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FET CLAUSE INTERNATIONAL **INVESTMENT LAW**

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In international investment law, the Fair and Equitable Treatment (FET) standard is a core element of the legal protection afforded to foreign investors. The FET standard is often included in bilateral investment treaties (BITs), free trade agreements (FTAs), and other international investment agreements.

The FET standard generally requires that foreign investors be treated fairly and equitably by the host government. This includes the obligation to provide investors with due process, protection against expropriation without compensation, and the right to receive non-discriminatory treatment. The FET standard is intended to provide foreign investors with greater certainty and security, and to encourage foreign investment in the host country.

However, the interpretation and application of the FET standard can vary depending on the specific circumstances and the legal system involved. Some critics argue that the concept is too vague and subjective, and can be used to challenge legitimate government actions in the name of protecting foreign investors. Others argue that the concept is necessary to ensure that foreign investors are not subjected to arbitrary or discriminatory treatment, and to encourage investment in developing countries.

The FET standard is one of the most litigated provisions in international investment law, and has been the subject of many investor-state disputes. The interpretation and application of the FET standard continues to be a contentious issue in international investment law, and its implementation requires careful consideration of the specific circumstances and a balancing of the various interests

There have been a number of measures that have been found to be in breach of the Fair and Equitable Treatment (FET) standard in investor-state disputes. Some of the measures that have been considered to be in breach of the FET standard by case-law include:

1. Denial of justice: This occurs when a foreign investor is denied access to justice, or when the legal system is used to frustrate the investor's efforts to seek redress.
2. Arbitrary or discriminatory measures: This includes measures that are taken without a rational basis, or that discriminate against foreign investors in favor of domestic investors.
3. Lack of transparency: This occurs when the host government fails to provide foreign investors with sufficient information about the regulatory framework, or when the regulatory framework is changed without adequate notice.
4. Unreasonable or excessive measures: This includes measures that are disproportionate to the government's legitimate objectives, or that impose an unreasonable burden on the foreign investor.
5. Failure to protect against political risks: This includes measures that result in the confiscation of assets or the termination of contracts without compensation, or that expose foreign investors to political risks that are beyond their control.

These are just a few examples of the measures that have been found to be in breach of the FET standard in investor-state disputes. The interpretation and application of the FET standard continues to be a contentious issue in international investment law, and the specific circumstances of each case must be carefully considered in order to determine whether the FET standard has been breached.²

In recent years, there has been increasing debate and controversy surrounding the FET standard. Some argue that the standard is too vague and subjective, and can be used to challenge legitimate government actions in the name of protecting foreign investors. Others argue that the standard is necessary to ensure that foreign investors are not subjected to arbitrary or discriminatory treatment, and to encourage investment in developing countries.

¹ https://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf

² <https://jusmundi.com/en/document/publication/en-fair-and-equitable-treatment>

Overall, the FET standard remains an important element of the international law of foreign investment, and its interpretation and application will continue to be the subject of ongoing debate and discussion.

Fair and equitable treatment as a part of international law including all sources There is also a view that the “fair and equitable treatment standard” is not limited to the minimum standard as contained in the international customary law but takes into account the full range of international law sources, including general principles and modern treaties and other conventional obligations. This view was expressed in a 1984 OECD study and by the NAFTA Tribunals in the Metalclad and S.D. Myers cases.

The term “equitable treatment” appears for the first time in the 1948 Havana Charter for an international trade organization. Article 11(2) contemplated that foreign investors should be treated “justly and equitably”. The article stated that the ITO could: 1. Make proposals for and encourage bilateral or multilateral agreements on initiatives deriving from trade.³

To ensure fair and equal treatment of business, expertise, skills, capital and technology. The fair treatment obligation first emerged as a significant concern in a NAFTA investor – filed arbitration case. In this case, the NAFTA tribunal viewed the requirement as relating to treatment in addition to or above customary international law minimum requirements completely upholding the investor’s arguments. Subsequently, this interpretation was rejected. Apart from NAFTA, a series of arbitral adjudications recognised a host government’s responsibility for ensuring equal treatment and these rulings, unlike those by NAFTA tribunals, tended to view fair treatment clauses as treatment in addition to or above customary international law minimum requirements. According to article 1105(1), each party shall accord to the investments of another party treatment in compliance with international law including fair and equitable treatment as well as maximum protection and security. At the time of the arbitration, developments in arbitral tribunal rulings favoured viewing fair and equitable treatment clauses as either a standalone treaty clause or a concept contained in customary

³ https://unctad.org/system/files/official-document/unctaddiaeia2011d5_en.pdf

international law. The tribunal favoured the former ruling in favour of the investor but holding the issue of damages to be decided by a separate tribunal at a later date.

There have been numerous cases in international investment law where the Fair and Equitable Treatment (FET) standard has been at issue. Here are a few examples of FET cases:

1. **CMS Gas Transmission Company v. The Republic of Argentina:** In this case, the tribunal found that Argentina had breached the FET standard by failing to provide a stable legal and regulatory framework for foreign investors in the gas sector.
2. **Salini Costruttori S.p.A. and Italstrade S.p.A. v. Kingdom of Morocco:** In this case, the tribunal found that Morocco had breached the FET standard by failing to provide a stable and predictable legal framework for foreign investors in the construction sector.
3. **Tecmed v. Mexico:** In this case, the tribunal found that Mexico had breached the FET standard by failing to provide a stable and predictable legal framework for foreign investors in the waste management sector.
4. **Metalclad Corporation v. United Mexican States:** In this case, the tribunal found that Mexico had breached the FET standard by failing to provide a stable and predictable legal framework for foreign investors in the waste management sector, and by failing to provide adequate protection against environmental harm.
5. **Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay:** In this case, the tribunal found that Uruguay had not breached the FET standard by implementing tobacco control measures, such as graphic health warnings on cigarette packaging.⁴

These are just a few examples of FET cases in international investment law. The interpretation and application of the FET standard remains a contentious issue, and the specific circumstances of each case must be carefully considered in order to determine whether the FET standard has been breached.

India has included the Fair and Equitable Treatment (FET) standard in several of its bilateral investment treaties (BITs) and free trade agreements (FTAs). The FET standard is typically included in the "Treatment of Investments" or "Investment Promotion and Protection" chapter of these

⁴ <https://www.acerislaw.com/fair-and-equitable-treatment-in-investment-arbitration/>

agreements. International investment law refers to the legal framework that governs investments made by individuals, companies, or governments in foreign countries. This law is essential in regulating the relationship between the investing party and the host state, as well as providing protection for investors' rights and interests.

When it comes to trade with other countries, international investment law plays a crucial role in facilitating and regulating cross-border investment. International investment agreements (IIAs), such as bilateral investment treaties (BITs) and free trade agreements (FTAs), provide legal protections and safeguards to encourage foreign investment and promote economic cooperation between nations. One of the main features of international investment law is the protection of foreign investors' rights, including the right to fair and equitable treatment, protection against expropriation without adequate compensation, and the right to transfer profits and other returns.

These provisions help to ensure that investors can operate in a stable and predictable legal environment, which is essential for attracting foreign investment. In addition to investor protections, international investment law also includes provisions on dispute settlement mechanisms. These mechanisms are designed to resolve disputes between investors and host states and may include international arbitration, conciliation, or mediation. The goal of these mechanisms is to provide a fair and impartial forum for resolving disputes, thereby reducing the risk of investment-related disputes escalating into diplomatic or trade conflicts. Overall, international investment law plays a crucial role in regulating trade and investment flows between countries. By providing legal protections and dispute settlement mechanisms, it helps to create a stable and predictable environment for foreign investment and promotes economic cooperation between nations.

The FET standard in India's investment agreements generally requires that foreign investors be treated fairly and equitably by the host government, and that they receive treatment that is no less favorable than that provided to domestic investors or investors from other countries.

In addition to the FET standard, India's investment agreements may also include provisions related to expropriation, compensation, and dispute settlement mechanisms. The inclusion of these

provisions is intended to provide greater certainty and security for foreign investors, and to encourage investment in India.

India has been a party to a number of investor-state disputes in recent years, and the interpretation and application of the FET standard has been at issue in several of these disputes. As in other jurisdictions, the specific circumstances of each case must be carefully considered in order to determine whether the FET standard has been breached.⁵

In international trade, treatment of other countries refers to the way in which countries treat each other's goods, services, and investments. The treatment of other countries can be governed by a range of agreements, including multilateral trade agreements, bilateral investment treaties, and regional trade agreements.

One of the core principles of international trade is the principle of non-discrimination. This principle requires that countries treat the goods, services, and investments of other countries no less favorably than they treat their own. There are two main forms of non-discrimination in international trade: most-favored-nation (MFN) treatment and national treatment.

Under MFN treatment, countries must provide the same treatment to the goods, services, and investments of all other countries. This means that if a country lowers tariffs or removes other trade barriers for one country, it must do the same for all other countries with which it has trade relations. Under national treatment, countries must provide the same treatment to the goods, services, and investments of other countries as they do to their own. This means that once a foreign good, service, or investment has entered a country, it must be treated the same as a similar domestic good, service, or investment. In addition to non-discrimination, international trade agreements also include provisions on market access, which specify the conditions under which goods, services, and investments from other countries can enter a country's market. These provisions can include tariff

⁵ <https://www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/5-investment-provisions/5-4-safeguarding-policy-space/5-4-5-fair-and-equitable-treatment-fet-or-minimum-standard-of-treatment-mst/>

reductions, quotas, and other measures designed to promote trade between countries. Overall, the treatment of other countries in international trade is governed by a range of agreements and principles, including non-discrimination, market access, and the promotion of fair and open trade. By promoting these principles, international trade agreements help to facilitate trade flows and promote economic growth and development.

