



# **APEC-UNCTAD REGIONAL TRAINING COURSE ON THE CORE ELEMENTS OF INTERNATIONAL INVESTMENT AGREEMENTS IN THE APEC REGION**

## **Presentations**

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Asia Pacific Economic Cooperation Secretariat  
35 Heng Mui Keng Terrace  
Singapore 119616  
Tel: (65) 68919 600 Fax: (65) 68919 690  
Email: [info@apec.org](mailto:info@apec.org)  
Website: [www.apec.org](http://www.apec.org)

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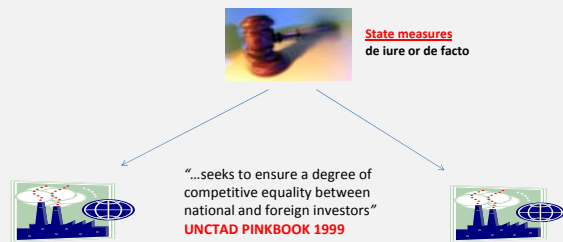


APEC-UNCTAD Regional Training Course  
**National Treatment**

**Alejandro Faya-Rodríguez**  
 Consultant, Counsellor-at-law, MJur, MPP  
 Professor of International Law on Foreign Investment

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## Object and purpose



## Legal qualifications

- ✓ **Relative standard:** case-by-case comparison
- ✓ **Similar objective situations**
- ✓ **Discrimination by reason of nationality**

## Negotiation approaches: “basic coverage”

Elemento	Efecto
<b>Pre-establishment</b>	Grants access rights. It applies to the “establishment, expansion and acquisition”.
<b>Post-establishment</b>	One the investment is made “under the law”. Applies to activities such as the “administration, use, operation, administration and disposal”.
<b>Investment</b>	The protection is restricted (e.g. China and Australia).
<b>Investment/investor</b>	The protection covers both vehicles (common practice).
<b>Like circumstances</b>	Part of the normal functioning of the NT clause, whether included or not.
<b>Exceptions</b>	They differ depending on the pre or post-establishment approach. There are general and specific exceptions.

## Article 75 Japan-Malaysia FTA

1. Each Country shall accord to **investors** of the other Country and to their **investments** treatment no less favourable than that it accords **in like circumstances** to its own investors and to their investments with respect to the **establishment, acquisition, expansion, management, operation, maintenance, use, possession, liquidation, sale, or other disposition** of investments (hereinafter referred to in this Chapter as “investment activities”).
- 2...
- 3...

## Russia-Thailand BIT (2002)

### Article 3 Treatment of Investments

1. Each Contracting Party shall accord in its territory to investments made in accordance with its laws by investors of the other Contracting Party **treatment no less favourable** than that it accords to investments of its own investors or to investments of investors of any third State, whichever is more favourable.
2. Each Contracting Party shall in its territory accord investors of the other Contracting Party, **as regards management, maintenance, use, enjoyment or disposal of their investments, treatment no less favourable** than that which it accords to its own investors or investors of any third State, whichever is more favourable.

## Exceptions

### Pre-establishment

- ✓ Existing and future measures
- ✓ Government procurement
- ✓ Subsidies

### Post-establishment

- ✓ **Regional Economic Integration Organizations** ("REIO"): e.g. free trade areas, customs or monetary unions, labor markets
- ✓ **Taxation**: International agreements and/or domestic law

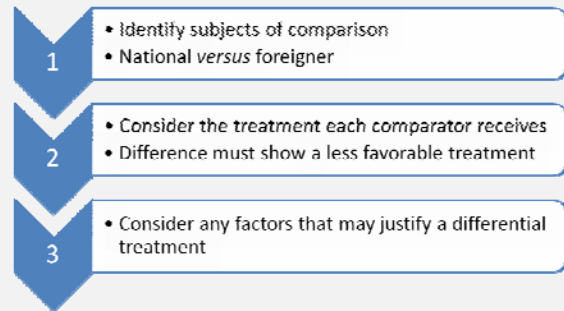
## Article 10.9 Korea-Singapore EFTA

1. Articles 10.4, 10.7, and 10.8 shall not apply to:
  - (a) any **existing non-conforming measure** that is maintained by a Party as set out in its Schedule to Annex 9A;
  - (b) the continuation or prompt renewal of any non-conforming measure referred to in paragraph (a); or
  - (c) ...
2. Articles 10.4, 10.7 and 10.8 shall not apply to any measure that a Party adopts or maintains with respect to **sectors, sub-sectors or activities, as set out in its Schedule to Annex 9B**
3. ...
4. Articles 10.4 and 10.8 shall not apply to:
  - (a) **government procurement** by a Party; or
  - (b) **subsidies** or grants provided by a Party, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party, including government-supported loans, guarantees and insurance.
5. ...

## Article 129 Peru-China FTA

1. ...
1. ...
1. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment:
  - (a) to **socially or economically disadvantaged minorities and ethnic groups**; or
  - (b) involving **cultural industries** related to the production of books, magazines, periodical publications, or printed or electronic newspapers and music scores.
4. ...

## Jurisprudence



## STEP 1: basis of comparison

### 1. Same business or economic sector

...article 1102 [NAFTA] "invites an examination of whether a non-national investor complaining of less favorable treatment is in the **same business sector or economic sector** as the local investor..." **PCB waste**

SD Myers v Canada

## STEP 1: basis of comparison

### 2. Same economic sector & activity

SECTOR & ACTIVITY	CASE
cigarettes: producers/resellers	<b>Feldman v Mexico</b>
cotton commercialization: free market / fixed price governmental programs	<b>Champion Trading v Egypt</b>
Package delivering: postal / courier	<b>UPS v Canada</b> * With dissident opinion
steel producers: with respect to their potential use in a highway project	<b>ADF v USA</b>

## STEP 1: basis of comparison

### 3. "Less like" but available comparators

"...it would be as perverse to ignore identical comparators if they were available and use comparators that were less like, as it would be perverse to refuse to find and apply less like comparators when no identical comparators exist".

Methanol/Ethanol

Methanex v USA

"In like situations cannot be interpreted in the narrow sense advanced by Ecuador as the purpose is to protect investors as compared to local producers, and this cannot be done by addressing exclusively the sector in which that particular activity is undertaken". Local producers/exporters of cigarettes

Occidental v Ecuador

## STEP 1: basis of comparison

### 4. Direct competitors

"ALMEX and the Mexican sugar industry are in like circumstances. Both are part of the same sector, competing face to face in supplying sweeteners to the soft drink and processed food markets".

ADM v Mexico

"We conclude that where the products at issue are interchangeable and indistinguishable from the point of view of the end-users, the products, and therefore the respective investments, are in like circumstances. Any other interpretation would negate the effect of the non-discriminatory provisions..."

CPI v Mexico

Sugar/High fructose corn syrup

## STEP 2: less favorable treatment

#### • Damage must be

- real, not hypothetical, and
- verifiable

"The question may be raised whether the equality of treatment accorded by the Respondent to the Investor and to US steel manufacturers and steel fabricators was more apparent than real... evidence of discrimination, however, is required".

ADF v USA

## STEP 3: finding legitimate causes for differentiated treatment

"...the interpretation of the phrase like circumstances in Article 1102 must take into account...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".

SD Myers v Canada

"...it is clear that the concept of national treatment as embodied in NAFTA and similar arrangements is designed to prevent discrimination on the basis of nationality, or by reasons of nationality".

Feldman v Mexico

## STEP 3: Finding legitimate causes for differentiated treatment

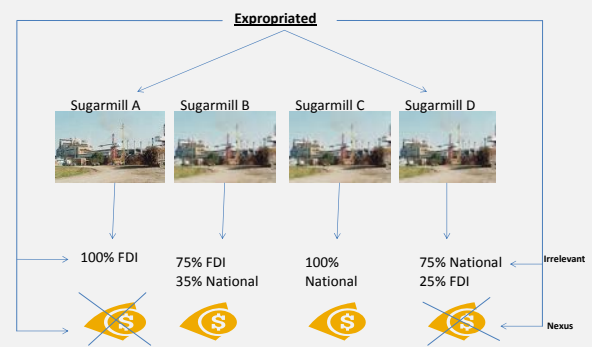
"Differences in treatment will presumptively violate Article 1102(2), unless they have a reasonable nexus to rational government policies that: (i) **do not distinguish, on their face or de facto, between foreign-owned and domestic companies**, and (2) do not otherwise unduly undermine the investment liberalizing objectives of NAFTA".

Pope & Talbot v Canada

No equality when it comes to illegality!

Thunderbird v Mexico

## Example



## Other relevant elements

- **Burden of proof:**
  - The investor must establish at least a “*prima facie*” case
  - The burden then shifts to the State as to justify any legitimate ground for differentiated treatment
- **Intent:**
  - Highly important for evidence purposes
  - However, no need to prove a “subjective intent”, as the “effect test” may be enough
  - But necessity of evidence on the negative effect remains

## Conclusions

- The NT clause continues to be an essential element of BITs. Its purpose is to guarantee equality of competitive conditions, linked to material treatment
- Advisable to draft the standard in a precise manner
- When pre-establishment is granted, exceptions do provide an important degree of flexibility for governmental public policies
- When it comes to the standard application, there is an interesting jurisprudential pattern (3-Steps), mainly from the NAFTA

## Conclusions

- However, there is an important degree of flexibility, especially for Step 1 (identifying the comparators)
- **Of paramount importance:**
  - to compare what is reasonably comparable, and
  - safeguard measures and policies that do not discriminate by reason of nationality

Thanks!

[afaya@afconsulting.com.mx](mailto:afaya@afconsulting.com.mx)

[afayardz@gmail.com](mailto:afayardz@gmail.com)