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A comparative approach of the national margin of appreciation doctrine before the ECtHR, investment tribunals and WTO dispute settlement bodies

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Abstract

The paper proposes a critical appraisal of the possibility of transposing the national margin of appreciation doctrine as developed in the ECtHR case law to the WTO dispute settlement system on the one hand and to investor-State arbitration on the other. For that purpose, the analysis first establishes the difference between the doctrine and the concept of national margin of appreciation which takes into account many situations that would otherwise be misleading. The paper then looks at the functional nature of the doctrine within the case law of the ECtHR to conclude that it acts as a “softener” of the otherwise stringent proportionality analysis test. While the observation of the case law in WTO and international investment law shows that there is currently little room for the transposition of the doctrine to these areas, the paper looks at possible theoretical explanations for such a state of the law which seems to be due to both structural differences and political contingencies.

Keywords

Margin of appreciation – standard of review – doctrine – concept – proportionality – fragmentation – investments – WTO

Introduction

Over the last years, there has been considerable debate around the national margin of appreciation doctrine and the way it could be applied to other fields than the law of the European Convention on Human Rights in which it first appeared. Some scholars have even pled in favour of an extension of this tool to all international dispute settlement systems¹. More recently, it is in the fields of international investment and WTO dispute settlement systems that the question has arisen. However, while the views are more or less contrasted, the literature does not always seem to refer to the same object when referring to ‘margin of appreciation’. This is why the discussion around the possible transposition of the national margin of appreciation doctrine must start with a clarification of the different meanings of the expression. They can be boiled down to the *concept* of the margin of appreciation on the one hand and the *doctrine* of the margin of appreciation on the other. As a concept, it refers to the idea of leeway, discretion or space for manoeuvre that is granted by the normative structure of the law, i.e. its texture², to any entity responsible for the enforcement of the law, be it the judge, the State or an international organization. In this sense, the margin of appreciation is not necessarily ‘national’ since it can also be the margin of appreciation of a judge or of an international institution. In this sense also, the concept can be used for any type of norm as long as its content is flexible. Thus, the ‘like products’ rule within international trade law (notably article III GATT) for instance is sufficiently flexible to call for a margin of appreciation by the judge, just as Article 41 of the UN Charter leaves a certain margin of appreciation to the Security Council to determine what constitutes a threat to international peace. In fact, this margin of appreciation is intimately related to the indetermination of legal norms. The more indeterminate the norm is, the wider the margin of appreciation that is left to the judge but also to the primary addressee of the norm, i.e. the State in most cases. As such, the margin of appreciation is common to all legal systems. It is thus not surprising that some scholars argue that the margin of appreciation technique is either applied or to be applied by all international judges³. What they probably refer to is not the doctrine of the national margin of appreciation but the concept of discretion that is inherent in any law and which is tightly related to the indetermination of the law. Indeed, it is not the doctrine but the concept of margin of appreciation which, as some put it, ‘introduces a degree of flexibility into the operation of the law’⁴ or ‘normative flexibility’⁵.

This paper aims to show that the *concept* of margin of appreciation must be distinguished from the *doctrine* of the margin of appreciation which will be called ‘national margin of appreciation’ (NMA) even though the ECtHR generally uses the wording ‘margin of appreciation’ without having to qualify it as ‘national’. Whereas the ‘concept’ evokes the margin of appreciation in a broad sense, the doctrine, as an articulated set of principles⁶, refers to the margin of appreciation *stricto sensu*. Therefore, it can be argued that any legal actor has a *certain* margin of appreciation (as a concept) when they interpret the law or legally characterize the facts of a given situation, but only States benefit from the margin of appreciation doctrine before an international tribunal. Whereas the concept conveys the idea of discretion in an abstract way, the doctrine always appears as related to a specific context as will be seen more in detail in the last part of the paper. It is well-known that, although its

¹ Y. Shany, *Toward a General Margin of Appreciation Doctrine in International Law?*, 16 *EJIL* 907 (2005)

² H. L.A. Hart, *The Concept of Law*, Oxford, 1961, 120-132.

³ Y. Shany, *op. cit.*

⁴ JP Cot, ‘Margin of appreciation’, *Max Planck Encyclopedia of Public International Law*, 1.

⁵ J. Lagomarsino, ‘WTO dispute settlement and sustainable development: legitimacy through holistic treaty interpretation’, *Pace Environmental Law Review* (2011)

⁶ JP Cot, *op. cit.* Note however that the author dismisses the characterization of doctrine and opts for that of ‘standard of review’.

roots may be traced to diverse techniques in different national legal systems⁷, the national margin of appreciation doctrine was created by the ECtHR in a very specific legal (and political) context⁸. The recent introduction of the NMA doctrine into the preamble of the European Convention for Human Rights and Fundamental Freedoms by Protocol 15 confirms that what is at issue is more than the concept of discretion inherent to the application of any type of law⁹. And if it is to be taken as a comparative tool, it is important to keep in mind the judicial evolution of the doctrine as well as its legal and political context.

Within WTO law, the search for the NMA doctrine as understood in this paper will center on the necessity tests of articles XX GATT and XIV GATS, thus excluding areas such as that of 'like products' or anti-dumping measures where it could be said that a sort of margin of appreciation appears in favour of the States given the indeterminate nature of such norms. These areas would fall under the concept of margin of appreciation rather than the doctrine. Besides, while the standard of review provided for by Article 17.6 of the Anti-Dumping Agreement could well be compared to the margin of appreciation as understood within the ECtHR, the 'greater margin of deference to the Member's anti-dumping determination'¹⁰ is explicitly provided for by the Agreement itself and is not left to the appreciation of the dispute settlement body as within the ECHR¹¹. However, although the necessity test appears also in other WTO agreements, the present study does not proceed to an exhaustive account of all the occurrences of the necessity test within WTO case law. The analysis will thus be limited to those included in the aforementioned Articles XX of GATT and XIV of GATS. Indeed, these two provisions bear the closest resemblance to the exceptions provided for in the ECHR law, as they imply a balancing of conflicting interests, and not simply analyzing indeterminate and therefore flexible norms.

As for investment protection law, since there are no general treaty provisions which could be previously identified and compared to Article XX GATT, it will be necessary to start the analysis with an identification of any rules providing for a necessity test which could give rise to a balance of the restriction of an investor's rights with a public interest objective of the State.

Before screening the relevant case law of the WTO and of investment tribunals in search of any reference or room for reference to the NMA doctrine, attention will first be paid to the doctrine as it functions within the ECtHR case law (part I). Tightly tied to that limited scope, this paper does not attempt to argue in favor (or against) the generalization of the NMA doctrine, but simply observes the existing law so as to examine whether there exists anything close to the NMA doctrine in WTO and international investment case law, and concludes on the absence of the NMA within the examined case law (part II). Part III aims at accounting for the observed state of law by determining the underlying principles which found the NMA doctrine and then examining whether said principles might be adapted to international economic law dispute settlement systems. Although this last part could *prima facie* be taken as a plea for discarding the relevance of the NMA doctrine regarding international economic law, the approach is not normative but analytical.

⁷ For instance, French scholars tend to see its origin in French administrative law which provides, in certain cases, for a wide margin of appreciation in favour of the administration.

⁸ It is the very famous *Handyside* case in which the doctrine appeared for the first time (*Handyside v UK*, 1 EHRR 737 (1976)). See *infra* part I.

⁹ Protocol 15 adopted on 24 June 2013 adds a new recital to the preamble: 'Affirming that the High Contracting Parties, in accordance with the principle of subsidiarity, have the primary responsibility to secure the rights and freedoms defined in this Convention and the Protocols thereto, and that in doing so they enjoy a margin of appreciation, subject to the supervisory jurisdiction of the European Court of Human Rights established by this Convention'.

¹⁰ The phrase is not used as such in the dispute settlement reports but it can be found in the explanatory pages dealing with the standard of review on the WTO web site.

¹¹ The fact that the NMA has been introduced into the text of the Convention does not change its original judicial nature.

I. The NMA at the ECtHR as a ‘softener’ of the proportionality analysis

The aim here is to look at the legal context of the NMA doctrine within the case law of the ECtHR in order to determine its functioning and its relationship with another central principle, ie the principle of proportionality.

The *Handyside v UK* judgment is the first case in which the ECtHR resorted to the NMA explicitly¹². The Court had to assess whether the judicial measures taken against Mr Handyside’s book, namely the seizure and destruction of all the copies of *the Little Red Schoolbook*, were ‘necessary in a democratic society’ to protect public morals. And it is within this assessment of necessity that the NMA doctrine slipped in. In other words, the NMA tool was used when it came to balancing different elements that had been taken into consideration by the government. The Court had to balance a fundamental freedom, the freedom of expression (Article 10 ECHR), and a collective goal, the protection of morals.

The NMA has thus appeared in relation to Articles 8-11 ECHR which have in common a second paragraph allowing for restrictions to the protected rights. However, this same doctrine plays an important role in relation to other substantive provisions of the Convention which do not have the same normative structure. To give but a few examples, even though their wording does not explicitly refer to a necessity test, Articles 6, 14 and 15 of the Convention as well as Article 1 of Protocol 1 entail a balancing exercise between the legitimate aim sought by the defendant Government and the means to achieving it. In all these cases the measures restricting the protected right must be duly justified. There must be a ‘reasonable relationship of proportionality’.

And wherever there is proportionality analysis, there is room for lowering that standard of review through the NMA doctrine. Indeed, the relationship between the proportionality analysis and the NMA doctrine is an issue of standard of review. The ‘normal’ standard of review before the ECtHR is that of proportionality analysis seen as a strict scrutiny test. As such, that test is commonly said to be composed of three sub-tests: suitability, necessity, and proportionality *stricto sensu*¹³. This presentation of the proportionality analysis being mainly scholarly, the Court does not distinguish between the three stages and it most of the time focuses on the last step. The proportionality *stricto sensu* step is the balancing between the means chosen and the legitimate aim that is pursued. Within the European human rights law, it is this step ‘that has played a decisive role in constraining the discretion that national authorities exercise’¹⁴. And it is to moderate this limitation of the States’ discretion that the NMA doctrine has been introduced by the Court. In that regard, the wording of the Court may be misleading in that its proportionality analysis is referred to as the ‘reasonable relationship of proportionality between the means employed and the aim sought to be realized’¹⁵. In some cases, the Court refers to this test as a ‘fair balance’ that must be ‘struck between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights’¹⁶. This wording might seem to indicate a deferential standard of review, particularly if one relates it to the *Wednesbury* unreasonableness test in English administrative law¹⁷ or

¹² *Handyside v UK*, 1 EHRR 737 (1976).

¹³ On the three elements of the proportionality analysis, see J. Jans, ‘Proportionality Revisited’, 27 LIEI (2000): 239, 240-41. Even though Jans’ analysis dealt mainly with EC law, it may be transposed to the proportionality analysis more generally.

¹⁴ D. Shelton, *The Oxford Handbook of International Human Rights Law*, ‘Proportionality Analysis by the European Court of Human Rights’, 2013, 464.

¹⁵ *James v UK*, judgment of 21 February 1986, § 50. Our highlight. *Kozacioglu v Turkey*, judgment of 19 February 2009, § 63. Our emphasis.

¹⁶ *Sporrong and Lönnroth v Sweden*, judgment of 23 September 1982, § 69

¹⁷ *Associated Provincial Picture Houses Limited v. Wednesbury Corporation* (1947)2 All ER 680

the American ‘rational basis review’¹⁸ which seem to be the lowest and most lenient standards of review in those systems. These two standards are usually opposed to stricter standards of review such as ‘strict scrutiny’ in American law or ‘proportionality’ analysis in English law. And yet, the ‘reasonable relationship’ test before the ECtHR is a very intrusive standard of review. Indeed, the ECtHR proves to be an international judge who applies a very intrusive standard of review of the action of its Member States.

However, while usually applying quite a strict proportionality test, the ECtHR proves to be reluctant regarding another test which is often linked to the necessity test and which, as we will see, plays a central role in the WTO dispute settlement system, ie the ‘least restrictive means’ (LRM) test. According to this test, the State has to adopt the least right-restrictive measure and make sure that there are no less restrictive alternatives which could be adopted instead of the envisaged one. The ECtHR considers such a test to be too encroaching on State sovereignty. It therefore appears unwilling to assign too much weight to it in its balancing exercise. In property cases, which can be best compared to trade rights since they involve a right which has an economic dimension, it seems that the Court squares the LRM test with a too stringent necessity test which it considers not to be inherent in Article 1 of Protocol 1. In *James v UK* the applicants argued that the measure was to be considered as not necessary (only) because there arguably existed an alternative less restrictive measure but the Court rejected that approach and took the LRM test as one factor among others in assessing whether a ‘fair balance’ was struck¹⁹. In other words, the sole existence of alternative less restrictive measures is not decisive in itself and it has to be balanced with other factors. Therefore, the standard of review applied by the ECtHR is a strict one but it could be stricter if the Court systematically drew a final conclusion from the existence of less restrictive alternatives as it did quite exceptionally in *Saint-Paul Luxembourg S.A. v. Luxembourg*²⁰. When the Court does take the LRM test into account, it hardly ever treats it as a self-standing test but rather as a factor among others in an overall assessment of necessity²¹. Besides, the cases in which the Court refuses to take into account the existence of a less burdensome option are often cases in which it recognizes a margin of appreciation to the defending State²².

However, even without the LRM test or with a minored LRM test, proportionality analysis remains a stringent standard of review. This is the reason why the Court has had to develop a more lenient test corresponding to the NMA doctrine. While the NMA may appear as an alternative standard of review, the Court determines on a case by case basis which issues must be submitted to the strict scrutiny standard – proportionality analysis – and which must be reviewed through this more lenient test. It has nevertheless attempted a rationalization of the doctrine through the establishment of criteria that are taken into account in determining whether the NMA doctrine must apply in a particular case. These criteria – mainly the importance of the protected right, the existence of a European consensus, the nature of the interest to be protected by the interference and the nature of the interference –, are vague enough to grant great flexibility to the European judge on a case-by-case basis. Moreover, lowering the scrutiny does not mean giving up the balancing vocabulary characterizing the proportionality analysis. The Court refers to the same ‘reasonable relationship’ both in cases in which it invokes the NMA doctrine and in cases in which it applies proportionality analysis. The difference between the two tests lies not in a distinct methodology but only in that the Court accepts in the first case that the State give more weight than itself or another Member State would to its legitimate aim as long as there

¹⁸ In *Romer v. Evans*, 517 U.S. 620 (1996), although the Act is struck down, the majority and the dissent agrees ‘that “rational basis” - the normal test for compliance with the Equal Protection Clause - is the governing standard’.

¹⁹ *James and others v UK*, § 51.

²⁰ 18 April 2013,

²¹ See the prisoners’ case: *Campbell v UK*, judgment of 25 December 1992, §§ 52-53; and also the discriminatory treatment of homosexual cases, for ex. *Smith and Grady*, judgment of 27 September 1999, § 102.

²² *Rasmussen v Denmark*, judgment of 28 November 1984, § 41.

is a balancing; whereas in the second case the Court itself proceeds to the balancing substituting its view for that of the national authorities. Therefore, it may be said that it is the way the standard of review is implemented rather than the standard itself which makes the difference. It thus appears that before the ECtHR the standard of review is always the same, but the actual applied test is different. This enhances the political character of the NMA doctrine²³ since it is not an independent standard of review but a variation of a unique ‘reasonableness’ – or proportionality – standard of review the application of which depends on the facts of each case.

Proportionality analysis and NMA doctrine are often presented as ‘tandem doctrines’²⁴. The NMA doctrine is also described as ‘the other side of the principle of proportionality’²⁵. However, that does not explain the nature of that relationship. In that regard, the proportionality analysis is often seen as something that is added, or that completes, the NMA doctrine. Hence, according to Judge Matscher, ‘the principle of proportionality is ‘corrective and restrictive of the margin of appreciation’²⁶. Similarly, Judge Spielmann considers the principle of proportionality as ‘probably the most important – and perhaps even decisive – factor’ that impacts the margin of appreciation²⁷. These positions assume that what is central is the NMA doctrine and that its functioning will depend on the principle of proportionality. Thus the proportionality analysis would be a factor acting on the NMA doctrine.

It is here argued that the principle of proportionality and NMA doctrine may be articulated the other way around. The principle of proportionality could well be what is central and the NMA doctrine what is ‘added’ in cases where deference towards a State’s acts seems appropriate. This is backed up by the fact that proportionality is what is common to all cases before the ECtHR whereas the NMA doctrine is relied on only in certain cases. Indeed, the NMA doctrine is not inherent to the nature of the obligations binding upon the Member States of the ECtHR. In other words, the NMA does not appear wherever there is a balancing between individual rights and collective interests. Therefore, the NMA doctrine rather seems to act as a ‘softener’ of the proportionality analysis.

II. Looking for the NMA doctrine in investment and WTO law

The practice of the WTO dispute settlement bodies and that of the international investment tribunals will be examined to search for anything that resembles the NMA doctrine. The case law suggests that none of these fields of international economic law seems to welcome the NMA doctrine as it exists before the ECtHR.

A. No NMA doctrine without an admitted proportionality analysis: the case of the WTO

Some scholars seem to identify recourse by the WTO panels or the Appellate Body (AB) to the NMA doctrine²⁸. However, in doing so they interpret the case law more than they rely on explicit excerpts of reports. Other scholars who argue for a generalization of the NMA doctrine have found only two

²³ *Infra* Part III.

²⁴ D. Shelton, *op.cit.*, 456.

²⁵ Y. Arai-Takahashi, *The Margin of Appreciation Doctrine and the Principle of Proportionality in the Jurisprudence of the ECHR*, Intersentia, 2002, 14.

²⁶ ‘Methods of Interpretation of the Convention’, (Martinus Nijhoff, Dordrecht; London 1993) 79.

²⁷ ‘Allowing the Right Margin: the European Court of Human Rights and the National Margin of Appreciation Doctrine – Waiver or Subsidiarity of European Review’ (Centre for European Studies Working Paper Series, Cambridge 2012) 22.

²⁸ H. Ruiz Fabri and P. Monnier, ‘Chronique de règlement des différends’, *Journal du droit international* 2004/3 and *Journal du droit international* 2014/3.; more generally but mentioning the case of the WTO dispute settlement reports and relying on the former reference, M. Delmas-Marty, *Ordering Pluralism*, Oxford, 2009, 45; Howse, R. and Tuerk, E., ‘The WTO Impact on Internal Regulations – A Case Study of the Canada-EC Asbestos Dispute’, p. 283 in G. de Burca and J. Scott (eds), *The EU and WTO: Constitutional and Legal Aspects*, Hart Publishing, Oxford, 2001, 325.

references to the margin of appreciation within the WTO case law²⁹. However, these uses are due not to the panels or the AB themselves but to arbitral panels convened under Article 22(6) of the WTO Dispute Settlement Understanding (DSU) in disputes concerning the appropriateness of retaliatory countermeasures in response to noncompliance with prior panel and AB reports³⁰. Whereas it is asserted that this example ‘clearly echoes the ECtHR’s approach to the margin of appreciation’³¹, it is here submitted that they do not have much in common. The arbitrators have used the concept, not the doctrine. Indeed, within the context of the retaliatory countermeasures, it is not the necessity but the appropriateness of the retaliatory measures that is at issue. Whereas this reference to the concept certainly shows deference for the defending State’s assessment, this deference does not replace the proportionality analysis. It intervenes in a context where it is expected that the States have more leeway since they are retaliating against a persistent violation of the WTO agreements. Proceeding to a strict scrutiny review of the appropriateness of their retaliatory measures would amount to depriving the Members from this alternative to compliance that is provided by the DSU.

And the unwillingness of the WTO bodies to borrow the doctrine of the NMA is to be induced from the fact that, besides these two examples, the use of the wording ‘margin of appreciation’ or anything close to it is carefully avoided in the reports. If there was not some sort of reluctance to import that tool one could come across if not the doctrine enshrined within a necessity analysis, at least the concept in some of the reports. That is not the case. Unlike some international investment tribunals, the WTO dispute settlement bodies are very cautious with any slip of the pen that could suggest that they are accepting in certain cases even the concept of margin of appreciation.

The freedom to set the level of protection, the weighing and balancing and the LRM test are central to the standard of review used by the WTO bodies when assessing the necessity of a given national measure. In the absence of any explicit reference to the States’ margin of appreciation in the case law of the WTO, the possibility of a disguised NMA doctrine will be assessed through the lens of these three elements.

a) A unique freedom to set the level of protection within the WTO

According to a supposedly ‘cardinal’, or even ‘constitutional’ premise of the GATT system: WTO Member States are free to choose their own level of acceptable risk in their political economy – their so-called ‘regulatory autonomy’³². Articles XX of the GATT and XIV of the GATS are the provisions that provide the Member States with public order exceptions to the freedom of trade that is guaranteed in the two agreements. What limits the action of the Member States in that regard is that 1) the restrictive measures must be necessary to achieve the identified legitimate aim, 2) they must be non-discriminatory and not arbitrary. The principle of the freedom to choose the level of protection allows a Member State to set a higher level of protection than that of other Member States and even a zero risk level of protection³³ where the necessity test in itself would not necessarily have this effect. What this means is that contrary to what happens at the ECtHR, the level of protection chosen by the State

²⁹ Burke White and Von Staden, *op. cit.*, 310-311. Decision by the Arbitrator, *US--Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, §§ 4.16-18, WT/DS285/ARB (Dec. 21, 2007); Decision by the Arbitrators, *EC-Regime for the Importation, Sale and Distribution of Bananas III*, P 52, WT/DS27/ARB/ECU (Mar. 24, 2000).

³⁰ Note however that in *Bananas* the arbitrators are the original panelists.

³¹ W. W. Burke-White and A. von Staden, ‘Private Litigation in a Public Law Sphere: the Standard of Review in Investor-State arbitrations’, *YJIL* (2010) 311.

³² J. H.H. Weiler, ‘Comment on Brazil – Retreated Tyres’, 8(1) *World Trade Review* 137 (2009), at 139; Meinhard Hilf, ‘Power, Rules and Principles-Which Orientation for WTO/ GATT Law?’ 4(1) *Journal of International Economic Law* 111 (2001), at 118.

³³ The freedom to choose the level of protection is cross-cutting in all WTO law and is particularly present in SPS Agreement cases. See *European Communities – Measures Affecting Asbestos and Products Containing Asbestos*, WT/DS135/AB/R, 12 March 2001.

will not necessarily be faced with other levels of protection set by other States. Thus, in *United States – Gambling*, the AB stressed, regarding Article XIV a), that Member States ‘should be given some scope to define and apply for themselves the concepts of “public morals”...in their respective territories, according to their own systems and scales of values’³⁴. Equally, in the *Brazil – Retreaded Tyres*, the AB concluded on the necessity analysis that ‘the fundamental principle is the right that WTO Members have to determine the level of protection that they consider appropriate in a given context’³⁵.

The freedom to set the level of protection seems to run counter to the very idea of any strict proportionality analysis within the WTO. And since the NMA doctrine maps onto the strict proportionality analysis, it seems to be thereby dismissed. Indeed, while the ECtHR explicitly admits that it balances the restrictive State measures against the aim pursued, the WTO dispute settlement bodies reject any idea of balancing the aim itself against the measures. Of course the balancing technique is present in their reasoning as we will see further but it is not openly admitted that the aim that the State has decided to pursue will be balanced against the restrictions to trade. This freedom of States to set their level of protection does not have an equivalent in the ECtHR case law where what is openly looked for is a balance between the restrictive measures and the legitimate aim pursued. When the Court says that it balances the measures against the aim that means that it may consider that the aim is not worth the measures. In other words, the Court may well come to the conclusion that the aim is not weighty enough to allow the restrictive measures. In that case, the Court questions the level of protection that the State has chosen.

However, that freedom is not as sacred as it may seem within the WTO law system. Thus, if a State opts for a zero level protection but it does not manage to prove that the risk is sufficiently established, it somehow loses the right to choose its own level of protection³⁶. And also, if the defendant chooses a ‘silly’ aim or level of protection, its ‘relative importance will be discounted in the balancing test’³⁷. This is because the dispute settlement bodies allow themselves to assess within the balancing exercise the importance of the specific value that is put forward by the Member State. In this sense, the balancing exercise gets very close to that used by the ECtHR which also takes into account the importance of the value involved when assessing the necessity of a measure. And while the ECtHR exercise is seen as a test of proportionality *stricto sensu*, the WTO organs do not admit directly balancing the aim pursued with the restrictive effects of the challenged measure. The balancing exercise is very carefully presented as part of the LRM test which corresponds to the necessity sub-test within the proportionality analysis. This position is consistent with the principle of the free level of protection which seems to rule out, at least theoretically, an assessment of proportionality *stricto sensu*³⁸. Indeed, whereas the first (suitability) and second (necessity) sub-tests of the principle of proportionality are not problematic, the third (proportionality *stricto sensu*) would imply that, beyond the question of their necessity, the restrictive measures are balanced against the chosen level of protection. In other words, the panels and the AB would have to answer the question whether the set level of protection is worth the trade restrictive effects of a given measure. And in finding that the measure is not proportionate, they would be questioning the chosen level of protection and asking the State to lower it by adopting less trade restrictive measures.

³⁴ The American measures were however struck down because the challenged measures did not satisfy the arbitrariness and discrimination conditions.

³⁵ *Brazil – Retreaded Tyres*, WT/DS332/AB/R, 3 December 2007, § 210.

³⁶ Although it is a case brought on the basis of the SPS Agreement and not on the GATT or GATS Agreements, see, amongst other examples, *Japan – Measures affecting the Importation of Apples*, WT/DS245/AB/R, 26 November 2003.

³⁷ G. Marceau and J. Trachtman, *op. cit.*, 852.

³⁸ P. Van Den Bossche, ‘Looking For Proportionality in WTO Law’, 35 *Legal Issues of Econ. Integration* (2008), 292.

Despite what seems now a slip of the pen in *Brazil – Retreaded Tyres*³⁹, the AB has clarified this point and dismissed any doubts or fears that the United States had on a disguised recourse by the panel to the strict proportionality balancing. Indeed, in the *China – Publications and Audiovisual Products* case, the United States challenged the fact that the panel adopted a two-step approach according to which it first checked the necessity of the measure taking into account a variety of factors such as the importance of the value at stake, the nature of the restriction etc. and then, after it drew an intermediate finding that the measure was necessary, it checked whether there were other less restrictive alternatives. Invoking the confusion that the two-step approach brought about, the US feared that the test would go beyond necessity to reach strict proportionality analysis. The AB made it clear that it is a single process which leads to one conclusion, ie the necessity of the measure⁴⁰. It is in the analysis of the necessity criterion that it does the balancing and not after. Even though it was not put so bluntly, the fear of the United States was that once a measure is considered necessary, it could still be considered disproportionate.

b) A different weighing and balancing

There undeniably is weighing and balancing within both systems. The question is whether it is the same factors that are weighed and balanced and whether the function of that exercise is the same in both systems.

The factors that are weighed and balanced in the ECtHR cases are the importance of the protected right, the European consensus, the nature of the interest to be protected by the interference (its objectivity and weight) and the nature of the interference. Whereas the nature of the interest is the equivalent of the ‘relative importance of the values’ of the WTO and the nature of the interference is nothing other than the restrictive effects factor of the WTO, the importance of the protected right and the European consensus factors do not have an equivalent within the WTO system.

Regarding the protected right, there cannot be any equivalent since all the rights that are protected within the WTO law fall under one category, the freedom of trade.

As for the European consensus, the lack of equivalent must be clearly defined because, theoretically, nothing prevents the dispute settlement bodies from having recourse to that concept, *mutatis mutandis*. They could well refer to an ‘international consensus’ on certain collective values. For instance, one could imagine that before declaring that a certain measure, adopted on grounds of the protection of public morals, is necessary, the WTO body might search for an international, or even regional, consensus. However, that would run counter the above mentioned principle of free choice of the level of protection⁴¹. That would somehow objectivize the control. This objectivization is admitted and accepted within the ECHR system but not within the WTO system. There are of course cases in which the WTO bodies come to the conclusion that a national measure is not necessary to protect a given legitimate objective, but that is generally because there are other less restrictive measures, not because there is an international consensus on the protection of the right or value at stake as in the European human rights law.

It is undeniable that the scope of the application of the necessity test was outlined and reduced to a LRM test in the *United States – Section 337* case⁴², and furthermore the *Korea – Beef* case has detailed the factors that are to be balanced to assess the necessity of a restrictive measure: the relative

³⁹ *Brazil – Retreaded Tyres*, AB Report, § 210. On the ambiguity of the wording chosen in this report, see P. Van Den Bossche, *ibid.*, 294.

⁴⁰ AB Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009; § 242.

⁴¹ It must be noted that reports on SPS and TBT Agreements consider international standards set by international organizations. However, not only are these agreements not covered in the present study but also these international standards are different and much closer to ‘hard law’ than the ‘European consensus’ of the ECtHR.

⁴² *United States – Section 337 of the Tariff Act of 1930*, BISD 36S/345-402 (L/6439), § 5.26.

importance of the common interests or values at stake, the extent to which the measure contributes to the realization of the end pursued, and the extent to which the compliance measure produces restrictive effects on international commerce⁴³. While these factors may suggest that the WTO dispute settlement bodies apply a proportionality analysis similar to that applied by the ECtHR, the AB adds shortly after that the weighing and balancing process is comprehended in the determination of whether a WTO-consistent alternative measure which the Member concerned could ‘reasonably be expected to employ’ is available, or whether a less WTO-inconsistent measure is ‘reasonably available’⁴⁴. Slightly different is the approach of the panel that has been upheld by the AB in the *China – Audiovisual products*: the weighing and balancing plays a role in both sequences of the necessity appraisal. The different factors are first assessed regarding the challenged measure, and then they are assessed regarding the proposed alternative measures⁴⁵. Therefore, the function of the weighing and balancing is again to determine whether a less restrictive alternative exists. In contrast, the ‘weighing and balancing’ of the different factors by the ECtHR is part of its overall necessity appraisal which we have seen leaves little room for the LRM test. Therefore, the weighing and balancing has a different function in the two systems.

c) A stricter ‘least restrictive means’ test

According to J. Weiler, ‘[t]he LRM family derives from, and is meant to be respectful’ of the freedom of the Member States to set their own level of protection⁴⁶. However, whereas the freedom to determine the level of protection seems protected at least as a matter of principle within the WTO case law, States’ freedom of action appears to be seriously restricted through the LRM test if we compare it with what happens within the ECtHR system. Indeed, whereas the test is familiar within the ECtHR case law, it has been shown that it is considered to be too restrictive to be used in a decisive way⁴⁷.

The LRM test is indeed an intrusive test although its definition by the WTO bodies leaves room for some flexibility. Examining the LRM test within the ECtHR, a scholar considers that ‘(r)eliance on this doctrine may be considered as one of the most stringent forms of proportionality appraisal’⁴⁸. This may suggest that the test applied by the WTO is stricter than the AB seems to imply. Indeed, within the WTO case law, the LRM is not one factor among others, but it is *the* decisive factor. The existence of a less restrictive measure is not really weighed against other factors and this is the reason why it is sometimes examined separately from what is said to be the other part of the same process, ie the weighing and balancing of the other factors. There is no real weighing and balancing regarding the LRM test: if the applicant shows that there is an alternative measure which is less restrictive and reasonably available, the measure will be inconsistent, whatever the weight of the protected value or the extent of the restriction which are usually examined separately from the LRM test. Some however argue, quite convincingly, that there is some sort of strict proportionality analysis within the LRM test applied by the dispute settlement bodies⁴⁹. But contrary to what could be expected, the decisive assessment of proportionality is not the one which is called ‘weighing and balancing’ of different factors but the one that lies in the ‘reasonable availability’ sub-test of the LRM test. Indeed, once it has identified the level of protection sought by the respondent, the dispute settlement body will assess whether there exist any less-trade restrictive alternative which is reasonably available. Even though the

⁴³ *Korea – Various Measures on Beef*, WT/DS161/AB/R, WT/DS169/AB/R, 11 December 2000, §§ 162-164.

⁴⁴ *Ibid.*, § 166.

⁴⁵ *Ibid.*, §§ 245-246.

⁴⁶ J. Weiler, 139.

⁴⁷ See *supra* part I.

⁴⁸ Y. Arai-Takahashi, *op. cit.*, 15.

⁴⁹ F. Fontanelli, ‘Necessity Killed the GATT - Art XX GATT and the Misleading Rhetoric about ‘Weighing and Balancing’’, 5 *European Journal of Legal Studies* (2012/2013) 39.

test implies that a ‘reasonably alternative measure’ must not impose an ‘undue burden’⁵⁰, the burden of proof lies with the responding State. Indeed, when the complaining party puts forward an alternative measure, it is up to the respondent to demonstrate that the measure is not ‘reasonably available’. However, while the necessity appraisal is here quite close to that of the ECtHR, it is not accompanied by any ‘softener’ comparable to the NMA before the ECtHR. Therefore, although it may be possible to assert the existence of a certain type of strict proportionality analysis within the ‘reasonably available measure’ test, this must not be assimilated with the NMA doctrine. One could however imagine that if the NMA were to develop over time within the WTO dispute settlement system, it would probably find its place in this part of the reasoning.

The AB’s methodology in which the existence or absence of a LRM is decisive and self-standing therefore contrasts clearly with the ECtHR’s use of the LRM test above described. This is made particularly obvious in the *China – Audiovisual* case in which the AB confirms the two-step methodology of the panel: the other factors that can make the challenged measure necessary are first balanced in a provisional appraisal of necessity; and then, the panel moves on to examine, separately, whether there is any alternative measure which is reasonably available⁵¹. Therefore, even though the ECtHR openly applies proportionality analysis, ie proportionality *stricto sensu*, and the WTO dispute settlement bodies do not, at least explicitly, the above observations show that the test applied by the AB is far stricter than the one of the ECtHR.

We may thus draw the same conclusion from two paradoxical observations. On the one hand, the ‘mantra’⁵² of the freedom to set their level of protection is so prevalent in the discourse of the panels and the AB that there is no room for a NMA doctrine which would come as a softener of a stricter test. The WTO dispute settlement bodies do not recognize that they resort to the proportionality analysis *stricto sensu* in which the aim sought to be realized is balanced directly with the restrictive effect of the challenged measure⁵³. Thus, as long as it is not admitted that the WTO dispute bodies proceed to a proportionality analysis similar to the one used by the ECtHR and that in this context they admit to balance values, it is unlikely that there will ever be any room for the NMA doctrine in cases where this assessment of values is deemed too sensitive politically. On the other hand, the prevalence of the LRM test in the WTO dispute settlement bodies’ methodology and the incompatibility of this test with the NMA doctrine in the ECtHR case law equally show that there is currently little room for such a doctrine within the WTO system.

B. No NMA doctrine within the necessity test in investment arbitration

Whereas the WTO dispute settlement bodies are very cautious in their wording, investment tribunals seem to be more adventurous. Indeed, while the former are bound by fairly homogenous substantive provisions within the WTO treaties, as well as a certain procedural discipline⁵⁴, it is not the case of the latter mainly because of their multiplicity and diversity, but also because there is no common appeal

⁵⁰ AB Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009, §§ 318-326.

⁵¹ AB Report, *China – Publications and Audiovisual Products*, WT/DS363/AB/R, 21 December 2009, §§ 237-249.

⁵² J. Weiler, *op. cit.*, 139.

⁵³ It is significant that the only reference to the ‘proportionality principle’ that can be found in *Law and Policy of the WTO* of P. Van Den Bossche (who is also member of the Appellate Body) is related to technical issues, ie the balance of payment measures and scientific evidence for SPS measures (p. 1037, index). The authors therefore carefully distinguish proportionality from necessity.

⁵⁴ Not only because there is a systematic appeal procedure but also because Article 15 of the MoU on Dispute settlement provides for an interim review stage in which the Member states can draw the attention of the panels on any ‘slip of the pen’ and see the contentious wording or excerpt modified.

system⁵⁵. Hence, whereas the WTO dispute settlement bodies carefully abstain from using the wording ‘margin of appreciation’ to avoid any misunderstanding or expectation on behalf of the Member States, investment tribunals refer from time to time to the NMA ‘word’. However, it appears on further examination that in most cases at issue it is not the doctrine but the concept of margin of appreciation that is really referred to. And that is the case even where the tribunal refers to the case law of the ECtHR. Before looking at the case law, it is necessary to further define what rules within international investment law could allow for the use of the NMA doctrine.

1) Investment protection rules that could welcome the NMA doctrine

Whereas in the WTO law, particularly within the limited scope of the GATT and the GATS, it is fairly straightforward to presume at what stage of the legal reasoning the NMA doctrine could be invoked, things are less obvious in the case of investment law. This is mainly due to the diversity of the applicable law which is based on a wide array of individual treaties. The question is therefore whether there exists within these disparate provisions anything similar to Article XX of the GATT. Whereas the vague wording of most international investment rules can justify the use of the *concept* of margin of appreciation, only some very specific rules could potentially welcome the *doctrine* as defined previously. Some authors have drawn conclusions concerning the appropriateness⁵⁶ or lack of appropriateness⁵⁷ of the recourse to the NMA doctrine by arbitral tribunals, but none seem to have precisely identified which rules of investment protection law are involved. Whereas their analysis usually focuses on the language of the arbitral tribunals, the point here is rather to start from the investment rules or principles which would be similar to those allowing for the NMA doctrine within the ECtHR case law.

Not all rules containing a public interest condition allow for a (at least theoretical) recourse to the NMA doctrine⁵⁸. Only those which give rise to a balancing between public interest and private rights are relevant.

a) General exceptions

BITs have always provided for exception clauses. Some of these have been applied in certain disputes.

To start with, one needs to clarify the debate on necessity by stating where in investment law the NMA doctrine cannot be imported. Within international investment law, the issue of necessity has been widely discussed in the aftermath of the Argentinean cases resulting from the 2001 financial crisis. Some authors have suggested that the tribunals should adopt a NMA test instead of the ‘no other means available’ test used in early awards concerning Argentina⁵⁹. However, the ‘no other means available’ test cannot be compared with the necessity test developed by the ECtHR because it applies within the state of necessity as a rule of customary international law. Moreover, setting the debate in terms of standard of review is not specific enough and it does not allow for instance to distinguish between the standard of review that is imposed by a given rule – as the only means available test – and the standard of review which is freely chosen by the adjudicator – as the national margin of appreciation or the proportionality analysis which are both encompassed in the same rule. Therefore,

⁵⁵ Note however that the investor-State arbitration case law is not as ‘chaotic and unsystematic’ as it could be. See S. Schill, ‘The Jurisprudence of Investment Treaty Tribunals’, in T. Treves, F. Seatzu and S. Trevisanut (eds.), *International Investment Law and Common concern*, 2013, esp. at 10.

⁵⁶ W. Burke White and A. Von Staden, ‘The Need for Public Law Standards of Review in Investor-State Arbitrations’, in S. Schill (ed.), *International Investment Law and Comparative Public Law*, 2010, 689.

⁵⁷ J. Arato, « The Margin of Appreciation in International Investment Law »,

⁵⁸ For an inventory of the different manifestations of public interest in substantive investment protection rules, see S. El Boudouhi, ‘L’intérêt général dans les règles substantielles de protection des investissements’, *AFDI* (2005) 554 .

⁵⁹ W. Burke White and A. Von Staden, ‘The Need for Public Law Standards...’, *op. cit.*, 689.

once the Tribunal has decided, rightly or wrongly, to rely on the customary principle of necessity rather than on the treaty rule of Article XI of the US – Argentina BIT for instance⁶⁰, it has no discretion as to the standard of review applicable because the ‘no other means available’ test is set by Article 25 of the ILC Articles on State Responsibility for Internationally Wrongful Acts⁶¹. This standard of review is very high since the ILC made it clear that the plea of necessity ‘is excluded if there are other (otherwise lawful) means available, even if they may be more costly or less convenient’⁶². Be that as it may, the issue of the state of necessity falls outside the scope of this analysis. Therefore, as far as the Argentinean cases are concerned, the only awards that could give rise to a recourse to the NMA doctrine are the ones which apply the treaty rule providing for the possibility for the host State not to guarantee investment protection in case of risk to public security, public order etc.

General exceptions such as that of Article XI of the US – Argentina BIT tend to be applicable to all substantive rules included in the treaty. They generally provide the host State with the possibility to take measures that are necessary, for instance, to the ‘the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests’⁶³. Whilst still rare, there is a steady trend towards the protection of public interest through these general exceptions in treaty drafting⁶⁴. Thus, among the most recent trend, one may note Article 22.1 (General Exceptions) of the Australia-Korea FTA which is related to the chapter on investment⁶⁵. This provision contains an exception that ‘is modeled, to a degree, on WTO exceptions provisions such as GATT Article XX and GATS Article XIV’⁶⁶. Article 10 of the Canadian Model BIT provides for a similar ‘general exception’. It is not the purpose here to list and analyze all these exceptions which are very diverse and which can be more or less similar to those of the ECtHR or of the WTO agreements. Suffice it to say that all these treaty exceptions have the same normative structure: they all allow for the adoption of measures which are restrictive of the investments protection as long as they are necessary for a legitimate objective. And that is where the comparison can be drawn with Articles 8-11 of the ECHR. It is in this assessment of the necessity of the measures that investment tribunals could follow the path of the ECtHR and allow, in some cases, for a wide margin of appreciation of the host State.

⁶⁰ Article XI of the US – Argentina BIT : ‘This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the Protection of its own essential security interests’.

⁶¹ Article 25 provides that ‘necessity cannot be invoked...a) unless the act is the only way for the State to safeguard an essential interest’.

⁶² ILC Commentary to Article 25, at § 15.

⁶³ See *supra* note 59.

⁶⁴ S. El Boudouhi, ‘L’*int*érêt général dans les règles substantielles de protection des investissements’, *AFDI* (2005) 554 ; S. Lester, ‘Improving Investment Treaties through General Exceptions Provisions: The Australian Example’, *Investment Treaty News*, 14 May 2014.

⁶⁵ For the purposes of Chapter 11 (Investment), subject to the requirement that such measures are not applied in a manner which would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures: (a) necessary to protect human, animal or plant life or health; (b) necessary to ensure compliance with laws and regulations that are not inconsistent with this Agreement; (c) imposed for the protection of national treasures of artistic, historic or archaeological value; or (d) relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

⁶⁶ S. Lester, *op. cit.*

b) Specific exceptions

Specific exceptions are those that are attached to a specific substantive rule. Although all the substantive rules usually contained in the BITs can be qualified by these public interest exceptions, we will mention only those concerning the expropriation rule and the indirect clauses, ie the clauses which provide for national treatment and treatment no less favorable. These are indeed the rules which are most frequently invoked in the disputes.

Concerning the indirect clauses, there is an interesting example in the Protocol to the China – Germany BIT which provides that '[m]easures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable"'⁶⁷. Whereas it does not include explicitly the necessity test, 'have to be taken' clearly conveys that only the measures which are necessary will be lawfully taken. The necessity assessment could therefore, theoretically, welcome the NMA doctrine.

As for the expropriation clause, the use of the word 'exception' to characterize the provision that limits its scope may be disputed. What is referred to however is any provision that is introduced within the BIT to allow a host State to take expropriatory measures without having to comply with the expropriation rule which imposes strict conditions. In other words, we will see an exception to the expropriation rule wherever a BIT, explicitly or implicitly, provides for a distinction between an indirect expropriation and a regulatory measure. The US model of BIT is a good illustration and must be examined closely. Its Article 6 subjects any expropriation measure to four conditions which can be summarized as: a) public purpose, b) non-discrimination, c) compensation and d) due process. Then, Annex B adds an exception/distinction : 'Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations'. Thus an indirect expropriatory measure will not be considered as such under two conditions: non-discrimination and legitimate public welfare objectives. The distinction is of the highest importance because an expropriation requires a fair market compensation while a lawful regulation allows no compensation whatsoever for the investor. What may be confusing is that these two conditions are very similar to two of the four conditions for the legality of an expropriation. Indeed, while the non-discrimination criterion is exactly the same, the public interest criterion of Article 6 is very close to the legitimate objectives of Annex B. A very similar wording is used by Annex B 13(1) of the Canadian Model BIT except that the latter does not qualify those non-discriminatory measures of 'regulatory'. In the absence of any 'necessity' word in these two series of conditions, the question arises as to at what point a balancing between private rights and public interest might be introduced.

A look at the case law of the ECtHR can be useful in this regard. Indeed, the structure of Article 1 of Protocol 1 to the ECHR on the right to property is similar to the BIT provisions just examined. While the first paragraph subjects any deprivation of property to public interest and to other conditions provided by the law, the second paragraph allows the '[S]tate to enforce such laws as it deems necessary to control the use of property in accordance with the general interest'. In other words, the second paragraph provides for an exception to, among other things⁶⁸, the protection against expropriation. As such, it provides for the same proportionality analysis as the one used in regards of Articles 8-11. According to an established case law of the ECtHR, 'a measure depriving a person of his property [must] pursue (...) a legitimate aim 'in the public interest' and bear 'a reasonable

⁶⁷ Point 4 a) of the Protocol to the Agreement between the People's Republic of China and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments, 1 December 2003. This provision is all the more significant as it has been inserted in the German Model BIT.

⁶⁸ In contrast with international investment law, Article 1 of Protocol covers not only direct and rampant expropriatory measures but also other attempts to property.

relationship of proportionality between the means employed and the aim sought to be realized'⁶⁹. It is therefore the necessity criterion of the second paragraph that calls for the balancing, not the 'public interest' condition of the first one. The case law shows that while this necessity could be subject to a strict scrutiny, the economic nature of the matters involved leads the Court to often recognize a wide margin of appreciation⁷⁰. The Court considers that 'in implementing social and economic policies the margin of appreciation enjoyed by the national authorities in determining what is in the general interest of the community is a broad one'⁷¹.

What this case law teaches regarding investment law is that it is not within the assessment of the legality of the expropriatory measure that the NMA doctrine could play a role. Thus, the fact that the rule on expropriation requires that the measure be taken in a public interest is not relevant here because in this case the public interest is not balanced against other factors. It is an indispensable condition among others on which the arbitrators usually use a very loose scrutiny standard. They usually show some sort of deference at this point, and it is when it comes to the cumulative criterion of compensation that the measure is most often found to be in breach of the Convention⁷². The proportionality analysis of the ECtHR could rather be borrowed when it comes to assessing whether a measure deserves or not the characterization of regulatory measure rather than that of indirect expropriation. Even though the BITs which make that distinction do not explicitly require that the measure be 'necessary' to achieve the legitimate public welfare objective, the idea of necessity is implicit.

And yet, despite this possibility to follow the path of the ECtHR regarding the expropriation rule, investment arbitral tribunals have not really imported the NMA doctrine, at least not within the rule on expropriation. Except for the *Methanex* sentence which was very controversial and which did not exactly balance public objectives against private rights⁷³, there are no instances in which the tribunals used the distinction provided for in the treaties in a manner similar to the practice of the ECtHR.

2) NMA doctrine in investment protection case law

Since we have highlighted the link between proportionality analysis and NMA doctrine before the ECtHR, the search for the latter within investment law may start with a review of the former. For the investment tribunals to be able to apply the NMA doctrine, they must in the first place use the balancing technique between private rights and collective aims. And contrary to the cautious attitude of the WTO dispute settlement bodies, investment tribunals do not seem to hesitate in referring to a 'reasonable relationship of proportionality between the charge or weight imposed on the foreign investor and the aim sought to be realized by any expropriatory measure'⁷⁴. The list of awards which abundantly use the balancing technique has started with the *Tecmed v Mexico* case but is now long

⁶⁹ *In the case of James and Others*, judgment of February 21, 1986, §§ 50 and 63, and *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States* (ICSID Case No. ARB(AF)/00/2), §§ 121-122.

⁷⁰ A. LEGG, *op. cit.*, 164 and ff.

⁷¹ *Stefanetti and others v Italy*, 15 April 2014, §§ 56-57. Other examples in *Sporrong and Lonnröth v Sweden*, 23 September 1982, 19; *James and others v UK*, § 46.

⁷² See, for instance, the case *Compañía del Desarrollo de Santa Elena S. A. v Republic of Costa Rica*, award of 17 February 2000 (ARB/96/1), §§ 71-72. Whereas its environmental objectives were generously and liberally considered of 'public interest', the measure was still said to be illegal because it had not come with a full market compensation.

⁷³ *Methanex Corporation v United States of America*, award of 3 August 2005, Part IV, Chapter D, § 7; T. WEILER, 'Methanex Corp. v. U.S.A. Turning the page on NAFTA Chapter Eleven?', *JWIT* 6 (2005) 919.

⁷⁴ *Técnicas Medioambientales Tecmed S.A. v The United Mexican States (Tecmed v Mexico)*, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, § 122.

enough not to be detailed⁷⁵. Many of these awards resort to the proportionality analysis while at the same time relying explicitly on the case law of the ECtHR. The *Tecmed v Mexico*⁷⁶ and *Azurix v Argentina*⁷⁷ are just examples amongst many others. While the *Azurix* Tribunal quotes quite extensively from the *James and others v UK* judgment of the ECtHR⁷⁸, it does avoid any reference to the NMA doctrine which is yet one of the main features of that judgment. As for the *Tecmed* tribunal, the use of the language of the ECtHR referring to the ‘reasonable relationship’ is somewhat misleading. Indeed, instead of the NMA doctrine which usually softens the proportionality analysis in favour of the State, the Tribunal only mentions the ‘due deference’ in asserting that it does not prevent it from reviewing the proportionality of the contested measure⁷⁹. It then proceeds to an appraisal of proportionality of the measure without leaving much room for the State’s margin of appreciation. This is worth noting because it seems to have partially borrowed the language of the ECtHR while at the same time avoiding an explicit reference to the margin of appreciation. In other words, it borrows the proportionality analysis to which it refers as a ‘reasonable relationship’ but not the tool that the ECtHR uses to soften that rather stringent test. It therefore only pays lip service to the ECtHR’s methodology.

As for the phrase ‘margin of appreciation’ itself, it is quite often invoked by responding States⁸⁰ as well as by expert opinions⁸¹ to argue for some deference towards State action. However, this does not necessarily correspond to the NMA doctrine but rather to the concept of margin of appreciation. That is the case for instance in the opinion of Sir Christopher Greenwood according to whom in matters of denial of justice, ‘international law allows a broad margin of discretion to each State in the way it organizes its legal system’⁸². This is not however exactly a reference to the doctrine since it is tied neither to the necessity test nor to the use of State discretion in the context of the appraisal of an allegedly expropriatory measure.

No investor-State tribunal seems to have resorted to the NMA doctrine as it functions within the ECtHR case law. In *Siemens A.G. v the Argentine Republic* the tribunal dismissed the doctrine because it was ‘not found in customary international law or the Treaty’⁸³. In doing so it implies that the doctrine is provided for in Article 1 of Protocol 1 to the ECtHR. It thus omits the important precision that the NMA is a judge-made construct which was not initially provided for by the Convention and which is therefore potentially available to investor-state tribunals as long as they apply similar rules to those of the ECHR.

In the *Continental Casualty v Argentina* case, the tribunal adopted the same methodology as the WTO dispute settlement bodies in examining the criterion of necessity in the context of Article XI of the previously mentioned BIT which allowed the host State to take the necessary measures to protect public order. However, it is somewhat confusing that the Tribunal borrows techniques both from the WTO and the ECtHR: while referring to the NMA doctrine⁸⁴, it also undergoes a detailed and relatively intrusive least restrictive alternative measure which is not, as it was seen above,

⁷⁵ For a list and analysis of these cases, see C. Henckels, ‘Indirect Expropriation and the Right to Regulate: Revisiting Proportionality Analysis and the Standard of Review in Investor-State Arbitration’, 15 *JIEL* (2012) 223.

⁷⁶ *Técnicas Medioambientales Tecmed S.A. v. United Mexican States (Tecmed v Mexico)* ICSID Case No. ARB(AF)/00/2 Award of 29 May 2003.

⁷⁷ *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12) Award, §§ 312-313 (July 14, 2006).

⁷⁸ *James and Others v United Kingdom*, judgment of 21 February 1986.

⁷⁹ *Tecmed v Mexico*, § 122.

⁸⁰ See, e.g., *Biwater Gauff v Tanzania*, ICSID CASE NO. ARB/05/22, Award, 24 July 2008, §§ 434-436.

⁸¹ Op. of Sir Christopher Greenwood in *Loewen Group, Inc. and Raymond L. Loewen v. United States of America*, ICSID Case No. ARB(AF)/98/3, § 65.

⁸² *Ibid.*

⁸³ ICSID CASE No. ARB/02/8, 6 February 2007, § 354.

⁸⁴ *Continental Casualty Company v. Argentina*, ICSID Case No. ARB/03/9, Award, 5 September 2008, § 181.

characteristic of the ECtHR methodology⁸⁵. However, the standard applied by the Tribunal is more consistent than it may seem. Whereas the application of the LRM test can be easily accounted for by the chairmanship of a former member of the WTO Appellate Body, Professor Giorgio Sacerdoti, the reference to the NMA seems to be nothing more than paying lip service to Argentina's pleadings which relied on the case law of the ECtHR. Indeed, the NMA is mentioned not at the stage of the assessment of necessity as is usually the case in ECtHR case law but at the previous stage of determining whether the measure at stake is a 'public order' or 'national security' measure. Therefore, the doctrine is appealed to only to check whether the measure is an appropriate one. This stage is not the one that is decisive neither in the ECtHR case law, nor in the WTO reports. The vast majority of the cases pass this test and it is rather uncommon that the Court or the WTO DSB declare that a given measure is not suitable to achieving the set legitimate objective.

Although some scholars may point to other cases as notable cases of use of the NMA doctrine, it must be stressed again that the mere use of the words 'margin of appreciation'⁸⁶ or 'margin of discretion'⁸⁷ does not, in itself, amount to the use of the NMA doctrine. In *Micula*, although the Tribunal uses inverted comas, perhaps so as to signify that it is borrowing the concept from elsewhere, it only said that 'the State conferring nationality must be given a "margin of appreciation" in deciding upon the factors that it considers necessary for the granting of nationality'⁸⁸. In doing so, it relies not on the doctrine of the ECtHR but on the one single case of the IACHR which uses the wording 'margin of appreciation', ie the advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*⁸⁹. As will be seen, the IACtHR resorted in that case to the *concept* of margin of appreciation, and not to the doctrine. The State's wide leeway in determining the conditions for granting its nationality does not have anything to do with the NMA doctrine that the ECtHR uses in some cases in which it has to balance individual rights with collective goals in the context of the necessity test.

The *Saluka* award may be seen as bearing more resemblance with the ECtHR methodology on the NMA doctrine because it applies, in respect to the rule on prohibition of deprivation of property, a lenient test to assess the action of the national authorities. This is notwithstanding that the Tribunal does not refer to the case law of the ECtHR. However, unless one considers that any standard of review that is favourable to State authorities amounts to an application of the NMA doctrine, it may be doubted that the methodology adopted by the Tribunal is borrowed from the case law of the ECtHR. Indeed, while it is true that the Tribunal recognizes a 'margin of discretion' to the Czech banking regulator in deciding to impose a forced administration to an entity⁹⁰, it does not really balance a legitimate objective with the effect of the restrictive measure on the investor. In this particular case the Tribunal adopts a test which is even more favourable than the NMA doctrine in that it only controls the 'reasonableness' – in the English law meaning of the word – of the appraisal made by the national authority. This is different from the 'reasonable relationship' that must be established between the aim pursued and the restrictive measure according to the ECtHR.

One must therefore conclude from the examined case law that although some arbitral tribunals may use the wording of the ECtHR, this does not imply that the NMA doctrine has been imported into investment law. And yet, recourse to the proportionality analysis by investment tribunals may allow

⁸⁵ *Ibid.*, §§ 189 ff.

⁸⁶ *Ioan Micula and others v Romania*, ICSID Case No. ARB/05/20, Decision on Jurisdiction and Admissibility, 24 September 2008, § 94

⁸⁷ *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 mars 2006, § 272.

⁸⁸ *Ioan Micula and others v Romania*, § 94

⁸⁹ 79 I.L.R. 283, pp. 302-303, §§ 62-63.

⁹⁰ *Saluka Investments BV v. The Czech Republic*, UNCITRAL Case, Partial Award, 17 mars 2006, § 272.

for some evolution in the near future. However, the political nature of the NMA doctrine may still account for a persistent reluctance similar to that observed in the WTO case law.

III. Accounting for an absence

How is it that neither the WTO dispute settlement bodies nor the investment tribunals borrow the NMA doctrine while the applicable rules are comparable to those applied by the ECtHR ? This fact situation can be accounted for by looking at the differences between the ECtHR system on the one hand and the WTO and investment dispute settlement bodies on the other hand. These differences are both structural and political.

A. Structural differences

The NMA doctrine within the ECtHR case law is part of a system. It is the counterpart to the judicial activism which is so characteristic of the ECtHR, not only through the proportionality analysis but also through other judicial techniques such as the evolutive interpretation and the principle of effectiveness. Three factors can be identified which could account for the absence of the NMA doctrine.

1) The absence of other related principles

Although there are similarities, there are irreducible differences between international, and particularly European, human rights law, and international economic law.

The first of those is the absence of the principle of subsidiarity in international economic law. The NMA doctrine has developed alongside with the principle of subsidiarity. It appears from the case law, and particularly from the very structure of the *Handyside* judgment⁹¹, that it is derived from this underlying principle. Indeed, according to the ECtHR, the rationale of the NMA is that of a ‘functional necessity’ according to which the Convention must be the lowest common denominator among the Member States⁹². This means that it is primarily for the national judges to protect fundamental rights and in that regard they may take further that ‘lowest common denominator’. Therefore, the NMA doctrine appears as a tool designed to apply the principle of subsidiarity⁹³.

Is there any room for a similar principle of subsidiarity which could give rise to the NMA doctrine within international economic law? The texts and the case law do not give any hints in that direction. One could nonetheless try to answer the question in an indirect way. The principle of subsidiarity entails that national authorities (governments, legislatures and courts) of Member States have the primary responsibility for guaranteeing and protecting human rights at a national level. The supervisory mechanisms established by the Convention have a subsidiary nature. The Court being the judicial supervisory mechanism, its subsidiary role entails that there be at the national level judges who will have the primary responsibility to guarantee the protection of human rights. Indeed, for the international judge to act only in a subsidiary manner in relation to a given international norm, the national judge must, in the first place, have jurisdiction and be empowered to enforce that same legal norm. While the same international norm can also be enshrined in national acts, and thus be enforced as a national norm, the direct applicability of international law is very useful for the principle of subsidiarity, at least in the monist legal systems, where it is applicable. And that is where the limits of

⁹¹ *Handyside v United Kingdom*, § 48.

⁹² F. Sudre, in *Les Grands arrêts de la Cour européenne des droits de l’homme*, comment on the *Handyside* judgment, PUF Thémis, Paris 2003, 76.

⁹³ In the *Handyside* judgment, as in the subsequent cases, the ECtHR links the principle of subsidiarity to the national margin of appreciation. In the reasoning of the Court, the latter is a consequence of the former. *Handyside v United Kingdom*, § 48.

the comparison between human rights law and international economic law appear: whereas national judges apply the ECtHR law as directly applicable international law in many Member States⁹⁴, they seem not to be empowered to review the enforcement of WTO law and international investment law. Indeed, despite ‘fierce academic debate’ and some variations from one national legal system to another, WTO law norms are not generally directly applicable⁹⁵. Equally, and although this is less widely debated, international investment treaties do not either seem to be directly applicable⁹⁶. While this may certainly be mitigated by the fact that the direct effect theory is only applicable to monist systems, it however contributes to the argument that WTO dispute settlement bodies, as well as the investor-State tribunals, appear as primary, and not subsidiary, judges. Therefore, the first, and functional, basis of the NMA doctrine within the ECtHR does not seem to have an equivalent in international economic law.

A second important difference lies in the interpretive system relied on by the compared judicial bodies. Indeed, the NMA doctrine is an interpretive technique which must be put in the context of other interpretive methods that make the ‘interpretive system’ of the ECtHR as a principled set of rules which are articulated and sometimes balanced against each other. Thus, the subsidiarity principle has a counterpart which is not found in the two examined fields of international economic law: the principle of effectiveness. Indeed, just as subsidiarity founds the NMA doctrine, the principle of effectiveness founds another focal interpretive method within the ECHR system: the evolutive interpretation. It is thus in the name of an effective protection of individual rights that the ECtHR has been able to extend the applicable rules to many situations that were not initially provided for by the Member States of the Convention. But the idea of an effective protection going beyond what is explicitly provided for in the text does not seem to play a role in investment law nor in WTO law. Unsurprisingly, the evolutive interpretation doctrine as it exists within the ECtHR case law cannot be found in international economic law⁹⁷. Whereas the discussion over dynamic interpretation of the BITs has not yet arisen within international investment law, the issues of the debate regarding the WTO agreements must be clarified and distinguished from those of the ECtHR case law. There has indeed been some academic discussion over the dynamic interpretation by the WTO dispute settlement bodies⁹⁸. It is true that in the *United States – Turtle/Shrimp* report the AB used an interpretive method which was very close to the dynamic interpretation of the ECtHR. It referred to international legal instruments that were not binding on the parties as well as to international non-legal instruments such as Agenda 21 in interpreting the terms ‘exhaustible natural resources’⁹⁹. With hindsight, and *mutatis mutandis*, its approach in that case is very similar to that of the ECtHR in the *Demir and Baykara v Turkey* judgment which is a clear case of evolutive interpretation applied to the freedom of association of Article 11 of the Convention. In both cases, the international adjudicator takes into account international law that is not binding on the party as well as soft law that is not binding at all. However,

⁹⁴ This assertion must be doubly-qualified: on the one hand, it does not take into account dualist legal systems; on the other hand, the direct applicability is a general trend but there are exceptions in certain monist legal systems which do not attribute direct effect to all Convention provisions. See H. Keller and A. Stone Sweet (eds), *A Europe of rights. The impact of the ECHR on National Legal systems*, OUP 2008.

⁹⁵ P. Van Den Bossche and W. Zdouc, *The Law and Policy of the World Trade Organization*, Cambridge University Press, 2013, 66; H. Ruiz Fabri, ‘Is there a case – Legally and Politically – for Direct Effect of WTO Obligations’, 25 *EJIL* (2014) 151.

⁹⁶ French Conseil d’Etat, judgment 21 December 2007, n°280264, *inédit au recueil Lebon* (dealing with the Algeria-France bilateral investment treaty of 1993).

⁹⁷ This does not mean that investment tribunals never resort to extensive interpretation of the rules protecting investments. They do so for instance in regards with the minimum standard treatment. However, in doing so, they do not rely on social facts as does the ECtHR but on the evolution of the contents of the customary rule of minimum standard of treatment.

⁹⁸ Arguing that the interpretation by the WTO dispute settlement body is not an ‘evolutive interpretation’, S. D. Murphy, in G. Nolte (ed.), *Treaties and Subsequent Practice*, Oxford, 2013, 87.

⁹⁹ *United States — Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R, report of 12 October 1998, § 130.

beyond that specific and isolated case, it does not seem that the WTO bodies resort to the evolutive interpretation as used by the ECtHR. In subsequent case law, the WTO dispute settlement bodies only take into account in their interpretive effort international obligations actually binding on the parties. In the *EC – Biotech Products* report, the Panel goes even further in requiring that for another international instrument to be referred at, it must bind not only the parties to the dispute but also all the parties to the WTO¹⁰⁰. This is very different from the evolutive interpretation of the ECtHR the purpose of which is to take into account not only law that is binding on the respondent party but also any soft law or social facts within its well-known ‘present-day conditions’ criterion. To clarify the meaning of a legal provision, the judge refers, on the one hand to other legal rules which are applicable to the parties, on the other hand to ‘simple’ facts that have not been turned into law. The role of the judge is therefore not exactly the same in the instances. The ECtHR acts as a ‘constitutional judge’ – or even as a legislator – in assessing social facts which are usually at the discretion of the national legislator. In the *SAS v France* judgment it explicitly recognizes that it ‘had a duty to exercise a degree of restraint in its review of Convention compliance, since such review led it to assess a balance that had been struck by means of a democratic process within the society in question’¹⁰¹. In thus justifying the use of the NMA doctrine in this specific case, the Court implicitly recognizes its judicial activism in other cases where the debate concerning the democratic process is not so weighty.

Thus, whereas one could regret the fact that international economic law adjudicators do not resort to the NMA doctrine, it has to be underlined that they do not use other tools of the ECtHR which are usually seen as restrictive of State sovereignty. The systems at issue are irreducibly different in spite of both being international legal systems. This does not necessarily aim at fitting within the theory of fragmentation of international law but it definitely runs counter to the idea that there is a tendency towards harmonization of the international law techniques resulting from the different courts and tribunals imitating each other. There are structural differences between the different legal systems¹⁰².

2) Different actors

It may be interesting to account for the difference in the use of the NMA doctrine in the fields of human rights and international economic law by looking at the legal nature of the parties in a dispute: in WTO law, as well as in international investment law, what is at stake are rights of foreign economic actors, be they ‘represented’ by their State, as in the WTO law, or not, as in investor-State arbitration. So, in the case of the WTO, recognizing a NMA to the responding State is somehow restricting the protection that is granted to the complaining State. Whereas the ECtHR system is an objective system of protection of individuals, the WTO law is a subjective system of synallagmatic obligations that Member States owe to each other. Both the applicant and the defendant are sovereign and deserve a ‘neutral’ application of the law. This is nothing else than an application of a basic principle of international law, ie the principle of equality of States. In human rights adjudication, applying the NMA doctrine amounts to restricting not another sovereign’s rights but an individual’s rights. And, however disappointing that may be, it seems easier for an international adjudicator to restrict an individual’s rights than a State’s rights, at least regarding international human rights law.

The NMA is not only about the relationship between an international adjudicator and a responding State but also and above all about the relationship between an applicant and a respondent. Whereas it is easy to see the difference between an international human rights system and the WTO system, it

¹⁰⁰ *European Communities– Measures Affecting the Approval and Marketing of Biotech Products*, WT/DS291/R, WT/DS292/R, WT/DS293/R, 21 November 2006, § 7.68.

¹⁰¹ *SAS v France*, judgment of 1 July 2014, § 154.

¹⁰² This is notwithstanding that there are some techniques which are unavoidably common since all these tribunals are public international law tribunals. Thus, for instance, the WTO panels and AB refer almost systematically to the Vienna Convention on Treaties, and particularly to Article 31 3) c).

may prove more difficult to account for the lack of the NMA doctrine in investor-state arbitration where the applicant is not another sovereign State but a private actor, just as the applicant before the ECtHR. Theoretically, the explanation of the absence of the NMA doctrine through the nature of the actors should hold for WTO case law but not for investor-State arbitration. In investment law, we are exactly in the same position as in human rights law: on the one hand, a private individual whose protection is guaranteed by an international treaty against a sovereign State, on the other hand, a sovereign State who has public policy obligations overriding in some cases the protection of private interests. And yet, the NMA doctrine, as a doctrine which favours the police powers of the State in some cases, does not seem to be welcomed. Is it because the investor is heightened to the status of a State and thus the arbitral tribunals take the same precautions as they would with a State? Is it because behind the investor hides his State of nationality¹⁰³? Whatever the reasons for the reluctance in fact of investment arbitrators to show any deference to State sovereignty, it must be underlined that, from a theoretical point of view, the investor-State arbitration system is in a different position than the WTO adjudication system.

Therefore, if we set aside the differences as to the underlying principles such as the subsidiarity principle, it may be suggested that the investor-State arbitration is more likely than the WTO system to welcome the NMA doctrine throughout its case law in the future. This is all the more so as investment tribunals have already adopted a proportionality analysis similar to that of the ECtHR. The resistance may therefore be purely political, rather than structural.

B. Political contingencies

What does the doctrine of NMA have in common with the Monroe, Hallstein, Brezhnev, Stimson¹⁰⁴ or even the Calvo doctrines? On the face of it, not much. Whereas the former is a judicial construct, the latter are the result of both official statements and state practice. Besides, whereas the latter are used to ‘announce [State] political or strategic interest or intention’, a judicial body, as a neutral law-enforcement body, is not supposed to have any political or strategic interests or intentions. Also, it seems that the word ‘doctrine’ is ‘an opinion emanating from politicians on controversial points of international law which are to be used as a basis for their government’s conduct’¹⁰⁵. And yet, it appears that it is not by chance that the technique of the NMA used by the ECtHR has soon been coined ‘doctrine’, rather than principle, concept or notion. Although the Court itself does not use the word ‘doctrine’ which seems to have been coined by scholars, this choice reveals an intent – which is not explicitly stated though – on behalf of the Court to be deferent towards the defendant State’s regulatory choices. In other words, besides the functional rationale derived from the principle of subsidiarity, the doctrine also responds to an ideological requirement, that of the deference due to each Member State’s sovereignty.

It is thus argued that even though the situation of the different adjudicators at stake were exactly the same and the structural differences between the compared systems reduced, there would still remain an element which could explain why investment tribunals and WTO dispute settlement bodies do not follow the practice of the ECtHR, that is the political nature of the NMA doctrine. Notwithstanding that we have set it in its legal context, the NMA doctrine itself is not a systematic mechanism. Therefore it cannot be transposed, even if the structural conditions were to be exactly the same as in the ECtHR, without a political intent and an ideological requirement.

¹⁰³ In this sense, the investor-State arbitration is sometimes presented as the successor, in fact, of the diplomatic protection mechanism.

¹⁰⁴ Max Planck Encyclopedia of Public International Law, ‘doctrines’

¹⁰⁵ J. Salmon (ed.), *Dictionnaire de droit international public*, ‘Doctrine’, p. 352. Our translation.

Just as the idea of deference it conveys, the NMA doctrine does not seem to have any normative meaning¹⁰⁶. Its meaning is mainly political. It is therefore more of a political than a legal concept. And that can be illustrated by the cases in which the Court proceeds to quite a rigorous balancing of the different factors within the necessity test and where it nonetheless refers to the Member State's margin of appreciation to conclude that there was no violation of the Convention. A concurring opinion of a judge has rightly pointed that out¹⁰⁷. One may wonder if the Court could not come to exactly the same conclusion without referring to the margin of appreciation. The NMA doctrine therefore appears as a political banner by which judges not only show deference, but want to be seen as showing deference. Rather than a sound standard of review, it is a tool of political deference.

Indeed, the decision to resort to the doctrine in cases of normative flexibility is clearly a choice that is offered to an adjudicating body. And that choice is not determined by the law. Does that mean that the NMA doctrine is not submitted to any legal criteria within the ECtHR case law? In fact, faced with the skepticism of the opponents to the doctrine, the European judge has early on developed a methodology which includes several legal criteria among which the most famous one is the European consensus¹⁰⁸. However, these judge-made but legal criteria which still provide the judge with normative flexibility act on a case by case basis. They do not account for the initial decision of the judge to introduce the doctrine in its case law, no matter to what precise cases it will apply it. It is that initial decision which is founded on political considerations rather than determined by legal considerations. The fact that some Member States have recently felt the need to add the doctrine within the text of the Convention confirms the idea that the initial introduction was not legal but political. Therefore, 'political' has to be understood as opposed to anything that is inherent to the nature of the applicable law. The doctrine has been founded on extra-legal factors such as the need to manage State sovereignty and national communities' susceptibilities.

Indeed, it could be assumed that the IACtHR which proceeds to a similar balancing between individual rights and collective interests also uses the NMA doctrine. However, and notwithstanding the assertions of some scholars¹⁰⁹, it seems that even this other regional human rights judge does not, for reasons which have nothing to do with the nature of the obligations binding upon the States, ie reasons which are more of a political than of a legal kind. Indeed, whereas the literature tends to rely mainly on the same case, i.e. the advisory opinion on the *Proposed Amendments to the Naturalization Provisions of the Political Constitution of Costa Rica*¹¹⁰, it is doubtful that the Court really uses the doctrine, even though its terminology may evoke in certain cases the *concept* of margin of appreciation¹¹¹. It is significant that the IACtHR uses similar legal tools to those used by the ECtHR, be it the proportionality principle or the evolutive interpretation, but is not yet ready to borrow the NMA doctrine in spite of frequent pleadings in that sense by the responding States. The reasons for the IACtHR's reluctance are not legal or structural but political, the Court considering that the Inter-American system of protection of human rights is not mature enough for it to loosen its control¹¹², some judges even considering that such a doctrine would be 'dangerous' for the protection of human rights in American States¹¹³.

¹⁰⁶ G Letsas, 'Two concepts of the margin of appreciation', *Oxford Journal of Legal Studies*, 2006, 711.

¹⁰⁷ *Odièvre v France* (2003), concurring opinion of Judge Rozakis

¹⁰⁸ See above, part I.

¹⁰⁹ Y. Shany, *op. cit.*, 136; A. Legg, *op. cit.*, 32.

¹¹⁰ 79 I.L.R. 283, pp. 302-303, ¶¶ 62-63.

¹¹¹ Some read all the references to concepts which are close to the margin of appreciation as implicit uses of the doctrine of margin of appreciation, Legg A., *op. cit.*, 32-33, 85.

¹¹² L. Burgorgue-Larsen, 'Les méthodes d'interprétation de la Cour interaméricaine des droits de l'homme *Justice in context*', *RTDH* (2014) 66-67.

¹¹³ M.E. Góngora Mera, *Inter-American Judicial constitutionalism - On the Constitutional Rank of Human Rights Treaties in Latin America through National and Inter-American Adjudication*, I.I.D.H., 2011, 213 : « In general terms, the Inter-

Therefore, the absence of the NMA doctrine in international economic law must also be attributed to a political reluctance on behalf of the adjudicating bodies to follow the path of the ECtHR. It is true that some investment tribunals may be tempted to borrow, mainly for legitimacy purposes, from the ECtHR the concept of margin of appreciation. This phenomenon must however be distinguished from a genuine political willingness to leave a certain leeway to the host State. As for the WTO, it is more obvious and straightforward that its dispute settlement bodies do not try to borrow the ECtHR methodology. In an era where international tribunals tend to quote each other as much as possible, it is worth noting that in spite of having a necessity test which is quite comparable to the one of the ECtHR, the WTO dispute settlement bodies hardly ever quote the case law of the ECtHR. In fact, their caution is such that they seem even to avoid using the concept of 'margin of appreciation' within the context of the necessity test, let alone the doctrine. There is therefore a political weariness in that regard.

If we recall that they are tandem principles, it may be observed that while proportionality analysis is sometimes criticized for 'de-politicizing' and 'de-moralizing' the 'rights discourse'¹¹⁴, it may be said that NMA repoliticizes any field it enters. So, considering the introduction of the NMA doctrine in an area of law is also considering politicizing or re-politicizing that area. Indeed, whenever it uses the NMA doctrine, the ECtHR implicitly admits being a political stage or at least being an international tribunal where national policy considerations can be taken into account. Hence that the discourse about introducing NMA into international investment's law is highly political. This is consistent with the 're-politization' discourse, and beyond, with the 'public interest' literature which calls for no less than a recognition of the political sensitivity of the interests at stake. And that claim is legitimate enough since other courts and tribunals take into account, without expressly admitting it, the political sensitivity of certain issues.

A final hypothesis may be drawn which could account for the political reluctance of international economic law dispute settlement bodies towards the NMA doctrine. The authority an international tribunal has over its Member States may also be a factor accounting for the decision to introduce the NMA doctrine. Hence, whereas the ECtHR has been faced with many political crises in which one Member State or another threatens that it will take measures against the supranational body, or more simply that it will not apply its decisions¹¹⁵, it seems that there has not been any such reactions on behalf of the Member States who 'lose' before the WTO bodies. Therefore these bodies do not feel the need to show deference towards their Member States. Or at least there are other forms of deference which are explicitly provided for by the agreements such as in the anti-dumping Agreement of the WTO. As for the international investment tribunals, there seems to be sufficient debate today for the arbitrators to consider the usefulness of such a tool where more and more States question the legitimacy of this type of dispute settlement mechanism.

Conclusion

It appears that the NMA doctrine as understood in this paper is ill-adapted to the WTO dispute settlement system not only because of the characteristics of the system, but also because the adjudicators generally dismiss anything that could suggest that they are responsible for balancing trade with other values. Hence, as long as such a proportionality analysis is not admitted, there is little chance that the NMA doctrine be ever invoked within the WTO. The situation of the investor-State

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American Court and Commission have not embraced the margin of appreciation doctrine, largely for fear of State abuse but also due to the nature of the cases presented to the Court [...] the cases that reach the Inter-American Court involve gross violations of fundamental rights about which all legal systems would agree, so that the Court has had fewer occasions for considering specific national standards ».

¹¹⁴ WEBBER G., 'Proportionality, Balancing, and the Cult of Constitutional Rights Scholarship', 1 (2010) *The Canadian Journal of Law and Jurisprudence* 719.

¹¹⁵ See for instance the case of the United Kingdom which ended with the Brighton Declaration.

arbitration is different and there could theoretically be more room for NMA doctrine. But the necessary political mindset does not seem to be present within the arbitrators' community for now. Foreign investors go to investment tribunals instead of national tribunals to avoid any imbalance in favour of the State and to 'de-politicize' the dispute. Although highly desirable in certain politically sensitive cases such as the Argentinean ones, the introduction of the NMA doctrine would appear as favouring the responding State. However, the borrowing of the proportionality analysis from the ECtHR may be seen as a first step towards a future NMA doctrine within investor-State arbitration.

Beyond that, the issue of the generalization of the NMA doctrine in international adjudication must be approached with much caution. It is true that the often-hailed flag of 'fragmentation' of the international system may lead to efforts to harmonize the methods of international tribunals looking for 'lowest common denominators'. However, given the diversity of the systems and their functioning, as well as the unique political status of each of these tribunals which have not been created at the same time nor in the same political and legal conditions, methods can certainly be compared but tools not necessarily exported. Thus, the NMA doctrine is very specific to the ECtHR and cannot be exported although there are obvious similarities in the reasoning. It could however be a useful tool if investor-State arbitrations were to be further questioned by civil society and host-States.

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