



*The Jean Monnet Center for  
International and Regional  
Economic Law & Justice*

THE NYU INSTITUTES ON THE PARK

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*Justice, only justice  
shalt thou pursue.  
(Deut. XVI;20)*

## **Vindicating public policy as “an excuse” for Discrimination in Investment Regimes without an “Exception” Clause**

There are many similarities (as well as crucial differences) between trade Agreements and Investment Agreements, not least a prohibition on protectionist discrimination encapsulated in National Treatment clauses.

However, whereas practically all trade agreements contain an Exception Clause such as Article XXIV GATT which can be used as a defense in the face of the showing of a violation of the national treatment provision, most BITs as well as Ch XI of the NAFTA do not have such an exception clause.

The investment jurisprudence illustrates the trickiness of that absence.

Interestingly, whereas the Market provisions of the EU Treaty contain as regards the fundamental free movement rights Exception clauses, there is one inexplicable omission: There is no exception clause to the prohibition on Tax Discrimination.

The purpose of this workshop will be to examine the manner in which the European Court of Justice has grappled with the vindication of public policy in the Tax Discrimination field and to speculate if there are any lessons to be learnt in thinking of the similar problem in the Investment field.

For the purpose of the Workshop we will examine 4 cases. I will introduce two classic cases from the Jurisprudence of the ECJ:

*Case 21/79 Commission v Italy (Mineral Oil Products)* (the So Called Regenerated Oil Case)

and

*Case 46/80 Vinal v Orbat*

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We attach a PDF file with Trade taxation cases in the EU, which includes edited versions of both cases.

We are hugely pleased and honored to have Barry Appleton with us at the workshop and have chosen the Myers and Pope Cases from the Ch. 11 repertoire in which Barry was involved and which produce perfect cases studies for the emergence of this issue in the Investment arena.

We assume that everyone will have easy access to Myers and Pope.

I will present the EU cases and some comparative reflections and Barry will be the initial discussant

We look forward to a rewarding evening.

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