First round of break-out sessions: Substantive content of IIAs
Fair and Equitable Treatment (FET)[1]

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In the session on fair and equitable treatment (FET), the weight of comments were directed at the type of reform that should be adopted. One view was that no change was needed, and that tribunals should retain wide discretion to interpret the FET provision and to allow that interpretation to evolve other time and maintain the protective function of IIAs. In contrast, other statements by the experts indicated that new drafting approaches were important. They differed, however, on what those new drafting approaches should be. There were four main strategies advanced by the experts.

One was to include an exhaustive list of the types of conduct that could be deemed to violate the FET provision. The EU-Canada Comprehensive Trade and Economic Agreement (CETA) was given as an example of a recent treaty that adopted this approach. Advantages cited of defining FET through an exhaustive list were that (1) negotiating parties could specifically identify and agree on the standards of conduct to which they were willing to commit; and (2) an exhaustive list would limit the tribunal's discretion to interpret and expand the clause beyond what the State parties had intended. Concerns were raised, however, that it would be challenging to identify the appropriate contents of such a list, and to control how it was interpreted by tribunals. As one potential solution, one expert said that the FET provision could also be drafted to explicitly clarify what the standard did not include.

A second approach that was advocated was to link the FET provision to the minimum standard of treatment under customary international law (MST) as is done, for example, in the United States-Dominican Republic-Central America FTA (US-CAFTA-DR). Some speakers noted that it was difficult to define the contents of the MST, and therefore tying the FET to the MST was arguably to tie one unclear standard to another. In response, however, one expert stated that the MST could be determined by state practice and *opinio juris*, and that, by putting the burden on investors to establish the content of the MST, States could prevent unchecked expansion of the standard.

[1] The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

One member of the group cautioned that tribunals did not always seem to follow States' instructions to define the FET standard by reference to the MST. Another expert, however, noted that the approach of linking the FET to the MST had been successful for it as a respondent State.

The third approach considered by the experts in the break-out session was to replace the FET standard with alternative language such as a requirement for "fair administrative treatment". The Southern African Development Community's (SADC) model bilateral investment treaty template was cited as an example of a text in which this had been done.

Finally, the fourth approach discussed in the session was to omit the FET provision entirely due to the uncertainty inherent in defining it and controlling its interpretation. Another related suggestion was to include it only as a political statement as opposed to an operative legal standard upon which a claim could be based.