

National Treatment

Professor Dr. Lawan Thanadsillapakul
Kyushu University

Definition

- National treatment can be defined as a principle whereby a host country extends to foreign investors treatment that is at least as favourable as the treatment that it accords to national investors in like circumstances.
- In this way the national treatment standard seeks to ensure a degree of competitive equality between national and foreign investors.

General application of NT

- National treatment typically extends to the post-entry treatment of foreign investors.
- Some international investment agreements also extend the standard to pre-entry situations. (US and Canada BITs)
- Normally such an extension accompanied by a “negative list” of excepted areas of investment activity to which NT does not apply, or a “positive list” of areas of investment activity to which NT is granted.
- Several types of general exceptions to national treatment exist concerning public health, safety and morals, and national security.

National Treatment VS MFN Treatment

- National treatment seeks to grant treatment comparable to domestic investors operating in the host country. (to secure a certain level of treatment for FDI in host country)
- NT serves to eliminate distortions in competition and thus is seen to enhance the efficient operation of the economies involved
- MFN seeks to grant foreign investors treatment comparable to other foreign investors operating in the host country

The factual area to which NT applies

- The “same”, “Identical” situation
- The list of economic activities
- The “like” or “ similar” cases or circumstances
- The case-by-case basis, no factual comparisons

The comparable treatment

The treatment will be

■ **The “same as”**

■ **The “as favourable as”**

■ **The “no less favourable”**

That accorded to national
investors

The nature and origins of the NT standard under International Law

- The standard represents one of the competing international law doctrines for the treatment of the person and property of aliens “The Calvo Doctrine” or the so called “Negative National Treatment”
- The doctrine of State Responsibility for injuries to aliens and their property. It asserts that customary international law establishes a minimum international standard of treatment to which aliens are entitled, allowing for treatment more favourable than that accorded to nationals where this fails below the international standard

The differences of NT that applicable to trade and investment

- National Treatment in trade agreement is applicable to “Product”
- The national treatment in investment agreement is applicable to “investments” and/ or “investors”

Scope and application of NT

- **What stage of investment process does NT apply?**
 - Whether NT applies to both pre-, post-entry stages of the investment process or it applies only to investment that have already been admitted to the host country
- **What is the meaning of NT where States have subnational authorities exercising constitutional powers to make investment policy?**

The substantive content of NT

- **What are the factual situations in which NT applies?**
 - This defines the limits of factual comparison
- **In what manner, and to what extent, is the treatment of foreign investors assimilated to that of nationals?**
 - This deals with the techniques of comparison, the application of which is limited to the factual situations identified in answering the first question

“De jure” and “De facto” NT

- **De Jure NT, the treatment of foreign investors based on NT provided under national law and regulation or under the investment treatment**
- **De facto NT, the treatment of foreign investors under the factual measures that might work against NT e.g. licensing requirements, qualification requirements. Although these measures may be justified on policy grounds.**

Exceptions to national treatment

- **General exceptions: public health, order and morals, and national security**
- **Subject-specific exceptions: intellectual property rights guaranteed under IP conventions, taxation, prudential measures in financial services, incentives, safeguards, cultural industries exception**
- **Country specific exceptions: specific industries for national economic policy and social policy**
- **Reciprocal national treatment clauses**
- **Exceptions based on development considerations**
- **Monitoring**