

**Drafters' Note on Interpretation of "In Like Circumstances" Under
Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment)**

1. The TPP Investment Negotiating Group and the Chief Negotiators discussed the interpretation of "in like circumstances" under Article 9.4 (National Treatment) and Article 9.5 (Most-Favoured-Nation Treatment) and confirmed the shared intent of the Parties, as reflected in the text of these articles and the relevant footnote, to ensure that tribunals follow the existing approach set out below.

2. When a claimant challenges a measure as inconsistent with Article 9.4 (National Treatment) or Article 9.5 (Most-Favoured-Nation Treatment), the claimant bears the burden to prove that the respondent failed to accord to the claimant or the claimant's covered investment treatment no less favourable than it accords, in like circumstances, (a) to its own investors, or their investments, in its territory (Article 9.4), or (b) to investors of any other Party or of any non-Party, or their investments, in its territory (Article 9.5). Articles 9.4 and 9.5 do not prohibit all measures that result in differential treatment. Rather, they seek to ensure that foreign investors or their investments are not treated less favourably on the basis of their nationality.

3. The phrase "in like circumstances" ensures that comparisons are made only with respect to investors or investments on the basis of relevant characteristics. This is a fact-specific inquiry requiring consideration of the totality of the circumstances, as reflected in paragraphs 4 and 5. Such circumstances include not only competition in the relevant business or economic sectors, but also such circumstances as the applicable legal and regulatory frameworks and whether the differential treatment is based on legitimate public welfare objectives. Accordingly, the Parties agreed to include a new footnote in the text: "For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives."

4. In considering the phrase "in like circumstances", NAFTA tribunals have held that investors or investments that are "in like circumstances" based on the totality of the circumstances have been discriminated against based on their nationality. *See, e.g., Archer Daniels Midland, et al. v. United Mexican States*, ICSID Case No. ARB(AF)/04/05, Award, (21 November 2007), para. 197, (finding a breach of the national treatment obligation after taking into account "all 'circumstances' in which the treatment was accorded . . . in order to identify the appropriate comparator").

5. NAFTA tribunals have also accepted distinctions in treatment between investors or investments that are plausibly connected to legitimate public welfare objectives, and have given important weight to whether investors or investments are subject to like legal requirements. *See, e.g., Grand River Enterprises Six Nations Ltd., et al. v. United States of America*, UNCITRAL, Award (12 January 2011), at paras. 166-167 ("NAFTA tribunals have given significant weight to the legal regimes applicable to particular entities in assessing whether they are in 'like circumstances' under Articles 1102 [National Treatment] or 1103 [Most-Favoured-Nation Treatment].... The reasoning of these cases shows the identity of the legal regime(s) applicable

to a claimant and its purported comparators to be a compelling factor in assessing whether like is indeed being compared to like for purposes of Articles 1102 and 1103.”); *GAMI Investments Inc. v. United Mexican States*, UNCITRAL, Award (15 November 2004), at paras. 111-115 (holding that foreign investor was not “in like circumstances” with domestic investors because the difference in treatment was “plausibly connected with a legitimate goal of policy . . . and was applied neither in a discriminatory manner nor as a disguised barrier to equal opportunity”); *Pope & Talbot Inc. v. Canada*, UNCITRAL, Award on the Merits of Phase 2 (10 April 2001), at paras. 78-79 (the tribunal’s assessment included whether the difference in treatment had a “reasonable nexus to rational government policies” and was not based on nationality).