



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

## **Presentations**

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UNCTAD-APEC  
REGIONAL TRAINING COURSE

# National Treatment

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- II. Regional practice and prospect



# I. The Chinese practice and rationale

- The practice
- The rationale



# The Practice: Evolution of NT provisions

1. No NT
2. Best Effort NT
3. Substantially Qualified NT
4. NT Subject to Local Law
5. NT Subject to Grandfather Clause
6. Full Post-Admission NT



# 1. No NT

- Most Chinese BITs so far. (more than 70 out of the 120 plus Chinese BITs)
- Why?



## 2. Best Effort NT

- “...either Contracting Party shall *to the extent possible*, accord treatment *in accordance with the stipulations of its laws and regulations* to the investment of nationals or companies of the other Contracting Party the same treatment as that accorded to its own nationals or companies.”



## 3. Substantially Qualified NT

- “For the purpose of the provisions of paragraph 2 of Article 3 of the Agreement, it shall not be deemed “treatment less favourable” for either Contracting Party to accord discriminatory treatment, *in accordance with its laws and regulations*, to national and companies of the other Contracting Party, in case it is really necessary for the reasons of public order, national security or *sound development of national economy*.”[1]

[1] Japan BIT, Point 3 of the Protocol.





## 4. NT Subject to Local Law

- *Without prejudice to its laws and regulations,* each Contracting Party shall accord to investments and activities associated with such investments by the investors of the other Contracting Party treatment not less favourable than that accorded to the investments and associated activities by its own investors.[1]  
[1] Latvia BIT, Article 3(2).



# **5. NT Subject to Grandfather Clause: Mexico BIT 2008**

## **Article 3 National Treatment**

- 1. Without prejudice to its laws and regulations at the time the investment is made, each Contracting Party shall accord to investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the operation, management, maintenance, use, enjoyment or disposal of investments.**
- 2. Without prejudice to its laws and regulations at the time the investment is made, each Contracting Party shall accord to investments of investors of the other Contracting Party treatment no less favorable than that it accords, in like circumstances, to investments of its own investors with respect to the operation, management, maintenance, use, enjoyment or disposal of investments**



# New Zealand FTA Ch 11 2008

## Article 138 National Treatment

Each Party shall accord to investments and activities associated with such investments, with respect to management, conduct, operation, maintenance, use, enjoyment or disposal, by the investors of the other Party treatment no less favourable than that accorded, *in like circumstances*, to the investments and associated activities by its own investors.



# New Zealand FTA Ch 11 2008

## Article 141 Non-Conforming Measures

- 1. Article 138 does not apply to:
  - (a) any existing non-conforming measures maintained within its territory;
  - (b) the continuation of any non-conforming measure referred to in subparagraph (a);
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
- 2. The Parties will endeavour to progressively remove the non-conforming measures.
- 3. Notwithstanding anything in paragraph 1, Article 138 shall not apply to any measure, which with respect to each Party, would not be within the scope of the national treatment obligations in any of that Party's existing bilateral investment treaties.



# China-Peru FTA 2009

## **Article 129: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the management, conduct, operation, and sale or other disposition of investments.
3. Notwithstanding paragraphs 1 and 2, the Parties reserve the right to adopt or maintain any measure that accords differential treatment to socially or economically disadvantaged minorities and ethnic groups.<sup>12</sup>

## **Article 130: Non-Conforming Measures**

1. Article 129 (National Treatment) does not apply to:
  - (a) any existing non-conforming measures maintained within its territory;
  - (b) the continuation of any non-conforming measure referred to in subparagraph (a); or
  - (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not increase the non-conformity of the measure, as it existed immediately before the amendment, with those obligations.
2. The Parties will endeavour to progressively remove the non-conforming measures.



## 6. Full Post-Admission NT?

- Each Contracting Party shall apply on its territory to the investors of the other Party, with respect to their investments and activities related to the investments, a treatment not less favourable than that granted to its investors, or the treatment granted to the investors of the most favoured nation, if the latter is more favourable. ...[1]



[1] Seychelles BIT, Article 5.



# Summary of Chinese practice

- No pre-establishment NT
- Post-establishment NT substantially qualified (general policy)
  - Best effort
  - Domestic law
  - Grandfather clause



# The rationale

- Planning economy legacy
  - Socialist legacy
  - The “comparator”/ “like investor” problem
- General level of economic development
  - Strong enough?





## II. Regional practice and prospect

1. Practice: APEC Non-Binding Investment Principles:
  - **National Treatment**
  - *With exceptions as provided for in domestic laws, regulations and policies, member economies will accord to foreign investors in relation to the establishment, expansion, operation and protection of their investments, treatment no less favourable than that accorded in like situations to domestic investors.*



# Compromise

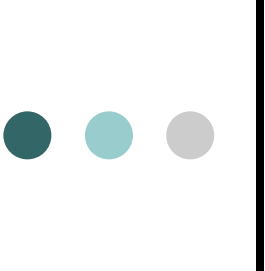
- Pre and post establishment commitments;
- “like circumstances” qualification;
- Substantial restriction:
  - *“With exceptions as provided for in domestic laws, regulations and policies,”*



# APEC Study 2007

“APEC IIAs show consistency in the approach to drafting national treatment provisions, although they vary in terms of extending it to pre-establishment phase or limiting it to post-establishment phase of an investment”

-----APEC: Identifying Core Elements in Investment Agreements in the APEC Region, Dec 2007



# The way ahead: A more liberal NT Provision?

The key lies in pre-establishment NT commitments:

- A negative list (NAFTA) approach?
  - Most liberal, but
  - also most demanding
- A positive list (GATS) approach?
  - Eg. Australia-Thailand BIT and New Zealand Thailand BIT



# Australia-Thailand FTA

## Art 904

- **Pre-establishment National Treatment**

In the sectors inscribed in Annex 8, and subject to any conditions and qualifications set out therein, each Party shall accord to investors of the other Party treatment no less favourable than it accords, in like circumstances, to its own investors, with respect to the establishment and acquisition of investments in its territory.

- **Schedules of Commitments on Services and Investment**

- Schedule of Commitments of Australia [See separate document]
- Schedule of Commitments of Thailand [See separate document]



# Summary

- The Chinese practice and rationale
  - Practice: from resistance to gradual acceptance
  - Rationale: economic system and economic level
- Regional practice and prospect
  - Practice: pre-establishment NT or not?
  - Prospect: negative or positive list?



*Thank you!*

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