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# The Use and Abuse of WTO Law in Investor-State Arbitration: A Reply to Jürgen Kurtz<sup>†</sup>

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The challenge of coherence and consistency in jurisprudence has become a major concern for scholarship in international investment law.<sup>1</sup> The assumption is that such consistency is necessary to increase predictability, reduce transaction costs, and maintain or enhance credibility and legitimacy. Several of the key norms in investment treaties are articulated as quite general standards of treatment, such as Fair and Equitable Treatment and National Treatment. This gives considerable scope to arbitral tribunals to define the contours of investor protection. But these tribunals operate in a decentralized system, without *stare decisis* or appellate review by a

permanent judicial instance. When we turn to the law of the World Trade Organization (WTO) we see by contrast a jurisprudence that has evolved through appellate review premised on *de facto* (if not *jure*) vertical *stare decisis*. It is thus understandable that, where the norms seem similar, investor-state arbitral tribunals might turn to the WTO case law as a common *acquis* or common ground for the interpretation of investment treaties. Moreover, due to the important historical and conceptual links between investment treaties and trade jurisprudence, special attention should be given to the judicial dialogue created by the dependence of investor-state arbitral tribunals on WTO jurisprudence. Kurtz, who has contributed significantly to the understanding of this dialogue in investor-state tribunals' decisions,<sup>2</sup> argues here that instead of using WTO case law as an anchor that promotes coherence and consistency in investment law jurisprudence,

<sup>†</sup> Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents', 20 *EJIL* (2009) 749, <http://ejil.oxfordjournals.org/cgi/reprint/20/3/749>.

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<sup>1</sup> See, e.g., Egli, 'Don't Get Bit: Addressing ICSID's Inconsistent Application of Most-Favored-Nation Clauses to Dispute Resolution Provisions', 34 *Pepp. L. Rev.* 1045, at 1058–59 (2007).

<sup>2</sup> See, e.g., Kurtz, 'National Treatment, Foreign Investment and Regulatory Autonomy: The Search for Protectionism or Something More?', in P. Kahn and T. Wälde (eds), *New Aspects of International Investment Law* (2007) 311.

the arbitral tribunals, through their multiple misunderstandings of the WTO *acquis*, have actually produced greater incoherence and inconsistency in the case of the National Treatment standard.

Yet, any attempt to merge trade and investment jurisprudence should not ignore the unique characteristics of the investment law regime. While the multi-lateral trading system can be described as centralized through its negotiation process and unified dispute settlement system with a final judicial instance, the investment field is much more diffused, both in terms of proliferation of investment treaties with various texts and multiple arbitral tribunals, which, using Kurtz's own words, 'prioritizes party autonomy, speed, and finality over the process of legal reasoning and justification' (at 751).

While it has proven extremely difficult to achieve agreement multilaterally on changes to WTO treaty texts, there is an ongoing evolution in international investment law in light of the arbitration jurisprudence; textual adjustments in new treaties and reassessment of those agreements that have already been signed can be seen as responses to the various tribunals' interpretations of the wording in the prior agreements. For instance, the *Maffezini* decision opened the door to the application of the most-favoured-nation (MFN) protection standard to procedural rights in investment treaties. Consequently, several later investment treaties contained explicit language excluding the procedural and dispute settlement provisions from the application of the MFN provision. The US-CAFTA bilateral investment treaty,<sup>3</sup> for example,

includes a footnote that refers to the negotiation history of the treaty and emphasizes the parties' intention to exclude procedural rights from the MFN protection.<sup>4</sup> Several recent investment treaties<sup>5</sup> include regulatory exceptions to the National Treatment standard in order to avoid the uncertainty concerning the application of National Treatment to regulatory diversity that is the result of decisions such as *Methanex*. This investment treaty evolution has the potential to reduce the level of incoherence and inconsistency in investment law jurisprudence, or at least its impact.

Kurtz, while noting the possibility of investment treaty evolution in light of the case law, may underestimate the difference in character between the WTO law system and the investment realm, in assuming that the selective and discretionary, and sometimes incorrect, use (and non-use) of WTO jurisprudence is necessarily an 'abuse' – as it no doubt would be if an adjudicator *within* the WTO system were to act in such a way, as the Appellate Body of the WTO recently noted in the *Mexico-Steel* case, in articulating the importance of *stare decisis*, both horizontal and vertical, within the WTO system. In a system in which legal rules cannot be adjusted except with

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[\\_Agreements/Bilateral/CAFTA/CAFTA-DR\\_Final\\_Texts/Section\\_Index.html](#) [hereinafter CAFTA-DR].

<sup>4</sup> *Id.* art. 10.4 n.1. This footnote in the CAFTA-DR draft explicitly states that the most-favoured-nation clause 'does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case'.

<sup>5</sup> The new wave of Japanese investment treaties includes explicit exceptions to the national treatment standard. For more on the Japanese BITs see Japan Grows Positive on Bilateral Investment Treaties, *Japan Econ. Rev.*, Feb. 15, 2004.

<sup>3</sup> Dominican Republic-Central America-United States of America Free Trade Agreement, Aug. 5, 2004, available at <http://www.ustr.gov/Trade>

the greatest difficulty through consensual changes or agreed interpretations of the rules, adjudicators bear a particularly heavy burden for ensuring consistency. More fundamentally, as we will suggest below, there are indeed difficulties with the reasoning in both cases that Kurtz considers in depth, *Occidental* and *Methanex*, but the manner in which these tribunals viewed WTO law is more the symptom than the disease – the disease being the shortcomings in the interpretative method of the tribunals in addressing the treaties that they have the jurisdiction to apply, namely the investment treaties that are the basis of the claims in the disputes.

It is vitally important that arbitrators interpret the treaty they are *applying* in a reasoned and consistent way. We should not miscalculate the impact of this potential wrong implementation of various legal methodologies in investor-state arbitral awards. As Kurtz himself mentions in his essay, where states can face the risk of large incorrect awards, the legitimacy of the regime is put in doubt, even to the point that withdrawal from particular treaties may be contemplated. But the manner in which and the extent to which tribunals rely on WTO jurisprudence, may quite understandably vary according to the interpretative challenge they face with respect to the specific investment instrument they are applying. This may be different in the case of a regional trade agreement such as NAFTA, where investment guarantees are set within a broader project of economic integration than in the case of a BIT, for example, between states of vastly different levels of development and very different political and economic systems. Since any attempt in recent years to negotiate investor protection multilaterally has failed, some have

assigned to investment tribunals the role of harmonizing bilaterally and regionally negotiated investment norms.<sup>6</sup> Under the Vienna Convention on the Law of Treaties, Article 31 and 32, however, the first duty of the treaty interpreter is fidelity to the treaty regime it is interpreting, including the context of that particular regime, the *acquis* of practice, and to some extent its negotiating history.

Often for example in the case of apparently inconsistent jurisprudence of different tribunals faced with making sense of the scope of application of MFN or umbrella clauses, the tribunals have emphasized in their interpretations certain textual and/or structural features of the particular treaties they were applying. They may also have been influenced in their approach to the law by the particular facts and subject matter of the dispute before them. Thus, although the tribunals may have been interpreting what would seem to be the same or similar *norms*, mixed results should not be much of a surprise, and need not lead us to conclude that inconsistencies are threatening legitimacy. This goes to what we mean by consistency and coherence. Where previous tribunals have come up with apparently different approaches to similar norms, the treaty interpreter needs to engage in a reasoned conversation with those tribunals, taking into account textual and systemic differences as well as similarities, in articulating the rationale for its own approach in

<sup>6</sup> See Efraim Chalamish, 'The Future of BITs: a de facto Multilateral Agreement?', 34 *Brooklyn Journal of International Law* (2009) (introducing the concept of 'multilateral bilateralism' and discussing the role of investor-state arbitral tribunals in the process of harmonization of international investment law norms).

relation to this complex *acquis*. Different outcomes and approaches do not necessarily imply inconsistency and incoherence. The result of conversations between tribunals may well be an understanding of the grounds of difference rather than a unified jurisprudence; and mutual influence may occur without such a unification being supposed or achieved.<sup>7</sup>

Norms apparently common both to investor protection law and the multi-lateral trading system, such as National Treatment and Most-Favoured-Nation, are understood in a different contextual and textual space when used in the investment law regime. This regime is meant to further a variety of different interests, such as promoting the flow of capital and protection of foreign investment, which requires a different legal reasoning than the one used in the WTO adjudication process. Investor-state arbitral tribunals' task of balancing investors' interests, states' sovereignty and regulatory power can evolve over time in response to changing circumstances and developments in the global economic order. To illustrate this point, the current wave of protectionism against foreign investors, designed to shield national interests during a global economic recession, can encourage arbitrators to give a broader definition to the 'competition factor' of the National Treatment standard.

Moreover, modern investment treaties equip foreign investors with a variety of legal rights, which may have been abstract or vague as part of the old customary international law practice. Some of these rights are perceived as substitutes to traditional rights, such as National

Treatment. The Fair and Equitable Treatment standard can serve as a classical example. A legal norm which received very little attention during the early days of international investment law, it now occupies the time and imagination of legal scholars and forces investor-state arbitral tribunals and treaty negotiators to discuss it seriously as a response to investors' claims.<sup>8</sup> The same regulatory measures can trigger violation of both the Fair and Equitable treatment standard and National Treatment. However, each of these norms can serve as an alternate justification when the tribunal finds itself with limited arguments. Any analysis of the developing investment law jurisprudence should not ignore this unique context.

Kurtz' essay discusses the tribunals' analysis of the National Treatment standard and its jurisprudence in a way that makes this context, which he is very aware of, almost disappear. This is perhaps the inevitable consequence of addressing major systemic issues by focusing on how two tribunals in two disputes have addressed a single isolated interpretative issue. Fair and equitable treatment includes a non-discrimination obligation that may be broader or narrower than National Treatment, but which clearly protects investors to some extent against discriminatory treatment in relation to domestic actors, regardless of whether a competitive relationship exists. In determining how to apply the concept

<sup>7</sup> Teitel and Howse, 'Cross-Judging,' forthcoming *NYU JILP*.

<sup>8</sup> See, e.g., NAFTA Free Trade Commission, *Notes of Interpretation of Certain Chapter 11 Provisions* (31 July 2001), which responded to several investor-state arbitral awards that expanded the standard beyond the minimum customary international law standard.

of a competitive relationship to the National Treatment obligation, tribunals would need to consider not the WTO National Treatment jurisprudence in isolation nor the National Treatment norm in the investment treaty in isolation but rather how both relate to a larger conception of the meaning of discrimination against non-nationals. Just as this concept, as Kurtz himself emphasizes, has been underpinned in the WTO context by the historical preoccupation of the multilateral trading system with the avoidance of protectionism, in the investment context, the meaning of discrimination against non-nationals has been influenced by the tradition of diplomatic protection, which remains foundational to the norm of Fair and Equitable Treatment not found in the WTO treaty system.

With these considerations in mind, we now turn to Kurtz's analysis of the two cases that are the basis of his conclusions, *Occidental* and *Methanex*.

## 1 *Occidental*

According to Kurtz, in *Occidental*, the tribunal 'opposes a role for competition in a likeness inquiry and does so based on a misreading of National Treatment in the GATT-WTO'. Let us examine the analysis of the tribunal in *Occidental* one step at a time. The tribunal began with the text of the treaty and noted that it required that 'in like situations' 'no less favourable treatment' be extended to investors of the other party than that provided to 'investments or associated activities of its own nationals'. The tribunal in our view correctly noted that 'like situations' could extend beyond those situations where the

investor is in direct competition in the same sector with a domestic enterprise of the host country. The tribunal, however, contrary to Kurtz's suggestion, did *not* say that competition was *irrelevant* to whether there was a 'like situation'. It only suggested that 'like situations' were not *limited* to situations where the investor was competing with a domestic enterprise in the same sector. This judgment was connected to the tribunal's view of the purpose of the National Treatment obligation in the treaty. The purpose was to protect investors of the other party from being treated worse than domestic producers generally. At this point the tribunal began to contrast National Treatment in the treaty with National Treatment in the GATT/WTO system. It suggested that in the latter case the purpose was limited to ensuring equality in the competitive relationship between domestic and imported products, and that, true to this purpose, in the GATT/WTO system, 'likeness' would have to be defined by a competitive relationship between the domestic and the imported product. Here we agree with Kurtz that the tribunal's understanding of GATT/WTO law was inadequate: there are National Treatment norms that apply to services and intellectual property and not only to goods, and this suggests a broader purpose for the National Treatment obligation in the GATT/WTO system than the tribunal suggests.

However, it is not obvious to us that this misreading of the GATT/WTO system explains much about the underlying logic of the tribunal's decision. The tribunal began with a strong intuition that 'like situations' is not confined to cases where there is a competitive relationship between the foreign investor and a domestic enterprise in the same sector,

and it turned to GATT/WTO law only to explain why this intuition did not need to be revised on account of the centrality of competition to the National Treatment norm in the GATT/WTO system. The tribunal's intuition was in fact a sound one, given that investment law is rooted in the diplomatic protection of aliens, where the concern with discriminatory conduct towards aliens is in no way limited to situations where they are competing with a specific domestic business. What the tribunal did not consider in its analysis of purpose, however, was that another norm in the treaty, Fair and Equitable Treatment, arguably serves the function of protecting investors against generally discriminatory conduct: the question then is what National Treatment specifically adds. In the NAFTA case of *Loewen*, where the tribunal was confronted similarly with investor protection provisions that contained both a National Treatment and a Fair and Equitable Treatment obligation, the tribunal correctly found (although dismissing the claim on other grounds) that the treatment of the investor animated by prejudice or bias against foreign nationality was to be disciplined as a violation of Fair and Equitable Treatment. The root of the difficulty with the approach of the tribunal in *Occidental* was, therefore, not its misreading of GATT/WTO law but its failure to consider the division of labour between Fair and Equitable Treatment and National Treatment obligations, as developed by recent investment law jurisprudence, in ensuring that generally investors are not worse-treated than domestic actors. Had it done so, the tribunal might well have found that competition is relevant to the application of the National Treatment standard in a way that it is not in the case

of discriminatory conduct that is caught by Fair and Equitable Treatment (as the *Loewen* tribunal found).

## 2 *Methanex*

Just as the broad approach to National Treatment in *Occidental* does not oppose a role for competition in the likeness inquiry (it merely does not view competition as *indispensable* to all National Treatment claims), nor does the narrow approach in *Methanex*. In *Methanex* the tribunal did not *reject* competition: rather, it found that 'likeness' must be established by using a comparator that reflects the closest or most intense competitive relationship. The tribunal thus, in effect, confined the National Treatment obligation to the obligation to treat the investor no less favourably than the enterprise(s) with which it has the most direct or complete competitive relationship. In effect, and here we see merit to Kurtz's critique, this would allow the host state to treat the investor worse than other *indirect* domestic competitors.

Yet, despite the extensive treatment of GATT/WTO law in the decision, it is hard to trace, even with Kurtz's guidance, this particular move of the tribunal to any specific misreading of WTO law. To understand the narrowing of National Treatment by the tribunal in *Methanex* we are better off paying attention to the unusual facts of that case. First of all, while the investor was relying on a competition-based view of 'likeness', at the same time they were producing not the same or a directly competitive product with the comparator domestic enterprises they were proposing, but rather an input (MTBE) in a product (Methanol) that



competed directly with the product produced by those domestic enterprises (Ethanol). This clearly raised a serious jurisprudential issue: How remote or indirect a competitive relationship is acceptable for establishing 'likeness' for National Treatment purposes? This issue arises not as Kurtz seems to suggest by rejecting the role of competition but rather by taking it very seriously indeed. The investor produced evidence that its sales were clearly *affected* by more favourable treatment of ethanol than methanol. But of course there is a vast range of goods and services the demand for which may be affected by measures that alter the competitive relationship between a product for which those goods and services are an input and another product which uses other inputs. In *Methanex*, the tribunal saw an easy way out of the not easy task of crafting a principled approach to remoteness, or the requisite degree of directness or intensity in the competitive relationship, for there just happened to be domestic producers of exactly the same product as *Methanex* was producing – MTBE. This way out led the tribunal to the infelicitous suggestion that National Treatment only applies to the investor's competitive relationship with the *most* obviously direct or complete competitor. However, a careful reading reveals that the tribunal left the door open to reconsideration, in a situation where the facts do not disclose any such obvious most direct or complete competitor. Another contextual dimension of *Methanex* must be borne in mind, especially when we think of Kurtz's critique that the tribunal's narrow approach doesn't account for the possibility that a host country might embed or hide protectionism targeted against the investor in measures

that are explicitly directed to the competitive relationship between another enterprise and the domestic enterprise being protected against the investor. In *Methanex*, the investor had made a great deal of its allegations that in fact there was actual corruption or patronage behind the measures that it complained of; these allegations were found by the tribunal to be groundless. What the tribunal considered the investor's 'crying wolf' may well have put it in a frame of mind suited to a cautious or narrow interpretation of National Treatment, which does not open the door to claims based on remote or indirect impacts on the investor's business of government interventions not explicitly addressed to it.

Finally, we note that in its actual discussion of GATT/WTO law, the tribunal was probably correct that the test for 'likeness' in WTO Appellate Body jurisprudence would *not* be met on the facts of *Methanex*, especially given the significance of physical characteristics and end-uses in that test. *Methanex* appeared to be arguing on the basis of an approach to 'likeness' sometimes proposed in WTO litigation and looked on with favour by some academics and WTO panels, namely an exclusive focus on cross-elasticities, i.e., how changes in the price of one product affect the demand for the other. We agree with Kurtz that a conception of equal competitive opportunities is central to National Treatment, but the tribunal in *Methanex* was correct in perceiving that the jurisprudential test that gives life to this concept is based on a broader range of considerations concerning 'likeness', and indeed of competition in the market, than the technical conception of cross-elasticities. Thus, in the case of *Methanex*, while there is merit to Kurtz's critique of

the tribunal's approach to 'likeness' we do not agree with Kurtz that the tribunal seriously misread WTO law or that its reading of WTO law, right or wrong, is the foundation of its approach.

Kurtz's analysis of the *Occidental* and *Methanex* decisions examines the nature of the judicial dialogue of investor-state arbitral tribunals with GATT/WTO jurisprudence. This dialogue has a special importance in the context of applying 'shared standards' in a diffused legal system such as the investment law regime. Yet, any analysis of investor-state arbitration case law should take into account both the specific facts of the cases and the unique character of the legal regime. A careful review of these legal decisions has led us to the conclusion that they do not emphasize a misreading of WTO law by rejecting the competition factor in the National Treatment obligation, which has been established in previous investment law cases. *Occidental* provides a broad approach to the competition requirement in National Treatment, influenced by the broad spirit of investment protection in investment law. *Methanex*, on the other hand, proposes a narrower approach resulting from the specific facts of the case that make a 'direct competition' analysis impractical. Moreover, both cases highlight internal jurisprudential challenges within the investment realm, rather than WTO law, such as the necessary differentiation between National Treatment and Fair and Equitable standards in the *Occidental* case. Furthermore, the unique character of the international investment law regime can explain this illusive inconsistency and incoherence. The arbitral tribunals' obligation to apply a specific investment treaty with various textual contexts, the conflicting investors

and states' interests involved in investment jurisprudence, and the institutional differences between investment and trade law regimes – all these should be considered by the scholarship which attempts to create a cohesive international economic law.

Finally, Kurtz goes further and explains the inconsistencies in the interpretation of the National Treatment norm in investment treaty jurisprudence as a lack of skills and qualifications on the arbitrators' side. He, thus, proposes to 'look to requiring one or even two members of an investor-state arbitral tribunal to be recognized authorities in the increasingly specialized international economic law components of the broader field of public international law' (at 771). Although international investment law is indeed evolving as an independent legal field in international law, it also requires the integration of other disciplines, such as international human rights law and international environmental law. It is not appropriate to prejudge the mix of specializations in international law that might be appropriate to any particular arbitral panel (or other expertise, such as in anti-trust or science-based regulation). The quality of the WTO Appellate Body's jurisprudence in cases involving competing public values (health and the environment vs. free trade, for instance) may in part be attributable to a broader public international law outlook of a number of its members, who do not come from the insider community of international economic law specialists.<sup>9</sup>

<sup>9</sup> R. Howse and M. Matua, *Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization* (2000).