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Fair and Equitable Treatment – Ten Years On

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I Introduction

About a decade ago, as a newly hired counsel in Canada's Trade Law Bureau, I was asked to speak about the obligation of fair and equitable treatment (FET), at an international investment treaty conference in Washington. Several investment treaty decisions recently had been released that espoused an expansive view of the contents of FET. (1) The buzzword at the time was arbitral precedent. Gabrielle Kaufmann-Kohler in a speech the year before had asserted that arbitrators had a duty to follow arbitral precedent, to promote investor certainty about the contents of international investment law. (2)

The thrust of my remarks at the time was to raise the issue of the potential State responses to arbitral decision-making concerning the content of investment treaty rules in general, and of FET in particular. (3) If States disagreed with current arbitral interpretations, I suggested, there likely would be an eventual response in new treaties. This response already had occurred in the context of the North American Free Trade Agreement (NAFTA), with the 2001 Note of Interpretation. That Note clarified that the reference to FET in Art. 1105(1) of NAFTA meant a reference to the Minimum Standard of Treatment (MST) at customary international law. (4) The substance of that ● Note had then been translated into the new Model Bilateral Investment Treaties (BITs) of both Canada and the United States. Assuming such State restatements were to occur more broadly, what would be the status going forward of arbitral jurisprudence developed before these new treaties emerged, notably regarding the content of the FET standard?

Ten years on, and the biggest sea change in international investment law arguably has been "the return of the State". In their new treaties, in new model BITs and in public statements about their respective investment treaty programmes, States around the world have signalled a desire to reassert control both over the substance of investment treaty standards, and over the process of investor-State dispute resolution. One of the key turning points of this evolution arguably was the change in the European approach to investment treaties, notably through the Canada-European Union Comprehensive Trade and Investment Agreement (CETA). Before that, Western Europe had been a bastion of liberalism vis-à-vis investment treaty obligations. One of the biggest targets in this new wave of treaty-making has been to reign in the FET standard.

Meanwhile, through a steady stream of decisions the FET jurisprudence has grown exponentially.

All of which returns to the question I asked ten years ago, with a new urgency: what will be the impact of these new treaties on the direction of travel for investor-State obligations, and notably for FET? How will the clash of norms between existing FET jurisprudence and its treatment in new treaties be resolved?

This article seeks to provide an encapsulated history of the FET standard, providing a backdrop to these questions. I first will reference early recognition of the need to provide an objective minimum standard of treatment for investors, and the expression of that standard in early model treaties (II). I then will evoke the split that occurred in investment treaty jurisprudence, between FET understood as a reference to the minimum standard of treatment (MST) at customary international law and FET as a treaty standard open to the interpretations of investment tribunals (III). I then will describe the content tribunals have ascribed to FET as a bare treaty standard (IV), before considering the parallel content of FET as the customary international MST (V). This overview will serve as a backdrop for considering recent State attempts at resetting the dial on FET – responses ranging from eliminating all reference to FET, to expressly limiting FET to MST, to ascribing specific content to FET (VI). Finally, I will consider potential responses to next-generation treaties by current and future arbitral tribunals (VII).

II Towards an International Baseline

Legal theorists have been promoting an international standard of treatment of foreigners since at least the eighteenth century. (5) Through the nineteenth century, States asserting ● arbitral claims on behalf of their national investors abroad in effect were asserting the existence of international standard of treatment. In the early twentieth century former US Secretary of State Elihu Root famously asserted that

"There is a standard of justice, very simple, very fundamental and of such general acceptance by all civilized countries as to form a part of the international law of the world. The condition upon which any country is entitled to measure the justice due from it to an alien by the justice which it

its reasoning that State regulation had to be “reasonable” to avoid sanction. This and other tribunals have expressed the notion of reasonableness as “proportionality”, i.e. that the State's means must be proportionate to the end pursued, and that no one investor may be particularly singled out through the application of the measure. (60)

The potential breadth of limiting State regulatory action on the basis of potential idiosyncratic notions of what constitutes “reasonable” regulation or a “proportionate” response continues to generate controversy around FET as a treaty standard. Again, to the extent State submissions in investment treaties are available, they suggest that States vigorously contest the correctness of employing FET to second-guess good faith State policy decisions that are not tainted by failure to respect the customary MST. (61)

V FET as the Customary International Law Minimum Standard of Treatment

P 214 ● In parallel to the development of a jurisprudence interpreting FET as a treaty standard, arbitrators (primarily but not exclusively under the NAFTA) have been prompted to consider and to apply FET as the customary international law minimum standard of treatment, on the understanding that reference to FET is a shorthand for that standard.

In this customary international law context, arbitral tribunals' interpretative role in relation to FET formally is more constrained. In accordance with standard rules of public international law, the content of customary international law must be determined in light of consistent State practice, guided by a sense that such practice reflects a legal obligation. (62) In practice, this means that any attempt to add to the recognized content of a customary international law standard, or to lower the threshold for a breach of a recognized element of the standard, must be based upon evidence of consistent State practice and *opinio juris*. Proving advances to existing customary norms is difficult. This has put a natural breaking effect on the expansion of the FET standard, understood as a customary minimum norm.

The result has been a standard that includes a more limited range of obligations than FET as a treaty standard open to arbitral interpretation, and one with a relatively higher threshold for breach. (63) Notably, under their interpretation of FET understood as the customary minimum standard of treatment of investors, NAFTA Parties exclude:

- legitimate expectations;
- discrimination on a national treatment basis;
- transparency; or
- the broad “fairness, equity and reasonableness” standard articulated by the tribunal in *Merrill*.

To the contrary, core obligations recognized by NAFTA Parties under FET as a customary standard include the prevention of denial of justice (including avoidance of gross procedural unfairness in judicial decision-making), as well as direct targeting and harassment of investors. Some NAFTA States also acknowledge that the MST precludes State decision-making on manifestly arbitrary grounds. (64)

In this context, the notion of “balancing” investor rights against those of the State has been far more mitigated, for the simple reason that the standard places fewer constraints on State policy space in the first place.

Nonetheless, the standard continues to experience interpretive pressure.

First, claimants have relied upon decisions of arbitral tribunals interpreting FET as a stand-alone treaty standard, to assert novel content for FET as a customary standard. Tribunals typically have rejected such attempts, on the understanding that arbitral tribunals' decisions do not count as State practice. (65)

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Formally, there is no contradiction in referring to decisions of arbitral tribunals articulating the contents of a customary rule, so long as these decisions themselves refer back to consistent State practice and to *opinio juris*. Indeed, arbitral decisions often can be a convenient shorthand when they summarize the contents of an existing rule. Where arbitral tribunals simply hark back to a recognized articulation of the standard, their statements arguably will be less scrutinized for evidence of State practice and *opinio juris*. However, arbitral assertions necessarily will be subjected to greater scrutiny as statements of customary international law when they assert novel content for the customary standard, or suggest a lower threshold for a breach.

Indeed, State endorsement of a particular articulation of an international rule by an arbitral tribunal is itself evidence of State practice and of *opinio juris*. By endorsing an arbitrator's articulation of what the State considers a customary rule, the State gives weight (although not necessarily definitive weight) to the rules' standing as part of customary international law. A basic challenge to establishing State practice on the basis of their investment case submissions is the failure of most States to publish their submissions. Their endorsement of this practice, as of 2001, has given NAFTA Parties' submissions substantial prominence in the analysis of international investment law. It is to be hoped that States increasingly will adopt the same policy, by adopting the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the

Mauritius Convention on Transparency). Currently, these submissions can only be determined at second hand, as rehearsed by tribunals in awards.

Second, claimants and commentators have sought to ground an expanded notion of FET in general principles of law. (66) They note that reference in investment treaties to a guarantee of FET “in accordance with international law” formally does not restrict the contents of “international law” purely to customary international law. According to the Statutes of the International Court of Justice, the primary sources of international law are treaties, custom, and general principles of law. (67) Harking to these “general principles of law”, claimants have argued a general duty of good faith in dealings, through which they seek (inter alia) to introduce respect for legitimate expectations amongst the obligations of even customary FET.

The challenge with this second approach is that the contents of recognized general principles of law are relatively limited. The duty of “good faith” or related requirement that *pacta sunt servanda* are stated in general terms, rather than as specific obligations owed by a State to an investor. Commentators have questioned expanding the content of FET as a minimum standard in specific ways (such as respect for “legitimate expectations”), by reference to such general obligations. (68) In any event, to the extent

P 216 ● FET is understood at a customary minimal norm, in formal terms this is distinct from general principles.

Third, several tribunals have suggested that the content of FET as the customary minimum standard of treatment has been expanded by the widespread reference to an obligation of FET in the over 3,000 bilateral investment treaties signed over the past forty years. This is put forward as evidence of consistent State practice, confirming that customary international law has moved on, at least from the standard expressed in *Neer*. Tribunals suggesting that MST has evolved through the introduction of thousands of additional treaties providing for FET have been noticeably silent as to the precise new content added to the customary standard through this mechanism. (69)

Commentators and States take issue with the above argument, on several grounds. As recognized by the International Law Commission (ILC) in its commentary on the development of customary international law, reference to an obligation in a treaty does not necessarily signal an intention to make that obligation binding, other than as a treaty standard. (70) Indeed, it arguably signals the reverse. Beyond this, there is no confirmation that States when referencing FET in treaties meant anything other than the minimum standard of treatment, as classically understood. Finally, there is an inherent circularity to arguments that States in referencing FET intended to expand the recognized content of the minimum standard. The jurisprudence interpreting FET clauses as a bare treaty standard post-dates the wave of entry into force of most BITs. One can hardly ascribe to States an intention to adhere to specific content for FET that was unknown at the time States began inserting a requirement of “FET” into their investment treaties. The doctrine of legitimate expectations, entirely arbitrator-made, is a good example. Indeed, as we shall see below, the recent wave of treaties entered into by States suggests the reverse of any intention to develop customary international law in the direction ascribed in FET jurisprudence.

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Yet the inherent disciplines on FET as a customary standard have not entirely forestalled attempts to expand the content of the standard.

In one approach, investment tribunals have waived away differences between FET interpreted as a bare treaty standard and FET as a reference to the customary minimum standard of treatment. (71) This typically arises where a claimant asserts that FET is a (more expansive) treaty standard, and the responding State argues that reference to FET is to the customary minimum standard. Some tribunals have resolved this difference by finding that there is (or is not) a violation of the standard irrespective of which standard applies, asserting (without any analysis or evidence) that the two expressions are essentially the same thing, or have converged.

In another approach, tribunals have asserted that they are applying the customary minimum standard of treatment, while going on to apply that standard in a manner implying a substantial (and undemonstrated) expansion of its scope.

For example, in the *Bilcon v. Canada* case the tribunal recognized that the applicable standard was FET as the customary MST. (72) Nonetheless, the Tribunal went on to find Canada in violation of Art. 1105(1) of NAFTA (Minimum Standard of Treatment) because it disagreed with the application of Canadian law by a domestic administrative tribunal. This was in circumstances in which the Claimants had not sought judicial review of the decision forming the “measure” at issue in the arbitration. It is difficult to square this interpretation with MST, one of the core standards of which is protection against denial of justice. It is trite law to note that in considering alleged State breaches of an international standard, State behaviour must be taken as a whole. In the context of a claim based upon an administrative review decision with which the claimant disagreed, this necessarily must take into consideration the investor's ability to seek review of the impugned decision through impartial courts. Where tribunals ignore this, as in *Bilcon*, they are in effect dramatically expanding the scope of the FET obligation.

Other tribunals have purported to give novel content to the MST standard by referring spontaneously to the results of their own investigation into State practice and *opinio juris*. One example of this was the decision of the Tribunal in *Merrill & Ring v. Canada*. (73) The Tribunal found no violation of Art. 1105(1) in that case. However, this did not constrain the Tribunal from engaging in a lengthy excursion into alleged developments of public international law since the 1960s. Curiously for a decision considering inter alia obligations of due process, the Tribunal in that matter saw no need to consult with the disputing parties for their views on the materials the Tribunal had relied upon *sua sponte* to set out an elaborate new statement of FET as a customary norm. ● Still other tribunals have looked to the decision-making of tribunals not purporting to apply the customary minimum standard, to expand the scope of custom. The award in *Railroad Development Corp v. Guatemala* (RDC) is an example of this approach. (74)

States have continued to push back on the contents of FET as the customary MST in their submissions in ongoing cases. For example, in the *Mesa v. Canada* matter, the tribunal invited the disputing parties to provide their views on the significance of the *Bilcon* decision. In that context, the United States in a non-disputing party submission set out a starkly restrictive view of the contents of the Minimum Standard. (75)

Overall, tying FET to the customary MST has had a mitigating effect on the strength of the obligation. Nonetheless, the absence of universally recognized content for the customary international law standard has led claimants, tribunals and commentators to seek through a variety of means to expand the contents of the standard. While States regularly have pushed back, the dynamic arguably has led to a climate of uncertainty. Given mounting opposition of some members of civil society to investor-State dispute resolution – or at least, mounting questions – continued reliance on an undefined standard, especially one designated as the “core” protection, may seem unsatisfactory at best.

VI State Attempts at Redrafting the Standard

In light of the uncertainties surrounding the use of FET in investment treaties, States around the world in recent years have pushed back by altering their treaty practice, in at least three ways.

The most radical approach has been to remove reference to the FET obligation altogether (1). The second approach has been to follow the practice of the NAFTA Parties, by clarifying that FET provides no more than the MST at customary international law (2). The third has been to ascribe specific content to the FET standard, while confirming that only States may expand the scope of this content (3). However, there is also evidence of a failure on the part of some States to react, and to pursue older approaches to treaty-drafting – suggesting the emergence of a “split” in State practice (4).

Overall, the direction of travel is a challenge to existing arbitral jurisprudence interpreting FET as a bare treaty standard. The end result of these efforts remains to be seen.

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1 Eliminating FET Altogether

Faced with the perceived intolerable impact of FET on their policy space, some States have responded to recent jurisprudence by eliminating the FET obligation altogether from their investment treaties.

For some States, this has been accomplished as part of a broader effort to eliminate the perceived restrictions of international investment agreements. States such as Venezuela, Ecuador and Bolivia have pursued this policy, in parallel with denouncing the ICSID Convention. While this arguably radical approach on its face does not specifically target FET, concerns about the potential scope of this obligation (as applied to these States) have been front and centre.

Ironically, this approach may be adopted by the United States in the new version of NAFTA currently being renegotiated. According to current media reports, the United States has accepted a policy proposal from Canada to remove the investment chapter from NAFTA altogether. From a Canadian point of view, this may be seen as less of a radical policy move, given that Canada in any event maintains investment protection vis-à-vis Mexico through the parallel Trans-Pacific Partnership (TPP) treaty. Canadian investors in the United States have met little success in NAFTA Chapter Eleven claims. Canada by contrast has repeatedly been at the receiving end of claims brought by litigious US investors. From a US perspective elimination of investment protection in NAFTA would amount to a radical policy shift. To recall, the United States initially was *demandeur* of investor-State dispute resolution in the original version of the Treaty. Failure to maintain investment protection in what is arguably the United States' marquee free trade agreement may make it more difficult to claim investment protection as a necessary feature of US relations with non-NAFTA States, going forward. (76)

The approach of some other States has been to retain commitment to investment protection, while eliminating FET from the scope of new treaties. This has been the