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Fair and Equitable Treatment

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1. My name is Jeremy Sharpe. I am an international arbitrator and a member of the Board of the United Nations Register of Damage.

2. The subject of this lecture is the fair and equitable treatment standard. In 1996, Judge Rosalyn Higgins remarked that *fair and equitable treatment* are well known in international investment law. In retrospect, we can say that the terms fair and equitable treatment – or FET – were well known but not well developed. At that time, FET was still something of a sleeping beauty—lying dormant in a large number of international investment agreements.

3. In recent years, FET has sprung to life, emerging as an enormously important substantive standard in the field of international investment law. There are at least six reasons for its significance today.

4. First, the FET standard is very common in treaties. More than 180 States have concluded some 3,000 international investment agreements, including bilateral investment treaties and investment chapters of free trade agreements. Some 95% of these agreements require the State parties to accord fair and equitable treatment to investors of the other State.

5. Second, the FET standard has a broad scope. FET is often considered a kind of catch-all or gap-filling provision. The FET standard seeks to redress harm not captured by

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other, more specific international investment protections, such as the expropriation and non-discrimination provisions.

6. Third, the FET standard has broad application within States. The standard applies to measures taken by all branches of the government, whether the executive, the legislative, or the judiciary. The standard also captures acts and omissions of government officials at the national, provincial, and often municipal levels. So FET has broad application horizontally across the State as well as vertically within the national and subnational parts of the State.

7. Fourth, FET has proven enormously important in practice, including in international investment disputes. FET is the most commonly invoked standard in international investment arbitrations, of which there have been more than 1,300 in recent three decades. According to recent statistics from the United Nations Conference on Trade and Development, foreign investors have alleged an FET breach in some 87% of reported international investment disputes. FET is also currently the most common standard on which states are held liable in these cases – far more than any other investment treaty standard, including the traditional standards of expropriation and non-discrimination.

8. Fifth, the FET standard is open-textured. FET is a quintessential evaluation rule, to use the terminology of Professor Michael Reisman. FET is not a black-and-white rule of compliance or non-compliance, but one inherently calling for judgment and appreciation in light of an often complex legal and factual situation. The FET standard is often criticized as being insufficiently precise, or even indeterminate. Its application is often criticized as being inconsistent and unpredictable.

9. Finally, the FET standard has proven incredibly dynamic. Ad hoc arbitral tribunals have continuously developed the content of the FET standard through its interpretation and application of hundreds of international investment disputes.

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10. So the FET standard is widespread in treaties, broad in meaning and scope, important in practice, hard to define with precision, and continuously evolving through ever-increasing number of international arbitral awards.

11. It's no wonder, then, that in recent years, FET Standard has been subject to extensive discussion, commentary, criticism, and reconsideration by States at all levels of economic development.

12. Today I will address four questions. First, briefly, what is the origin of the FET standard? Second, what is the content of the FET standard? Third, what are the main formulations of the FET standard—that is, how have States expressed FET in their international agreements? And fourth, how have States responded to the rapid development and evolution of FET in recent years, and where might the standard be heading in the future?

13. *So First*, what is the origin of the FET standard? As Judge Higgins observed, by 1996, FET was already well known by that time in the field of international investment law. The first reference to *just and equitable* treatment can be found in the 1948 Havana Charter for an International Trade Organization. That agreement was never concluded, although it did help lay the foundation for today's international trade law regime. The standard of "fair and equitable treatment" was then included in a large number of U.S. Friendship, Commerce and Navigation Treaties concluded from the 1950s and 60s. These agreements covered an incredibly broad range of topics, including investment protection. The FET standard also made its way into the 1958 Draft Convention on Investments Abroad – a highly influential text known as the Abs-Shawcross Convention. This agreement too was never concluded. But its provisions – including on fair and equitable treatment – then found their way into bilateral investment treaties, including the first ever concluded, the 1959 Germany-Pakistan BIT.

14. FET was then incorporated in the vast majority of the some 3,000 international investment agreements concluded since that time. It has also been included in some foreign

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investment contracts, and it has been included in some States' foreign investment laws. So it is fair to say that, since the Second World War, States have incorporated FET broadly into a very large number of legal instruments for the protection of international investment.

15. The second question is, what is the content of the fair and equitable treatment standard? A typical FET clause may provide: "Investors and investments of each contracting party shall at all times be accorded fair and equitable treatment in the territory of the other contracting party". But what exactly constitutes fair and equitable treatment? These standard clauses typically provide no further guidance. It is understood that fair and equitable treatment standard is a *legal* standard. It does not permit adjudicators to apply their own sense of fairness and equity.

16. It's also understood that FET is an *absolute* standard of protection: FET can be distinguished from so-called relative or contingent standards of protection. It's different in that sense from provisions like the non-discrimination, provision in these international investment agreements, where the treatment to be given to a foreign investor or foreign investment is compared to the treatment that the host State provides to its own investors or investments, or those of a third State. The determination of what is "fair and equitable," by contrast, does not depend on the treatment that the State provides to its own investors or those of another State. It is in that sense an "absolute" standard of protection.

17. As to the content of the FET standard, arbitral tribunals may interpret the standard by the ordinary rules of treaty interpretation. Under Article 31 of the Vienna Convention on the Law of Treaties which reflect customary international law, an interpreter is to look in good faith to the ordinary meaning of the terms in context and in light of the treaty's object and purpose. But arbitral tribunals struggle to find clear guidance in the ordinary meaning of the terms fair and equitable. Some have found that the words stand for *just*, *even-handed*, or *unbiased*. But other tribunals recognize that these words are of "almost equal vagueness." Interpreters may find some additional guidance in treaty context, such as where the FET

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provision is located in a treaty. But, again, context generally provides little concrete guidance for interpreting the terms Fair and Equitable

18. Finally, interpreters may find guidance in a treaty's object and purpose. Arbitral tribunals often look to the treaty's title and preamble, which may record the parties' desire to promote and protect foreign investment. Many tribunals have recognized that, while the primary object and purpose of an investment treaty is to protect foreign investment, the treaty's ultimate aim is broader – it includes encouraging foreign investment, stimulating business, and increasing prosperity in both States. These broader purposes call for a balanced approach to the interpretation of the Fair and Equitable Treatment standard as well as the other substantive standards.

19. Contextual and teleological factors can differ within treaties. So, some tribunals have interpreted the Fair and Equitable Treatment Standard differently even when the treaties use the exact same provision, terminology for fair and equitable treatment protection.

20. Arbitral tribunals increasingly interpret FET in light of how other arbitral tribunals have interpreted the standard, even in cases brought under different treaties. Because the FET standard is open-textured, and because there have been so many international investment arbitrations in recent years, it has primarily fallen to arbitral tribunals to elaborate the content of FET.

21. In deciding concrete cases, arbitral tribunals have interpreted FET to include a number of elements. The more common elements include:

- Legal certainty, stability, and predictability;
- Transparency in the host government's legal process;
- Protection of investors' legitimate expectations;

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- Procedural propriety, due process, and protections against denial of justice.
- Protection from harassment, coercion, abuse of power, or bad-faith misconduct;
- Protection from arbitrary and discriminatory treatment; and
- Good faith in dealings with the host government.

22. The International Court of Justice, for its part, had its first major opportunity to address FET in the *Certain Iranian Assets* case. In the Court's Judgment of March 30, 2023, the Court found that certain U.S. measures breached the 1953 Treaty of Amity between Iran and the United States.

23. The Treaty of Amity was one of a great number of friendship, commerce, and navigation treaties concluded by the United States up until the 1970s. One of the provisions at issue in the *Certain Iranian Assets* case was Article IV, paragraph 1, of the Treaty of Amity. That provision contained three obligations: fair and equitable treatment; effective means of enforcing contract rights; and a prohibition against unreasonable or discriminatory measures impairing legally acquired rights and interests.

24. The Court found that certain U.S. measures were unreasonable, in breach of Article IV, paragraph 1, of the Treaty. In reaching its conclusion, the Court introduced a three-part test for assessing reasonableness. The court looked:

- First, to the legitimacy of the purpose of the challenged measure;
- Second, to the relationship between the measure and the stated purpose of that measure; and
- Third, to whether the adverse impact of the measure is manifestly excessive in relation to its purpose—that is, whether the effect of the measure was disproportionate to its aim.

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25. The Court in that case did not find a breach of the FET provision, nor did the Court address possible elements of FET, beyond the well-established provision governing denial of justice. And the Court found that FET could encompass protection against unreasonable or discriminatory measures.

26. The Court thus opened the door to the potential application of its new three-part test for unreasonableness – including proportionality – when examining FET provisions in other treaties.

27. This is a potentially significant development. The principal judicial organ of the United Nations has now opined on the interpretation of FET, potentially offering new interpretive guidance. This may well influence the development of an already rapidly evolving FET standard.

28. The second question concerns the different ways States have expressed the fair and equitable treatment standard.

29.Let me mention the two most common approaches. The first approach, as discussed, is to adopt the so-called *autonomous* standard, by which the States prescribes “fair and equitable treatment” without linking the standard to international law. This is the most common approach to FET in international investment agreements.

30. A second approach is to link FET to the customary international law minimum standard of treatment. The international minimum standard of treatment developed more than a century ago, partly in response to the so-called Calvo doctrine. Under the Calvo doctrine, the core principle is that aliens are not entitled to protections beyond those provided to nationals of the home state, based on principles of national law.

31. The minimum standard of treatment, by contrast, sets a common minimum standard for the protection of aliens based on international law, regardless of how the host

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State treats its own nationals. That is, the State may comply with domestic law and still be found to have breached its international law obligations.

32. The minimum standard of treatment finds expression in the 1910 statement of then U.S. Secretary of State Elihu Root, an international lawyer who co-founded and served as the first president of the American Society of International Law. Root identified a "perfectly distinct and settled" rule of international law for the protection of aliens. He said:

> "Each country is bound to give to the nationals of another country in its territory the same redress for injury which it gives to its own citizens, and neither more nor less: *provided* the protection which the country gives to its own citizens conforms to the established standard of civilization".

33. This "very simple, very fundamental" standard, he argued, is of "such general acceptance by all civilized countries as to form a part of the international law of the world." Root's remarks capture the concept of a *minimum* standard of treatment in customary international law.

34. The minimum standard of treatment was also famously addressed in the 1926 *Neer* decision of the US-Mexican Mixed Claims Commission, in the diplomatic-protection context. That Commission laid down a requirement that, to breach of international law, "the treatment of an alien ... should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."

35. That sets a rather low bar for permissible State conduct at the international level. The *Neer* case, of course, has to be understood in context, both in terms of the time in which it was decided and the subject matter of the case itself. The *Neer* case concerned the physical security of an alien, rather than the protection of foreign investment as such. The

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Neer case also was decided more than a century ago, when customary international law was less developed, including with respect to international investment protections.

36. As the tribunal in *ADF v. United States* recognized in 2003, "what customary international law protects is not a static photograph of the minimum standard of treatment of aliens as it stood in the 1920s, when the Award in the Neer case was rendered. ... customary international law and the minimum standard of treatment ... are constantly in a process of development."

37. In any event, States such as the United States continue to conclude treaties that incorporate the minimum standard of treatment under customary international law, of which Fair and Equitable Treatment is part of that standard. The United States considers the minimum standard of treatment – or MST – an umbrella concept reflecting a set of rules that, over time, has crystallized into customary international law in *specific contexts*.

38. The standard establishes a minimum *floor* below which treatment of foreign nationals cannot fall. Many non-U.S. international investment agreements similarly include a minimum standard of treatment under customary international law. This includes some recent important agreements, such as the CPTPP – or Comprehensive and Progressive Agreement for Trans-Pacific Partnership – which already 12 States have become State Parties as of the date of this lecture.

39. This trend raises an important question: does it matter in practice whether a treaty incorporates FET as an autonomous standard or as part of the customary international law minimum standard of treatment? Some arbitral tribunals say no. They dismiss the distinction between the treaty standard and the customary standard as more theoretical than real. But many recent treaties show that the distinction between the treaty and customary standards can have real practical importance.

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40. There are at least three significant differences between the treaty and customary international law standards.

41. The first difference concerns the content of the two standards. Arbitral tribunals have interpreted the autonomous FET standard to include a broad range of elements, including the protection of the investor's legitimate expectations. States adopting the minimum standard of treatment under customary international law, by contrast, have sought to establish a baseline for FET.

42. The CPTPP, for example, prescribes what falls inside and outside of the standard. Article 9.6 of that agreement provides that FET "*includes* the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings in accordance with the principles of due process embodied in the principal legal systems of the world." The provision clarifies that the concept of FET does not "create additional substantive rights" or extend protection beyond the minimum standard of treatment under customary international law. The agreement further provides that the *mere fact* that a measure upsets an investor's expectations is not therefore a breach of the minimum standard. CPTPP thus suggests that there may be a difference in the content of the two standards: the autonomous treaty standard of FET and the customary international law standard.

43. The second difference between the treaty and customary standards concerns how tribunals are to interpret FET. The method for ascertaining and applying a treaty-based standard is different from the method for ascertaining and applying a customary international law standard. The treaty standard, as discussed, requires the interpreter to look in good faith to the ordinary meaning of the terms in context and in light of the treaty's object and purpose. But because the terms "fair and equitable treatment" are open-textured, arbitral tribunals have elaborated the content of FET when interpreting the autonomous treaty standard.

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44. The method for ascertaining customary international law, by contrast, is very different. Customary international law is the general and consistent practice of states that they follow from a sense of legal obligation. Customary international law thus has two elements: State practice and *opinio juris*. This two-element approach - State practice and *opinio juris* – is widely accepted by States and confirmed by international courts and tribunals, including the International Court of Justice. The ICJ, for example, stated in its Judgment in the *Jurisdictional Immunities* case: "The *material* of customary international law is to be looked for primarily in the *actual* practice and *opinio juris* of States." As examples of relevant State practice, the Court cited national court decisions, domestic legislation, and official declarations by relevant State actors on the subject. The exercise of establishing a rule of customary international law is different from elaborating a legal standard from the text of a treaty.

45. A third and related difference between the treaty and customary international law standards concerns the role of arbitral awards in the interpretation and development of FET. Arbitral tribunals routinely interpret the FET standard in light of prior arbitral decisions. Article 38 of the ICJ Statute confirms that arbitral awards themselves are not primary sources of international law. The primary sources of international law are treaties, international custom, and general principles of law. International Arbitral decisions are considered subsidiary means in the interpretation of rules of law.

46. In reality, though, arbitral decisions have been a *primary* driver of international investment law in recent decades, including a primary driver of the interpretation of the fair and equitable treatment standard. In fact, the elements typically considered at the core of FET—such as transparency, stability, and the protection of investor expectations—have been developed primarily by arbitral tribunals, rather than the States parties concluding treaties. Nowhere is this more obvious than in the development of the legitimate expectations protections.

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47. The first arbitral decision to clearly spell out that FET encompasses the protection of investor legitimate expectations is the 2003 award in *Tecmed v. Mexico*. The Tribunal interpreted a standard FET clause to require the treaty parties to provide to international investments treatment that does not affect the investor's basic expectations when making its investment.

48. A mere three years later, the tribunal in *Saluka v. Czech Republic* proclaimed that the protection of legitimate expectations forms the *dominant element* of the fair and equitable treatment standard.

49. And by 2015, the tribunal in *Electrabel v Hungary* could proclaim, "It is widely accepted that the most important function of the fair and equitable treatment standard is the protection of the investor's reasonable and legitimate expectations." This is an extraordinary feature of international investment law: Arbitral tribunals have found that the most important function of the most important investment treaty protection is one proclaimed by arbitral tribunals rather than by States when concluding treaties.

50. But that is the consequence of States having delegated to arbitral tribunals to decide concrete cases when interpreting these open-texturedprovisions, such as fair and equitable treatment. And as U.S. Supreme Court Justice Oliver Wedell Holmes remarked in 1905, "general propositions do not decide concrete cases."

51. States that place FET under the minimum standard of treatment have sought to resist this development. Some States have argued that arbitral decisions interpreting autonomous FET provisions in other treaties *do not constitute* evidence of the content of the customary international law minimum standard. These States further argue that arbitral decisions interpreting FET as part of customary international law are not themselves "State practice" for purposes of evidencing customary international law. Rather, they argue that arbitral decisions may be relevant for determining State practice when those decisions

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themselves are interpreting customary international law and examining State practice and *opinio juris* as part of that examination.

52. These States thus provide less scope for arbitral tribunals themselves to develop the content of customary international law, including FET – and this is precisely the opposite of the general trend in recent years.

53. So, in sum, the content of the minimum standard of treatment may differ from the autonomous FET standard; the methodology for interpreting the minimum standard is different from the methodology for interpreting an autonomous standard; and the role that arbitral awards may play in developing fair and equitable treatment is different from the role that those awards may play in developing customary law.

54. Depending on the facts of a case, these differences could make a difference in the application of FET and, potentially, the outcome of a particular dispute. But I reiterate that some tribunals and scholars reject this. They consider that the Fair and Equitable Treatment standard and the customary international law minimum standard are converging, if not already congruent.

55. The final question concerns current developments and the future of the FET standard. How are States responding to the significant developments inFET over the past few decades?

56. Unsurprisingly, States have responded differently. Some States have begun eliminating FET from their newer international investment agreements. This approach of course risks depriving foreign investors of important substantive protections that are not captured by the other provisions of an international investment agreement. So eliminating FET from an international investment agreement may leave important gaps in protection.

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57. Other States, as noted, increasingly link FET to the minimum standard of treatment under customary international law. This may alter the development of FET by linking it to state practice and *opinio juris*.

58. A third example concerns a so-called *articulated* standard. This is the European Union's preferred approach as of the day of this lecture, and it's reflected in its recent international investment agreements. For example, the Canada-EU Comprehensive Economic and Trade Agreement (or CETA) provides at Article 8.10:

> "Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment"

59. Traditionally, this would have been the full extent of the FET provision. But the CETA goes on to introduce three innovative features. First, the agreement specifies the elements of an FET breach. Paragraph 2 provides: "A Party breaches the obligation of FET if a measure or series of measures constitutes: a denial of justice in criminal, civil or administrative proceedings; a fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings; manifest arbitrariness; targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief; abusive treatment of investors, such as coercion, duress and harassment; or a breach of any further elements of the FET obligation adopted by the Parties in accordance with Paragraph 3 of that Article. So This list is broader than the formulated for example in the CPTPP. But it is narrower than the interpretation provided by some arbitral tribunals.

60. A second innovation is reflected in paragraph 3 of that provision, which instructs the treaty parties to regularly review the content of the FET obligation in order to develop recommendations for a decision by a Joint Committee of the treaty parties. Under CETA Article 8.31, decisions of the Joint Committee are binding on international arbitral tribunals. So CETA introduces an innovative solution to the problem of open-texture nature of the Fair

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and Equitable Treatment obligation, the indeterminacy. It allows the joint Committee to circumscribe contours of the agreement and to review arbitral awards to overtime continuously circumscribe that contentwithout having to amend the treaty.

61. A third innovation is CETA provides more precise guidance on one of the most important elements of the FET standard – legitimate expectations. Article 8.10, paragraph 4 provides:

> "When applying the above fair and equitable treatment obligation, the Tribunal *may* take into account whether a Party made a *specific representation* to an investor to *induce* a covered investment, that *created a legitimate expectation*, and upon which the investor *relied* when deciding to make or maintain the covered investment, but that the Party subsequently frustrated."

62. So in other words, to create legitimate expectations for an investor, the state must make a specific representation that induced the investment, the investor actually relied on that inducement or that representation when making or maintaining its investment, and then the State frustrated that expectation.

63. Again, this provides a more precise standard for investment tribunals to apply.

64. The CETA's refinement of the FET standard provides a good example of the evolving nature of international investment law, including FET. States initially concluded investment treaties requiring "fair and equitable treatment," with no further guidance. Arbitral tribunals interpreted that general provision, fleshing out its meaning in concrete cases. States then negotiated new treaties, which adopted, rejected, or modified arbitral tribunals' interpretation of the FET standard. Further arbitral tribunals will refine the standard based on the new standard. And then the CETA State parties will then review those decisions and further refine the standard going forward, without having to amend the treaty.

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65. These innovations suggest a broader lesson for the future. The fair and equitable treatment standard will remain an important, and dynamic, standard of international investment protection in the future.

66. Thank you for listening.

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