Overview
A. Introduction
1. This advisory provides an overview of one of the key protections offered by the majority of international investment treaties: the obligation to afford foreign investors and their investments “fair and equitable” treatment (FET).

B. Manifestations of the FET Standard
2. The fair and equitable treatment standard is generally included in investment treaties in one of three basic forms:

2.1 With the first, there is an express link between the requirement to accord fair and equitable treatment and the customary international law minimum standard of treatment of aliens (the Linked FET Standard).

(An example of the first formulation can be seen in the 2012 US Model BIT, which provides that the fair and equitable treatment obligation “prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments”.)

2.2 With the second, there is an express link between the requirement to accord fair and equitable treatment and international law generally. In this advisory, we will refer to the first and second formulations collectively as “the Linked FET Standards”.

(An example of the second formulation can be seen in Article 3(2) of the BIT between Belarus and Croatia, which states that investors “shall be accorded fair and equitable treatment in accordance with international law and provisions of this Agreement.”)

2.3 With the third formulation, there is no express link between fair and equitable treatment and the customary international law minimum standard of treatment (the Autonomous FET Standard).

(An example of the third formulation can be seen in Article 3(1) of the BIT between China and Zimbabwe, which simply states that “Investments and activities with investments of investors of either Contracting Party shall be accorded fair and equitable treatment...”)

3. Which formulation is used has important consequences. A number of arbitral tribunals have considered the existence (or lack thereof) of an express link between an investment treaty’s fair and equitable treatment standard and the customary international law minimum standard of treatment or international law generally to be determinative of what treatment is required by the standard. However, as will be seen below, not all tribunals have adopted this view.

4. The following sections will discuss the elements (or, requirements) of the fair and equitable treatment standard in these two formulations, focussing first on the Autonomous FET Standard and then on the Linked FET Standards. Thereafter, the final section discusses the threshold for breach in relation to both formulations.

C. Elements of the Autonomous FET Standard
5. The term “fair and equitable” (in its autonomous form) has been interpreted by a number of arbitral tribunals. The collective reasoning of the cases in this area indicates that in order to fulfil the elements of an Autonomous FET Standard, a host state’s conduct towards a covered investment must be transparent, non-arbitrary, non-discriminatory, fulfill the investor’s legitimate expectations, follow due process, not amount to a denial of justice, and not be abusive (i.e. be free from coercion, duress and harassment). The meaning of each of these elements is set out further in the following paragraphs.

(i) The requirement to fulfil a foreign investor’s legitimate expectations

6. The requirement to fulfil a foreign investor’s legitimate expectations has two aspects.

7. First, “legitimate expectations” covers expectations arising from an investor’s reliance on a host state’s representations, promises and commitments. Assurances giving rise to “legitimate expectations” can take the form of specific commitments addressed to the investor personally. In addition, assurances giving rise to “legitimate expectations” can also take the form of more general rules that were enacted with the specific aim of inducing foreign investment; however, these general assurances must have been relied on by the investor when making its investment.

8. Second, investors have a legitimate expectation at the time they make their investment that the host state will treat them and their investments in a just, consistent, transparent, even-handed, non-arbitrary and non-discriminatory manner, follow due process, and act in good faith, proportionately, without coercion or harassment, and pay compensation upon expropriation. (Several of these requirements are considered further at paras 10 to 13 below.) These requirements constitute the investor’s basic (legitimate) expectations. They are not dependent on a representation from the state, but are instead rooted in international norms (in particular the concept of good faith) and arise in any event. Therefore a breach of the fair and equitable treatment standard may occur with or without a representation from the state.

9. However, it is generally accepted that Autonomous FET Standards do not include a general requirement that host states maintain a stable business environment. To the contrary, investors should expect that general regulations will change over time, as is the case in most mature legal systems. As such, for a host state’s change of its regulations to breach an Autonomous FET Standard, an investor must establish either that (i) it had a legitimate expectation that no such change would be made on the basis of a specific commitment made by the state to the investor personally, or (ii) that the regulation that was changed was enacted with the specific aim of inducing foreign investment and that the investor relied on that regulation when making its investment.

(ii) The prohibition against manifestly arbitrary treatment

10. The prohibition against manifestly arbitrary treatment requires that actions taken against a foreign investor must be founded on reason or fact and not on prejudice. Thus, whether an action is arbitrary or not depends on the motivations and objectives behind the action.

(iii) The prohibition against discriminatory treatment

11. The prohibition against discriminatory treatment prevents a host state from specifically targeting a foreign investor on the basis of features such as their gender, race or religious belief. The scope of this prohibition will most likely be interpreted by reference to the characteristics protected by human rights law.

(iv) The denial of justice standard and requirement to follow due process

12. In general terms, the denial of justice standard and requirement to follow due process prohibit any gross or manifest misadministration of justice by domestic courts. Depending on the wording of the relevant treaty, they may also extend to administrative proceedings. By way of example, the following might be considered to be denial(s) of justice: lack of a court’s independence from the legislative and the executive branches of the state; denial of access to justice; unreasonable delay in proceedings; and corruption of a judge.

(v) The prohibition against abusive treatment

13. The prohibition against abusive treatment requires that investors be free from coercion, duress and harassment which involves unwarranted or improper pressure, abuse of power, persecution, threats, intimidation, or the use of force. However, this prohibition will only be breached where there are manifestly no lawful grounds for such action to be taken or where it is taken for improper reasons.

D. Elements of the Linked FET Standards

(i) The traditionalist approach

14. Some tribunals have held that the effect of linking the fair and equitable treatment standard to the customary international law minimum standard of treatment (or to international law generally) is that the elements of the fair and equitable treatment standard are limited to the elements that comprise that minimum standard.
15. Therefore the question arises as to what those elements are. The elements of the customary international law minimum standard of treatment, prior to the proliferation of investment protection treaties from the 1950s onward, were understood to focus on denial of justice in its administration by the state’s courts, the treatment of foreigners under detention, and full protection and security (the Traditional Elements). This interpretation of the Linked FET Standards is significantly narrower than the protections offered by the Autonomous FET Standard (discussed above).

(ii) The partially progressive approach

16. A number of arbitral tribunals have considered the traditionalist approach to be outdated. One approach to remedying this has been to add some additional elements to the Traditional Elements, but nevertheless keep the protection narrower than the interpretation that has been given to the Autonomous FET Standard. By way of example, one view is that a Linked FET Standard would be breached by a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evidence of discrimination or a manifest lack of reasons. This interpretation of the Linked FET Standards is still narrower than the protections offered by the Autonomous FET Standard (discussed above).

(iii) The fully progressive approach

17. Some tribunals have taken an even more progressive approach. Rather than restricting their interpretation of a Linked FET Standard to the Traditional Elements, some tribunals have applied the same interpretation as that which has been given to the Autonomous FET Standard. In other words, they consider that there has been a convergence between the customary international law minimum standard of treatment (which they consider to have evolved) and the fair and equitable treatment standard widely adopted in investment treaties over the past several decades.

(iv) Which approach will be taken?

18. Which of these three interpretations of a Linked FET Standard will be adopted by an arbitral tribunal will depend principally on the language used in the applicable investment treaty. Where the standard is linked to international law generally (see para 2.2 above), a more progressive approach is more likely. By contrast, where the standard is expressly linked to the customary international law minimum standard of treatment (see para 2.1 above), it is more likely to be interpreted according to the traditionalist approach.

19. In practice, the persuasiveness of counsel and the composition of the tribunal are likely to be significant factors in determining which approach is taken. As to the latter, this is an example of a situation where it is very important for a disputing party to an investment treaty arbitration to carefully consider which arbitrators to appoint to the tribunal determining its dispute: ideally, parties should take great care to appoint arbitrators who are known to accept the interpretation that is most favourable to them.

E. Threshold for Breach of the FET Standard

20. As has been seen above, whether or not an investment treaty expressly links its fair and equitable treatment standard with the customary international law minimum standard of treatment or with international law generally affects the scope of the protection. In addition, the different formulations also influence the threshold for establishing that the standard has been breached. In general, tribunals are less likely to find a breach of the standard in circumstances where the fair and equitable standard is a Linked FET Standard; in such circumstances, tribunals have held that there must be a high level of shock, arbitrariness, unfairness or discrimination before the host state will be held to have breached the standard. By contrast, in circumstances where the standard is an Autonomous FET Standard, the threshold for breach is lower and has been expressed in terms such as “manifestly unfair or unreasonable”.

F. Conclusion

21. The manner in which a fair and equitable treatment protection is formulated (i.e. as an Autonomous FET Standard or a Linked FET Standard) has a significant effect on both the scope of protection offered and the threshold for its breach. These matters continue to develop as further decisions are rendered in a wider array of scenarios. We will keep you apprised of such developments.

Practices

Investor-State Arbitration

WTO Disputes