A Study on Defeasibility and Defeaters in International Law: Process or Procedure Distinction Against the Non-Discrimination Rule

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CAPÍTULO 11

A STUDY ON DEFEASIBILITY AND DEFEATERS IN INTERNATIONAL LAW: process or procedure distinction against the non-discrimination rule

Henrique Marcos

Abstract: This is a paper on legal logic and defeasibility in international law. It argues that exceptions to rules are defeaters to such rules. The paper does that by using the World Trade Organisation's (WTO) case law on the rule of non-discrimination and exceptions grounded on process or procedure method (PPM) distinctions. By arguing that rules have defeaters, this paper indirectly claims that legal reasoning is defeasible. Further, this investigation also serves as a criticism of accounts of legal reasoning as syllogistic-deductive reasoning.

Keywords: Legal Logic; Defeasibility; Defeasible Reasoning; Defeaters; Reason-Based Logic (RBL).

Introduction

This paper links defeasibility to international law. It does that by analysing the World Trade Organisation's (WTO) case law; emphasising distinctions based on process or procedure methods (PPM) in the context of social and collective rights tied to sustainable development, environmental protection, and free trade. Under the General Agreement on Tariffs and Trade (GATT), a State may not distinguish imports between like products (non-discrimination rule). For example, State *A* is prohibited from negatively discriminating a

product because it comes from State *B* instead of *C*. However, if the discriminating State shows that the distinction is based on PPMs, an exception can be made to the non-discrimination rule in some specific cases.

This paper's main argument is that such exceptions are *defeaters* to the non-discrimination rule. Defeaters pertain to the notion of defeasibility, which has recently come to occupy a central spot in logic, epistemology, and legal reasoning. Defeasible reasoning supplies an alternative to traditional deductive reasoning. In that connection, this paper argues that rules have defeaters and that legal reasoning is defeasible.

We will begin our investigation by contextualising international law's regulatory expansion (section 1), pointing out how the unsupervised enlargement of international law's ruleset is prone to cause concern among some interpreters. Nonetheless, the paper claims that such fears are grounded on a deductive outlook on international law. It may still be possible to perceive international law as a workable set of rules if we abandon such deductivist aspirations (section 2). To demarcate the scope of the investigation, we briefly review the rule of non-discrimination and PPM distinctions (section 3). We will then shift our focus to defeasible reasoning. The paper first provides an explanation of defeasible reasoning by contrasting it with deductive reasoning (section 4). After that, we consider reasons and defeaters (4.1). We follow to defeasibility in legal reasoning (4.2) employing legal constructivism, rule applicability, and application (4.2.1). Thereafter, we focus on exceptions (4.2.2) and, finally, examine a possible deductivist retort and how it can be counterargued (4.2.3). The last section (5) presents some final remarks.

1 International Law's Regulatory Expansion

Scholars are keen on differentiating classic and contemporary international law. International law has remote historical origins that can be traced to documents before the Common Era (SAND, 2018; TRUYOL Y SERRA, 1996, p. 19). Nonetheless, we can say that it followed from the series of peace treaties signed in 1648 at the end of

the "Thirty Years' War" (GROSS, 1948). Contemporary international law, in turn, gets pinpointed around the time of the United Nations' (UN) formation in the nineteen-forties (MENEZES, 2007).

Contemporary international law has many distinctive features (MENEZES, 2005, p. 36-38). For our present goals, however, its regulatory expansion is where most of our attention will lie[1]. We can define international law's expansion as the progressive increase of the volume of rules that belong to international law's ruleset. In short, Let S_n be the set of rules of international law at the time before the UN's formation. Across the years, the number of rules of S_n has increased in the form of S_{n+m}. Being n the number of rules at the time of the UN's formation and m the number of rules introduced thereafter (considering both n and m natural numbers other than zero).

What is particularly interesting about expansion is how it can be tied to functional differentiation (ILC; KOSKENNIEMI, 2006, p. 11). According to Luhmann, whenever a "system" (such as the law) is subject to restructuring in the face of changing social contexts, it does not undergo such a change through an organized and planned reformation but through an "evolutionary restructuring of established installations" (KOSKENNIEMI, 2007, p. 22; LUHMANN, 2004, p. 93, 234). According to the ILC, alongside the expansion of international law, functional differentiation gives rise to an enormous scope of diverse themes under the umbrella of international law (ILC; KOSKENNIEMI, 2006, p. 11; KESSLER; KRATOCHWIL, 2013, p. 166).

All of this, together with international law's classic horizontality, give rise to remarkable convolution. Given that there is no central legislator or authority in international law, States are responsible for creating new rules through the signage of treaties, the practice of customs, and the unmediated operation of other legal sources (MARCOS, 2018). In this scenario, States are prone to sign various treaties with distinct groups. However, due to the lack of

[1] In the past, some authors have talked about "multiplication," "diversification," or "proliferation" (ICJ; GUILLAUME, 2001). It is not clear if all of these are synonyms. Here, we will follow the International Law Commission's (ILC) nomenclature and call it "regulatory expansion" or simply "expansion" (ILC; KOSKENNIEMI, 2006).

central supervision or coordination, it is not unusual for the themes of newly signed treaties to intersect with those of other international treaties, regional agreements, and even national law. For example, take the increasing number of free trade agreements (FTAs) signed between States, replacing the signature of centralised, multilateral WTO agreements — the "spaghetti bowl effect" (BHAGWATI, 1995).

The complexity of the picture that we have been sketching thus far is the cause of concern among some lawyers and scholars. Certain interpreters have looked at it and concluded that international law is fragmented beyond salvation. Its fragmentation turns it into an unworkable set of rules, riddled with inconsistency and prone to rule conflicts (KOSKENNIEMI; LEINO, 2002). Nonetheless, it is possible to question if this conclusion is too hasty[2].

2 Deductivism

There is a long tradition in legal thought that law's unity and cohesiveness depend on a foundational structure from which it is possible to construct valid legal conclusions. From Hobbes to Austin, and Hart to Kelsen, several scholars, share the assumption that the possibility of intelligible argument within law somehow depends on certain foundational elements that provide firm grounds from where the interpreter can infer what the law requires from its subjects as well as how one can further develop the legal enterprise (POSTEMA, 1987, pp. 317-318).

Let us try to be more concrete by referring to Kelsen's theory of legal interpretation. In his view, legal interpretation finds the meaning of its object by considering the limited realm of possibilities that fit within the frame that the law composes (KELSEN, 1967, p. 351). We can look at Kelsen's legal interpretation as something similar to a deductive syllogism where one concludes by applying general

[2] Many authors have advanced interpretations that strive to show that international law is "unified," "systemic," or somehow consistent, despite its regulatory expansion. See: Benvenisti (2008); Dupuy (2020); Marcos, Waltermann e Hage (2021); Menezes e Marcos (2020; Peters (2017); Prost (2012).

rules to a closed domain[3]. Valid law serves as the major premise. The minor premise consists of a description of a case's fact situation. Together, they allow the deduction of a conclusion — the resulting legal interpretation. For instance, following Kelsen's idea, the reasoning underlying the conclusion that a State's use of force against another State is unlawful would work something like this: *(major premise)* if an act is use of force, then that act is unlawful — *(minor premise)* act is use of force — *(conclusion)* therefore, the act is unlawful[4].

Deductive reasoning has its attractiveness. If all premises are true and we follow the rules of deductive logic, then the conclusion is necessarily true, leaving no room for uncertainty. Overall, it would seem that the problem with international law is that due to its regulatory expansion, interpreters no longer have a firm footing from where they can look at the world and draw their legal conclusions. In short, it is international law's fault. Its bloated status leaves it unable to supply adequate grounds for legal reasoning. And that would be the end of the story.

That narrative might seem convincing. On a closer look, however, we notice that it ignores that deductivism is just *one* of many models of reasoning. Could we not turn the tables? When a model does not serve to represent a phenomenon, should we not replace the model instead of blaming the phenomenon? Deductivism might not serve as an adequate model for legal reasoning since it leaves no room for contradictory input and exceptions, which is particularly problematic given how (international) law behaves in practice.

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[3] Kelsen does not ignore the logical complications pertaining to representing legal reasoning as a deductive syllogism (KELSEN, 1973). As such, it is not uncontroversial to claim that Kelsen would consent to such interpretation of his theory. See: (DUARTE D'ALMEIDA, 2019).

[4] The attentive reader will have noticed that this simplistic syllogism ignores the exceptions to the rule that the use of force is unlawful. For instance, if the use of force is preceded by Security Council authorization or is performed in self-defence, it is not-unlawful. As we will soon see, that is one of the many limitations of deductive reasoning applied to law. On the use of force, see: Dörr (2019); Guerra e Marcos (2016, 2017); Marcos e Guerra (2020).

The law demands a broad connection between a rule's conditions and its conclusions, but it allows a certain level of contradictory input. For it is not always possible to derive the conclusions of a rule when its conditions are satisfied. Deductive reasoning cannot easily explain such a peculiarity; it is impossible for the premises to be true and the conclusion to be false on valid deductive reasoning. Striving for concreteness, the next section will consider a particular case of international law that illustrates what we are on about.

3 Rule on Non-Discrimination and PPM Distinction

As mentioned in section 1, in the scenario of unsupervised regulatory expansion (and functional differentiation), it is not unusual for thematically different rules to intersect. That is not different when dealing with rules concerning sustainable development and environmental protection against rules accounting for free trade. The first group of rules are often responsible for restricting trade and affecting aspects dear to the WTO by their very nature.

For instance, specific rules developed to protect marine wildlife can harm basic trade rules such as the general rule on non-discrimination. As Calle Saldarriaga (2018) glaringly emphasises, the WTO's focus often lies on fishing and harvesting techniques in cases such as *US-Tuna (Mexico), US-Tuna (EEC)*, *US-Shrimp*, *US-Tuna II (Mexico)*, and *EC-Seal Products*[5].

To understand what is going on, we must first consider the general rule on non-discrimination (also called the "principle of non-discrimination"). This rule stipulates that members shall not

[5] Respectively: GATT Panel Report, *United States-Restrictions on imports of tuna*, DS21/R, DS21/R, 3 September 1991 (BISD 39S/155); GATT Panel Report, *United States-Restrictions on imports of tuna*, DS29/R, 16 June 1994; WTO Appellate Body Report, *United States-Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, 6 November 1998 (DSR 1998: VII, 2755). WTO Appellate Body Report, *United States-Measures concerning the importation, marketing and sale of tuna and tuna products*, WT/DS381/AB/R, 13 June 2012. WTO Appellate Body Reports, *European Communities-Measures prohibiting the importation and marketing of seal products*, WT/DS400, WT/DS401, 22 May 2014.

discriminate between like products from different trading partners. Discrimination is also not permitted between a member's products and alike foreign products[6]. In short, the rule posits that discriminating like products is *unlawful.*

Procedurally speaking, the non-discrimination rule can be engaged in two steps. First, are the products like? Second, if they are indeed alike, is there discrimination against foreign products? An example: State *A* produces the product *P1*, State *B* produces *P2*. Now suppose that *B* claims that *A* is discriminating against *P2*. The first question that we must raise is: are these two products *P1* and *P2* alike? Second question: is *A* discriminating against the foreign product *P2* compared to *A's* treatment of its domestic product *P1*? If the first question is answered positively (the two products are alike), the second question still needs to be investigated. Namely, were the imported products treated in a less favourable fashion than domestic products? If so, that discrimination is unlawful.

Having understood the non-discrimination rule, let us consider what is particularly relevant for sustainable development and environmental measures. We now ask: may products be treated differently because of process or procedure methods (PPMs)? Considering the above rule that only like products may not be discriminated against, this question only makes sense if the products are still alike. So, the inquiry becomes: may products be discriminated against because of their PPMs even in cases where such PPMs have no effect on the finalised product?

At first, it is not so easy to see why this matter is tricky because the products are still alike — the PPMs that interest us have no difference on the finished product. It would seem that the non-discrimination rule is perfectly applicable in these cases. Despite PPM differences, if the product is alike, discrimination is unlawful. Or is it?

Certain PPMs deserve a closer look. An interesting example is that of distinction based on PPMs concerning the protection of wildlife. For instance, tuna or shrimp PPMs that are unnecessarily cruel or bring

[6] See GATT Articles I and III.

about the needless death of dolphins or turtles[7]. In some of these cases, the distinction between like products based on PPMs was deemed *not unlawful*. For instance, in the abovementioned *US-Shrimp case*, the WTO Appellate Body deemed that the United States' distinction based on PPMs was not unlawful because it was a measure to reduce the needless killing of turtles[8].

The point is that the non-discrimination rule has an "exception"[9]. There are reasons for making an exception to this rule laid down in GATT Article XX. To allow an exception to be made, Article XX makes two demands.

First demand: the case falls under at least one of the exceptions laid down in Article XX's paragraphs. Concerning sustainable development and environmental protection, paragraphs "b" and "g" are what interests us the most here[10]. These paragraphs tell us that members may adopt policy measures (such as a measure of PPM distinction) inconsistent with GATT when these are necessary to protect the health or lives of humans, animals or plants, as well as in cases where such measures are taken for the conservation of exhaustible natural resources.

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[7] Notice that the product — tuna and shrimp — is exactly the same regardless of whether the fishing methods kill or not kill other animals. Consumers end up with identical seafood on their plate.

[8] The Appellate Body considered the measure as provisionally justified under GATT Article XX, "g." See: WTO Appellate Body Report, *United States-Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, 6 November 1998 (DSR 1998: VII, 2755).

[9] As we will see in section 4.2.2, it is not adequate to talk of a rule as an exception. An exception is the outcome of an argument on whether the rule should be applied, not a reason against applying a rule.

[10] GATT, Article XX: "General Exceptions. Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures: […] (b) necessary to protect human, animal or plant life or health; […] (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption; […]."

Second demand: Article XX posits that an exception cannot constitute arbitrary or unjustifiable discrimination between members where the same conditions prevail nor constitute a disguised restriction on international trade.

The WTO's case law introduces a third demand: there must be a connection between the measure and the goal at hand. For instance, a PPM distinction must be necessary to protect human, animal or plant life/health or the conservation of exhaustible resources. To determine the connection between measures and these goals, the WTO Appellate Body engages in balancing certain factors. For instance, it may consider the environmental contribution made by such distinctions against alternative measures and the adverse effects that restrictive measures would have on free trade.

Again, in the *US-Shrimp case*, the WTO Appellate Body deemed that the United States' measures of PPM distinction were adequate.11 Such efforts were narrowly focused (instead of being broad discrimination on shrimp importation). It also evaluated that measure against alternatives and its impact on free trade. In the end, the WTO found the distinction not unlawful on the grounds of Article XX paragraph "g." It also found that the measures were consistent with the United States' restrictions on the domestic harvesting of shrimp.

The above concludes the doctrinal explanation of the non-discrimination rule and the PPM distinction as a reason for making an exception to this rule. Before we move on, it is important to emphasise two points. First, in the *US-Shrimp case,* the WTO found that the United States treated WTO members differently (it overlooked the same conditions in certain States, treating other States with more lenience than others). But in the compliance stage of the case, the WTO Appellate Body found that the United States changed its strategy so that its treatment of WTO members was no longer arbitrary.

Second, the matter at hand gives rise to an ongoing doctrinal debate. Many scholars and lawyers disagree with the WTO's decision and its interpretation of GATT's Article XX. However, this discussion is not entirely relevant for our purposes here. Our interest is the idea of

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[11] WTO Appellate Body Report, *United States-Import prohibition of certain shrimp and shrimp products*, WT/DS58/AB/R, 6 November 1998 (DSR 1998: VII, 2755).

a rule and an exception to that rule. If WTO's legal interpretation is suboptimal, that is a different topic.12

4 Defeasibility in Legal Reasoning

In section 2, we have said that deductivism is just one of many models of reasoning. That might have sounded surprising to those who carry the misconception that *reasoning is deducing* and that the conclusions "logically follow" from the premises in good reasoning. That is incorrect. Deductive reasoning is but one model of reasoning. Non-deductive reasoning — such as defeasible reasoning — is just as possible as deductive reasoning (POLLOCK, 1987).

In that regard, defeasible reasoning is an alternative to deductive reasoning. So, it is prudent to make sure we understand what deductive reasoning is. Deductivism can be thought of as a process of top-down reasoning where a conclusion is reached in a reductive manner (GOLDFARB, 2003, p. xiii f.). We apply a general rule that holds over a closed domain of discourse. Then, we narrow the range under consideration until only the conclusion remains. Because of that, we can say that there is no uncertainty in deductivism.

A simple example can help us understand what is going on. Consider the first statement: *"all humans are mortal."* That is our general rule; it says that all individuals belonging to the human category are mortal. Now, consider the second statement: *"Socrates is a human."* That is a narrower sentence. It says that a specific individual, Socrates, belongs to the category human. From these two statements, which we can call premises, a conclusion follows: *"Socrates is mortal."* We can conclude that Socrates is mortal because premise two tells us that Socrates is an individual of the human category, and premise one tells us that all individuals of the human variety are mortal. If Socrates is a human and all humans are mortal, therefore, Socrates is mortal. The two premises, together with the conclusion is our argument. In this case, the argument is deductively *valid* — it is impossible for its premises to be true and its

[12] We direct the interested reader to Calle Saldarriaga (2018); Howse e Regan (2000); Kysar (2004) e Steinberg (2004).

conclusion false. The argument is also *sound:* not only it is valid, but all its premises are indeed true[13].

In turn, defeasible reasoning and defeasibility are linked to processes that respond to normal inputs with certain kinds of results (default outcomes) but deliver different results when such inputs are supplemented with further elements (KOONS, 2017; POLLOCK, 1987).

A popular example used to explain defeasible reasoning is that of Tweedy the bird[14]. Suppose we are just told that Tweedy is a bird. We know that birds can typically fly. Because of that, we are justified to conclude that Tweedy can fly. After all, Tweedy is a bird. Assume, however, that we are now introduced to new information: Tweedy is a penguin. We will link this new input to our knowledge that penguins are birds that do not fly. Because of this new input, we will naturally reject the earlier conclusion that Tweedy flies. Our new conclusion will be that Tweedy is a bird, but she is a bird of a particular kind — a penguin — that the default rule — birds can fly — does not apply[15].

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[13] It is easy to think of a valid but unsound argument. For example: all dogs are yellow. Fido is a dog. Fido is yellow. That is a valid but unsound argument. It is unsound because its premises are not true (not all dogs are yellow). Nevertheless, it is a valid argument because it would be impossible for its conclusion to be false if its premises were true. In a world where all dogs are indeed yellow, if Fido is a dog, then Fido is yellow.

[14] For instance, Sartor (2018, pp. 66–67) makes use of an identical example to explain defeasibility.

[15] The above is a relevant example because it emphasizes the fact that the input is *new,* indicating how defeasibility is connected to a procedural view of reasoning and the increase of inputs over time. That is one of the distinctions between non-monotonic systems of logic and defeasibility. "A system of logic is monotonic if and only if it is such that if a set of sentences *S** is a superset of *S*, the conclusions *C** that follow according to this logic from *S** is a superset of the set *C* of conclusions that follow from *S"* (HAGE, 2005a, p. 8).

Classic deductive logic is monotonic. New input does not alter the set of previously justified conclusions drawn from earlier input. Meanwhile, defeasible reasoning is linked to a non-monotonic logic. As Sartor (1995) claims: "Defeasible reasoning schemata license non-monotonic reasoning: Their conclusions may need to be abandoned when new information is available."

But the two are not identical. Defeasibility is connected to the increase of inputs over time. In a first moment, when an initial set of inputs is available, one is justified to

4.1 Reasons and Defeaters

4.1.1 Reasons

We can implement defeasibility by means of reasons and defeaters for those reasons (POLLOCK, 1975, p. 42 f., 1987, p. 483 f.; POLLOCK; CRUZ, 1999, p. 196 f.)[16]. Let us first talk about reasons[17], and then we can look at defeaters[18].

A reason is a fact that pleads *for* or *against* a particular conclusion (a *pro* and a *con* reason, respectively). For example: *(i)* the fact that it is raining is a con reason for going to the beach. *(ii)* The fact that it is raining is a pro reason to bring an umbrella when going outside. *(iii)* the fact a polygon has three edges and three vertices is the reason why it is a triangle. *(iv)* The fact that the water was heated above 100º C (212º F) is a reason it will evaporate. And *(v)* the fact that the dog barked is the reason the baby got scared, which led the baby to start crying.

Notice that as the five examples show, there are distinct kinds of reasons: *"i"* and *"ii"* are practical reasons that guide behaviour (not go to the beach or bring an umbrella). In contrast, *"iii"* is a reason that makes something the case (the polygon, a triangle). Other reasons, like *"iv,"* cause events (water evaporates at 100º C or 212º F). Finally,

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draw certain conclusions. At a second moment in time, when more inputs become available (the set has gained more elements), not all of the previously conclusions are still justified now. In turn, non-monotonicity is not connected to time. Non-monotonicity is a characteristic of a logical system where valid conclusions of a theory are not necessarily a subset of the valid conclusions of every superset of this theory (HAGE, 2005b, p. 233–234).

[16] It is relevant to emphasise that there are many kinds of defeasibility. Hage (2005a), for instance, distinguishes between ontological, conceptual, epistemic, justification, and logical defeasibility. In this paper, we focus on the defeasibility of reasons.

[17] On reasons and the law, see: Hage (1997, 2005c, 2015) and Raz (2002).

[18] The connection between defeaters and the law has already been the object of past studied such as the classic work by Raz "Practical Reason and Norms" (2002) who talks of "exclusionary reasons." In international law, the topic has been dealt by publications such as Hage and Waltermann (2017); Hage, Waltermann and Arosemena Solorzano (2018).

reasons like *"v"* explain past events and their connection (dog barks, baby gets scared, scared baby cries).

In any case, all reasons are facts that are relevant to other facts. When we notice that such a connection between facts is not a one-time occurrence but something prone to repetition, we realise that reasons can be universalised (HAGE, 2015). Universalising a reason allows us to obtain a general connection between kinds of facts.

Suppose that a *fact-*X_1 is a reason for a *fact-*Y_1. It might as well be possible that in other cases of *fact-X*, such as *fact-*X_2, *fact-*X_2 will be a reason for a *fact-*Y_2. As such, we can universalise *fact-*X_n as a reason for *fact-*Y_n. An example: the fact that Mia studied for her tort law exam is a reason for the fact that Mia passed the tort law exam. We can universalise the connection between these two facts by saying that if Mia studies for her exam, she will pass her exam.

Universalising reasons is fascinating because a rule can make such a connection. An example of universalisation in international law is the connection between discrimination of like products and the unlawful nature of such acts. That connection is brought by the non-discrimination rule that posits that these kinds of acts are unlawful.

The problem is that *fact-*X_n may be a reason for *fact-*Y_n in general cases but not under all circumstances. There might be extraordinary circumstances that challenge the connection between these two facts. For instance, the fact that Mia studied for her exam will not necessarily be connected to her passing the exam if Mia's memory is unreliable, causing her to forget everything she studied quickly.

The erratic connection between facts is commonly caused by there being multiple reasons, some pleading for and against a conclusion. In practice, it is often necessary to balance such reasons to uncover which kinds of reasons (pro or con) have more weight. In our example, it might be that having unreliable memory outweighs studying for the exam. As such, the conclusion Mia will pass her exam might no longer obtain.

We must too consider that there is a twofold division on the kinds of reasons in play. In most cases, we are dealing with *contributory reasons*[19]. These are reasons that plead into a particular

[19] Pollock calls them "*prima facie* reasons" (POLLOCK, 1987).

direction (pro or con) but may have to be balanced against other reasons pleading in the opposite direction. That is the case of Mia studying for her exam being balanced against her having unreliable memory.

But there are also *decisive reasons*. These reasons do not need balancing. For example, the fact that a polygon has three edges and three vertices is a decisive reason that it is a triangle; there is nothing to balance. Finally, it is important to mention that when a contributory reason leads to a conclusion, it does not turn into a decisive reason. It is still a contributory reason, but it has prevailed when balancing reasons pleading in the opposite direction (HAGE, 2015).

4.1.2 Defeaters

We have already begun talking about defeaters, even if we had not mentioned them by name. Reasons that defeat contributory reasons are defeaters (POLLOCK, 1987, p. 484). Pollock provides an interesting definition of defeaters as follows: "If *P* is a logical reason for *S* to believe that *Q*, then *R* is a defeater for this reason [if and only if] the conjunction (*P & R*) is not a logical reason for *S* to believe that *Q"* (1975, p. 42).

For example, the fact that my smartphone is connected to the charging cable *(P)* is a *reason* for me *(S)* to believe that my smartphone is charging *(Q),* the fact that the charging cable is not connected to any power source *(R)* is a *defeater* for that reason if the conjunction smartphone connected to charging cable and charging cable not connected to any power source *(P & R)* is not a reason for me *(S)* to believe that my smartphone is charging *(Q)*.

Defeaters are not only relevant with reasons to believe, as Pollock leads us to think. Nor they are exclusive for reasons for action (RAZ, 2002). Defeaters are relevant for all reasons (HAGE; WALTERMANN; AROSEMENA SOLORZANO, 2018). For instance, Mary looking like Lucy is a pro reason for concluding that they are related. A DNA test pointing out that they have different genetic makeup is a defeater for that conclusion. In the same way that the fact that Jim stole something from the supermarket is a reason that

Jim is a thief that ought to be legally prosecuted. Jim being a three-year-old kid is a defeater for that conclusion.

Having understood what a defeater is and how it affects certain reasons, we can propose to (re)define contributory reasons as reasons for which there are defeaters. As such, *P* is a contributory reason for *Q* if and only if *P* is a reason for *Q* and there is a *R*, which is a defeater for *P* as a reason for *Q*, and *R* is consistent with *P*[20].

An example to make this more concrete. The fact that Mia studied for her exam *(P)* is a contributory reason for her passing her exam (*Q)* if and only if studying for her exam *(P)* is a reason for passing her exam *(Q)* and there is a case, such as Mia having an unreliable memory *(R),* which is a defeater for her having studied for her exam *(P)* as a reason for her passing her exam *(Q),* and her having unreliable memory *(R)* is consistent with her having studied for her exam *(P)* (i.e., she can both have studied for the exam and have unreliable memory).

There are two kinds of defeaters. The first kind is what we will call a *rebutting defeater*. If *P* is a contributory reason for *Q*, then any reason *R* for the falsity of *Q*, even though *P* is true, is a rebutting defeater — this first kind of defeater attacks *Q*. The example above serves us once more. Mia having unreliable memory (*R*) is a rebutting defeater for having passed the exam (*Q* is false) even though she studied for it (*P* is true).

We call the second kind an *undercutting defeater*. Unlike rebutting defeaters (which attack *Q*), undercutting defeaters attack the conditional connection *if P then Q*. For example, an undercutting defeater attacks the link from the fact that Mia studied for the exam *(P)* to her passing the exam *(Q)* in a case in which she studied for tort law when the exam was for labour law. Notice that this defeater works *not* by claiming that *Q* is false (not passing the exam) but by claiming that the seeming connection between *P* and *Q* is not present. Mia studying for the wrong exam (tort law) has no relation to passing the proper exam (labour law). Again, that is not to say that Mia will fail her exam, but just that the fact (studying for the tort law exam

[20] Here we use consistency with its traditional meaning. A set of statements is consistent if and only if it is logically possible that all sentences in the set are true. If that is not possible, the set is inconsistent (HODGES, 1977, p. 13).

[*P*]) and the conclusion (passing the labour law exam [*Q*]) are not connected. In other words, the fact is no reason at all for the conclusion.

To finalise this explanation, notice that in a rebutting defeater, there is a balancing of reasons. The connection between facts is preserved, but the defeater brings us reasons against the initial conclusion (the defeater may outweigh the reason). In an undercutting defeater, something that usually counts as a reason for a particular conclusion exceptionally does not count as a reason at all for that conclusion (the defeater excludes the reason)[21].

4.2 Reasoning With Rules and Exceptions

4.2.1 Legal constructivism, applicability and rule application

There are many differences between legal rules and statements. For one, statements aim to describe the world. If they are successful in doing so, they are true. If they fail, they are false. For example, the statement "*the Congo is larger than Belgium*" is true because it effectively describes a state of affairs that obtains in the world (i.e., a fact). Meanwhile, "*Argentina shares a border with Kazakhstan*" is false because that is not the case in the world (that state of affairs that does not obtain, i.e., a non-fact).

In turn, rules are not true nor false. They have no interest in describing the world. Rules try to affect change in the world. In a world where the rule *that the discrimination of like products is unlawful* exists (i.e., it is valid), that rule makes it the case that such discrimination is unlawful.

In short, statements have a word-to-world direction of fit. Statements are successful (in the sense of being true) if their content matches the content of the world. Rules have a world-to-word direction of fit. They are successful (exist/valid) if they affect states of affairs in effect in the world[22].

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[21] That is one of the reasons why Raz calls undercutting defeaters "exclusionary reasons" (RAZ, 2002).

[22] The notion of direction of fit is inspired by Aquinas (1981 Part I, Question 21, Article 2), developed by Anscombe (2000, p. 56 f.) and popularised by Searle (1975, 1995, 2010).

Moreover, different from statements that seem to operate autonomously, rules demand *application*. This is an essential difference that deserves a moment of our time. Some share the feeling that legal interpretation is an activity that merely uncovers (or reconstructs) the effects of rules in the world. That seems intuitive when dealing with easy cases: a rule posits that thieves are punishable. John is a thief. John is punishable. No fuss.

Hard cases challenge such intuitions, however. A hard case is a legal case where genuine disagreements flourish, and there is no clear answer. In such cases, the conclusion is evidently not a mere process of discovery of a pre-made answer, but an industrious construction brought by reasoning and argumentation of legal scholars, lawyers and officials.

The difference between easy and hard cases brings us to a fork in the road. On one side, we could claim that the law can somehow tell the difference between easy and hard cases, operating autonomously on the former but awaiting construction for the latter cases. How the law has such sapience stays a mystery, though. The other path leads us to conclude that legal reasoning is constructive in both easy and hard cases. The difference is that the answers are more predictable in easy cases, leading to less disagreement between scholars and lawyers. Without much argument, we will here choose the second path, given that it seems more sensible[23].

Legal reasoning is, therefore, a constructive activity. That is relevant for us because it reveals a rift between a rule's *applicability* and its *application*. The fact that a rule is applicable to a case (i.e., a fact-situation) is not always connected to that rule's application to a case[24].

Notice, however, that the rule's ability to affect the world is not connected to a rule's efficacy but merely its fact constitution capabilities. See: Hage (2018, pp. 60-61).

[23] Given the limitations of space, that was an incomplete explanation of hard cases and legal disagreements. For a full account, see: Dworkin (1978, 1986); Levenbook (2015); Shapiro (2007); Smith (2015). On legal constructivism, see: Hage (2012a, 2012b).

[24] On the difference between application and applicability, see: Hage (1997, 2005c); Hage and Waltermann (2017); Hage, Waltermann and Arosemena Solorzano (2018).

A rule is *applicable* to a case if *(i)* the rule exists, i.e., is valid, *(ii)* the case falls within the rule's (temporal, territorial, and personal) scope, and *(iii)* the case satisfies the rule's conditions.

For example, the rule that the use of force is unlawful is applicable to a case where State *A* uses force against a military vessel flying the flag of State *B* because that rule is valid, the case falls within the scope of that rule, and the case satisfies the rule's conditions (the act was an act of the use of force). That same rule will not be applicable to a second case where *A* "uses force" in its territorial sea against a private vessel in the context of maritime law enforcement activities[25]. It is not applicable because this second case falls outside the rule's scope and its conditions are not satisfied.

A rule is *applied* when it attaches its legal consequences to a case. We can say that the rule that the use of force is unlawful is applied to the case of *A's* act against *B* when that rule attaches the consequence is unlawful, thereby turning *A's* act into an unlawful act. We could say something similar about the rule of non-discrimination. It is applied to a case when it attaches the consequence is unlawful to a case where one discriminates like products.

4.2.2 Exceptions

Having understood applicability, what is now interesting is to explore the possibility of an *applicable* rule, which is, nevertheless, *not applied* to a case: an exception. We can say that an exception to a rule is made when an applicable rule is, for some reason, not applied. Given that the rule is not applied, it does not attach its legal consequences to the case.

Let us focus on the non-discrimination rule and PPM distinctions. We can notice that the WTO allows exceptions to the rule on non-discrimination in some instances where the products are alike but PPMs justify a distinction based on environmental protection or sustainable development, *inter alia*.

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[25] Maritime law enforcement and its connection to the use of force in international law is explored by (MARCOS; MELLO FILHO, 2019).

What is happening in these cases? The non-discrimination rule is applicable: the rule is valid, the case falls within the rule's scope, and the case at hand matches the rule's conditions. But the applicable rule is not applied, i.e., an exception was made. The exception was made because of a meta-rule (a rule about rules) stemming from Article XX GATT that gives us reasons for not applying an applicable rule.

How can we rationally explain what is happening here? It is not evident how deductive logic can explain exceptions. As seen above (section 2), on valid deductive reasoning, it is impossible for the premises to obtain and the conclusion nevertheless to not obtain. (So, the applicable rule should always be applied.) But here we are dealing with an exact situation where the premises (a rule's applicability) obtains but the conclusion (a rule's application) does not follow. The opposite of what should happen according to deductive reasoning.

Fortunately, by adopting a defeasible logic, such situations can easily be explained. Herein we will use one iteration of defeasible logic called "reason-based logic" (RBL). We choose it because it provides an elegant way to balance reasons[26]. Instead of reasoning with syllogisms ("if conditions, then conclusion"), which leave no room for exceptions to a rule nor the balancing of reasons, RBL gives the centre stage to reasons. That makes it easy to account for balancing reasons and exceptions to rules.

We already know what reasons are, and if multiple reasons are pleading for or against a conclusion, we must balance such reasons. The outcome of this operation is a decision on which reasons (pro or con) outweigh the other set. It is important to remember that the *presence* of a (pro or con) contributory reason in itself does not determine the conclusion. Only the *balancing* of (pro and con) contributory reasons can lead to the conclusion.

Analogously, a rule's applicability to a case is a contributory reason for applying that rule to that case. We can even say that a rule's applicability is a strong reason for applying a rule to a case in normal circumstances. But remember that a rule's application is not an

[26] Reason-based logic was developed mainly by Hage (1997, 2005c). See also: Hage and Verheij (1994). Nevertheless, there many different logics for defeasible reasoning. For an overview, see: Brożek (2014).

autonomous operation — it is an act that depends on an underlying decision.

In a rational setting, a rule is applied to a case if there are reasons for applying a rule to that case. Nonetheless, there are instances where an applicable rule is not applied. That can be explained by the existence of reasons against applying an applicable rule. If the reasons against the application of an applicable rule prevail, we have got ourselves an exception. Notice that the exception is the outcome of an argument on whether the rule should be applied, not a reason against its application[27].

There are many reasons for not applying an applicable rule. Two popular reasons are that, first, applying an applicable rule would lead to a rule conflict with another applicable rule, and, second, applying the applicable rule to that case would violate that rule's purpose. Let us see an example for each.

4.2.2.1 Making an exception in case of conflicting rules

Consider that State *A* uses force against State *B*. That case allows us to draw the defeasible conclusion that State *A's* act is unlawful given the rule that acts of use of force are unlawful. Without further input, we only have reasons to apply the rule that acts of use of force are unlawful to this case. Suppose, however, that we are now introduced to information that *A* used force against *B* in self-defence. We know that there is another rule positing that acts of use of force in self-defence are not unlawful[28].

Now, we have two applicable rules, one positing that A's act is unlawful and another that it is not unlawful. If applied, these two rules attach incompatible legal consequences to a case — the act will be both unlawful and not unlawful, which is incompatible according to the logical rule of non-contradiction (BARKER-PLUMMER *et al*., 2011, p. 137). The fact that these two rules can attach incompatible

[27] This important distinction is explained in: Hage and Waltermann (2017); Hage, Waltermann and Arosemena Solorzano (2018).
[28] See footnote 4 above.

consequences is a reason to make an exception to one of them. But which rule?

We can make use of meta-rules that remove conflicts by giving reasons for making an exception to one of the conflicting rules (MARCOS; WALTERMANN; HAGE, 2021). For example, *lex superior, specialis*, and *posterior*. In this case, it makes sense to use *lex specialis* — the rule that the use of force in self-defence is not unlawful is more specific than the general rule that posits that such acts of use of force are unlawful.

By balancing reasons for and against applying each of the conflicting rules to the case, our outcome may be that we should make an exception to the rule that use of force is unlawful and decide not to apply that rule (even though it is still applicable the case). If we follow through, we have made an exception to that rule in favour of the rule that the use of force in self-defence is not unlawful.

4.2.2.2 Making an exception because applying a rule to a case would violate that rule's purpose

Let us once more focus on the non-discrimination rule and PPM distinctions. Consider a case where State *A* discriminates against like products *P1* and *P2* where *P1* is a domestic product and *P2* is produced by State *B*. We can already tell that the non-discrimination rule is applicable to this case, which is a contributory reason for applying it to the case. Nevertheless, *A* contends that its discrimination against *P2* is grounded on PPM distinctions — the process/procedure used by *B* to produce *P2* is responsible for cruelty against wildlife and may lead to the exhaustion of natural resources.

Suppose that this case meets all demands made by Article XX. the case falls within one of the exceptions laid down in Article XX, *A's* action is not a disguised arbitrary discrimination or restriction on international trade, and there is a connection between *A's* measure (restricting *P2* imports) and the goal at hand (environmental protection). Thus, we have reasons for applying the non-discrimination rule (the rule is applicable to the case) but we also have reasons for not applying it.

Notice that, like the WTO Appellate Body, we will need to balance these reasons. It might be the case that *A's* measure was too strict, having far-reaching adverse effects on free trade. Imagine that *B's* PPMs are cruel against wildlife but restricting all *P2* imports would lead to an economic crisis in that sector. That would be a contributory reason *against* making an exception to the non-discrimination rule. Equally, we must also consider protecting wildlife and the conservation of exhaustible natural resources as reasons for making an exception to that rule.

Suppose we balance the reasons and conclude that the reasons for making an exception outweigh the reasons for applying the applicable rule. In this case, we will have made an exception to the rule and will have not applied the applicable rule. In such a situation, the reasons against applying the rule would have worked as a *rebutting defeater* to the rule's application. The connection between facts is preserved, but the defeater gives reasons against the initial conclusion (applying the applicable rule).

Alternatively, the exception can also work as an *undercutting defeater*. Suppose that in our reasoning, instead of deeming that environmental protection works as a reason against applying the applicable rule, we understand that the fact (the rule's applicability) which would typically count as a reason for a conclusion (the rule's application) does not count as a reason after all.

It does not count as a reason because, in this alternative case, the discrimination of like products is motivated by a case of environmental protection with far-reaching consequences — consequences that would lead to grave disadvantages to international free trade due to the potential exhaustion of essential natural resources. For instance, imagine that *B*'s PPM for producing *P2* will lead to the extinction of many species of marine wildlife in a matter of months, which will ultimately cause an economic crisis jeopardizing free trade.

In this last scenario, the defeater works by excluding the reasons for applying the rule. Something (the rule's applicability) which would generally count as a reason for a conclusion (applying the rule), does not count as a reason in an exceptional situation (applying the applicable rule would violate that same rule's purpose). The main

difference between the two scenarios is that in the rebutting defeater, the exception was made because we considered that environmental protection outweighed free trade. In the second scenario, we are dealing with an undercutting defeater because the consequences of applying the non-discrimination rule would violate that rule's purpose. Applying a rule developed to protect free trade would end up threatening free trade.

4.2.3 Deductivist retort

Deductivists might claim that the criticisms made above are unreasonable. They can try to salvage deductive reasoning by claiming that legal reasoning is not defeasible; there are no real exceptions. These "exceptions" are just hidden rule conditions. They could claim that we can rearrange a rule and its "exception" into a derived rule that has no exceptions. So, the non-discrimination rule and its possible "exceptions" in the case of a PPM distinction grounded on environmental or sustainable development reasons could be conjoined into an all-encompassing rule with no need for exceptions.

That can be easily counterargued (HAGE; VERHEIJ, 1994; HAGE; WALTERMANN; AROSEMENA SOLORZANO, 2018). First, the development of such derived rule ignores the shift in the burden of proof when exceptions are in play. In a legal procedure filed by *B* against *A*, the burden to prove that *A* is discriminating a product produced by *B* falls on *B*. In turn, the burden to invoke a defeating condition for the unlawful nature of such discrimination falls on *A*. In other words, while *B* is responsible for presenting reasons for applying the non-discrimination rule, *A* must give reasons for making an exception to that rule. If we try to join the rule with the "exception" into a derived rule, we will be ignoring the law's procedural dimension.

Second, it is not easy to imagine how this derived rule would look like when considering all possible cases for making an exception. Demanding such a formulation would make it extremely complicated to determine the conditions of a rule unless we know precisely to what cases a rule can and cannot be applied. Only by the complete enumeration of the cases to which we can apply a rule we would be

able to locate all the hidden rule conditions. Consequently, rules would become less instrumental for figuring out the consequences of a case, given that we would need first to know if a rule is to be applied before we can even know what the rule's conditions are.

5 Final Remarks

In this paper, we have seen how exceptions can be perceived as defeaters. To do that, we first analysed the WTO's case law concerning the non-discrimination rule and PPM distinctions. We then concluded that such exceptions could be both rebutting as well as undercutting defeaters. This was made possible by abandoning deductive logic and adopting a defeasible logic like RBL. This logic abandons a syllogistic-deductive style of reasoning where premises (conditions) and conclusions are absolutely linked. It gives the centre stage to reasons, allowing the logic to account for the balancing of reasons in favour (pro) and against (con) a conclusion and exceptions to rules.

Thinking of legal reasoning as defeasible reasoning might be the cause of some anxiety. As trained lawyers and scholars, we are habituated to look for firm grounds to deduce conclusions. The problem is that following such a framework proves to be problematic. Legal deductivism gives rise to mismatches between legal practice and our way of rationalising it. The law demands a broad connection between a rule's conditions and its conclusions, but it allows a certain level of contradiction. For that reason, it seems more profitable to look at international law not as a consistent set of deductive axioms but as a toolbox for legal argumentation. This outlook can help us understand international law's expansion and better manage its ever-growing ruleset.

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