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Investment
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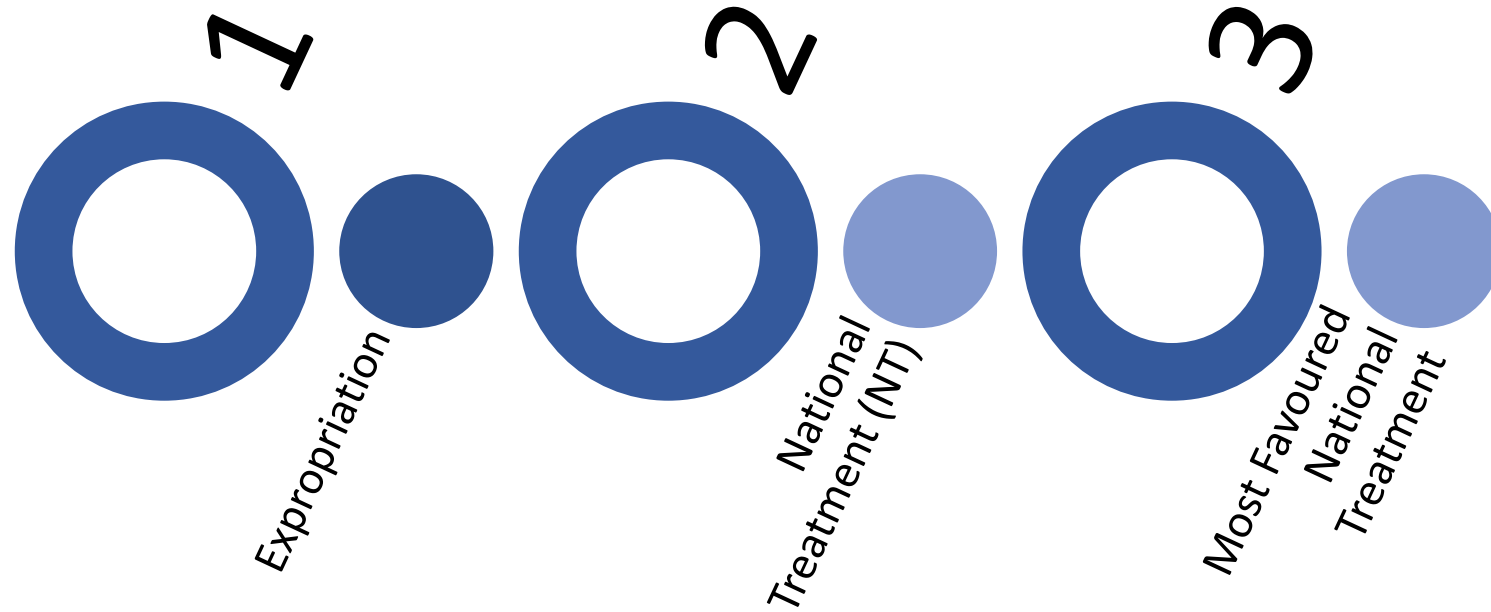
Investment Protection: Relative Standards and Expropriation

Julien Chaisse

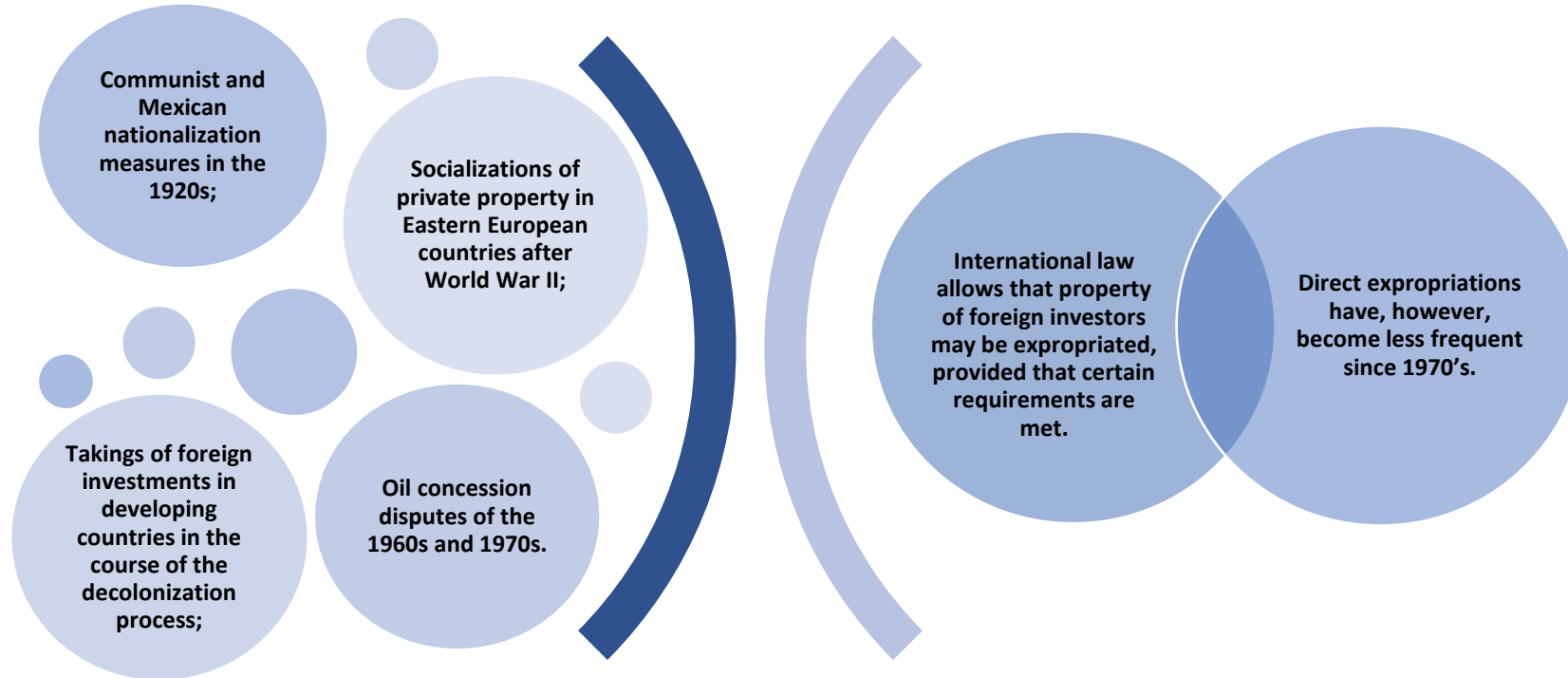
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Outline



Introduction



Expropriation = Outright taking of private property by the state, usually involving a transfer of ownership rights to the state or to a third person.

Legal controversies and different modes of settlement.

Expropriation Clause

Today, predominant form of expropriation is indirect expropriation.

- E.g. Article 4(2) Germany/China BIT (2003): “Investments by investors of either Contracting Party shall not directly or indirectly be expropriated, nationalized or be subjected to any *other measure the effects of which would be tantamount to expropriation or nationalization* in the territory of the other Contracting Party (hereinafter referred to as expropriation) except for the public benefit and against compensation.”

Indirect expropriations are complex.

- General legal concept is not new;
- However, many unanswered legal questions.

Terminology: 'Expropriation' = 'Taking'

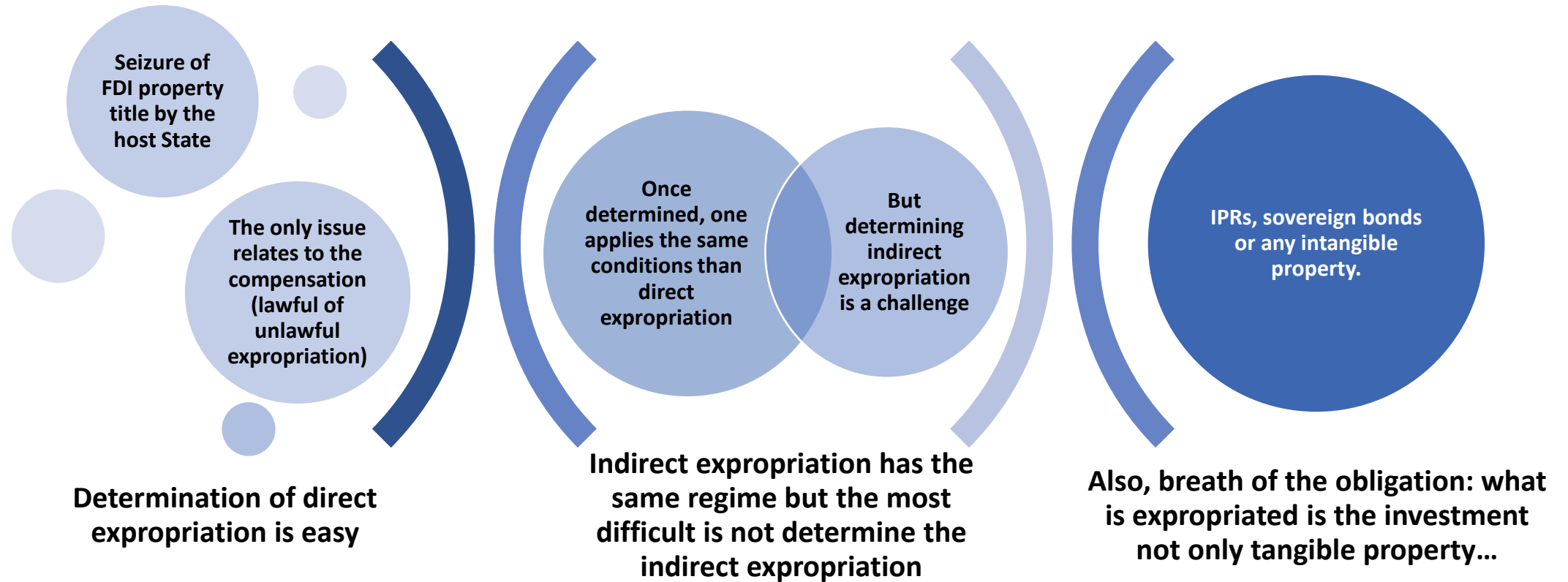
Quick observation with regard to terminology.

The term 'expropriation' is frequently, most often by U.S. lawyers, replaced by the term 'taking'.

- Other terms include 'de facto', 'disguised', 'consequential', 'regulatory', 'creeping' expropriations, 'measures tantamount to' or 'equivalent to' expropriation, etc.

- Except "creeping expropriation", all these terms can be used interchangeably.

Indirect Expropriation (or Takings)



The Criteria Used to Define Indirect Expropriations

Main Factors

- **The substantiality of the interference: the 'sole effect doctrine'**
- The Durational Aspect
- Interference by Actions and Omissions

Other Factors

- The Enrichment of the Host State
- The intentions of the State
- Investment-backed expectations of the investor
- The requirement of proportionality

The 'Sole Effect Doctrine'

The tribunal in *Biloune v Ghana* noted that:

- “[t]he motivations for the actions and omissions of Ghanaian governmental authorities are not clear. But the **Tribunal need not establish those motivations to come to a conclusion in the case**. What is clear is that **the conjunction of** the stop work order, the demolition, the summons, the arrest, the detention, the requirement of filing assets declaration forms, and the deportation of Mr Biloune without possibility of re-entry **had the effect of causing the irreparable cessation of work on the project**. Given the central role of Mr Biloune in promoting, financing and managing MDCL, his expulsion from the country effectively prevented MDCL from further pursuing the project. In the view of the tribunal, such prevention of MDCL from pursuing its approved project would constitute constructive expropriation of MDCL’s contractual rights in the project and, accordingly, the expropriation of the value of Mr Biloune’s interest in MDCL, unless Respondents can establish by persuasive evidence sufficient justification for these events” (*Biloune and Marine Drive Complex Ltd v Ghana*, 27 October 1989).

The 'Sole Effect Doctrine'

Denying the occurrence of an expropriation, the **Pope & Talbot** tribunal stated:

- “Even accepting (for the purpose of this analysis) the allegations of the Investor concerning diminished profits, the Tribunal concludes that the degree of interference with the Investment’s operations due to the Export Control regime does not rise to an expropriation (creeping or otherwise) within the meaning of Article 1110. While it may sometimes be uncertain whether a particular interference with business activities amounts to an expropriation, the test is whether that interference is sufficiently restrictive to support a conclusion that the property has been ‘taken’ from the owner. [. . .] under international law, expropriation requires a ‘substantial deprivation’” (Pope & Talbot Inc v Canada (UNCITRAL, NAFTA), Interim Award, 26 June 2000)

The **Metalclad award** (refusal of a construction permit by the municipality) found that an

- “[. . .] expropriation under NAFTA includes not only open, deliberate and acknowledged takings of property, such as outright seizure or formal obligatory transfer of title in favour of the host State, but also covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be expected economic benefit of property [. . .]” (Metalclad Corp v Mexico, Award, 30 August 2000)

The Criteria Used to Define Indirect Expropriations

Main factors

The substantiality of the interference:
the 'sole effect doctrine'

The Durational Aspect

Interference by Actions and Omissions

Other factors

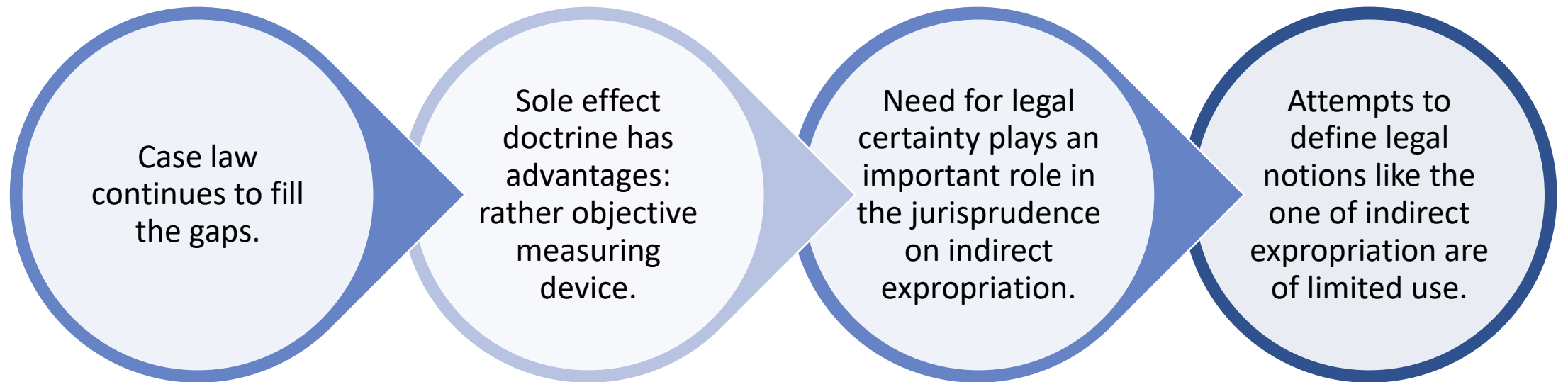
The Enrichment of the Host State

The intentions of the State

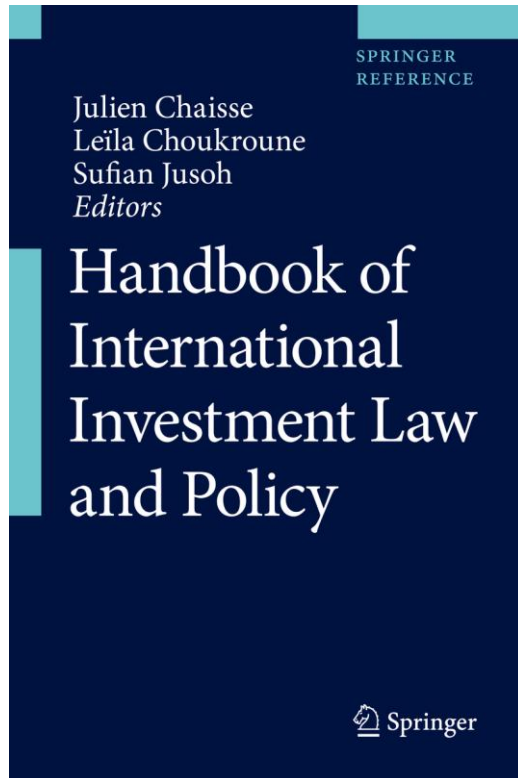
Investment-backed expectations of
the investor

The requirement of proportionality

Conclusion



Further Reading



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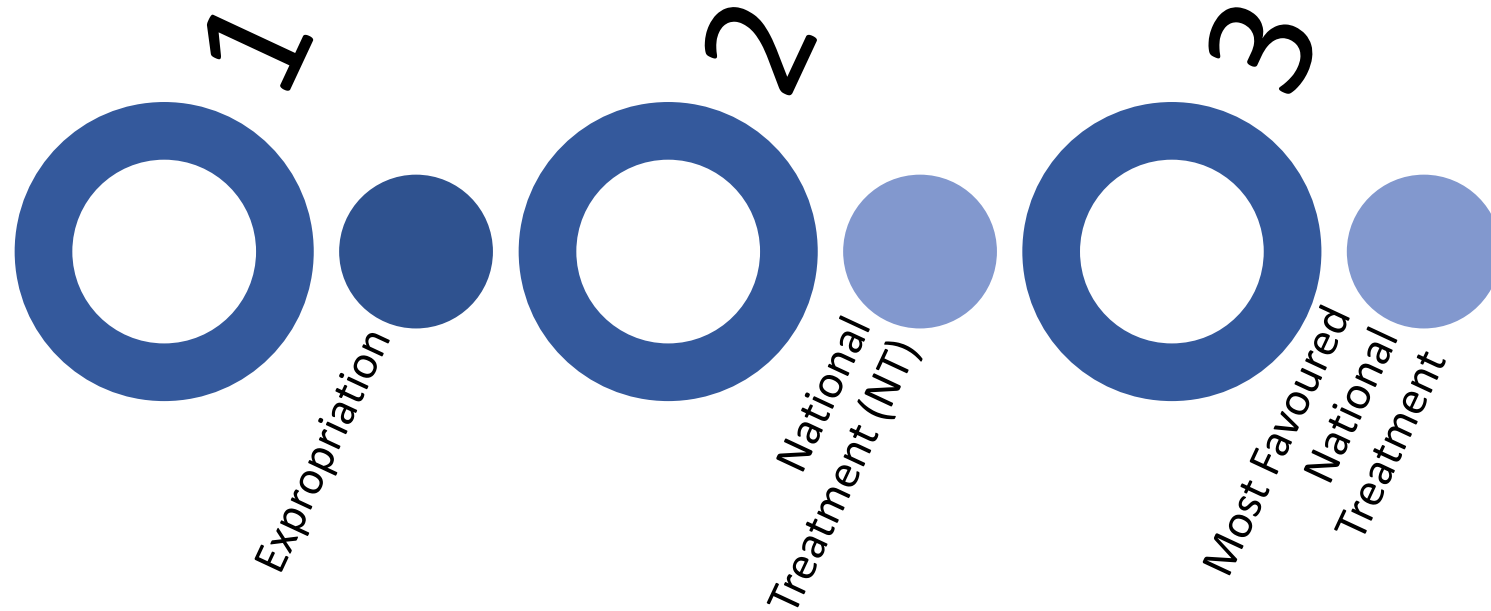
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https://doi.org/10.1007/978-981-13-3615-7_120

Outline



In a Nutshell

There is relative homogeneity of the clauses in IIA practice

A violation must be based on **some form of discrimination (de jure/de facto, pre/post establishment...)** where **foreign investors are discriminated** against on the basis of their nationality

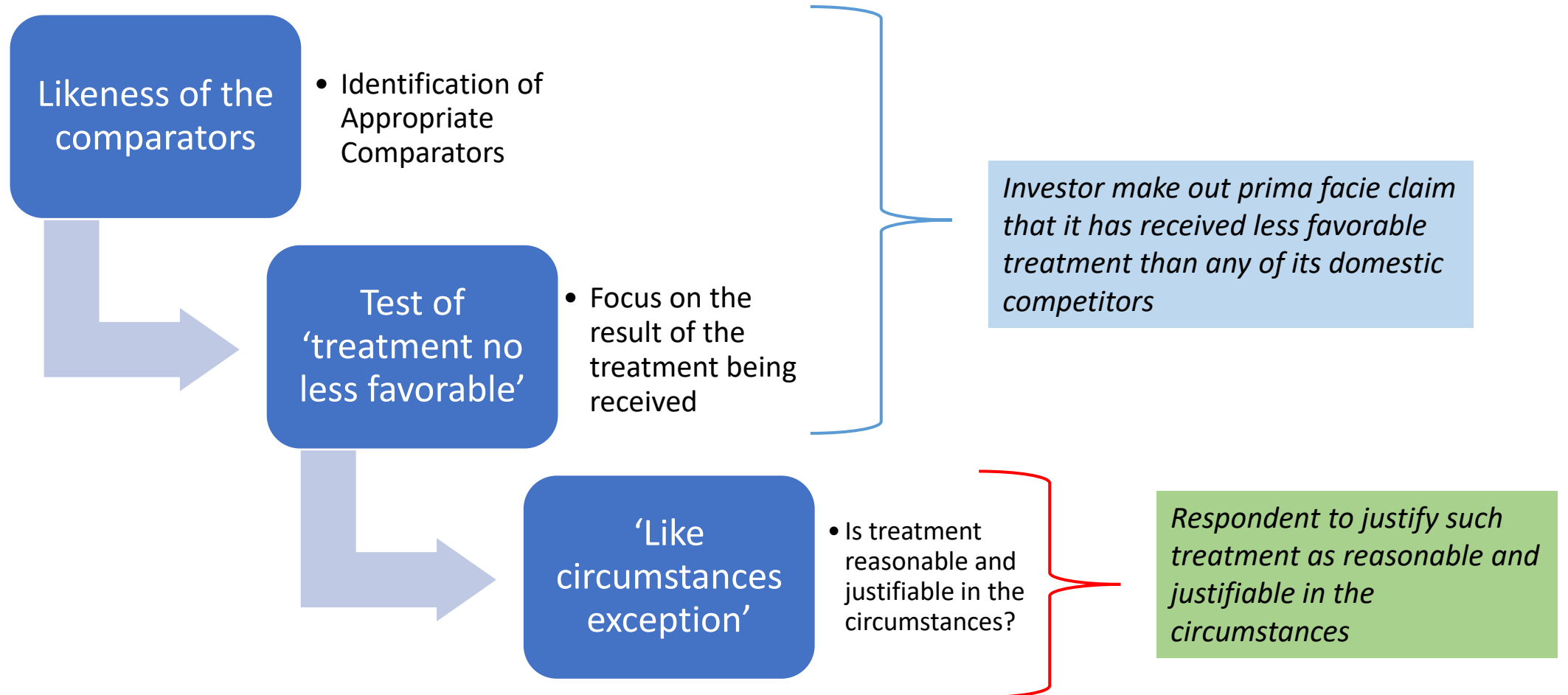
Does it mean the NT standard may be easier to apply than other standards? **NO!**

Key idea: application of NT is fact specific with two consequences

NT standard resists abstract definitions

No hard and fast approach to interpreting the clause will be found

The Non-Discrimination Test



Occidental Petroleum v Ecuador

The tribunal held that the purpose of the national treatment obligation is to protect foreign investors, and that it would be inappropriate to address '[...]' exclusively the sector in which that particular activity is undertaken'.

- Further, the tribunal concluded that exporters should not be placed at a disadvantage in foreign markets because they had to pay more taxes in the country of origin.

The Occidental tribunal's conclusion was unusual.

Bilcon v. Canada

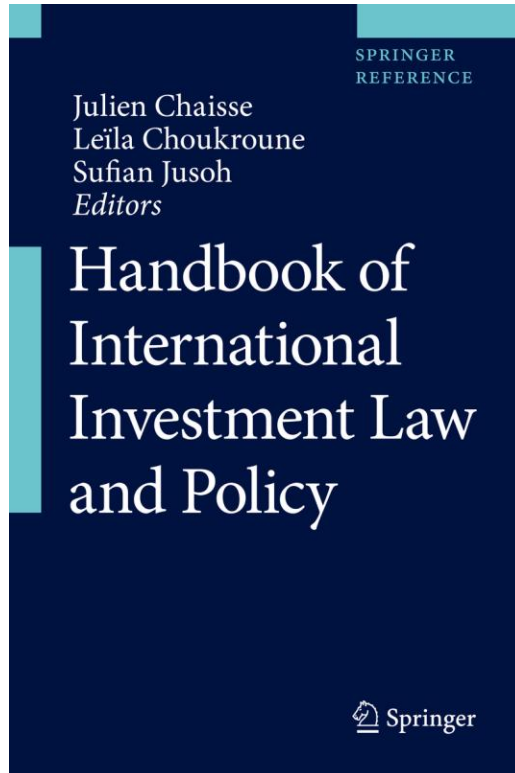
Lastest Bilcon v Canada Award 2015 offers a confirmation of the concept and clarification of the regime

While not always noted explicitly applied, this first step can be seen in the reasons for decision of all other tribunals (including the latest Bilcon v. Canada in December 2015).

'In the present case the Tribunal is unable to discern any justification for the differential and adverse treatment accorded to Bilcon that would satisfy the Pope & Talbot test with respect to the standard of evaluation under the laws of federal Canada.'

Clayton v. Canada, PCA Case No. 2009-04, Award on Jurisdiction and Liability, 17 March 2015 at 724.

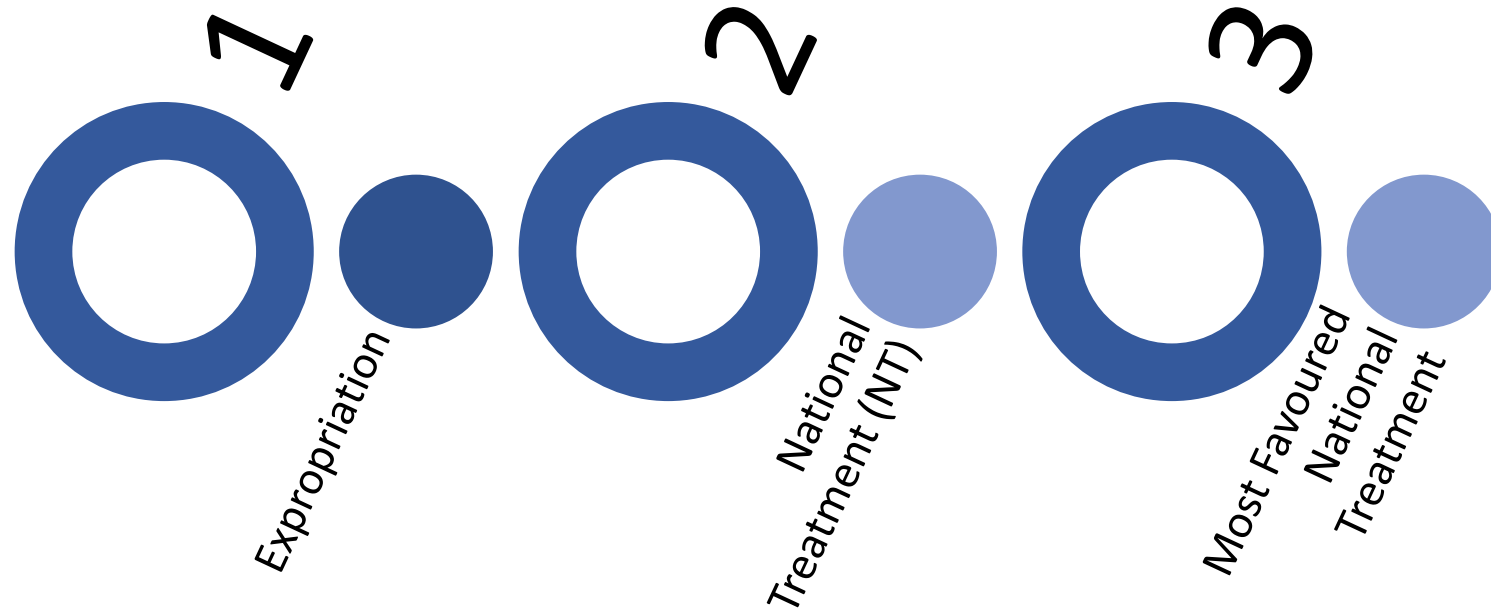
Further Reading



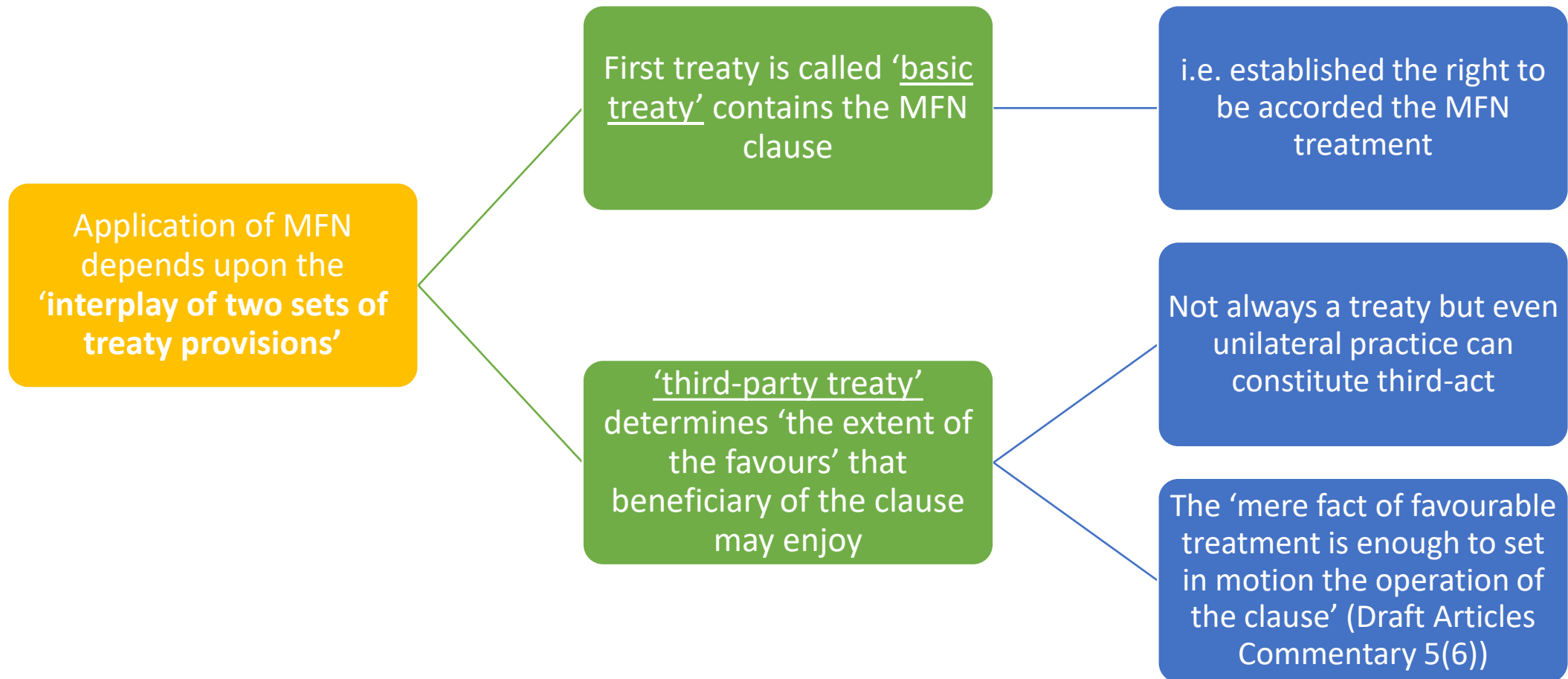
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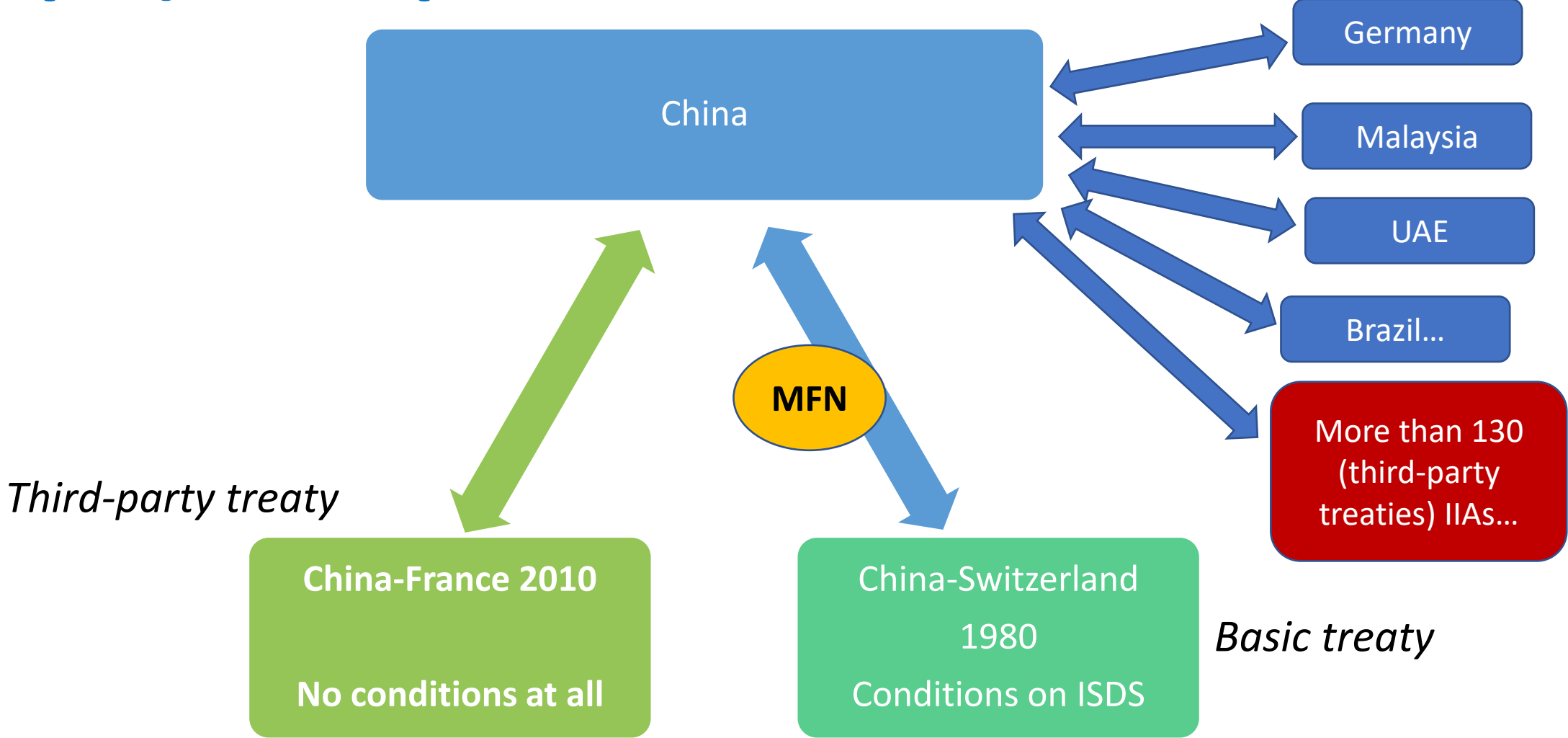
Outline



MFN Application is 'Double' in Nature



(Simple) Example



MFN Drafting

- See HK-Thailand BIT
- Art. 3:1 requires each State to treat investments made by nationals of the other in manner
 - ‘no less favourable than that accorded in respect of the investments and returns of **the investors of [...] any third party.**’

MFN Drafting (Case Law)

Each MFN clause is a world in itself



Possible

- Post-admission substantive treatment
- Fair and equitable treatment
- National treatment
- Expropriation clauses
- Effectives means standard

Impossible

- Concept of investor
- Concept of investment

Substantive Treatment Post Admission

Claim was based on the Croatia BIT by way of the MFN clause of the BIT

The Tribunal considers 'the legal basis of the **claim valid based on the wide scope of the MFN clause in the BIT**, as already discussed.' para 204

Base treaty

- Art. 3(1) Chile-Malaysia 1995
- 'Investments made by investors of either Contracting Party in the territory of the other Contracting Party shall receive treatment which is fair and equitable, and not less favourable than that accorded to investments made by investors of any third State.'

Third-party treaty

- Article 3(2) Croatia-Chile 1996
- 'When a Contracting Party has admitted an investment in its territory, it shall grant the necessary permits in accordance with its laws and regulations.'

This 'clause obligates the State, once the investment is approved, to grant the necessary permits to the investor, **in accordance with the country's laws and regulations.**' 198

Likeness and less favorable test are passed

MTD Equity v Chile ICSID Case NO.ARB/01/7 award of 25 May 2004

NB: Although, MFN applied, Chile has not violated that obligation: 'To the extent that the application for a permit meets the requirements of the law, then, in accordance with the BIT and Article 3(2) of the Croatia BIT, the investor should be granted such permit. On the other hand, said provision does not entitle an investor to a change of the normative framework of the country where it invests. All that an investor may expect is that the law be applied.' Para 205

MFN and Fair and Equitable Treatment (FET)

- Bayindir v Pakistan (2009) found that FET could be read into the base treaty, the Pakistan-Turkey BIT even though there was no FET clause therein.
 - Because wording of the MFN clause + all other Pakistanese BIT incorporate FET!
 - Because the Preamble referred to the fair and equitable standard as well
- Tribunal concluded “prima facie Pakistan was bound to treat investments of Turkish nationals fairly and equitably”.
- It should be the Pakistan-Switzerland treaty **on the ground that it was the later in time**
 - NB: It should be noted that this was a decision on jurisdiction and that the finding was only a *prima facie finding*

Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, 27 August 2009 at 153-160 and 163-167

MFN and 'Effective Means'

Delay by Indian courts violated India's obligation to provide *White Industries* with an 'effective means' of asserting claims and enforcing rights.'

- Despite the fact that the India-Australia BIT does not mention or include such a duty for host states...
- *White Industries* could borrow the 'effective means' provision present in the India-Kuwait BIT by relying on the MFN provision of the India-Australia BIT.

Tribunal overruled India's objection that such borrowing will 'fundamentally subvert the carefully negotiated balance of the BIT.' (para 11.2.1)

- Balance can be subverted only if the MFN provision is used to borrow a beneficial dispute resolution provision from another BIT. (para 11.2.2)
- Borrowing beneficial substantive provision from a third-party treaty does not subvert the negotiated balance of the BIT, but rather achieves the result intended by the incorporation of the MFN provision. (para 11.2.3 and 11.2.4)

Article 4(2) of the India-Australia BIT

'a contracting party shall at all times treat investments in its territory on a basis no less favourable than that accorded to investments or investors of any third country'.

Article 4(5) of the India-Kuwait BIT

'each contracting party shall...provide effective means of asserting claims and enforcing rights with respect to investments...'.

Applying MFN to Procedural Provisions

Securing procedural rights through MFN has been very controversial

- There can be significant variations among investment treaties as to the rights, conditions, and forums available

It is only here that we have had problems and legal reasoning a bit different (and problematic)

- Need to carefully read the specific provision
- Each MFN clause is a world in itself
- There are 3 different worlds

3 Variations on the Intent

Exclusion of
ISDS from
MFN scope

NAFTA and many others

Inclusion of
ISDS

UK Model BIT and many others

Ambiguous

German BIT model, Mexico-UK and many others...

Azerbaijan-UK 1996

ARTICLE 3

National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Articles 1 to 11 of this Agreement.

ISDS is in Article 10 and 11, so covered by MFN

Azerbaijan and UK agreed that ISA is within the scope of MFN

Also in Article 3(3) of the UK model BIT

Article 1103(2) of NAFTA

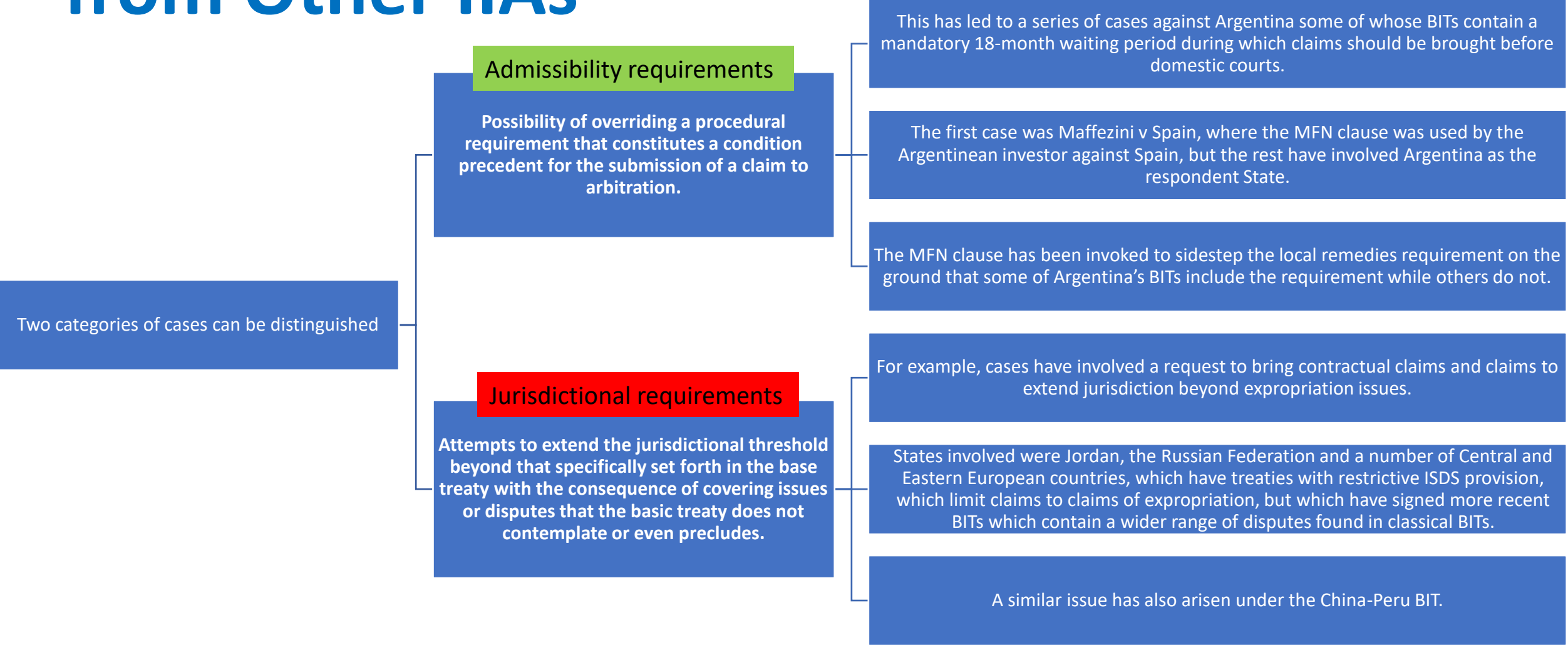
‘Each Party shall accord to investments of another Party treatment no less favourable than it accords, like circumstances, to investment of investors of any other Party or of a non-Party *with respect to the establishment, acquisition, management, conduct, operations, and sale or other disposition of investments.*’ (emphasis added).

Legal Issue: What is the Intent of the Parties?

Article 3 of the German BIT provides:

- **(1)** 'Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments... of investors of any third State.
- **(2)** Neither Contracting State shall subject investors of the other Contracting State as regards their activity in connection with investment in its territory, to treatment less favourable than it accords to... investors of any third State.'

MFN and Procedural Standards from Other IIAs



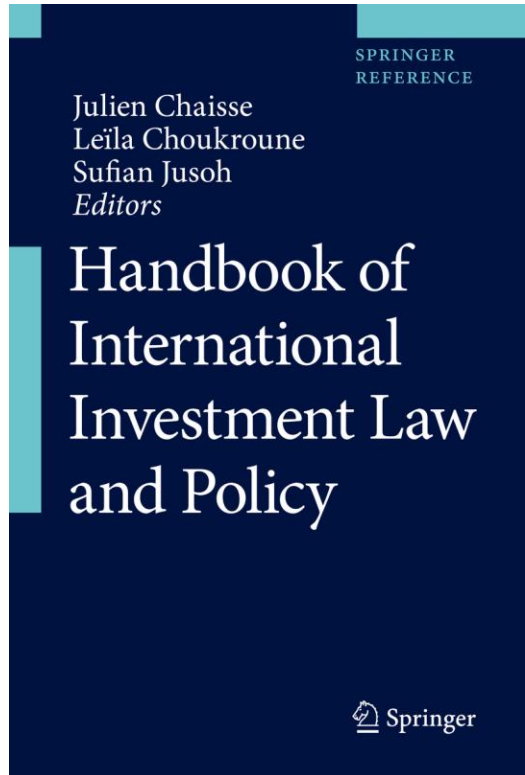
Concluding Remarks

MFN clause has both costs
and benefits



Purpose, function, and
workability of the MFN
clause are demonstrated by
its use for substantive
provisions in the treaty

Further Reading



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Research Interests

- International Economic Law
- Commercial and Investment Contracts
- Special Economic Zones
- Arbitration and Dispute Resolution
- Cyberlaw (ICANN, domain names, trademarks)
- Transborder Data Flows and Data Privacy Law

