

Regional Comprehensive Economic Partnership agreement (RCEP)

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Overview

Regional Comprehensive Economic Partnership (RCEP) was launched in November 2012 and negotiations began in May 2013.

The objective of launching the RCEP negotiations was

"to achieve a modern, comprehensive, high-quality and mutually beneficial economic partnership agreement among the ASEAN Member States and ASEAN's FTA Partners" that will "cover trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement and other issues."

The first round of negotiations was held in May 2013, and by August 2017 19 rounds had taken place, as well as several RCEP ministerial meetings.

Details of the negotiations are confidential, although official reports provide progress reports, e.g. two chapters (on small and medium-sized enterprises and on economic and technical cooperation) had been concluded by the end of 2016.

Negotiations have become more complex, with around 700 officials ingathering for negotiations in 2017, compared to 60 delegates at the meetings in 2013.

Overview

The RCEP negotiation includes:

trade in goods, trade in services, investment, economic and technical cooperation, intellectual property, competition, dispute settlement, e-commerce, small and medium enterprises (SMEs) and other issues.

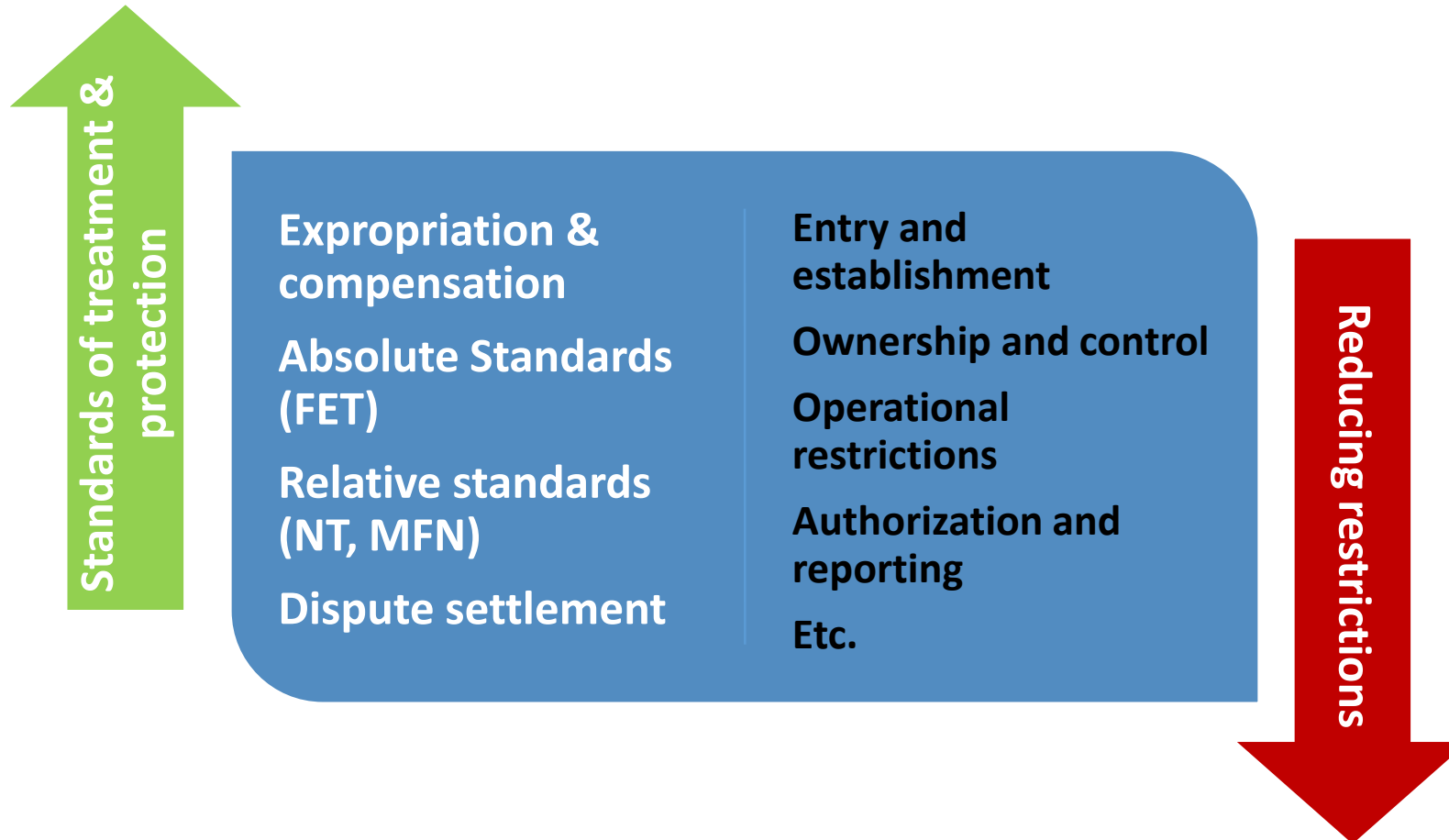
Potential to consolidate numerous FTAs advances in the region

This Presentation focuses on investment

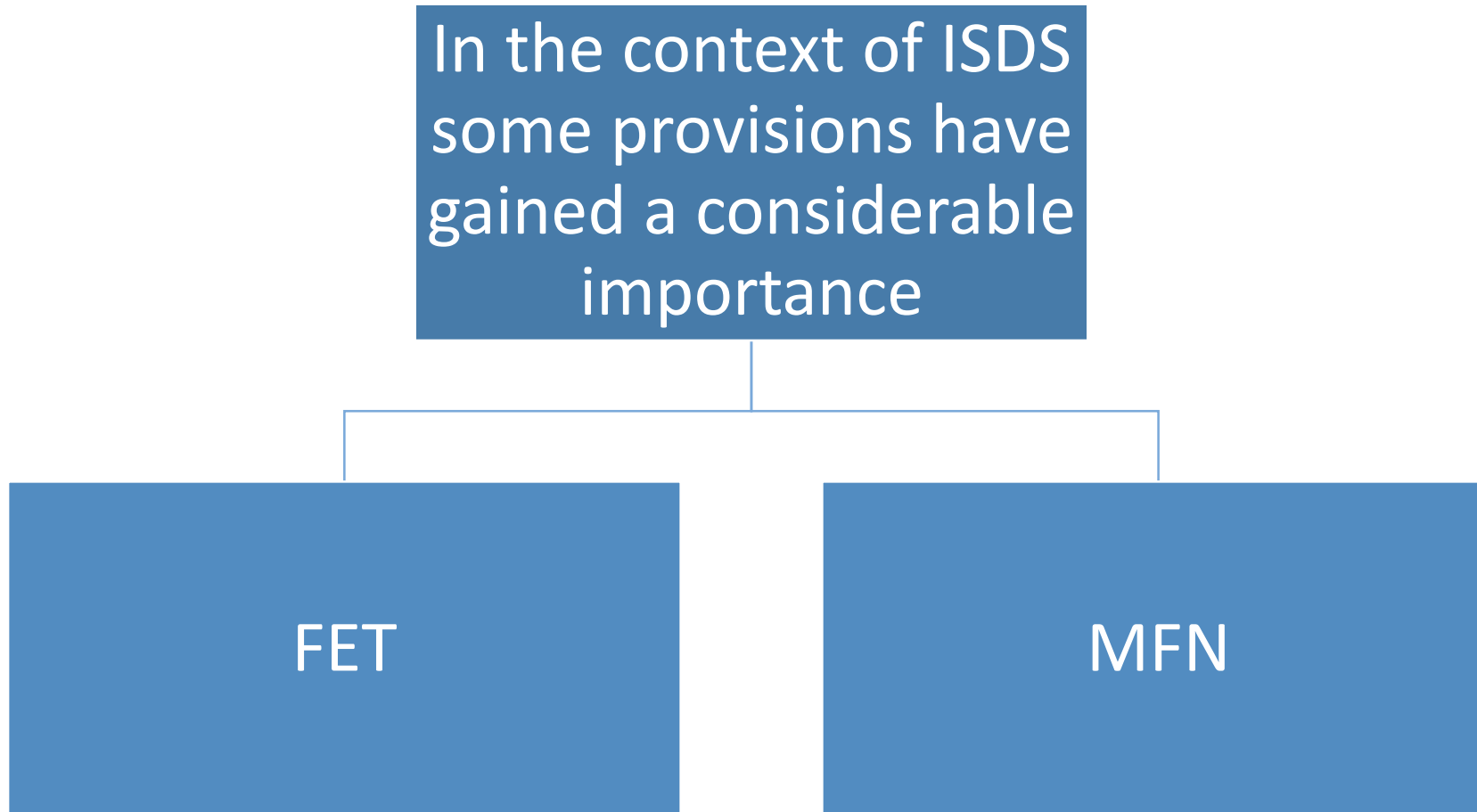
Considerable importance for trade, SMEs, and also in light of past RCEP countries' experience as 110 cases have been filed against RCEP.

Ppotential to consolidate investment rules while giving a center, in particular, to the management to investment disputes in Asia

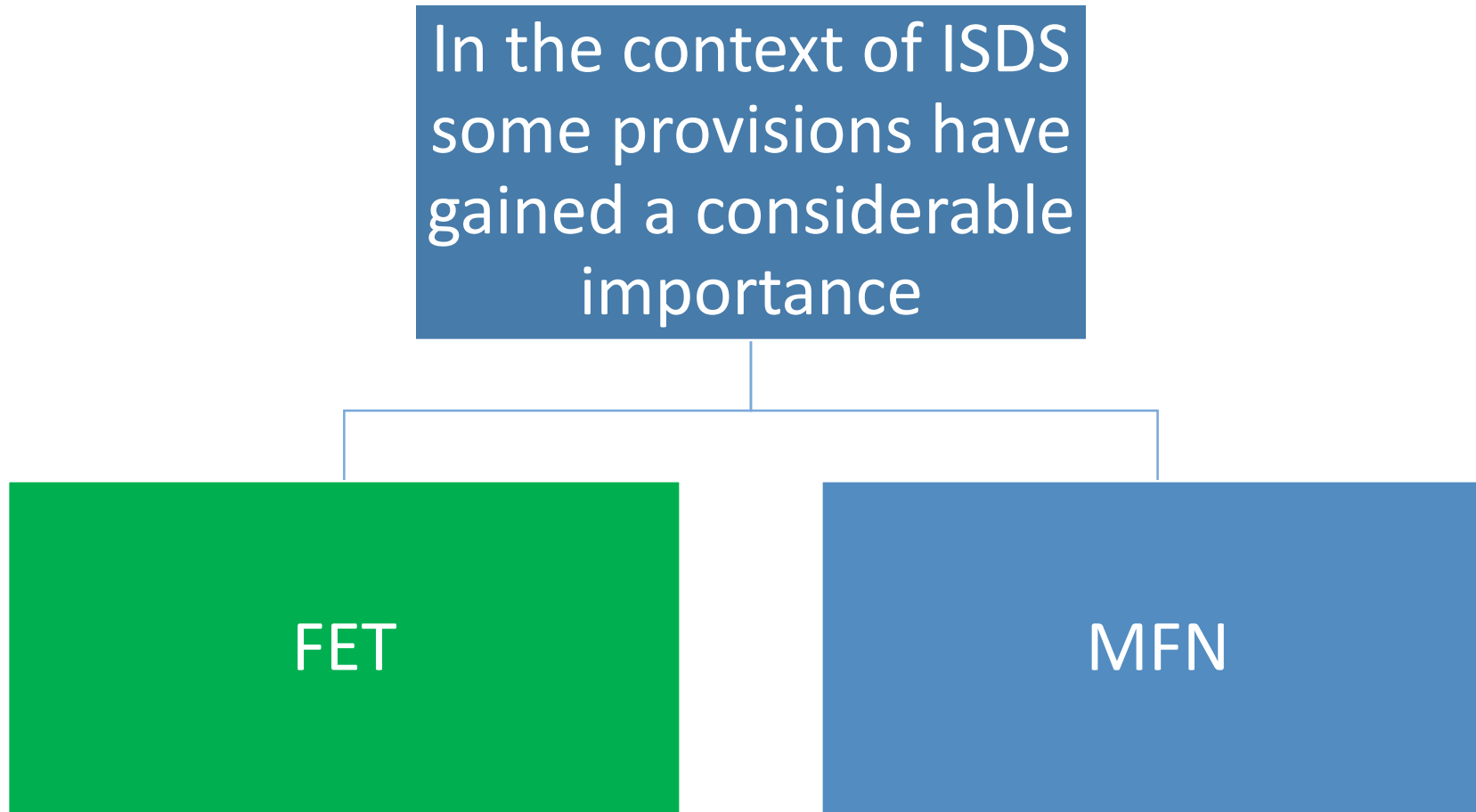
Investment Protection in RCEP



Lessons from arbitration practice



Lessons from arbitration practice



RCEP *draft* FET Clause

Article XX TREATMENT OF INVESTMENT / MINIMUM STANDARD OF TREATMENT

1. Each Party shall accord to covered investments fair and equitable treatment and full protection and security in accordance with customary international law.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.

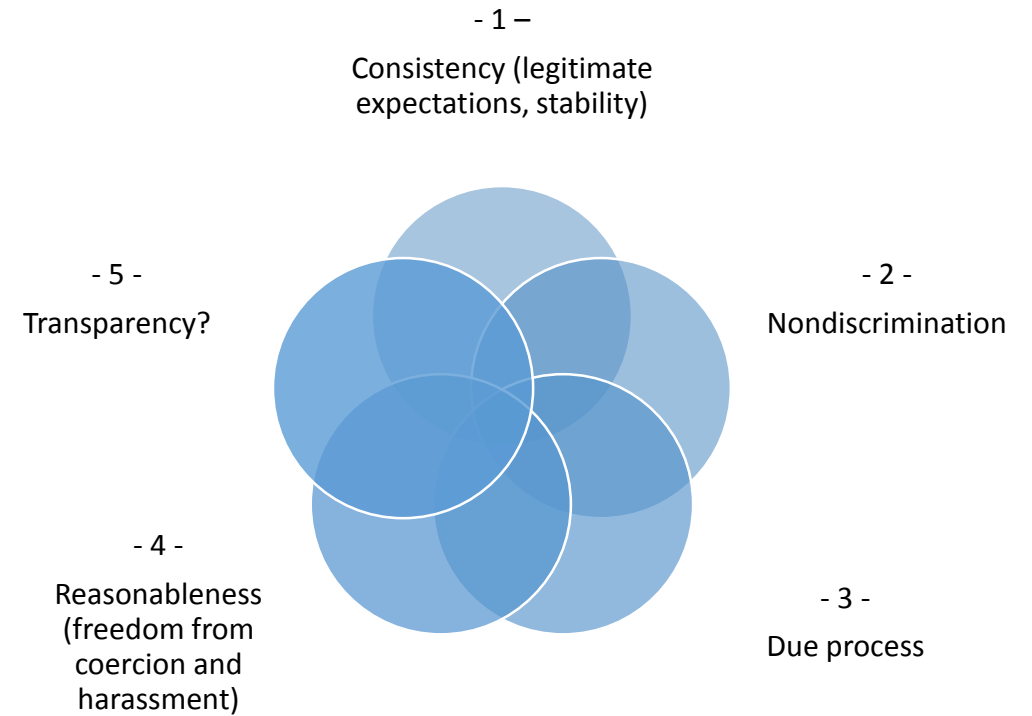
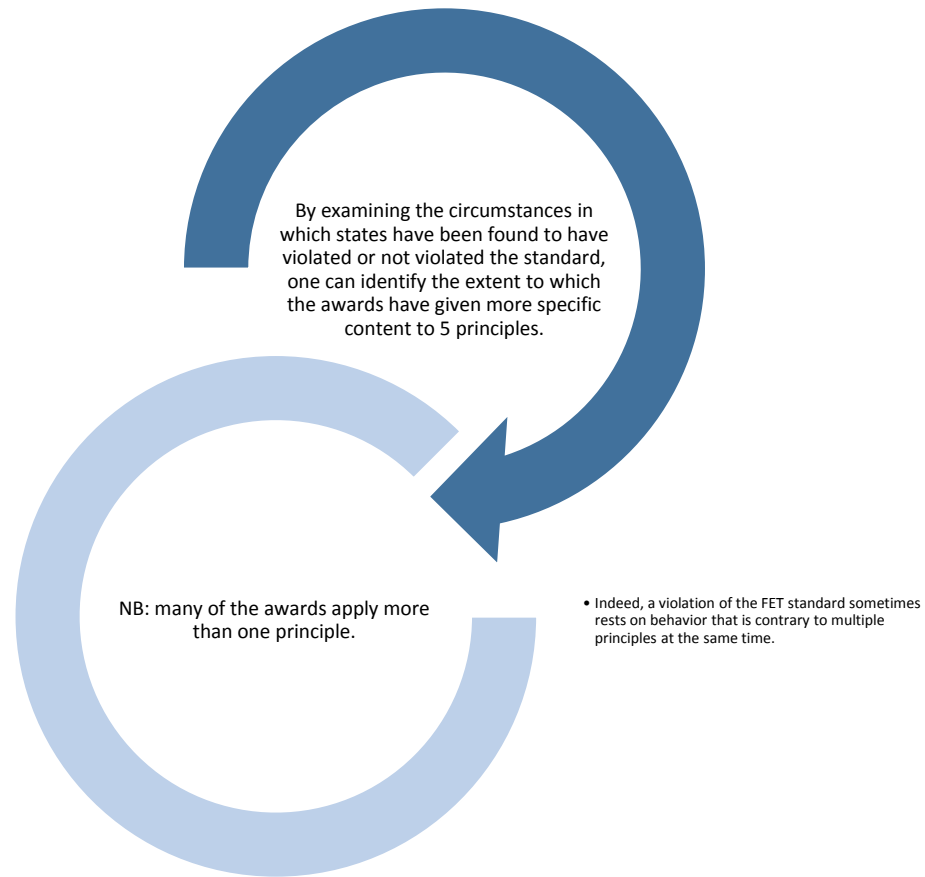
3. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:¹⁸

(a) fair and equitable treatment refers to the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law and;

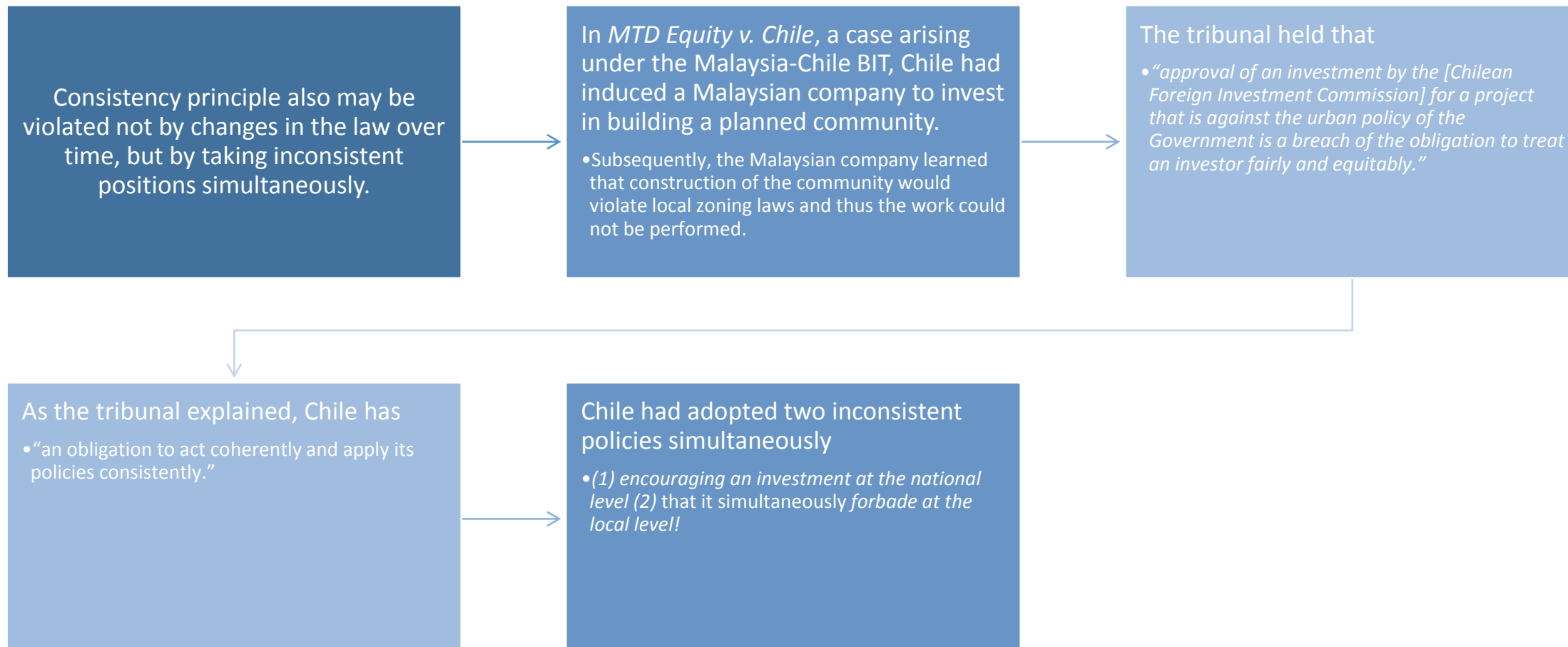
(b) full protection and security refers to the requirements on each/a Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, [does/shall] not establish that there has been a breach of this Article.

What does Fair & Equitable Treatment mean?



FET (1) Lack of consistency



MTD Equity Sdn. Bhd. v. Republic of Chile, ICSID Case No. ARB/ 01/7, Award, (May 25, 2004) 165-166

FET (2) Reasonableness

In *Vivendi v. Argentina*, a case arising under the France-Argentina BIT,

Claimants' investment had obtained a concession to operate a water distribution system undergoing privatization.

Tribunal found that

after sharp rate increases and a temporary but harmless discoloration of the water had stirred local opposition,

local officials engaged in a campaign to force the investment to accept new terms,

such as by encouraging customers not to pay their bills.

Further, after the investment sought to terminate the agreement and to institute arbitration under the BIT, Argentina enacted legislation to prevent the investment from pursuing collection lawsuits or enforcing debts, measures that the tribunal found to constitute

“a vindictive exercise of sovereign power aimed at punishing . . . [the investment that] cannot plausibly be justified.”

FET (3) Denial of justice

In *Bayinder v. Pakistan*, the claimant argued that it did not receive due process before the Pakistani courts

Citing a letter written by one government official to another

Letter predicting that Pakistan would prevail in a local court action brought by the claimant against a Pakistani government agency challenging the constitutionality of a contract termination.

Tribunal rejected this argument.

The claimant also alleged that the lack of independence of the Pakistani judiciary was notorious

Here too, tribunal found no evidence supporting that allegation

Transparency: a criterion *in the making*

- “Conduct which is unjust, arbitrary, unfair, discriminatory or in violation of due process has also been noted by NAFTA tribunals as constituting a breach of fair and equitable treatment, even in the absence of bad faith or malicious intention on the part of the state. **Transparency as noted was unsuccessfully linked to this concept**”
- “while a requirement for transparency may not at present be proven to be part of the customary law standard, as the judicial review of Metalclad rightly concluded, **it is nonetheless approaching that stage**. Indeed, it would be difficult today to justify the appropriateness of a secretive regulatory system”

FET Lessons

Awards have not always given those FET principles **their full potential scope**.

- Principle of consistency, in fact, permits some inconsistency, while the principle of nondiscrimination permits some discrimination.
- Principle of transparency rarely has offered a basis for an award in favor of the claimant, *except in combination with another principle*.
- Principle of due process similarly has been of *little significance to date*.

This case-law had essentially developed since 2003

- Consistency and nondiscrimination are likely to reach full potential soon while transparency, due process are likely to gain importance in coming decade

Contrasting with Vietnam-EU (2017)

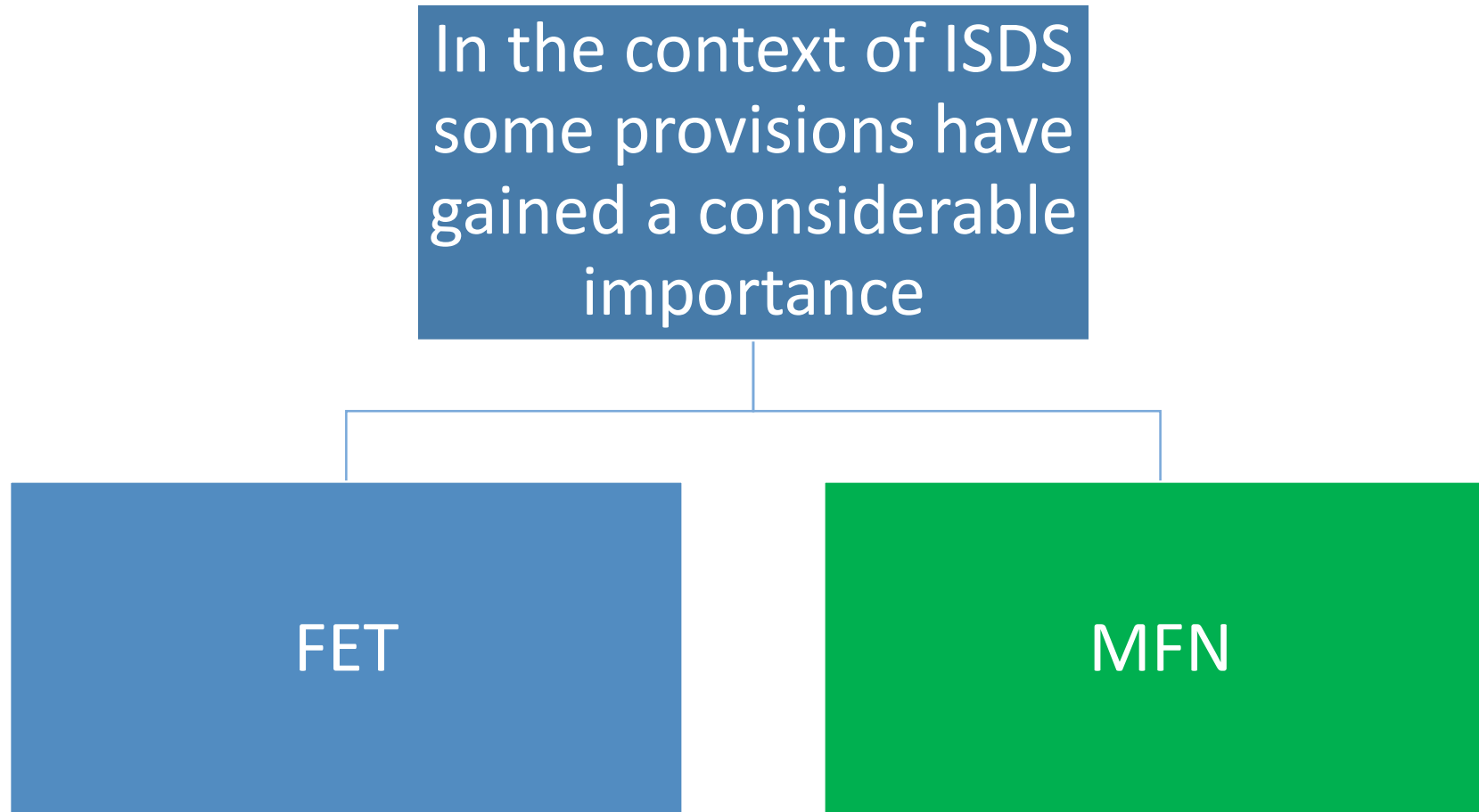
Article 14 Treatment of Investment

1. Each Party shall accord fair and equitable treatment and full protection and security to investments and investors of the other Party in its territory in accordance with paragraphs 2 to 7.
2. A Party breaches the obligation of fair and equitable treatment referenced in paragraph 1 where a measure or series of measures constitutes:
 - a. Denial of justice in criminal, civil or administrative proceedings; or
 - b. Fundamental breach of due process in judicial and administrative proceedings;
 - c. Manifest arbitrariness; or
 - d. Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; or
 - e. abusive treatment such as coercion, abuse of power or similar bad faith conduct. or
- f. A breach of any further elements of the fair and equitable treatment obligation adopted by the Parties in accordance with paragraph 3 of this Article.
3. Treatment not listed in paragraph 2 can also constitute a breach of fair and equitable treatment where the Parties have so agreed in accordance with the procedures provided in Article X.6 (Amendments).

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2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments.
3. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:¹⁸
 - (a) fair and equitable treatment refers to the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process of law and;
 - (b) full protection and security refers to the requirements on each/a Party to provide the level of police protection required under customary international law.
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Lessons from recent practice



RCEP *draft* MFN Clause

Article XX MOST FAVOURED NATION TREATMENT

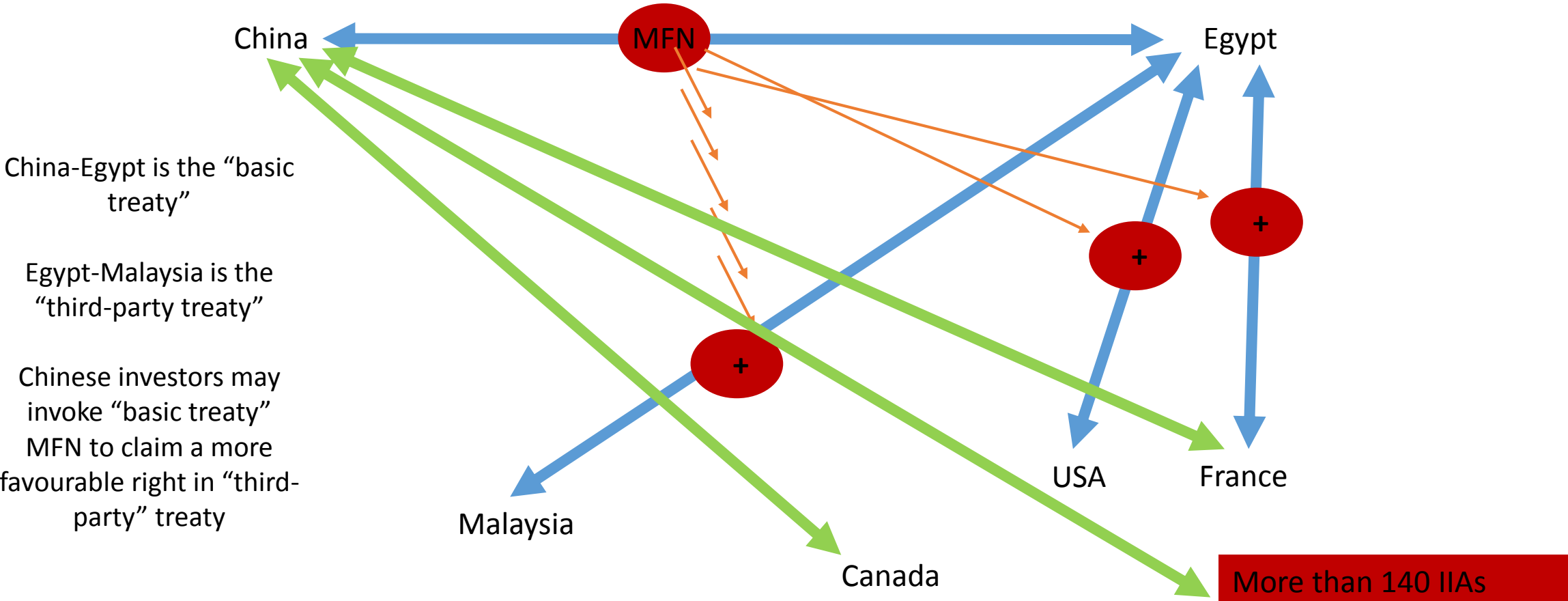
1. Each Party shall accord to investors of [another/any other] Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. Paragraphs 1 and 2 of this Article shall not be construed to oblige any Party to extend to the investors of another Party or covered investments any treatment, preference or privilege by virtue of any bilateral or multilateral agreement relating to investment in force or signed prior to the date of entry into force of this Agreement. ¹⁷

4. For greater certainty, the treatment referred to in this Article does not encompass dispute resolution procedures or mechanisms such as those included in Section B of this Chapter.

MFN clause



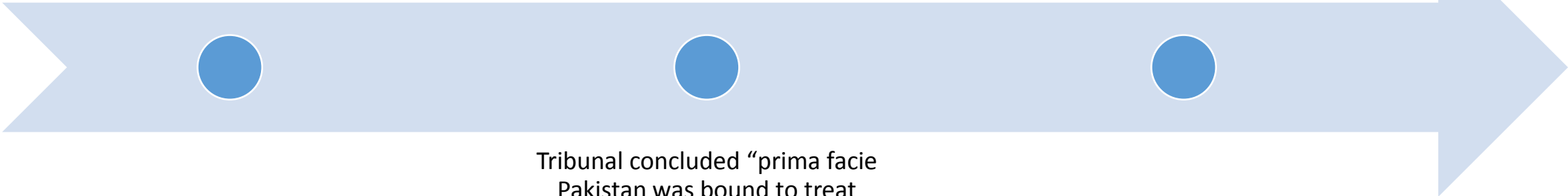
MFN and Fair (and FET)

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

It should be the Pakistan-Switzerland treaty **on the ground that it was the later in time**

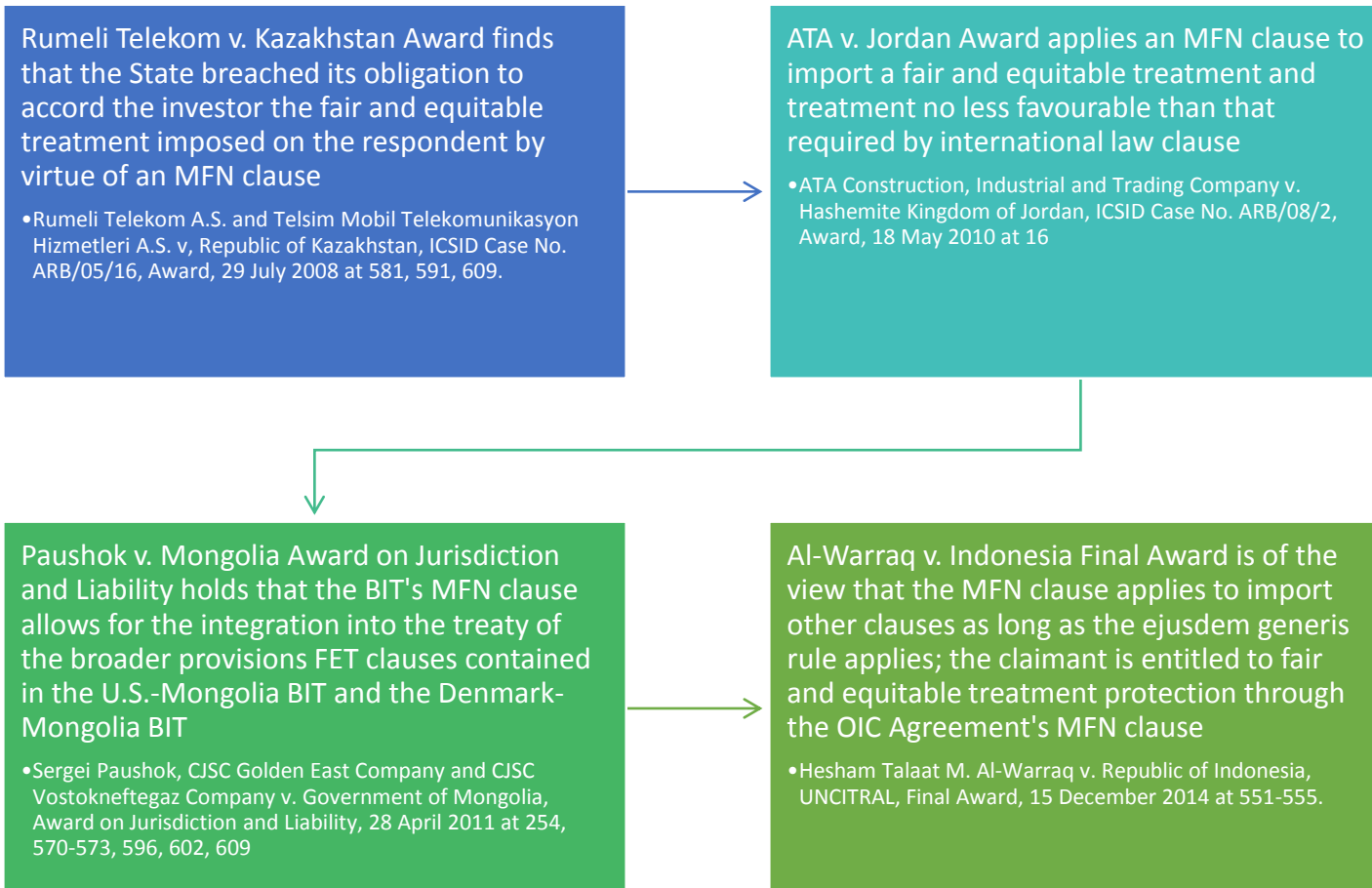
- NB: It should be noted that this was a decision on jurisdiction and that the finding was only a *prima facie finding*



Tribunal concluded “prima facie Pakistan was bound to treat investments of Turkish nationals fairly and equitably”.

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 / FET Success Story...



MFN and Umbrella Clause

EDF v. Argentina Award finds that the applicable treaty's MFN clause permits recourse to the "umbrella clauses" of third-country treaties

In doing so, the tribunal notes that it takes no position on the debate over the interaction of MFN clauses with jurisdictional and procedural requirements

- EDF International S.A., SAUR International S.A. and León Participaciones Argentinas S.A. v. Argentine Republic, ICSID Case No. ARB/03/23, Award, 11 June 2012 at 930-936

Arif v. Moldova Award notes that the treaty's MFN clause can import an "umbrella" clause (which is substantive in nature) from either of the two treaties concluded by the respondent, thereby extending a more favourable standard of protection granted by such clauses into the applicable BIT

- Mr. Franck Charles Arif v. Republic of Moldova, ICSID Case No. ARB/11/23, Award, 8 April 2013 at 396

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...’.

Contrasting with Vietnam-EU (2017)

Article XX MOST FAVOURED NATION TREATMENT

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2. Each Party shall accord to covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of any other Party or of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. Paragraphs 1 and 2 of this Article shall not be construed to oblige any Party to extend to the investors of another Party or covered investments any treatment, preference or privilege by virtue of any bilateral or multilateral agreement relating to investment in force or signed prior to the date of entry into force of this Agreement.¹⁷

4. For greater certainty, the treatment referred to in this Article does not encompass dispute resolution procedures or mechanisms such as those included in Section B of this Chapter.

Article 4 Most Favoured Nation Treatment

1. Each Party shall accord to investors of the other Party and to their investments as regards the establishment of an enterprise in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors and their investments under free trade agreement the former Party is negotiating on [17 July 2015].
2. Each Party shall accord to investors of the other Party and to their investments as regards their operation in its territory, treatment no less favourable than the treatment it accords, in like situations, to investors and investments of any non-Party
3. Paragraph 1 and 2 shall not apply to the following sectors:
 - Communication services, except for Postal services (CPC...) and Telecommunication services (CPC..);
 - Cultural, Sports and Recreational services;
 - Fishery and aquaculture;
 - Forestry and hunting;
 - Mining, including oil and gas.
4. Paragraph 2 shall not be construed to oblige a Party to extend to the investors of the other Party or their investments the benefit of any treatment granted pursuant to any bilateral, regional and/or international agreements that entered into force before the entry into force of this Agreement
5. Paragraphs 1 and 2 shall not be construed to oblige a Party to extend to the investors of the other Party or their investments the benefit of:
 - (a) any treatment granted as part of a process of economic integration, which includes commitments to abolish substantially all barriers to investment among the parties to such a process, together with the approximation of legislation of the parties on a broad range of matters within the purview of this Agreement¹⁴.
 - (b) any treatment resulting from any international agreement for the avoidance of double taxation or other international agreement or arrangement relating wholly or mainly to taxation.
 - (c) any treatment resulting from measures providing for the recognition of qualifications, licences or prudential measures in accordance with Article VII of the General Agreement on Trade in Services or its Annex on Financial Services
6. "For greater certainty, the 'treatment' referred to in paragraphs 1 and 2 does not include international dispute resolution procedures or mechanism, such as those included in Section 3, provided for in any other bilateral, regional and/or international agreements. Substantive

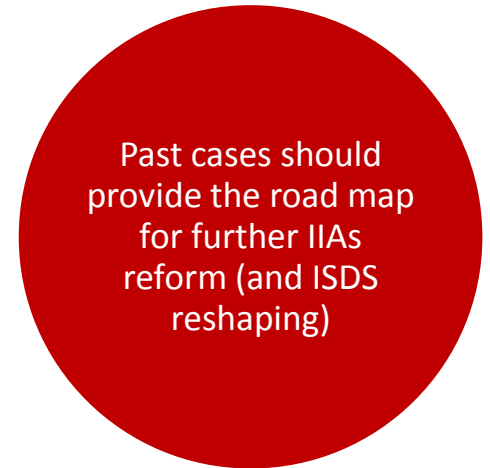
Concluding remarks



Asia-Pacific region is in the midst of unprecedented economic growth. Foreign investment inflows and outflows are at historic highs.



Investment protection instruments like IIAs continue to be critical to the investment framework of the region.



Past cases should provide the road map for further IIAs reform (and ISDS reshaping)

Recent treaties (ACIA, Vietnam-EU, ASEAN-HK...) and ongoing negotiations (RCEP...)

Thank you and keep in touch



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