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National Treatment: New Developments

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Clauses on national treatment are part of the standard repertoire of bilateral investment treaties. In their typical version, the clauses state that the foreign investor is accorded treatment no less favourable than that which the host state accords to its own investors.[1] In the past decades, the wording of the clauses has essentially remained the same. This is true at least for the practice of European states. The U.S. treaties specify that the clause will apply when “like situations” exist. Presumably, this will not affect the meaning of the clause, even though the change in U.S. practice in recent years from the term “in like situations” to “in like circumstances” may indicate that for the U.S. Government even between these two versions nuances exist which deserve attention.[2]

The relative homogeneity of the clauses in BIT practice may explain why it has been said that the standard may be easier to apply than other standards. That assumption, however, seems to be more misleading than correct.

Initially, it will be noted that today it is generally agreed that the application of the clause is fact-specific. Usually, as in the context of fair and equitable treatment, such a statement warns that the standard resists abstract definitions and that no hard and fast approach to interpreting the clause will be found. The reason will be seen immediately when the two major components of the rule are considered.

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1 For a review of different national-treatment-clauses in bilateral investment treaties *see Dolzer/Stevens*, Bilateral Investment Treaties (1995), pp. 63-65. According to Lauder v. Czech Republic, Award of 3 September 2001 (Briner, Cutler, Klein), a discriminatory measure is one that fails to provide national treatment (para. 220). However, it is not clear whether the two standards are in every respect identical.

2 Article 1102 of the North American Free Trade Agreement (NAFTA) also refers to “like circumstances”. Article 1102 (1) NAFTA reads: “Each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.”

First, it has to be decided whether the foreign investor and the domestic investor are placed in a comparable setting, or, in U.S. terminology, in "a like situation" or in "like circumstances". Secondly, it has to be determined whether the treatment accorded to the foreign investor is at least as favourable as the treatment accorded to domestic investors. Behind these two seemingly simple parameters of the clause lie complex issues, among them being the most prominent:

- Which policies of the host country may justify differential treatment between the foreigner and the national?
- Is it necessary in this context to distinguish between *de jure* and *de facto* discrimination?
- What role, if any, will be attributed to the intentions which a government pursues with the act that allegedly discriminates? What evidence is required to demonstrate "intention"?
- Does a violation of the standard only occur on the basis of nationality-based differentiations? What is the significance of a differentiation which is not nationality-based but is not justifiable on rational grounds?
- When the foreign investor is compared with the domestic investor, is it necessary to identify a domestic investor who is in exactly the same business, or is it sufficient to point to an investor who is not in the same line of business but in the same economic sector? How do we define "business" and "sector" in this context?

Recent case law does not answer all these questions.

The scope of activities of the national investors to be compared with those of a claimant remains controversial. In *Feldman v. Mexico*, "in like circumstances" was interpreted to refer to the same business, i.e. the exporting of cigarettes,[3] whereas the Tribunal in *Occidental v. Ecuador* referred to local producers in general, "and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken".[4]

As to the circumstances under which different treatment is allowed under NAFTA, *S.D. Myers v. Canada* stated that the "assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest."[5] In *GAMI v. Mexico*, the tribunal underlined, in para. 115, that the relevant measures were not geared towards the foreign investor.[6]

Concerning the role of intent on the part of the host government to favor the national, the tribunal in *S.D. Myers v. Canada* seems to focus on the practical impact rather than on intent.[7] In the context of the

3 Marvin Feldman v. Mexico, Award of 16 December 2002 (Kerameus, Covarrubias Bravo, Gantz), 18 ICSID-Rev.- FILJ 488 (2003), para. 171.

4 Occidental Exploration and Production Company v. Ecuador, Award of 1 July 2004 (Orrego Vicuna, Brower, Sweeney), para. 173.

5 S.D. Myers Inc. v. Canada, First Partial Award of November 13, 2000 (Hunter, Chiasson, Schwartz), 40 ILM 1408 (2001), para. 250.

6 GAMI v. Mexico, Award of 15 November 2004 (Reisman, Lacarte Muró, Paulsson), 44 ILM 545 (2005).

7 S.D. Myers Inc. v. Canada (cit. Fn 5), para. 254: "Intent is important, but protectionist intent is not necessarily decisive on its own. The existence of an intent to favour nationals over non-nationals would not give rise to a breach of Chapter 1102 of the NAFTA if the measure in question were to produced no

impact, the decision asks whether the host state could have achieved its goal with alternative measures that would have a less restrictive impact on the foreign investor.[8] On the other hand, the *Methanex* decision includes language which may be understood to require evidence of intent to discriminate.[9] Concerning the necessity to establish nationality-based discrimination, the *Feldman* ruling suggests that in view of the practical difficulty to produce evidence of this kind it is sufficient to produce proof of discrimination and not necessary to show discrimination based on nationality.[10]

In general, there seems to be agreement that the overall legal context in which a measure is placed will also have to be considered when "like circumstances" are identified and, when the identity or difference of treatment is examined.

In the context of NAFTA, the *S.D. Myers* decision has ruled that the legal context of Chapter XI requires considering the NAFTA framework as a whole.[11] Even broader, it was assumed that OECD principles on foreign investment as reflected in the OECD Declaration on International and Multinational Enterprises has to be considered when it comes to define "a like situation".[12] The 1993 review of the Declaration points to the "same sector" and allows differentiations based on national policy grounds if the national objectives are not contrary to the principle of national treatment.

Currently pending cases raise the issue whether labour laws may play a role in establishing the case for a violation of national treatment if these laws keep wages down and thereby prevent equal opportunities for the foreign investor. Also, a current NAFTA Tribunal considers a case in which a Canadian entity

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adverse effect on the non-national complainant. The word "treatment" suggests that practical impact is required to produce a breach of Article 1102, not merely a motive or intent that is in violation of Chapter 11".

8 *Id*. at para. 255.

9 Methanex v. United States, Award of 3 August 2005 (Veeder, Reisman, Rowley), 44 ILM 1345 (2005), Part IV, Chapter B, para. 12: "In order to sustain its claim under Article 1102(3), Methanex must demonstrate, cumulatively, that California intended to favour domestic investors by discriminating against foreign investors and that Methanex and the domestic investor supposedly being favored by California are in like circumstances."

10 Marvin Feldman v. Mexico (cit. Fn 3), paras 181: "It is clear that the concept of national treatment as embodied in NAFTA and similar agreements is designed to prevent discrimination on the basis of nationality, or "by reason of nationality." (U.S. Statement of Administrative Action, Article 1102.) However, it is not self-evident, as the Respondent argues, that any departure from national treatment must be explicitly shown to be a result of the investor's nationality. There is no such language in Article 1102. Rather, Article 1102 by its terms suggests that it is sufficient to show less favorable treatment for the foreign investor than for domestic investors in like circumstances. […] For practical as well as legal reasons, the Tribunal is prepared to assume that the differential treatment is a result of the Claimant's nationality, at least in the absence of any evidence to the contrary." See also Occidental v. Ecuador (cit. Fn 4), para. 177 (focusing on the "result of the policy enacted").

11 S.D. Myers v. Canada (cit. Fn 3) at para. 250: "The Tribunal considers that the interpretation of the phrase "like circumstances" in Article 1102 must take into account the general principles that emerge from the legal context of the NAFTA, including both its concern with the environment and the need to avoid trade distortions that are not justified by environmental concerns. The assessment of "like circumstances" must also take into account circumstances that would justify governmental regulations that treat them differently in order to protect the public interest. The concept of "like circumstances" invites an examination of whether a non-national investor complaining of less favourable treatment is in the same "sector" as the national investor. The Tribunal takes the view that the word "sector" has a wide connotation that includes the concepts of "economic sector" and "business sector"."

12 *Id*. at para. 248.

provides subsidies to Canadian companies only in order to promote the Canadian audio-visual culture. If the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions was in force, one question would be whether such a differentiation would be allowed or even promoted.[13]

In *S.D. Myers v. Canada*, the Tribunal seems to have assumed that subsidies are allowed to promote national policies.[14] The *Oscar Chinn Case* decided by the Permanent Court of International Justice also dealt with measures by a host state to support its transport industry and, in a majority vote, upheld the legality of the Belgian measures in the light of a treaty which provided for "competitive equality".[15] Here, the special legal context of a BIT and of the relevant treaty in the *Chinn Case* may have to be examined in a contemporary context in order to determine the persuasive power of the *Chinn Case* today.[16]

Over the past five years, the most contentious issue concerning the significance of the overall legal context concerned the relevance of WTO law and its jurisprudence on "like products" for the interpretation of a BIT. The earlier NAFTA decisions in *S.D. Myers*[17], *Pope & Talbot v. Canada*[18] and *Feldman v. Mexico*[19] seemed to assume that the relevant WTO jurisprudence was indeed suitable to guide NAFTA tribunals.

Meanwhile, and this is probably the most significant development in the understanding of the national treatment clause in the past years, the tide seems to have turned against considering WTO jurisprudence in the interpretation and application of a BIT. This is important because the jurisprudence of the WTO had developed in a specific direction which called for a distinct approach in which the Government making a differentiation was obliged to bear the burden of proof for the legitimacy of the policy underlying the rules. It is at least open to question whether such an approach will be appropriate in an analysis which focuses on the language employed in bilateral investment treaties.

An initial blow against the previous jurisprudence came in 2004 when the Tribunal in *Occidental v. Ecuador* rejected the argument that the WTO jurisprudence should be applied to a BIT between Ecuador and the U.S.A.[20] The Tribunal observed that while the WTO is concerned with "like products", the BIT

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13 In this regard, it is not sure whether Article 20 of the Convention will be able to resolve all existing doubts. Article 20 of the UNESCO Convention reads: "(1) Parties recognize that they shall perform in good faith their obligations under this Convention and all other treaties to which they are parties. Accordingly, without subordinating this Convention to any other treaty, (a) they shall foster mutual supportiveness between this Convention and the other treaties to which they are parties; and (b) when interpreting and applying the other treaties to which they are parties or when entering into other international obligations, Parties shall take into account the relevant provisions of this Convention. (2) Nothing in this Convention shall be interpreted as modifying rights and obligations of the Parties under any other treaties to which they are parties."

14 S.D. Myers v. Canada (cit. Fn 3), para. 255: "CANADA's right to source all government requirements and to grant subsidies to the Canadian industry are but two examples of legitimate alternative measures."

15 The Oscar Chinn Case, UK v. Belgium (12 December 1934), 1934 *PCIJ Rep*, Series A/B, No. 63.

16 *See*, for one position, *T. Weiler*, Saving Oscar Chinn: Non-Discrimination in International Investment Law, in: Horn (ed.), Arbitrating Foreign Investment Disputes – Procedural and Substantive Legal Aspects (2004), pp. 159-192.

17 S.D. Myers v. Canada (cit. Fn 5) at paras 244-247.

18 Pope & Talbot Inc. V. Government of Canada, Award of 10 April 2001 (Dervaird, Greenberg, Belman), 122 ILR (2002), 352, at paras 45-63, 68-69.

19 Marvin Feldman v. Mexico (cit. Fn 3) at para. 165.

20 Occidental Exploration and Production Company v. Ecuador (cit. Fn 4).

addresses “like situations” and added that the WTO policies concerning competitive and substitutable goods could not be treated the same way as the BIT policies concerning “like situations”.[21]

The second strike, even sharper than the first one, came in August 2005 with the *Methanex* ruling and its detailed analysis clause-by-clause of the various parts of NAFTA as compared to the language in the WTO.[22] The Tribunal highlights that the NAFTA rules use different language in different parts. In part, the language is the same as in the WTO, but not so in Chapter XI. The conclusion in *Methanex* is that the NAFTA parties were aware of the difference in language and that in NAFTA Chapter XI concerning foreign investment the Parties deliberately referred to “like circumstances” as opposed to “like goods”. In the light of traditional rules of interpretation, the *Methanex* Tribunal ruled against this background that “like circumstances” in the context of a foreign investment cannot be considered to be identical with the concept of “like goods” and that therefore the NAFTA investment provisions had to be interpreted in an autonomous manner, independent from trade law considerations.[23]

If this trend of divergence between trade and investment law continues, the discussion will sharpen whether this dual approach to national treatment in international economic law needs to be revisited and whether, one way or another, the concepts should be merged. From the point of view of legal clarity and foreseeability, such a revision would be helpful. Given the current divergent wordings of WTO law and investment law, it cannot be assumed that investment tribunals or the WTO dispute settlement bodies will in the future change direction to allow for a homogeneous jurisprudence. Thus, the more practical question is whether the competent Governments wish to revisit the two legal regimes and decide whether the different wordings reflect different underlying policies which deserve to be protected. If this is not the case, and the Governments decide that it would be preferable to establish a single regime, a mechanism would also have to be created which would ensure consistency of jurisprudence in trade and in investment cases. For the time being, the investors, the traders and the Governments will have to live with the dual system.

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21 *Id*. at para. 176. In the particular case, the tribunal found that the purpose of national treatment was rather the opposite of that under GATT/WTO: „ …it [the national treatment] is to avoid exporters being placed at a disadvantage in foreign markets because of the indirect taxes paid in the country of origin, while in GATT/WTO the purpose is to avoid imported products being affected by a distortion of competition with similar domestic products because of taxes and other regulations in the country of destination“.

22 Methanex v. USA (cit. Fn 9), Part IV Chapter B at paras 30-35.

23 *Id*. at paras 35, 37.