The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents: A Rejoinder to Robert Howse and Efraim Chalamish

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I thank Robert Howse and Efraim Chalamish for their insightful response to my recent *EJIL* article.[1]

As a starting point, I am in full agreement with them that fair and equitable treatment offers useful contextual guidance to an adjudicator faced with delineating the scope of national treatment in investment law. The fair and equitable standard has been interpreted (often in light of its adoption of customary precepts) as a limit on a very particular type of discrimination. If this is correct, then we must logically turn our mind to what *other* forms of discrimination are to be countered by national treatment (otherwise we face a problem of redundancy). As it happens, this point buttresses my criticism of the *Methanex* award. Howse and Chalamish identify the failure of the *Occidental* Tribunal to seriously consider the 'division of labour' between the fair and equitable standard and national treatment. But this flaw appears also in the *Methanex* award. In fact, given the conflicting claims made of the fair and equitable standard in that case,[2] one might suggest the error is even more egregious in *Methanex*.

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1 Kurtz, 'The Use and Abuse of WTO Law in Investor-State Arbitration: Competition and its Discontents', 20 *EJIL* (2009) 749.

2 *Cf. Methanex Corporation v USA,* Final Award (UNCITRAL, 3 Aug. 2008) at Pt IV, Chp. C, paras 14 and 25 (ruling that NAFTA Article 1102 on national treatment 'offers full play for a principle of non-discrimination' in the investment chapter 11 of the NAFTA suggesting that NAFTA Article 1105 on fair and equitable treatment has no concern with discrimination of any sort) *with* para 26 (recognizing that 'customary

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While important, these broader points are strictly ancillary to the argument I present in the *EJIL* article. I do not offer a normative claim on how national treatment should be read. My objective is more modest: to identify and chart interpretative flaws in the use of WTO law by select investor-state arbitral tribunals law in construction of *their* claims on national treatment. Howse and Chalamish see this use of WTO law as only a symptom with the underlying disease comprising shortcomings in interpretative method. But the pathology here is not confined to interpretative shortcomings. These flaws are part of a broader failure to construct an explicit theory on what national treatment does and, critically, what specific type of risk (faced by a foreign investor) it is to be matched against. In my article, I trace the manner in which earlier tribunals – especially *SD Myers* and *Pope & Talbot* – managed to offer a type of theory and did this on the basis of a robust (if not perfect) interpretative method. In contrast, the *Occidental* and *Methanex* tribunals make no such attempt and present instead the worst form of ends-driven reasoning, embedded within extensive if superficial reliance on WTO law. Cases can, of course, be decided correctly without a clear explicit theory. But ends-driven jurisprudence will normally lead to uncertainty (at best) and incoherence (at worst) and when it does so, fails a basic function of law.

This absence of a theory on the role of national treatment is especially apparent in *Occidental.* We are merely provided with a claim that the 'purpose of national treatment is to protect investors compared to local producers' and, as a result, the relational condition of likeness cannot be confined to competitive interactions (between domestic and foreign actors).[3] The Tribunal is presenting its intuitive sense of the purpose of national treatment without testing that claim against objective indicators in the text, other provisions in the treaty and its preambular recitals (as required by the rules on treaty interpretation). Instead, and as I trace in my article, all we are offered is superficial reliance on supposed differences with WTO law as further support of this intuitive claim.

Clearly, protection is *a* goal pursued by the system as a whole and, as noted by Howse and Chalamish, the customary law that preceded and accompanies the construction of investment treaty norms. But this tells us little of what specific risks are to be countered by national treatment and why competition should not play a role in that analysis. This intuition eventually cashes out as an extraordinarily broad reading of the scope of national treatment. In a sparse single paragraph, the Tribunal rules that adverse effects suffered by the foreign investor *vis-à-vis* domestic exporters were sufficient to constitute breach.[4] Thus, unlike earlier tribunals that had clearly endorsed a role for

international law . . . has decided that some differentiations are discriminatory' which as NAFTA Article 1105 incorporates aspects of customary law would suggest that this article limits certain forms of discrimination).

[3] *Occidental Exploration and Production Company v. Ecuador,* Final Award (UNCITRAL, 1 Jul. 2004), at para 174.

[4] *Ibid.*, at para 177.

protectionist purpose, the *Occidental* Tribunal was prepared to find breach simply on the basis of differential impact of the measure in question. There is a serious flaw in this juridical move which is justified only by the investment treaty adjudicator's *personal* intuition of the role of national treatment in the system and its supposed difference to WTO law. There is no general exception provision (such as GATT Article XX) in most investment treaties to militate against overreach in the application of such a broad test. We are left then with an outcome – which looks solely to harm suffered by the foreign investor and excludes consideration of the motivations of the regulating state – that seriously risks invalidating measures that should be viewed as legal. The highly questionable method and legal test applied in *Occidental* cannot be dismissed as a mere outlier or by the formal notion that investor-state tribunals operate in a system without rules of *stare decisis*. There is explicit citation and endorsement of its broad disparate impact approach in a sizeable number of later cases.[5] Even at this relatively early stage in the development of the system, poor juridical outcomes are acquiring purchase far beyond the specific fact patterns and parties to a given dispute.

When it comes to *Methanex*, Howse and Chalamish are unconvinced that a misreading of WTO law has a foundational impact on that award. In contrast, I see a loose type of deductive logic that is central to the *Methanex* award. We have a poorly constructed syllogism at play in *Methanex* that can be summarized as follows: (i) competition is a condition of likeness in a national treatment inquiry in WTO law *solely* because of the use of the phrases such as 'like product' in Article III of GATT; (ii) national treatment when applied to foreign investors in NAFTA Article 1102 uses the textually dissimilar notion of 'like circumstances'; (iii) therefore, a full conception of competition between foreign and domestic actors need not play a role in determining whether they stand 'in like circumstances' for the purposes of NAFTA Article 1102.[6] There are multiple flaws in this sequence with the most obvious – as I suggest in my article – that premise (i) is incorrect as a matter of WTO law. It seems to me almost impossible to read *Methanex* without the vivid impression that the Tribunal is obsessed with distancing its chosen approach (of locating an 'identical' domestic comparator) from what it perceives to be taken in the WTO. For those unfamiliar with the case, here is a crude metric that might help in painting the picture. There are a total of 21 paragraphs in which the Tribunal explains its ruling on national treatment;[7] a full 13 of these 21 are devoted to extensive (and in my view, largely irrelevant) analysis of

[5] E.g., *Siemens A.G. v. Argentina,* Award (ICSID, 6 Feb. 2007), at paras 320–321; *Corn Products International, Inc. v. Mexico,* Award (ICSID, 15 Jan. 2008), at para. 138; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Pakistan,* Award (ICSID, 27 Aug. 2009), at paras 389–390.

[6] I am basing this construction on paras 29–38 (inclusive) of Pt IV, Chp. B of the *Methanex* award. *See Methanex, supra* note 2.

[7] *Ibid.*, at paras 17–38. I am omitting paras. 11–16 (inclusive) from this count because in these paragraphs, the Tribunal is simply restating and summarizing the submissions of the disputing parties.

WTO-based concepts.[8] What we do *not* find is the sort of sophisticated and contextual approach on the intersection with fair and equitable treatment that Howse and Chalamish rightly propose might be critical in offering a normative claim on national treatment. I leave the reader to draw their own conclusion.

Howse and Chalamish go on to suggest that a careful reading of the award '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'. I am, once again, in agreement with them. Some of the recent case-law has moved in that direction and reverted to a fuller competition-based reading for national treatment.[9] Yet the scorecard should leave us with cause for concern. Not all tribunals have recognized the subtle invitation implicit in the *Methanex* award. Others have *only* taken from *Methanex* the simplistic notion that national treatment 'must be interpreted in an autonomous manner independently from trade law considerations' as justification for their own strained and implausible readings.[10]

Finally, Howse and Chalamish point the reader to a contextual dimension central to the facts of *Methanex*. They raise the claimant's unsupported allegations of corruption and suggest this might 'have put [the Tribunal] in a frame of mind suited to cautious or narrow interpretation of National Treatment'. But there are a multitude of options by which an adjudicator can express its disapproval of speculative litigation and at the margins aim to discourage similar claims in the future. This particular strategy – artificially narrowing the scope of national treatment by searching for an 'identical' domestic comparator to the foreign investor – appears disproportionate to that goal. If adopted by other cases, it runs a very real risk of failing to ferret out hidden forms of discrimination and thereby allowing measures that should be declared illegal. There are far more targeted mechanisms which can be used to discourage problematic litigation, not least an award of full costs against the losing party. As it happens, the *Methanex* Tribunal chose to *also* employ that cost strategy and did so with explicit reference to the claimant's poor handling of the case.[11]

[8] *Ibid.*, at paras. 25–38 (inclusive).

[9] *Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. Mexico,* Award (ICSID, 21 Nov. 2007), at paras 202–204; *Corn Products, supra* note 5, at paras 121–123

[10] *Bayindir, supra* note 5, at para 389 and 402.

[11] *Methanex, supra* note 2, at Pt II, Chp I, p. 29 (criticizing the investor's conduct of the case as having 'offended basic principles of justice and fairness required of all parties in every international arbitration') and Pt V (awarding costs against the losing investor).