in note 1.

related to an individual transaction, or to other countries' compliance[100].

5. *Reasonableness in Extraterritoriality*

Following the discussion on extraterritoriality of the CSDDD, it is important to make a few remarks. Firstly, it appears that the triggers on which the Commission based its proposal, namely economic presence and nationality, are accepted and already used triggers under EU law. Secondly, it does not necessarily follow that those triggers are legitimate exertions of jurisdiction under customary international law: being a field of law in development and often without precise demarcations, it is difficult to ascertain whether the CSDDD would be too far of an encroachment into other States' jurisdictions. However, much of the assessment on whether the CSDDD is extraterritorial jurisdiction encroachment into other States' jurisdictions will depend on their reactions – should it be adopted. Such can manifest after the approval of the measure by means of calls for imperialism and colonialism, diplomatic protests, non-recognition of laws, blocking statutes, or even retaliatory measures – thereby shaping customary international law[101]. That is why, in asserting extraterritorial jurisdiction, the concept of reasonableness becomes key[102]. First introduced by Roth, it was suggested that, to exert jurisdiction, it does not suffice that the conduct has direct, substantial, and foreseeable effects in that State. Exertion of jurisdiction over acts carried out in a foreign State should be in

[100] Scott, *Global Reach of EU law* at 25 cited in note 37.

[101] Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma raised/created by the use of the extraterritorial techniques* at 23, cited in note 19.

[102] P. M. Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests,* 41 No. 2 The International and Comparative Law Quarterly 245 (1992).

accordance with 'reasonableness' in the particular case, on the following basis:

> First, to what extent does that foreign State encourage or support the conduct in question? Second, how close are the connections of the defendants and their conduct to the forum State? On that basis, the critical question can be considered: is the strength of those connections such that, notwithstanding the degree of conflict with the interest of the foreign State, extraterritorial jurisdiction is justified?[103]

Although the demarcation of these questions was grounded on adjudicative jurisdiction, they can also be seen in light of prescriptive jurisdiction. Firstly, to what extent do the foreign States encourage or support the conduct in question (i.e. conduct of companies, subsidiaries, or value chains that counters sustainability and human rights)? Secondly, how close are the connections of the companies and their conduct with the EU? On that basis, is the strength of that connection such that, notwithstanding the degree of conflict with the interest of the foreign State, extraterritorial jurisdiction is justified? Concretely answering these questions poses difficulties as, already with the first matter, foreign States should support with great extent the imposition of human rights and sustainability standards. As a matter of fact, the obligations imposed through the Annex are referenced to widely accepted international treaties, some of which have become part of customary international law[104]. However, in practice, some jurisdictions in which companies operate are unable or

[103] See *Id.* at 274.

[104] Annex Part I and Part II, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and amending Directive (EU) 2019/1937.

unwilling to concretise enforcement in upholding such standards[105]. Thus, while foreign States may publicly support such standards of conduct, in practice their concrete application may go against their interests.

Furthermore, the connection between the EU and the companies subject to the CSDDD has been extensively discussed before. While under EU law the trigger of jurisdiction due to economic presence may be accepted, we cannot necessarily conclude that international law prohibits or permits such exertion. Therefore, the considerations will depend much on the reactions of foreign States that will develop and consolidate customary international law on the matter. Anyhow, the extensive effect that the CSDDD would have outside of the EU cannot be contended. As analysed previously, it is precisely in the goals of the Commission to have such a far-reaching external effect and uphold sustainability and human rights abroad[106]. Given such ambition and far-reaching effects, considerations on the reasonableness of the CSDDD application should be made. The wide extent of the obligations included makes this paper prone to comment that the EU could have tried to insert the concept of reasonableness into the CSDDD. For instance, safety valves may be seen as a concretisation of reasonableness in extraterritorial legislation within EU law. However, the EU did not include any mechanism in the CSDDD by which account of third-country legislation should be taken, and, after an equivalence assessment, the CSDDD could be disapplied when those companies are already obliged in the third country to comply with those strict standards – so-called contingency. It further does not include any mechanism by which different contexts in different countries are monitored and the application of the CSDDD would be triggered

[105] Chambers, *An Evaluation of Two Key Extraterritorial Techniques to Bring Human Rights Standards to Bear on Corporate Misconduct Jurisdictional dilemma raised/created by the use of the extraterritorial techniques* at 23, cited in note 19.

[106] *Explanatory Memoranda* at 3-4, cited in note 8.

only if the operations in those countries would no longer benefit from the human rights and sustainability standards – so-called contextuality. Given the absence of such safety valves that limit jurisdictional overreach and demonstrate to other States a willingness to exert jurisdictional restraint, the CSDDD can be said not to be incorporating the concept of reasonableness, key in exerting extraterritorial legislation.

6. *Conclusions*

This paper has analysed the international and EU law background to extraterritoriality. The distinction between direct extraterritoriality and domestic measures with extraterritorial implications, or territorial extension, has been drawn, to conclude that the EU generally has a permissive stance towards extraterritoriality, and that international law offers few guidance to assess the assertions of extraterritorial jurisdiction.

Against this backdrop, the CSDDD proposal was examined. The trigger of jurisdiction for EU companies is their nationality, which makes the CSDDD an extraterritorial measure in the sense that it relies on another connecting factor other than territory. However, the trigger of jurisdiction for non-EU companies is their economic presence as a proxy for effects in the EU, making the CSDDD a measure of territorial extension, as the economic presence consists of a link to the EU territory. Although it cannot be necessarily concluded that the scope will be accepted by other States under international law, it also cannot be said to be manifestly exceeding the EU's jurisdictional remits. It remains to be seen whether the amended version, when and should it be adopted, will be subject to the same conclusion.

Although the EU's jurisdictional exertion cannot be definitely said to be illegitimate, we can conclude that the EU could and should have included the concept of reasonableness through the usage of

safety valves to avoid jurisdictional overreach – given the wide extent of effects the CSDDD would have in other States.

In essence, precise conclusions over the legitimacy of the CSDDD are difficult to be drawn, but it is likely that this type of exertion of extraterritorial legislation will increasingly be used in the future. Extraterritoriality is, generally, not a black-and-white issue, but it is a matter of degree[107]. In fact, this extraterritorial legislation does not only raise issues concerning the legitimate exertion of jurisdiction, but it also poses several questions as to its different consequences from a private international law standpoint. Namely, where would companies be sued for their civil liability for adverse consequences on environmental and human rights, should they occur outside of the EU? On which basis of the EU's private international law regime could the plaintiffs have jurisdiction – and how would it impact the doctrines on the place where damages occurred and where damages had consequences? While these questions are outside the scope of the present article, they shed light on the prospective developments that the CSDDD, and future akin extraterritorial legislation, would bring about both from a public and private international law perspective.

While under international law the issue of the CSDDD and other extraterritorial legislation is presented as an issue of jurisdiction, in practice, the underlying problem is one of State interest and politics[108]. The example of the CSDDD within the framework of business and human rights can be seen as an instance of 'jurisdictional assemblage'[109], by which a multiplicity of States have valid jurisdictional claims, yet having no hierarchy or priority over them – a necessary corollary to the fundamental transformations

[107] B& Zerk, *Extraterritorial jurisdiction: lessons for the business and human rights sphere from six regulatory areas* at 15, cited in note 9.

[108] Roth, *Reasonable Extraterritoriality: Correcting the "Balance of Interests* at 273, cited in note 102.

[109] Krisch, *Jurisdiction Unbound: (Extra)territorial Regulation as Global Governance* at 482, cited in note 42.

occurring in a globalised, digitalised, and interconnected world. Against such a backdrop, as the EU aims at establishing itself as a global actor and asserting its regulatory power in its international relations, it also needs to be wary of the opposite counterreactions from other States: as the EU exercises such extraterritorial overreach in other jurisdictions, other States may then exert such extraterritorial overreach in the EU themselves.

The Most-Favored-Nation Treatment Standard

CAMILLA MANTESE*

Abstract: In this article, we will analyze the importance of the Most Favored Nation (MFN) treatment standard in the context of international investment law as an instrument to create equal competition between foreign investors. We will investigate the history of this standard, and the changes it underwent during different moments of history. Our aim, through this article, is to understand how this standard has supported the liberalization of world trade. In furtherance of the aim, we will analyze the connection between the two relative standards, the National Treatment Standard and the Most-Favored-Nation Treatment Standard, as they are both used to create an equal playing field among foreign investors, and between foreign and national investors. We will examine the most important MFN clauses in different investment law agreements and analyze their main components and differences, together with the exceptions and limits of some MFN clauses. We will then focus on some of the most important decisions regarding the possibility of extending a Tribunal's jurisdiction through an MFN clause and shortening the waiting periods. Our aim through this article is to understand how this standard has supported the liberalization of world trade.

Key words: International Investment Law; International Commercial Law; BIT; Treaties; Most Favored Nation Treatment Standard.

1. *Introduction*

The international investment law system is a multilateral system based on a series of Bilateral Investment Treaties (BITs) between two countries that contain different rules and standards of treatment regarding foreign investments. These standards are necessary for the protection of foreign investment. They are the Fair and Equitable Treatment standard (FET), the Full Protection and Security standard (FPS), the National Treatment standard (NT) and the Most-Favored-Nation treatment standard (MFN).

These may be divided between relative standards and absolute standards. The FET and the FPS standards are considered absolute, because there is no special condition for their implementation by the host State. The Most-Favored-Nation treatment standard and the National Treatment standard are relative standards. In the case of relative standards, the conduct of the State regarding foreign

investors of a certain nationality is compared with the conduct that that same State has towards investors of a different nationality.[1]

The wording of the clauses that enshrine these standards in these legal documents may differ from one treaty to another. However, unless the contracting parties have made it clear that they intend to give a particular meaning to the clause, the slight differences between the clauses in different treaties, that refer to the same standard, do not change its function.[2]

The focus of this essay will be the MFN treatment standard, whose importance has been recognized for centuries.[3] The MFN treatment requires the favorable treatment applied towards one country to be applied to all. The use and the scope of the MFN treatment has varied over time,[4] but one element always remained constant: the MFN treatment has always helped lock States into a multilateral framework, preventing them from making exclusive promises to achieve a specific concession from another State. MFN clauses harmonize the level of investment protection given to any foreign investor in a particular State, transforming the BITs from instruments of bilateralism into instruments of multilateralism.[5]

The MFN principle also helps to increase efficiency in the world economy by ensuring that member countries that want to levy their

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* Camilla Mantese is a fourth-year student at the Faculty of Law of the University of Trento. She has always been interested in the areas of international economic law, commercial and financial law. She is part of the ELSA network, in which she mainly operates in the Professional Development field, creating new working opportunities for law students.

[1] Ansari Mahyari, A. & Raisi, L.; *International standards of investment in international arbitration procedure and investment treaties*; 15 (2), Revista Jurídicas, at 13 (2018).

[2] Stephan W. Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses*, Berkeley Journal Of International Law, Vol. 27:2, at 503 (2009).

[3] In fact, MFN clauses were present in the international treaties concerning trade of the eleventh and twelfth century.

[4] See paragraph 4, on the history of the Most-Favored-Nation standard.

[5] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 504 (cited in note 2).

tariffs levy it on all member countries.[6] This in turn makes it possible for countries to import from the best supplier, securing the most efficient result.

Another effect of the MFN treatment is the stabilization of the multilateral trading system[7] through its extension to trade restrictions[8].

The MFN treatment also helps in reducing the cost of maintaining a multilateral trade system: countries will not have to re-negotiate a new BIT in order to obtain the most favorable conditions that are now given to other countries, because those conditions will be applied immediately by virtue of the MFN clause in the previous BIT. This raises the issue of free riders States, which are States that get an advantage by the application of the MFN clause, without participating in the negotiations. The free rider problem is the main critique against the MFN treatment. For example, under the GATT, whenever a few WTO members mutually exchange trade-barrier reductions, they must extend those reductions to all other WTO members under MFN, even if the latter do not reciprocate.[9]

For all of these reasons, the importance of the MFN treatment standard cannot be understated.

2. *History of the Most-Favored-Nation Standard*

[6] METI Japan Ministry of Economy, Trade and Industry, *Most-Favored-Nation Treatment Principle* Chapter 1 Part II (date missing), available at https://dl.ndl.go.jp/view/prepareDownload?itemId=info%3Andljp%2Fpid%2F1286059&contentNo=16 (last visited May 2, 2024) at 312.

[7] Ibid.

[8] See Article 13, GATT (Non-discriminatory Administration of Quantitative Restrictions).

[9] Donald McRae, *MFN in the GATT and the WTO*, Vol. 7, Asian J. WTO & Int'l Health L & Pol'y 1, at 5 (2012).

MFN clauses have been used in bilateral investment treaties since the eleventh and twelfth century[10], but their scope has varied over time. The prototype of the modern MFN clause was very broad. It was used by medieval trading cities when they were not able to achieve a monopoly in a foreign market. The clause then became widespread in trade treaties in the fifteenth and sixteenth centuries.

The phrase "Most-Favored-Nation" made its first appearance in a 1692 treaty between Denmark and the Hanseatic cities.[11] In that same century, the function of MFN clauses started to change because of the influence of mercantilist ideology.[12] During that period, the function of MFN clauses was significantly different from that of modern MFN clauses, even though they were similarly formulated. They were not considered as "instruments of multilateralism"[13], but rather as an instrument to advance a protectionist view on international trade relations.

Up until the Treaty of Amity and Commerce of 1778, only unconditional MFN clauses existed. They did not require the beneficiary State to make the same concessions to the granting State for the clause to have its beneficial effect.[14] Conditional MFN clauses were only introduced in the late 18th century. They were based on the concept of reciprocity: the privileges would be extended to the beneficiary State only if the beneficiary State made the same

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[10] Scott Vesel, *Clearing a Path Through a Tangled Jurisprudence: Most-Favored-Nation Clauses and Dispute Settlement Provisions in Bilateral Investment Treaties,* Vol. 32:125; The Yale Journal of International Law, at 129.

[11] Ibid.

[12] Mercantilists thought that the wealth of a nation depended on its supply of capital and that the volume of trade could never be changed. They believed that the wealth of a nation could only increase in case the positive external trade balance widened. Because of this, protectionist measures and high tariffs that discouraged imports were among the instruments of choice.

[13] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 510 (cited in note 2).

[14] Id at 512.

concessions in return.[15] This type of MFN clause was well suited to a protectionist view of international trade relations. Its purpose was to lower tariffs overall and to reach a system of international trade based on non-discrimination and equality.

Conditional MFN clauses were later abandoned because the system they created was too complex,[16] but they were still preferred by the United States up until the 1920s.

The forsaking of the conditional clause can be linked to the Free Trade movement of the 19th and 20th century. The key event in the abandoning of conditional MFN clauses was the 1860 Cobden Treaty, under which the two leading powers of the world at the time, France and Great Britain, lowered tariffs and granted one another unconditional Most-Favored-Nation status.[17] After this treaty, Europe as a whole abandoned its protectionist views of the economy, as well as the use of the conditional form of the MFN clause.

Even when Europe reconnected with a protectionist view in the 19th century, the unconditional clause was not abandoned.[18] However, the USA continued to use the conditional MFN clause until the end of the Great War.[19] During the Great War there was a resurgence of mercantilism, which led many States to renounce all the treaties containing MFN clauses.

After the World Economic Crisis of 1929, many States abandoned the MFN standards; bilateral trade relations and discriminatory trade surged.[20] The MFN treatment standard only regained its relevance in international trade relations after the 2nd World War, when it was included, in its unconditional form, in

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[15] Id at 130.

[16] For example, these clauses required trades to record the country of origin of every product, in order to classify it properly under the country-specific tariff.

[17] See Vesel, *Clearing a Path Through a Tangled Jurisprudence* at 131 (cited in note 10).

[18] See Ibid.

[19] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 512 (cited in note 2).

[20] See Id at 513.

Article 1:1 of the GATT, becoming the "cornerstone" of international investment law.[21] The principle was considered an instrument to prevent further wars by "prohibiting bilateral alliances and block building in an economic context prone to spill over into military conflicts"[22].

After the 2nd World War there was a renewed interest in codifying the use of the MFN treatment standard.[23] In 1978, the International Law Commission (ILC) submitted the *Draft Articles on Most-Favored-Nation Clauses* to the U.N. General Assembly, in which MFN clauses are defined as "treaty provision[s] whereby a State undertakes an obligation towards another State to accord most-favored-nation treatment in an agreed sphere of relations". The most favored nation treatment is defined in Article 5 of the Draft Articles to mean "treatment accorded by the granting State to the beneficiary State, or to persons or things in a determined relationship with that State, not less favorable than treatment extended by the granting State to a third State or to persons or things in the same relationship with that third State".

The U.N. General Assembly adopted a decision on December 9, 1991, through which it brought the *Draft Articles* "to the attention of Member States and of intergovernmental organizations for their consideration in such cases and to such extent as they deem appropriate." However, the U.N. General Assembly did not make the *Draft Articles* binding.[24] Nonetheless, they are still considered valuable instruments to interpret the different MFN clauses.[25]

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[21] See Vesel, *Clearing a Path Through a Tangled Jurisprudence*,at 134 (cited in note 10).
[22] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 514 (cited in note 2).
[23] See Ibid.
[24] See Vesel, Clearing a Path Through a Tangled Jurisprudence,at 136 (cited in note 10).
[25] See Schill, Vol. 27:2, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 516 (cited in note 2).

3. *Rules on non-discrimination*

The standard of most favored nation treatment, set out in Article 5 of the *Draft Articles on Most-Favored-Nation Clauses* creates a level playing field, in which States cannot discriminate against foreign investors, treating them differently from other investors of different nationalities.

The MFN treatment standard is intimately connected with the National Treatment standard (NT), which can be found in GATT Article 3 Paragraph 2. The NT standard requires that imported products shall not be subject "directly or indirectly to internal taxes or other internal charges of any kind in excess of those applied directly or indirectly to like domestic products"; and that imported products "shall be accorded treatment no less favorable than that accorded to like products of domestic origin".

Along with the National Treatment standard, the MFN standard creates a system of rules of non-discrimination in the investment law context:[26] The most favored nation standard forbids discrimination between foreign "like-products", whereas the national treatment standard forbids discrimination between foreign (and imported) products and domestic products.[27] The MFN treatment applies to both internal and external measures, while the NT standard only applies to internal measures. Thus, we can argue that the MFN treatment has a wider range of applicability than the NT standard. However, the MFN standard has stricter requirements of applicability, as it only refers to "like products", whereas NT applies also in the case of "directly competitive or substitutable goods".[28]

[26] Peter Van Den Bossche, Denise Prévost; *Essential of WTO Law,* Cambridge University Press, 2nd edition, 2021 [2016].

[27] Henrik Horn, Petros C. Mavroidis, Vol. 17, *Economic and legal aspects of the Most-Favored-Nation clause,* European Journal of Political Economy, at 238, 2001; MCRAE, *MFN IN THE GATT AND THE WTO* at p.6 (cited in note 9)

[28] See Ibid.

Both the MFN treatment and the NT standard have the objective of enabling equal competition between investors, which is essential to allocate resources efficiently in the market.[29]

4. *The Most-Favored-Nation Clauses*

MFN treatment is a treaty-based obligation that must be contained in specific provisions of a treaty. In the absence of a treaty-based obligation, nations retain the possibility of discriminating between foreign nations in their economic affairs.

An MFN clause is a relative standard as it requires a comparison between the treatments afforded to two foreign investors in the same circumstance.[30].

MFN clauses require at least three States: a granting State, a beneficiary State and a third State. The MFN operation entails that a granting State enters into an obligation with a beneficiary State to extend a more favorable treatment granted in a specific context, to any third State.[31]

The MFN clause between the granting State and the beneficiary State is enclosed in a treaty designated as the "basic treaty", as it contains the basis to incorporate the benefits granted in another treaty to investors of a different State into the relationship between granting State and beneficiary State. MFN clauses have been characterized as "drafting by reference",[32] because this automatic operation does not change the terms of the relationship between the contracting parties to the basic treaty.

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[29] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 503 (cited in note 2).

[30] See Ansari, Raisi; *International standards of investment in international arbitration procedure and investment treaties*; pp. 27-30 (cited in note 1).

[31] See chill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 506 (cited in note 2)

[32] Id. at 507.

MFN clauses are subjected to the *ejusdem generis* principle. Thus, they may only apply to issues belonging to the same subject matter or the same category of subject as to which the clause relates.[33]

Depending on the wording, we can distinguish between four different types of MFN clauses: broad MFN clauses; general MFN clauses; MFN clauses tied to fair and equitable treatment; narrow MFN clauses.

Broad MFN clauses contain terms and phrases that indicate that the MFN clause of the treaty will apply to "all matters" covered by the treaty.[34]

General MFN clauses differ from Broad MFN clauses, as they are contained in treaties that do not explicitly state the range and scope of their application. In these treaties both states are explicitly prohibited from according a "less favorable treatment" than that accorded to other foreign and national investors to the other contracting State's investors. The treaty, however, fails to define what constitutes a "less favorable treatment". Further, these treaties do not specify in what fields the no "less favorable treatment" has to be accorded, nor do they say whether the MFN clause extends to dispute resolution provisions as well.[35]

Another category of MFN clauses concerns those linked to the fair and equitable treatment standard (FET). This category creates confusion among many, because it ties the MFN treatment standard, which is a relative standard, to the FET standard, an absolute one. The BITs containing this type of clause normally have a first paragraph that states that the contracting parties have to "extend fair and

[33] See Ansari, Raisi, *International standards of investment in international arbitration procedure and investment treaties* at 28 (cited in note 1).

[34] See Julie A. Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration: Is There Any Hope for a Consistent Approach?'*, 14 J Int'l Econ L 157; at 163, (2011).

[35] Id at 165.

equitable treatment[36] to one another's investors"[37], and a second paragraph, that explains that the treatment required shall never be less favorable than that accorded by the contracting States to their own investors or to other foreign investors.

The final category of MFN clauses consists of the narrow clauses. These are found in BITs that explicitly limit the scope and range of the MFN clause, excluding that the clause can be applied to dispute settlement provisions.[38]

5. *Most-favored-nation Clause in the General Agreement on Tariffs and Trade (GATT)*

5.1. *GATT Article 1:1*

The MFN standard is considered a "cornerstone" of the General Agreement on Tariffs and Trade (GATT[39])[40]. It has been included in Article 1:1, as well as in several other provisions of the treaty.

Article 1:1 GATT states that, "With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with

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[36] In some treaties the phrase "just and equitable" treatment is used instead.

[37] Maupin, *MFN-Based Jurisdiction in Investor-State Arbitration* at 166 (cited in note 35).

[38] An example of a narrow MFN clause is the "vanishing footnote" of CAFTA.

[39] The GATT is an international treaty signed in 1947, in Geneva, Switzerland. The signing countries now represent 4/5th of world trade. Its general objective is to establish a multilateral system of trade relations and encourage the liberalization of world trade.

[40] World Trade Organization Appellate Body, European Communities-Conditions for the Granting of Tariff Preferences to Developing Countries, (Apr. 20, 2004), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/tratop_e/dispu_e/gatt_e/80coffee.pdf (last visited May 2, 2024)

respect to all matters referred to in paragraphs 2 and 4 of Article III,* any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties."

The main purpose of Art. 1:1 GATT is to ensure that all WTO members can enjoy equal opportunities to export or import to and from other WTO members[41].

The importance of the inclusion of the MFN standard in the GATT is paramount. It was only through the incorporation of an MFN clause in this treaty that the MFN standard became a multilateral obligation[42].

5.1.1. *Like Product*

A breach of Article 1:1 of the GATT can only occur if there is a discrimination between "like products"[43].

The GATT does not give a definition of the notion of "like product". As a result, the meaning of this concept is often contentious and had to be clarified through case law. In *the case of Spain – Tariff Treatment of Unroasted Coffee*[44], the Panel established that to determine the likelihood of products certain elements must be taken into consideration, such as the physical characteristics of the products, their end-users, and the tariff regimes of other Members[45]. The Panel

[41] Van Den Bossche, Prévost; *Essential of WTO Law*; at p. 14 (cited in note 27).
[42] McRae, *MFN in the GATT and the WTO* at 4 (cited in note 9).
[43] This term is also found in GATT Article 2 (Schedules of Concessions) and Article 4 (Special Provisions relating to Cinematograph Films).
[44] World Trade Organization Panel, Spain — Tariff Treatment of Unroasted Coffee 4:6, (Jan. 11, 1981), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.wto.org/english/tratop_e/dispu_e/gatt_e/80coffee.pdf (last visited May 2, 2024)
[45] Van Den Bossche, Prévost; *Essential of WTO Law*; (cited in note 27).

stated that the different varieties of the product, which in this case was coffee beans, could be considered "like-products" and thus establishing different tariffs for different varieties of coffee could be considered a violation of the MFN clause in GATT Article 1:1[46].

In contrast, in *Japan — Tariff on Imports of Spruce*, the Panel recognized that each WTO Member has much discretion in determining the tariff classifications. The panel decided to rely on the standards used by that particular State to determine whether the products in question were "like-products".

The term "like product" also appears in GATT Article 3[47], and it has been interpreted narrowly in some cases[4849]. However, Article 3 GATT is more complex than GATT Article 1:1, as it refers not only to "like products", but also to "directly competitive or substitutable products". Because of this substantial difference, it is not clear whether the term "like products" can be interpreted in a restrictive way in the context of the MFN clause found in Article 1:1, similar to its interpretation under GATT Article 3.

5.1.2. *Immediately And Unconditionally*

The drafters of the GATT opted for an unconditional MFN standard, thus creating a clear break from the previous notion of conditional MFN, which created a reciprocal obligation of extending the favorable provisions to the other State[50].

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[46] METI Japan Ministry of Economy, *Trade and Industry, Most-Favored-Nation Treatment Principle*, at 306 (cited in note 6)

[47] Rubricated "National Treatment on Internal Taxation and Regulation".

[48] See among others World Trade Organization Appellate Body, Japan-Taxes on Alcoholic Beverages, (Jan. 12, 1998) available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/8-17A1.pdf&Open=True (last visited May 2, 2024)

[49] McRae, Donald, *MFN in the GATT and the WTO* at 14 (cited in note 9).

[50] McRae, Donald; *MFN in the GATT and the WTO* at 4 (cited in note 9).

Article 1:1 GATT states that the MFN treatment has to be given "immediately and unconditionally" to all WTO members. Thus, WTO members cannot delay the award of an advantage to other WTO members, nor can they impose conditions that will create discrimination in the import or export activity between WTO members[51].

There have been some legal cases that touched on the matter of the unconditionality of the MFN clause found in GATT Article 1:1. One of them is *Canada-Autos*, in which the Appellate Body noted that the exemption to import duty, given to just some countries, is in contrast to Article 1:1 GATT[52].

5.1.3. *De Facto Discrimination*

Art 1:1 GATT covers both *de jure* and *de facto* discrimination[53]. GATT Article 1 refers to all advantages granted by WTO member states. However, there can be cases in which the principle is explicitly waived[54]. There are also several areas of trade in which the MFN principle is disciplined by specific agreements[55].

5.2. *GATT Article 2 – Non-discrimination And Tariffs*

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[51] Van Den Bossche, Prévost; *Essential of WTO Law*; Cambridge University Press

[52]World Trade Organization Appellate Body, Canada-CERTAIN MEASURES AFFECTING THE AUTOMOTIVE INDUSTRY, (May 31, 2000), available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/142-12.pdf&Open=True (last visited May 2, 2024)

[53] A de iure discrimination occurs in the case of measures that explicitly discriminate between foreign "like products". A *de facto* discrimination, instead, occurs when we have measures that are superficially non-discriminatory, but actually impose a heavier burden on foreign goods with a particular origin. Ibid.

[54] See paragraph 8.

[55] See for example, the clauses regulated in the Anti-dumping Agreement; Safeguard Agreement; The Agreement on Subsidies and Countervailing Measures.

GATT Article 2:1 reaffirms the MFN obligation in regard to tariff bindings. Under GATT Article 2, each contracting party is required to "accord to the commerce of the other contracting parties' treatment no less favorable than that provided for" in its schedule of tariff concessions.

One of the main differences between the MFN clause in Article 1 and the clause in Article 2 is that under Article 1, any advantage must be accorded "immediately and unconditionally" to all other WTO members, whereas under Article 2 "treatment" has to be "no less favorable" than that accorded to the other WTO members.

5.3. *GATT Article 3:7 – Quantitative Restrictions on The Mixture, Processing or Use of Products*

Paragraph 7 of GATT Article 3: supplements the discipline contained in GATT Article 1:1 by providing an MFN standard to follow in the administration of quantitative restrictions relating to the mixture, processing, or use of products[56].

5.4. *GATT Article 5 - Freedom of Transit*

GATT Article 5:2 supplements the MFN clause contained in Article 1:1 by providing for freedom of transit of goods, vessels and other means of transport across the territory of WTO members via the routes most convenient for international transit.

5.5. *GATT Article 13 - Non-discriminatory Administration of Quantitative Restrictions*

[56] Article 3:7, GATT: "No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply".

GATT Article 13 is a specification of the MFN clause as it states that countries, when imposing quantitative restrictions or tariffs on foreign products, should do it equally to all like-products of all countries.

The Article also asserts that the contracting parties shall "aim at a distribution of trade in such product [subject to import restrictions and tariff rate quotas], approaching as closely as possible the shares which the various contracting parties might be expected to obtain in the absence of such restrictions". This sentence highlights the main difference between the provision in Article 1 and the provision in Article 13. The latter provision states that the application of formally equal ratios for permitted import volumes might be a violation of Article 13 GATT, even though it would be totally permissible under Article 1 GATT[57].

5.6. *GATT Article 17 – State Trading Enterprises*

State trading enterprises are defined under GATT Article 17, as state enterprises established or maintained by a WTO Member or private enterprises granted exclusive or special privileges by WTO Members that make purchases or sales involving either imports or exports.

These States' trading enterprises have a monopolistic status, which they may use to discriminate against an importing country, operating against the principles of international investment law.

GATT Article 17 states that WTO Members have to act according to the MFN clause, and at the same time it provides that they must act solely in accordance with commercial considerations[58].

[57] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 308 (cited in note 6)

[58] Id.

6. *Most-favored-nation Clause in the General Agreement on Trade in Services (GATS)*

An MFN clause was reproduced in the GATS[59] agreement as well. In particular, Art. 2:1 states that, "With respect to any measure covered by this Agreement, each Member shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than treatment it accords to like services or service suppliers of any other country".

The MFN principle, central to GATT, is also considered a "core obligation" under GATS. However, there is a difference in wording between GATT Article 1 and GATS Article 2: whereas GATT relates to any “advantage”, GATS only relates to “measures affecting trade in services”. As observed by the Appellate Body in *Canada - Autos*, the wording of this provision suggests that analysis of the consistency of a measure with Article 2:1 should proceed in several steps. First, a threshold determination on whether a measure is covered by the GATS, must be made under Article 1:1. This determination requires that there is a 'trade in services' in one of the four modes of supply established, including a measure which 'affects' this trade in services. If the threshold determination is that the measure is covered by the GATS, appraisal of the consistency of the measure with the requirements of Article 2:1 is the next step. The text of Article 2:1 requires, in essence, that treatment by one Member of 'services and services suppliers' of any other Member be compared with treatment of 'like' services and service suppliers of 'any other country'. Finally,

[59] The General Agreement on Trade in Services (GATS) is a World Trade Organization treaty that entered into force in 1995, which aims to create a reliable and predictable system of international rules for trade in services and to facilitate the progressive liberalization of services markets. The basic principles of GATS apply, in principle, to all service sectors. The rules and principles of GATT, instead, apply to the trade of goods in the international market. (Munin, Nellie., Legal Guide to GATS. Paesi Bassi at 11 ss, Kluwer Law International, 2010).

the Panel should have applied its interpretation of Article 2:1 to the facts as it found them.

In Article 2 GATS we can also find the words "treatment no less favorable", also found in Article 2 and 3 of GATT, but not in Article 1 of GATT. However, this does not mean that arbitral tribunals and international courts have to interpret the MFN provisions under GATT Article 1 and GATS Article 2 in a different manner. In *EC-Bananas*, the Panel noted the similarities between GATS Article 2 (Most-Favored-Nation) and GATS Article 17 (National Treatment) and concluded that these two provisions had to be interpreted in the same way. However, the Appellate Body rejected this statement and stated that the MFN obligation in GATS Article 2 had to be interpreted in line with GATT Article 1.

The MFN obligation under GATS is not as broad as it might seem at first glance, as it is possible for States to create exceptions where the MFN clause wouldn't apply[60].

6.1. *Like Services or Service Suppliers*

In *Argentina – Financial Services*, the Appellate Body tried to give an explanation of the phrase "like services and service suppliers", found in Articles 2 and Article 17 of GATS[61]. It said that "the determination of 'likeness' of services and service suppliers must focus on the competitive relationship of the services and service suppliers at issue".

The Appellate Body stated that "the word 'like' refers to something sharing a number of identical or similar characteristics or qualities". It also established what degree or extent of similarity is required for services and service suppliers to be considered "like".

[60] GATS Article 2.2:
"A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the Annex on Article II Exemptions".
[61] WTO ANALYTICAL INDEX GATS – Article II (DS reports), at 2 ss.

In *Argentina – Financial Services*, the Appellate Body explained that what is being compared for 'likeness' is different in the context of trade in goods and trade in services. In the GATS, the likeness refers to both services and service suppliers, whereas the GATT only refers to "like products", and not to the producers[62].

The Appellate Body also spoke of the method a Panel should use to determine the "likeness", recalling four general criteria used to analyze the 'likeness' of products in the trade in goods[63]: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behavior in respect of the products; and (iv) the tariff classification of the products[64].

6.2. *De Facto Discrimination*

In *EC – Bananas III*, the European Communities argued that Article 2 of the GATS did not cover *de facto* discrimination, but only *de jure* discrimination, because otherwise the drafters of the GATS would have done so explicitly[65].

The Panel rejected this argument, stating that Article 17 "is meant to provide for no less favorable conditions of competition regardless of whether that is achieved through the application of formally identical or formally different measures".

The Panel also affirmed that the standard of no less favorable treatment must not be "interpreted narrowly to require only formally identical treatment", because such an interpretation could "lead in

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[62] World Trade Organization Appellate Body, Argentina – Measures Relating to Trade in Goods and Services 6.3.3-6.3.4 (Apr 14, 2016), available at https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/453ABR.pdf&Open=True (last visited May 2, 2024)

[63]See WTO Analytical Index GATS, Article II (DS reports).

[64] Appellate Body Report, Argentina MEASURES RELATING TO TRADE IN GOODS AND SERVICES (cited in note 63)

[65] See WTO Analytical Index GATS, Article II (DS reports), p. 7.

many situations to the frustration of the objective behind Article II which is to prohibit discrimination between like services and service suppliers of other Members".

The Appellate Body used different reasoning to confirm that GATS Article 2 could be applied to both *de facto* and *de jure* discrimination.

7. *Most-favored-nation Clause in Other Agreements*

MFN clauses are also present in other international agreements. For example, an MFN clause is also present in Article 4 of the Agreement on Trade-Related aspects of International Property Rights (TRIPS Agreement[66]), which states:

> With regard to the protection of intellectual property, any advantage, favour, privilege or immunity granted by a Member to the nationals of any other country shall be accorded immediately and unconditionally to the nationals of all other Members.

The inclusion of an MFN clause in a treaty regarding intellectual property is quite new, but the range of the provision is limited, as it does not apply to agreements stipulated before the WTO became effective[67].

An MFN clause is also included in the Technical Barriers to Trade Agreement (TBT Agreement), in Article 2[68]. The MFN clause in the TBT Agreement is slightly different in wording from the one

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[66] The Agreement on Trade-Related Aspects of Intellectual Property Rights, commonly known as the TRIPS Agreement, is an international treaty promoted by the World Trade Organization, better known as the WTO, aimed at setting the standard for the protection of intellectual property.

[67] McRae, *MFN in the GATT and the WTO* at 18 (cited in note 9).

[68] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 311 (cited in note 6)

found in the GATT. In the case of *EC-Seal Products* Appellate Body stated that these two clauses had to be interpreted in a different manner[69].

MFN provisions are also found in Article 2 of the Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement) and in Article 4 of the Agreement on Government Procurement (GPA Agreement)[70].

8. *Exceptions*

The potential scope of application of the MFN clauses is broad, but in practice there are many exceptions that limit their range [71]. We will try to give a complete analysis of the most important ones.

8.1. *Preferential and Regional Trade Agreements, Free Trade Areas and Custom Unions – GATT Article 24 and GATS Article 5*

The ability of the States to stipulate Preferential Trade Agreements is the most important exception to the MFN treatment standard. GATT Article 24 and GATS Article 5 allow members to liberalize trade more rapidly among a limited group of members

[69] It was the EC-Seal Products case, in which the Appellate Body determined that a violation of the MFN treatment obligation provided for in Article 2 of the TBT Agreement could be determined only after taking into consideration the objectives of the measure accused of violating the clause, whereas in the case of a violation of the MFN treatment obligation found in Article 1 GATT was determined solely on the basis that the measure would worsen the "competitive conditions of imported like products, regardless of the legitimacy of the objectives of the measure". (World Trade Organization Appellate Body, European Communities - Measures Prohibiting the Importation and Marketing Seal Products case, (Oct. 16, 2015) available at https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds400_e.htm (last visited May 2, 2024).

[70] METI Japan Ministry of Economy, Trade and Industry, *Most-Favored-Nation Treatment Principle* at 312 (cited in note 6)

[71] See McRae, *MFN in the GATT and the WTO* at 11 (cited in note 9).

through a regional trade agreement (RTA) or other kinds of Preferential trade agreements (PTA). Through these agreements, members grant each other a more favorable treatment in trade matters than the one granted to non-members of the agreement[72]. Even though, at first glance, this agreement would be in conflict with the MFN treatment obligation, WTO law recognizes that Preferential Trade Agreements might be a first step to pursue trade liberalization between all WTO members in the future. Thus, both the GATT and the GATS allow PTAs, RTAs, custom unions and Free Trade Areas, under certain conditions. First of all, tariffs and other barriers to trade must be eliminated with respect to substantially all trade within the region; secondly, the tariffs and other barriers to trade applied to outside countries must not be higher or more restrictive than they were prior to regional integration.

States can also form "interim agreements", that will lead, after a certain period – no longer than 10 years – to the formation of a Custom Union or a Free Trade Area[73].

Regional trade agreements regarding trade on goods are justified only when the measure was introduced upon the formation of a custom union, a free-trade area or an interim agreement that would meet all the requirements set out in WTO law, and the formation of the customs union or free-trade area would have been prevented if the introduction of the measure at issue were not allowed[74]. Thus, "not all action taken under a customs union or free trade area will escape the MFN obligation of GATT Article 1:1"[75].

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[72] See Van Den Bossche, Prévost, *Essential of WTO Law*; Cambridge University Press.

[73] Id, at 139-142

[74] World Trade Organization Appellate Body, Turkey-Restrictions on Imports of Textile and Clothing Products, P1, (Oct.22, 1999) available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/DS/34-14.pdf&Open=True (last visited May 2, 2024).

[75] McRae, *MFN in the GATT and the WTO*, at 12 (cited in note 9).

Regional trade agreements regarding trade in services are permitted only in the case of "economic integration agreements" if the measure is introduced as part of an agreement liberalizing trade in services that meets all the requirements set out in Article 5 GATS. WTO members are prevented from signing such agreements if the measures concerned violate GATS[76]. To this end, WTO Members will also have to notify the WTO of every regional trade agreement they might have concluded.

8.2. *General Exceptions: GATT Article 20 and GATS Article 14*

GATT Article 20 and GATS Article 14 are provisions that try to find a balance between the needs of trade liberalization and societal values.[77] The exceptions found in GATT Article 20 and GATS Article 14 do not apply only to the MFN clause in the GATT or in the GATS, but to all GATT or GATS obligations. They are, in fact, general exceptions[78]

GATT Article 20 establishes that a measure that deviates from the obligations of the treaty is justified when it is: (i) necessary for the protection of public morals; (ii) necessary for the protection of the life or health of humans, animals, plants; (iii) necessary to secure compliance with national law which is in itself not GATT-inconsistent; (iv) relate to the conservation of exhaustible natural resources.

Moreover, the application of a measure that is justified under Article 20 may never constitute an "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" nor a "disguised restriction on international trade". The same rule applies to measures that are justified under Article 14 GATS.

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[76] Van Den Bossch, Prévost, *Essential of WTO Law*, Cambridge University Press.

[77] Van Den Bossche, Prévost, *Essential of WTO Law*, Cambridge University Press.

[78] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 311 (cited in note 6)

In *US-Shrimp*, the Appellate Body stated, speaking especially of the exceptions found in GATT Article 20, that the obligations based on the treaty may be interpreted broadly, whereas the exceptions to those same obligations have to be interpreted restrictively.[79]

GATS Article 14 has many similarities to GATT Article 20, even though it presents some important differences. Under Article 14, a WTO Member can justify measures that contrast with GATS-based obligations if those same measures are: (i) necessary to protect public morals or to maintain public order; (ii) necessary to protect human, animal, or plant life or health; (iii) necessary to secure compliance with laws that are not inconsistent with the GATS.

Under Article 14 GATS WTO Members can also justify measures that are inconsistent with GATS Article 17[80], when the difference in treatment is aimed at the equitable and effective imposition or collection of direct taxes, or that are inconsistent with GATS Article 2, when the difference in treatment results from an international agreement on the avoidance of double taxation.

8.3. *Exceptions for National and International Security: GATT Article 21 and GATS Article 14-bis*

GATT Article 21 and GATS Article 14-bis establish that a WTO member has the possibility of not disclosing information that it would normally be required to supply when it 'considers' disclosure of that information contrary to its essential security interests. This mainly happens with information relating to fissionable materials, to trade in arms or other materials, or regarding the provision of services for military use. These exceptions apply to all obligations under the GATT or GATS.

[79] This restrictive approach to GATT exceptions can also be found in Mexico-Soft Drinks.

[80] Rubricated "National Treatment".

The security exceptions give a lot of discretionary power in the hands of WTO Members, as they are not subject to the requirements of the chapeau to avoid misuse.[81]

8.4. *Enabling Clause*

The Generalized System of Preferences (GSP) allows developed-country members to grant preferential tariff treatment to imports from developing countries, in order to promote their economic development. A WTO member can, under an enabling clause, grant additional preferential tariff treatment to some developing countries and not to others, on the condition that the WTO member involved treats all 'similarly situated' developing countries equally.[82]

Granting GSP preferences is only allowed if preferential tariffs may be applied not only to countries with special historical and political relationships but also to developing countries. More generally this is a benefit unilaterally granted by developed countries to developing countries[83].

8.5. *Other Exceptions and Limits*

An important limit of MFN clauses is that they cannot override clauses included in the basic treaty which absolve a party of the obligations under the treaty as a whole[84].Other exceptions include those found in Article 13 of the Marrakesh Agreement Establishing the World Trade Organization (the "WTO Agreement") that provides

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[81] Van Den Bossche, Prévost, *Essential of WTO Law*, Cambridge University Press.

[82] See *Ibid.*

[83] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 309 (cited in note 6) .

[84] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 521 (cited in note 2).

that the Agreement does not apply as between a Member and another Member, when one or more of these conditions are met: (a) at the time the WTO Agreement went into force, Article XXXV of GATT 1947 had been invoked earlier and was effective as between original Members of the WTO which were Members of GATT 1947; (b) between a Member and another Member which has newly acceded, the Member not consenting to the application has so notified the Ministerial Conference before the approval of the agreement on the terms of accession by the Ministerial Conference.

This provision deals with accession-related issues: WTO member States might not want to extend favorable treatment to another country that wants to become a WTO member. Thus, they might oppose the other country's entrance to the WTO. If the States that oppose the accession of the third State in the WTO are not enough to bar its entrance, then they will have to extend favorable treatment to the third country, without their consent.

Article 13 of the WTO Agreement gives these States the possibility not to extend a favorable treatment to another State, which may nonetheless become a WTO Member[85].

[85] METI Japan Ministry of Economy, Trade and Industry, Most-Favored-Nation Treatment Principle at 309 (cited in note 6)

It is also possible to obtain a waiver from the MFN principle. Under WTO Article 9:3[86], countries may, with the agreement of other Members, waive their obligations under the agreement[87].

9. *Interpreting MFN Clauses*

The MFN treatment standard is contained in many different treaty provisions. The basic rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties can be used to interpret the MFN treatment clauses in different BITs and multilateral agreements[88]. In particular, Article 31 of the Vienna Convention establishes that:

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[86] WTO Article 9:3:
In exceptional circumstances, the Ministerial Conference may decide to waive an obligation imposed on a Member by this Agreement or any of the Multilateral Trade Agreements, provided that any such decision shall be taken by three fourths of the Members unless otherwise provided for in this paragraph.
A decision to grant a waiver in respect of any obligation subject to a transition period or a period for staged implementation that the requesting Member has not performed by the end of the relevant period shall be taken only by consensus.
(a) A request for a waiver concerning this Agreement shall be submitted to the Ministerial Conference for consideration pursuant to the practice of decision-making by consensus. The Ministerial Conference shall establish a time-period, which shall not exceed 90 days, to consider the request. If consensus is not reached during the time-period, any decision to grant a waiver shall be taken by three fourths of the Members.
(b) A request for a waiver concerning the Multilateral Trade Agreements in Annexes 1A or 1B or 1C and their annexes shall be submitted initially to the Council for Trade in Goods, the Council for Trade in Services or the Council for TRIPS, respectively, for consideration during a time-period which shall not exceed 90 days. At the end of the time-period, the relevant Council shall submit a report to the Ministerial Conference.

[87] An important example of a waiver is the Lomè waiver.

[88] Dana H. Freyer and David Herlihy, *Most-Favored-Nation Treatment and Dispute Settlement in Investment Arbitration: Just How "Favored" is "Most-Favored"?*, ICSID

> A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in light of its object and purpose.

As explained by the International Law Commission, this rule emphasizes the primacy of the rule of literal interpretation for international treaties, while at the same time giving a certain relevance to the intentions of the contracting parties, as well as to the objects and purposes of the treaties as means of interpretation. Thus, the MFN treatment clause must be read and interpreted in light of its object and purpose[89].

It is undisputed that the purpose of an MFN treatment clause is to "attain equality of treatment irrespective of nationality"[90]. As for the object of the MFN treatment clause, most MFN clauses do not state clearly whether they may be applied to dispute settlement provisions. Thus, tribunals tend to rely on "considerations of purpose, surrounding circumstances, and pragmatic considerations, to decide individual cases"[91].

10. *Circumventing Restrictions to Arbitration through MFN Clauses*

On many occasions, MFN clauses have been used to allow access to jurisdiction on terms more favorable than those provided for in the BIT between the first state and the home state.

10.1. *Before Maffezini v. Spain*

Review—Foreign Investment Law Journal, at 62, available at www.meti.gov.jp (last visited May 2, 2024).

[89] See *Ibid.*.

[90] *Id.* at. 63.

[91] Vesel, *Clearing a Path Through a Tangled Jurisprudence* at 138 (cited in note 10).

Before Maffezini v. Spain, the Tribunals had never modified their jurisdictional mandate on the basis of an MFN clause[92].In the *Anglo-Iranian Oil Company Case*[93], the I.C.J. had actually rejected the argument that an MFN clause could extend the jurisdictional mandate of an international tribunal. This case arose from a dispute between an investor and the Persian State. In 1927, Iran had renounced to all treaties connected to the system of the capitulations[94]. It later adopted a declaration through which it accepted the jurisdiction of the Permanent Court of International Justice (P.C.I.J.). The jurisdiction was limited to disputes arising after

[92] Zachary Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails, Vol.2, No.1,* Journal of International Dispute Settlement, at 101 (2011).

[93] The Anglo-Iranian Oil Company case, also known as the "AIOC case," is a significant historical event that played a pivotal role in shaping the relationship between Iran and Britain. The Anglo-Iranian Oil Company (AIOC), later renamed British Petroleum (BP), was a British-owned oil company that operated in Iran. It held exclusive rights to extract and export Iranian oil under a concession granted by the Iranian government in 1901. Over time, dissatisfaction grew among Iranians regarding the terms of the concession, which they perceived as unfair and exploitative. In 1951, the Iranian Parliament voted to nationalize the country's oil industry, including the assets of the AIOC. Following the nationalization decree, the Iranian government took control of the AIOC's operations in the country. The British government strongly opposed the nationalization of the AIOC's assets. The AIOC contested the nationalization of its assets in Iran's domestic courts. However, the Iranian courts upheld the government's actions. Britain and Iran agreed to submit the dispute to the International Court of Justice (ICJ), which ruled in favor of Iran, stating that it had the sovereign right to nationalize its oil industry. (Brown, The Juridicial implications of the Anglo-Iranian Oil Company Case; Washington University Law Review Archive, at 385 ss, (1952) available at https://journals.library.wustl.edu/lawreview/article/5493/galley/22326/view/ (last visited May 2, 2024)

[94]The System of capitulations was based on treaties through which one state permitted another to exercise extraterritorial jurisdiction over its nationals within the former state's boundaries. In their later form, capitulations were imposed by European powers and came to be regarded as humiliating derogations from the sovereignty and equality of these states. (Van Den Boogert; The Capitulations And The Ottoman Legal System: Qadis, Consuls And Beraths In The 18th Century (Studies in Islamic Law & Society, 21); Brill Academic Pub (May 18, 2005))

the adoption of the declaration and on treaties that entered into force after the declaration[95]. The United Kingdom tried to use the MFN clause contained in the Treaty between the UK and Iran to extend the jurisdiction of the P.C.I.J. even to the disputes arising from that treaty. The UK stated that the more favorable treatment accorded to Danish investors through a Denmark-Iran treaty, that had entered into force after the Declaration, had to be extended also to British investors. Thus, in the UK's view, the disputes arising from the UK-Iran BIT had to be subjected to the jurisdiction of the P.C.I.J.

The Court rejected the United Kingdom's argument, as the United Kingdom did not have any right to invoke the Denmark-Iran treaty. The Tribunal is not clear in its reasoning, but the most acceptable explanation is that, since the Iranian Declaration specifically excluded consent for disputes arising out of pre-Declaration treaties such as the Anglo-Persian treaty, there could be no jurisdiction.

10.2. *Maffezini v. Spain*

The *Maffezini v. Spain* case refers to a legal dispute between a private investor, Mr. Maffezini, who invested in a Spanish company, and the Kingdom of Spain, which was brought before an international arbitration tribunal. A dispute arose between Maffezini and Spain regarding certain regulatory changes that affected his investment. Spain introduced legislative reforms that, according to Maffezini, adversely affected the value and viability of his investment. Maffezini argued that Spain's regulatory changes breached its obligations under the BIT, particularly, provisions related to fair and equitable treatment, protection against expropriation without compensation, and the free transfer of funds. Spain contested Maffezini's claims, arguing that its regulatory measures were lawful and did not violate its obligations under the

[95]See Vesel, *Clearing a Path Through a Tangled Jurisprudence* at 23 (cited in note 10).

BIT. The nation contended that the legislative changes were made for legitimate regulatory purposes and did not specifically target Maffezini's investment. The arbitration tribunal ruled in favor of Maffezini, finding that Spain's regulatory changes breached its obligations under the BIT. The tribunal awarded compensation to Maffezini for the losses suffered due to the regulatory measures.

In *Maffezini v. Spain* the Tribunal declared for the first time that an MFN clause could be used to circumvent pre-arbitration restrictions.[96] In this specific case, the BIT between Spain and Argentina required the investor to wait eighteen months before accessing international arbitration. During this period of time, the foreign investor could only try to resolve the dispute before the national courts.

However, Mafezzini claimed that the MFN clause of the Spanish-Argentinian BIT[97] made it possible for him to rely on a shorter waiting period than the one dictated in the BIT. The more favorable provision in question could be found in the Spanish-Chilean BIT, which only required a six-month waiting period.

Spain tried to argue that more favorable BITs with third countries constituted *res inter alios acta* and thus could not be invoked by foreign investors.[98] It also argued that the phrase "all matters" found in Article 4 of the BIT only referred to "substantive matters or material aspects of the treatment granted to investors and not to procedural or jurisdictional questions."

Nevertheless, the Tribunal stated that the MFN treatment clause may be applied to matters connected to both procedural and substantive investment protection, therefore establishing that the

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[96] See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 531 (cited in note 2).

[97] The treaty can be found at: https://edit.wti.org/document/show/906eff11-67f0-4fed-afb9-3f6a725b5c76 (last visited May 2, 2024)

[98] SCHILL, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 531 (cited in note 2).

Claimant had the right to access international arbitration without having to wait the 18th month.

To get to this conclusion, the Tribunal quoted the decision of the Commission of Arbitration in the *Ambatielos Case*[99], making a grave mistake, later highlighted in *Plama v. Bulgaria*. In fact, the Tribunal declared that the Commission of Arbitration had supported the application of the MFN clause to the jurisdictional provisions of a third treaty, whereas in reality, the Commission had actually stated that there was no general principle that prevents an MFN clause from being applied to matters related to the "administration of justice". With such a statement, the Commission referred to the substantive obligation "to provide foreign nationals with "free access" to the national courts of each contracting state to the treaty of commerce and navigation".[100]

The tribunal also rejected the second argument of the Kingdom of Spain by stating that BITs with third countries could not be considered *res inter alios acta*, unless they had an object that differed

[99] This revolves around the legal dispute between the Greek shipowner, Nicolas Ambatielos, and the United Kingdom in the early 20th century. One of the ships of Mr. Ambatielos was confiscated by the British government, during World War II and under war powers. After the war ended, Ambatielos sought compensation for the loss of his vessel. The United Kingdom argued that the requisition was justified under international law as a wartime measure. The case was brought before the International Court of Justice (ICJ). Ultimately, the ICJ ruled in favor of Ambatielos, finding that the requisition of his ship by the United Kingdom was unlawful. The court held that the UK had failed to provide adequate justification for the seizure and ordered the British government to pay compensation to Ambatielos for the loss of his vessel. The Ambatielos Case is significant in international law as it established principles regarding the rights of individuals and states during times of war and conflict, particularly with regards to the requisition of private property by governments for wartime purposes. (Bishop, Lissitzyn; Ambatielos Case (Greece v. United Kingdom), Vol. 50,
The American Journal of International Law, at. 674-679; No. 3 (Jul., 1956))

[100] See Douglas, *The MFN Clause in Investment Arbitration: Treaty Interpretation Off the Rails* at.102 (cited in note 99).

from that of the BIT in question. In this case, both BITs dealt with the matter of the promotion and protection of foreign investments.[101]

The tribunal also declared that the recipient of the clause should not be able to disregard public policy considerations that the contracting parties might have deemed essential conditions for agreeing to the said agreement. This applies especially when the recipient is a private investor, which is frequently the scenario. Consequently, the extent of the clause's applicability may be more limited than initially perceived.

The Tribunal listed some possible public policy exceptions to the application of MFN clauses and determined some access-restrictions provisions that could not be bypassed through the application of an MFN clause. For instance, the exhaustion of local remedies and "fork in the road-clauses"[102]. The main reasoning for these exceptions is the desire of the Tribunal to avoid the harmful effects of a too-broad application of MFN clauses, such as treaty shopping[103].

10.3. *Siemens v. Argentina*

[101]See Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 532 (cited in note 2).

[102] Fork-in-the-road clauses prevent investors from initiating international arbitration where the same cause of action already had been advanced in domestic proceedings, or vice versa (Markus A. Petsche, The Fork in the Road Revisited: An Attempt to Overcome the Clash Between Formalistic and Pragmatic Approaches, 18 WASH. U. GLOBAL STUD. L. REV. 391 (2019));

[103] Treaty shopping refers to the practice of taking advantage of certain tax treaties between countries in order to minimize the tax liability of the company. It usually involves structuring transactions or establishing entities in a specific country solely for the purpose of accessing favorable tax benefits available under a tax treaty between that country and another jurisdiction (Valente Piergiorgio, Caraccioli Ivo, Campana Gianluca; Beneficiario effettivo e treaty shopping - Monitoraggio dei capitali, fiscalità, antiriciclaggio at 3; Ipsoa; (2016));

The tribunal in *Siemens v. Argentina*[104] stated that the investor could use the MFN clause to incorporate benefits from third-country BITs without having to be subjected to the more restrictive provisions contained in the third-country treaty.[105] The Tribunal, though, allowed the investor to "cherry-pick" more favorable provisions from third-country BITs, without being subjected to the less favorable conditions that might have been contained in those same treaties.

In *Siemens v. Argentina,* the Claimant pursued the local remedies and then decided to access arbitration before the expiration of the eighteen months period required by the German-Argentine BIT. He

[104] The Siemens v. Argentina case refers to a legal dispute between Siemens AG, a multinational conglomerate based in Germany, and the Republic of Argentina. Siemens AG was involved in a contract with Argentina for the provision of services related to the modernization of the country's national identity card system. The contract was part of Argentina's efforts to upgrade its technological infrastructure. During the late 1990s and early 2000s, Argentina experienced a severe economic crisis characterized by currency devaluation, high inflation, and financial instability. The crisis led to widespread social and political turmoil in the country. In response to the economic crisis, the Argentine government implemented various emergency measures, including regulatory changes and the restructuring of contracts with foreign companies. Siemens AG initiated legal proceedings against Argentina, alleging that the government's actions violated the terms of the contract and resulted in financial losses for the company. Siemens argued that Argentina's regulatory changes and failure to honor contractual obligations constituted breaches of international law, particularly under bilateral investment treaties (BITs) and other investment protection agreements. Siemens brought the dispute before an International Centre for Settlement of Investment Disputes, seeking compensation for the damages incurred as a result of Argentina's actions. The arbitration tribunal ruled in favor of Siemens, finding that Argentina had breached its obligations under international law by failing to honor the terms of the contract and by implementing regulatory changes that adversely affected Siemens' investment. As a result, Argentina was ordered to pay compensation to Siemens for the losses suffered. (Sam Wordsworth, Chester Brown, *A Re-run of* Siemens, Wintershall *and* Hochtief *on Most-Favoured-Nation Clauses:* Daimler Financial Services AG v Argentine Republic, Volume 30 Issue 2, *ICSID Review - Foreign Investment Law Journal*, at 365 ss, Spring 2015, at 365 ss)

[105] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 533 (cited in note 2).

was able to do so through the MFN clause found in the treaty. The clause made it possible to apply a more favorable provision, contained in a BIT stipulated between Argentina and Chile, that required only a six-months waiting period. [106]

Argentina argued that the German-Argentine BIT had a narrower wording than the BIT between Argentina and Spain, and that the dispute settlement provisions were "specifically negotiated case by case".[107] Thus, an MFN clause could not override them.

Argentina also claimed that, if the Claimant could rely on the more favorable provisions contained in the Chilean-Argentine treaty, then it also had to be subjected to other provisions of that same treaty that brought disadvantages and limits, such as the "fork in the road" clause.

The Tribunal rejected all of these arguments, stating that the purpose of the MFN clause is to eliminate the effect of specially negotiated provisions, unless the contracting parties decided differently.[108]

It allowed the Claimant to rely on the more favorable provisions of the Chilean-Argentine BIT, without having to be bound to the "fork in the road" clause. In doing so, the Tribunal went beyond *Maffezini v. Spain* by establishing that not only could the MFN clause be used to make it possible for the Claimant to rely to the more favorable provisions of the other BIT, but it also did not incorporate the limitations and unfavorable provisions of the treaty.

Many have criticized the Tribunal's "cherry-picking" approach, as it seems to defeat the objective of the MFN clause, which is to ensure that all foreign investors will be subjected to the same treatment. In this case, the Chilean investors would be ultimately subjected to a less favorable treatment than that of German investors.

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[106] *Id*., at 534.

[107] See *Ibid*.

[108] Siemens A.G. v. The Argentine Republic, ICSID, August 3, 2004, Case No. ARB/02/8, Decision on Jurisdiction at 106.

But in reality, the MFN clause works both ways. A Chilean investor in Argentina could use the MFN clause found in the Chilean-Argentine BIT in order to be subjected to the more favorable treatment given to German investors in the country. By doing so, even Chilean investors have the ability to circumvent the "fork in the road"-clause in the Argentine-Chilean BIT.[109]

10.4. *Salini v. Jordan*

The Tribunal in *Salini v. Jordan*[110] opposed the decision of *Siemens v. Argentina*, by affirming that it could not expand its jurisdiction to "purely contractual claims"[111]. In fact, the Tribunal stated that the MFN clause in the Italian-Jordanian BIT could not be used as a way to incorporate the host State's consent to arbitration from the more favorable third-country BIT. The Tribunal also

[109] Schill; *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 536-537 (cited in note 2).

[110] The Salini v. Jordan case refers to a legal dispute between Salini Costruttori S.p.A., an Italian construction company, and the Kingdom of Jordan. Salini Costruttori S.p.A. was awarded a contract by the Jordanian government for the construction of a water pipeline project in Jordan. The project aimed to improve water infrastructure in the country. A dispute arose between Salini and Jordan during the course of the project. Salini claimed that Jordan had failed to fulfill its obligations under the contract, leading to delays, cost overruns, and other issues affecting the progress of the project. Salini initiated arbitration proceedings against Jordan to resolve the dispute. Salini argued that Jordan had breached its contractual obligations, including failure to provide necessary permits, delays in payments, and other actions that impeded the progress of the project. Salini sought compensation for the losses incurred as a result of Jordan's alleged breaches. The arbitration tribunal ruled in favor of Salini, finding that Jordan had indeed breached its contractual obligations under international law. Jordan was ordered to pay compensation to Salini for the losses suffered due to the delays, cost overruns, and other issues arising from the project.J.P. Gaffney; "Case Summary - Salini Costruttori S.p.A. and Italstrade S.p.A.-v- The Hashemite Kingdom of Jordan (ICSID Case No. ARB/02/13)" TDM 1 (2005), available at www.transnational-dispute-management.com)

[111] Schill; *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 541 (cited in note 2)

mentioned the risk of treaty shopping and of its negative consequences as a further reason to deny the application of an MFN clause to expand the jurisdiction of the treaty-based Tribunal.

10.5. *Plama v. Bulgaria*

In *Plama v. Bulgaria*[112], the Tribunal deviated from *Maffezini v. Spain*, by refusing to expand its jurisdiction based on a BIT stipulated between Bulgaria and Cyprus, which was limited to disputes regarding the measure of compensation for expropriation. This refusal was motivated by the assumption that the intention to apply the MFN clause to issues regarding dispute settlement should have been clear in the basic treaty.

To support this argument, the Tribunal also highlighted the existing difference between substantive rights and their procedural implementation, stating that the provisions regarding arbitration could be separated by those regarding substantive rights. Thus, in the Tribunal's view, the MFN treatment clause would not apply to

[112] The *Plama Consortium Limited v. Republic of Bulgaria* case is a notable international arbitration case. Plama Consortium Limited, a Cyprus-based company, was involved in the oil refining industry. Plama had entered into various agreements with the Bulgarian government for the privatization and operation of an oil refinery in Bulgaria. A dispute arose between Plama and the Bulgarian government regarding the implementation of certain measures affecting the oil refining industry in Bulgaria. Plama alleged that the Bulgarian government had taken actions that harmed its investment in the country and violated its rights under international law. Plama argued that Bulgaria's actions constituted breaches of its obligations under the ECT (Energy Charter Treaty), including protections against expropriation without compensation, fair and equitable treatment, and the free transfer of funds related to its investment in the oil refinery. The tribunal ruled in favor of Plama, finding that Bulgaria had indeed violated its obligations under the ECT. Bulgaria was ordered to pay compensation to Plama for the losses incurred as a result of the government's actions affecting its investment in the oil refinery. ((C. Crépet Daigremont; "Plama Consortium Limited v. Republic of Bulgaria (ARB/03/24) - The most-favoured-nation clause issue", TDM 3, (2005), available at www.transnational-dispute-management.com)

dispute settlement provisions, unless this was clearly and unambiguously stated in the basic treaty.[113]

The Tribunal also stated that applying MFN clauses to matters of dispute settlement would be against the intentions of the contracting states, who would "be confronted with a large number of permutations of dispute settlement provisions from the various BITs which they had concluded"[114].

Plama's approach to interpreting MFN clauses differs from *Maffezini*'s. The tribunal stated that an MFN provision in a basic treaty does not incorporate by reference dispute settlement provisions set forth in another treaty, unless the MFN provision in the basic treaty leaves no doubt that the Contracting Parties intended to incorporate them.[115]

11. *Conclusions*

As we have seen, the MFN treatment standard is of paramount importance in international investment law. MFN treatment clauses have helped to create a multilateral system of investment law, even before the institution of the World Trade Organization.

They have helped to foster equal competition and eliminate inequalities regarding the treatment of investors of different nationalities.

MFN clauses also help to lessen the cost of negotiation in the long term: even if one of the contracting States decides to stipulate a new BIT with a different contracting party, in which it grants different and more favorable conditions to the investors of such contracting State. Therefore, the first State will not have to negotiate another treaty in order to better protect its investors because the new, more

[113] Schill, *Multilateralizing Investment Treaties Through Most-Favored-Nation Clauses* at 543 (cited in note 2).
[114] *Plama Consortium Limited v. Republic of Bulgaria, ICSID,* February 8, 2005, *Case No. ARB/03/24,* Decision on Jurisdiction, at 219.
[115] See *Id*, at 223.

favorable provisions of the new BIT will automatically apply to the investors through the MFN treatment clause.

Under the MFN treatment standard, trade restrictions too must be applied equally. Although, the risk of trade restrictions becoming a political issue increase, states tend to apply less trade restrictions. The MFN treatment standard supports a more driven trade liberalization.

In this Article we have mainly focused on how the MFN clauses have been used to circumvent arbitration restrictions and to allow access to jurisdiction on more favorable terms than those provided for in the BIT between the first state and the home state. Case law have been mixed, as it is often the case in international investment law, and probably always will be. In our humble opinion, we ought to share the jurisprudential view that the MFN clause may be used to circumvent restrictions to arbitration unless, within the BIT, this possibility is explicitly excluded. This is the only interpretation that complies with the ration of the MFN treatment standard, as it is the only way to effectively protect competition.

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