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Historicizing Fair and Equitable Treatment ("FET"): Tracing its Unexplored Trade-to-Investment Genesis

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This Note offers a historically grounded reappraisal of the origins and conceptual architecture of the fair and equitable treatment ("FET") standard in international investment law, challenging the entrenched orthodoxy that treats FET as a doctrinal derivative of the customary international law minimum standard of treatment ("MST") and, in particular, the canonical formulation articulated in Neer v. Mexico. *Drawing on a meticulous examination of contemporaneous archival materials and U.S. treaty practice, the Note demonstrates that this prevailing account reflects a retrospective doctrinal synthesis rather than an historically substantiated lineage. It argues, instead, that FET emerged as a purposive instrument of economic governance within the transformation of U.S. commercial diplomacy during the Roosevelt Administration, crystallizing in the context of the Reciprocal Trade Agreements Act of 1934 as a mechanism designed to discipline discrete forms of sovereign economic conduct—most notably in relation to state monopolies, foreign exchange controls, and public procurement—where unstructured discretion threatened commercial reciprocity and market access. In its earliest iterations, FET did not embody a general standard of investor protection, but functioned as a targeted normative constraint, articulating expectations of non-discrimination, procedural regularity, and commercially reasonable conduct in specific domains of state activity. The Note traces the subsequent doctrinal migration of this trade-based standard into the post–World War II architecture of investment treaties, where it was progressively abstracted, universalized, and reinterpreted through the lens of MST, thereby obscuring its distinct genealogy and transforming its functional character. By reconstructing FET's origins as autonomous from, rather than derivative of, MST, this study not only fills a critical gap in the historiography of international investment law, but also provides a more coherent analytical foundation for contemporary treaty interpretation, suggesting that the standard's modern elasticity and expansiveness are better understood as the product of its evolution from a context-specific instrument of economic diplomacy into a generalized and highly indeterminate norm of investor protection.*

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Introduction

One of the most immediately apparent consequences of globalization is the spread of foreign capital through multinational corporations outside of their "home" country.[1] However, a foreign investor risks being subject to adverse, potentially capricious, action by the host state once the investment has been made,[2] prompting the need to provide investors with additional protections for foreign capital.[3]

Post–World War II, the most common legal tool used to accomplish this has been investment agreements that provide for investor–state arbitration.[4]

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1. *See* Muthucumaraswamy Sornarajah, The Settlement of Foreign Investment Disputes 5 (2000).

2. *See generally* Natalie Klein, *Dispute Settlement Options for the Protection of Nationals Abroad*, *in* Litigating International Law Disputes: Weighing the Options 436 (Natalie Klein ed. 2014) [hereinafter Litigating International Law Disputes] ("The treatment and protection of nationals abroad is an issue that has long been of concern in international law.").

3. *See, e.g.*, Sornarajah *supra* note 1, at 2 ("A more direct impact at the macro level on international law resulting from globalisation is that there would be an effort on the part of the states from which multinational capital flows *to ensure the protection of the capital*. This gives rise to attempts to create international law which protects such capital.") (emphasis added); Campbell McLachlan, Laurence Shore & Matthew Weiniger, International Investment Arbitration: Substantive Principles 5 (2007) ("The expansion of trade and investment in the nineteenth and early twentieth centuries directed increased attention to the legal status of foreign nationals abroad and to the protection of their economic interests.").

4. *See, e.g.*, Chester Brown, *Resolving International Investment Disputes*, *in* Litigating International Law Disputes, *supra* note 2, at 401 ("[T]he real growth in the litigation of international investment disputes has come about largely as a result of the reliance by investors on bilateral investment treaties (BITs). These are treaties which, in addition to providing for

Within these agreements, one provision in particular has emerged as the most contentious standard of protection for investors, despite once appearing relatively innocuous in its formulation. The provision, known as the fair and equitable treatment ("FET") standard, requires a state to treat foreign investors in a "fair" and "equitable" manner. Article 3 of the 2009 Belgium–Luxembourg Economic Union–Tajikistan Bilateral Investment Treaty is a representative example. It provides that: "All investments made by investors of one Contracting Party shall enjoy a fair and equitable treatment in the territory of the other Contracting Party."[5]

In contemporary doctrine, the FET standard occupies a central place in investment arbitration and is widely regarded as one of the most expansive protections afforded to foreign investors. It is often described as having emerged from the minimum standard of treatment ("MST") under customary international law, a rule historically understood to require states to afford foreign nationals a basic level of protection against egregious or arbitrary conduct. MST is often assumed to have emerged from the early decision in *Neer v. Mexico*, in which the tribunal articulated the standard as requiring conduct that does not rise to the level of outrage, bad faith, or willful neglect of duty.[6] Within the prevailing account, arbitral tribunals and much of the scholarly literature frequently interpret FET through the lens of MST, treating the standard either as a direct expression of that rule or as closely tethered to it. Yet the relationship between MST and FET appears to be a subsequent doctrinal development, as contemporaneous archival materials from the period in which FET provisions were first formulated do not connect the two. This Note therefore revisits the historical record by examining U.S. treaty practice and situating the emergence of FET within its broader commercial policy context.

This Note's inquiry challenges that prevailing narrative by undertaking a systematic historical examination of the standard's roots. It posits that the doctrinal fixation on MST elides a crucial lineage: the trade-based origins of FET and the degree to which commercial policy influenced subsequent investment protection regimes. By excavating the contextual factors that guided U.S. treaty negotiators as they drafted standalone FET provisions in the 1950s, this analysis establishes a more rigorous historical foundation for understanding the U.S. position. Meticulously tracing this evolution—from trade to investment—not

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substantive standards of protection, typically provide investors with a right to bring a claim in international arbitration against the host state of its investment, if the investor considers that the host state has breached obligations that it owes under the BIT.").

5. Agreement Between the Belgium-Luxembourg Economic Union and the Republic of Tajikistan on the Reciprocal Promotion and Protection of Investments art. III, Belg.-Lux. Econ. Union-Taj., Feb. 10, 2009, 2477 U.N.T.S. 107.

6. L.F.H. Neer v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 60, 61 (Gen. Claims Comm'n 1926).

only fills a critical scholarly lacuna but also offers indispensable context for evaluating the standard's contemporary application. To that end, Part I examines the contemporary understanding of FET as reflected in modern treaty practice, arbitral jurisprudence, and the prevailing scholarly literature. Part II then explores the underexamined trade dimension in the evolution of FET during the Roosevelt Administration. Part III analyzes the Reciprocal Trade Agreements Act ("RTAA") and its contribution to the historical development of the FET standard. Part IV traces the post–World War II crystallization of FET as a freestanding obligation in investment treaties. The Note concludes that FET did not originate as a doctrinal extension of MST, as commonly assumed. Rather, it emerged from Roosevelt-era treaty practice as a targeted instrument of economic governance designed to discipline specific forms of state-controlled commercial activity, thereby reshaping our understanding of the historical foundations of contemporary investment protection.

I. FET as It Is Understood Today and Conventional Scholarship

This Part examines the contemporary understanding of FET in investment law and the role it occupies within arbitral jurisprudence. In modern practice, the content of the standard has been shaped to a considerable degree by arbitral tribunals, which have elaborated its meaning and scope through case law. At the same time, the scholarship addressing the historical origins of FET remains relatively limited. Where it does engage with the question, the prevailing view assumes that the standard emerged in the post–World War II period as a doctrinal outgrowth of MST in customary international law, often with particular reference to the formulation articulated in *Neer v. Mexico*.[7] This conventional account has significantly influenced both arbitral reasoning and academic commentary concerning the foundations of the standard.

The FET standard has emerged as the single most invoked standard in investor–state dispute settlement ("ISDS") claims.[8] The disputes originate out

7. *Id.* at 60.

8. Katia Yannaca-Small, *Fair and Equitable Treatment: Have Its Contours Fully Evolved?*, *in* Arbitration Under International Investment Agreements: A Guide to the Key Issues 501 (Katia Yannaca-Small ed., 2018) ("FET is a flexible, elastic standard whose normative content is being expanded to include new elements. Because of this, it is the most often invoked treaty standard in investor-state arbitration, present in almost every single claim brought by foreign investors against host states."); Rudolf Dolzer et al., Principles of International Investment Law 186 (2012) ("[FET] is the most frequently invoked standard in investment disputes. It is also the standard with the highest practical relevance: the majority of successful claims pursued in international arbitration are based on a violation of the FET standard."); Stephan Schill, *"Fair and Equitable Treatment" as an Embodiment of the Rule of Law,* 2 (Inst. for Int'l L. & Just., Working Paper 2006/6, 2006), https://iilj.org/

of over 2,800 investment agreements (both bilateral and multilateral), and parties include virtually every country.[9] Regulatory measures adopted by elected representatives in a country are routinely the subject of investor–state tribunals, where a majority of three (unelected) tribunal members can order a state to pay billions of dollars in damages. When it comes to the FET standard, Professor Roland Kläger has noted that FET is "by its nature a general clause, and therefore, inherently vague."[10] Because of this, it has become an important cause of action for investor–state disputes. This is why FET is "present in almost every single claim brought by foreign investors."[11] The standard therefore occupies a critical role within investment law and policy.

Because the precise contours of FET have traditionally not been defined in treaties, tribunals often step in to analyze how FET should be understood.[12]

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wp-content/uploads/2016/08/Schill-Fair-and-Equitable-Treatment-under-Investment-Treaties-as-an-Embodiment-of-the-Rule-of-Law-2006-2.pdf [https://perma.cc/N2WT-SCXP] ("Over the past five years, however, fair and equitable treatment has emerged as a central element on the grounds of which host states are increasingly often ordered to pay damages to foreign investors in disputes before international arbitral tribunals.").

9. *See* United Nations Conference on Trade and Development [UNCTAD], *International Investment Agreements Navigator*, Inv. Pol'y Hub, https://investmentpolicy.unctad.org/international-investment-agreements [https://perma.cc/49Y8-PJNX] (listing 2840 Bilateral Investment Treaties ("BITs") and 475 Treaties with Investment Provisions as of January 2025).

10. Roland Kläger, Fair and Equitable Treatment in International Investment Law 67 (2011); *see also* Simon Lester, *Does Investor State Dispute Settlement Need Reform?*, CATO Unbound: A Journal of Debate (May 11, 2015), https://www.cato-unbound.org/2015/05/11/simon-lester/does-investor-state-dispute-settlement-need-reform/ [https://perma.cc/6XWQ-M53D] ("The 'fair and equitable' treatment obligation is well-known as a general 'catch-all' provision for government actions that harm companies. But to what degree do investors actually face treatment that is not 'fair' or 'equitable'? And what kind of treatment is this exactly? A few anecdotes aside, we have a very limited understanding. The result has been an explosion of litigation as creative lawyers seek to push the boundaries of the obligation.").

11. Yannaca-Small, *supra* note 8, at 501. Even the United Nations Conference on Trade and Development ("UNCTAD") has noted the key role that fair and equitable treatment ("FET") plays in the investor-state context, both in terms of its frequency as well as the number of times the tribunal has found a breach based on the FET standard. In November 2024, the UNCTAD noted that: "The fair and equitable treatment (FET) provision was invoked by claimants in about 85 per cent of ISDS [investor–state dispute settlement] cases for which information on breaches alleged was available, followed by indirect expropriation with 70 per cent . . . In cases decided in favour of the investor, ISDS tribunals most frequently found breaches of FET (about 65 per cent) and indirect expropriation (about 30 per cent)." UNCTAD, Facts and Figures on Investor-State Dispute Settlement Cases 8 (Nov. 2024). In another report, the UNCTAD notes that "[m]any past ISDS awards have dealt with the concept of legitimate expectations, although legitimate expectations are not explicitly referred to in the FET provisions of old-generation IIAs [international investment agreements]. The expansive interpretation of the FET clause to protect investor expectations has added high costs for legislative and regulatory changes, for example with regard to the modification or withdrawal of renewable energy incentives." UNCTAD, Review of 2021 Investor-State Arbitration Decisions: Insights for IIA Reform 10 (July 2023).

12. *See, e.g.*, Christoph Schreuer, *Fair and Equitable Treatment in Arbitral Practice*, 6 J. World Inv. & Trade 357, 368 (2005) ("Despite its generality and lack of precision, international

Arbitral tribunals have interpreted the FET standard in broad terms. Among the numerous elements deemed to fall within the ambit of FET are: (1) administrative negligence, capriciousness, and indifference;[13] (2) stable and predictable legal frameworks;[14] (3) consistency and transparency by all organs of the state;[15]

tribunals have given some specific meaning to the concept."); M. Sornarajah, Resistance and Change in the International Law on Foreign Investment 247 (2015) ("The law on the fair and equitable standard is of recent vintage, created largely through interpretations placed on the phrase by arbitrators who favoured expansion.").

13. *See, e.g.*, PSEG Global Inc. v. Republic of Turkey, ICSID Case No. ARB/02/5, Award, ¶ 246 (Jan. 19, 2007) ("The Tribunal is persuaded nonetheless that the fair and equitable treatment standard has been breached, and that this breach is serious enough as to attract liability. Short of bad faith, there is in the present case first an evident negligence on the part of the administration in the handling of the negotiations with the Claimants."); *see also* Impregilo S.p.A. v. Argentine Republic, ICSID Case No. ARB/07/17, Concurring and Dissenting Opinion of J. Charles N. Brower, ¶ 9 (Jun. 21, 2011); Cervin Investissements S.A. v. Republic of Costa Rica, ICSID Case No. ARB/13/2, ¶ 339, Decision on Jurisdiction (Dec. 15, 2014) [hereinafter Cervin Investissements S.A. v. Costa Rica].

14. *See, e.g.*, CMS Gas Transmission Co. v. Republic of Argentina, ICSID Case No. ARB/01/8, Award, ¶ 276 (May 12, 2005) ("[F]air and equitable treatment is inseparable from stability and predictability."); *see also* Duke Energy Electroquil Partners v. Republic of Ecuador, ICSID Case No. ARB/04/19, Award, ¶ 339 (Aug. 18, 2008). In light of criticisms of a very broad reading of this element, recent tribunals have scaled back this requirement to prohibit a radical change to the legal regime. *See, e.g.*, Sevilla Beheer B.V. v. Kingdom of Spain, ICSID Case No. ARB/16/27, Partial Dissenting Opinion by Peter D. Cameron, ¶ 89 (Feb. 11, 2022) ("The ECT allows a state to evolve its regulatory regime for energy investments without being in breach of the requirement to offer 'stable conditions.' However, a complete replacement of that regime by another that is different, unfamiliar and contains adverse economic effects on the Claimants' investments is a different matter."); Natland Inv Grp. N.V. v. Czech Republic, PCA Case No. 2013-35, Partial Award, ¶ 430 (Dec. 20, 2017) ("[I]t is well established in arbitral jurisprudence that one of the elements governed by the FET standard is regulatory stability. This is not to say that the State cannot change its laws or enact new laws; it merely means that such changes cannot undermine the legitimate expectation of the investors as to regulatory stability when making their investments, in particular where such an expectation is based on an intrinsic stabilization guarantee, which is the case here.").

15. *See, e.g.*, Crystallex Int'l Corp. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/11/2, Award, ¶ 579 (Apr. 4, 2016) ("[A]s noted by a number of arbitral tribunals, FET 'requires that any regulation of an investment be done in a transparent manner . . .' The Treaty expressly deals with one aspect of transparency in Article XV. Linked to the notion of transparency is the concept of consistency, which requires that '[o]ne arm of the State cannot . . . affirm what another arm denies to the detriment of a foreign investor.'") (ellipsis in original); *see also* Garanti Koza LLP v. Turkmenistan, ICSID Case No. ARB/11/20, Award, ¶ 382 (Dec. 19, 2016); Etrak Insaat Taahut ve Ticaret Anonim Sirketi v. State of Libya, ICC Case No. 22236/ZF/AYZ, Final Award, ¶ 343 (July 22, 2019); Glencore International A.G. and C.I. Prodeco S.A. v. Republic of Colombia, ICSID Case No. ARB/16/6, Award, ¶ 1419 (Aug. 27, 2019).

(4) denial of justice;[16] (5) proportionality;[17] (6) procedural propriety and due process;[18] and (7) the protection of an investor's legitimate expectations.[19] Significantly, tribunals do not require bad faith or ill intent by the state to find a breach of the FET standard.[20]

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16. *See, e.g.*, Jan de Nul N.V. v. Arab Republic of Egypt, ICSID Case No. ARB/04/13, Award, ¶ 188 (Nov. 6, 2008) [hereinafter Jan de Nul v. Egypt] ("The Tribunal recognizes that the 2002 and 1977 BITs do not comprise a specific provision regarding the miscarriage or denial of justice. It considers, however, that the fair and equitable treatment standard encompasses the notion of denial of justice. The Parties and their experts are in agreement on that point."); *see also* Compañía de Aguas del Aconquija S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award, ¶ 7.4.11 (Aug. 20, 2007); Mohammad Ammar Al-Bahloul v. Republic of Tajikistan, SCC V064/2008, Partial Award on Jurisdiction and Liability, ¶ 221 (Sep. 2, 2009).

17. *See, e.g.*, Eskosol S.p.A. in liquidazione v. Italian Republic, ICSID Case No. ARB/15/50, Award, ¶ 410 (Sept. 4, 2020) ("The Tribunal accepts in principle that part of assessing compliance with the fair and equitable treatment standard is determining whether State measures were disproportionate, in the sense of imposing burdens on foreign investment that went far beyond what was reasonably necessary to achieve good faith public interest goals."); *see also* Técnicas Medioambientales Tecmed, S.A. v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award, ¶ 122 (May 29, 2003); LG&E Energy Corp. v. Argentine Republic, ICSID Case No. ARB/02/1, Decision on Liability, ¶ 195 (Oct. 3, 2006); RREEF Infrastructure (G.P.) Limited v. Kingdom of Spain, ICSID Case No. ARB/13/30, Decision on Responsibility and on the Principles of Quantum, ¶ 463 (Nov. 30, 2018).

18. *See, e.g.*, Spyridon Roussalis v. Romania, ICSID Case No. ARB/06/1, Award, ¶ 314 (Dec. 1, 2011) (explaining that "the State must respect procedural propriety and due process"); *see also*, Jan de Nul v. Egypt, Award, ¶ 187; ECE Projektmanagement International GmbH v. Czech Republic, PCA Case No. 2010-5, Award, ¶ 4.805 (Sept. 19, 2013); Cervin Investissements v. Costa Rica, Award, ¶ 670.

19. *See, e.g.*, Bayindir Insaat Turizm Ticaret Ve Sanayi A.Ş. v. Islamic Republic of Pakistan, ICSID Case No. ARB/03/29, Award, ¶ 190 (Aug. 27, 2009) ("The Tribunal must first determine the relevant time for the formation of the investor's expectations. Several awards have stressed that the expectations to be taken into account are those existing at the time when the investor made the decision to invest."); *see also* Toto Costruzioni Generali S.p.A. v. Lebanese Republic, ICSID Case No. ARB/07/12, Award, ¶ 224 (June 7, 2012); Electrabel S.A. v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.75 (Nov. 30, 2012); Manchester Securities Corporation v. Republic of Poland, PCA Case No. 2015-18, Award, ¶ 492 (Dec. 7, 2018); Addiko Bank AG v. Montenegro, ICSID Case No. ARB/17/35, Award, ¶ 622 (Nov. 24, 2021); Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan, ICSID Case No. ARB/12/1, Decision on Jurisdiction and Liability, ¶ 811 (Nov. 10, 2017).

20. *See, e.g.*, The Loewen Group, Inc. v. United States of America, ICSID Case No. ARB(AF)/98/3, Award, ¶ 132 (June 26, 2003) ("Neither State practice, the decisions of international tribunals nor the opinion of commentators support the view that bad faith or malicious intention is an essential element of unfair and inequitable treatment or denial of justice amounting to a breach of international justice."); *see also* Invesmart, B.V. v. Czech Republic, UNCITRAL, Award, ¶ 419 (June 26, 2009); Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, ¶ 488 (March 27, 2020). In other words, an action undertaken in good faith by the state may still breach the FET standard. *See, e.g.*, Global Telecom Holding S.A.E. v. Canada, ICSID Case No. ARB/16/16, Award, ¶ 488 (March 27, 2020) ("FET is an objective standard which is "unrelated to whether the Respondent has had any deliberate intention or bad faith in adopting the measures in question."); National Grid P.L.C. v. Argentine Republic, UNCITRAL, Award, ¶ 173 (Nov. 3, 2008) ("A review of the case law adduced by the Parties

Despite the ubiquity of FET claims in contemporary ISDS, the genealogy of the standard remains conspicuously underexamined. The existing scholarship has largely failed to interrogate the standard's historical trajectory, thereby obscuring the formative prewar and immediate postwar developments which formed part of its evolution.[21] To the extent that the literature addresses these origins, it adheres to a conventional orthodoxy: that FET emerged as an autonomous concept in the early 1950s, derivative of the customary international law MST, which offers foreign investors a baseline level of protection, and the rejection of the Calvo Doctrine.[22] Consequently, outsized narrative weight is placed on the framework articulated in *Neer v. Mexico*—the seminal 1926 decision of the U.S.–Mexican General Claims Commission[23]—to the exclusion of other factors. *Neer* arose from the murder of Paul Neer, a U.S. citizen working as a superintendent of a mine near Guanaceví in Durango, Mexico.[24] The United States brought a claim on behalf of Fay, the widow of Mr. Neer, and her daughter Pauline before the Commission, alleging that the Mexican authorities "showed an unwarrantable lack of diligence or an unwarrantable lack of

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shows that fair and equitable treatment is considered an objective standard that does not require bad faith by the State.").

21. Professors Dolzer and Schreuer, in their leading treatise, state that the origin of the FET clause "seems to date back to the treaty practice of the United States in the period of treaties on friendship, commerce, and navigation (FCN)" and provide the example of the 1954 FCN Treaty between Germany and the United States. DOLZER ET AL., *supra* note 8. The few serious attempts to trace the genealogy of investment treaties typically commence in the post–World War II era—reflecting the conventional wisdom that FET emerged as a concept and independent principle of investment agreements in the early 1950s—thereby neglecting the antecedent conceptual and legal origins from which FET first emerged. For example, Professor Vandevelde's treatise begins with a chapter entitled "U.S. Postwar Foreign Investment Policy." KENNETH J. VANDEVELDE, THE FIRST BILATERAL INVESTMENT TREATIES: U.S. POSTWAR FRIENDSHIP, COMMERCE, AND NAVIGATION TREATIES 29 (2017). In a brief section regarding the FET standard, he opines that it was in 1948, following World War II, when the United States prepared an investment clause for inclusion in FCN treaties that FET was provided to foreign investors for the first time. *Id.* at 401. The other treatise by Todd Weiler similarly notes "the FET obligation is barely six decades old," and "U.S. treaty negotiators adopted a version of the FET standard . . . not long after the end of World War II." TODD WEILER, THE INTERPRETATION OF INTERNATIONAL INVESTMENT LAW: EQUALITY, DISCRIMINATION, AND MINIMUM STANDARDS OF TREATMENT IN HISTORICAL CONTEXT 183 (Eduardo Valencia-Ospina & Loretta Malintoppi eds., 2013).

22. Benjamin A. Coates, *The United States and International Law, 1776-1939*, *in* A COMPANION TO U.S. FOREIGN RELATIONS: COLONIAL ERA TO THE PRESENT 411 (Christopher R.W. Dietrich ed., 2020) ("Beginning in the 1860s, Argentine statesman Carlos Calvo argued that the rights of foreign investors should not exceed those of domestic citizens. Foreigners who claimed mistreatment should settle these disputes in local courts, not seek the bullying assistance of foreign powers. This became known as the 'Calvo Doctrine,' and many states incorporated 'Calvo Clauses' into their constitutions limiting the rights of foreign investors.").

23. *See generally* L.F.H. Neer v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 60 (Gen. Claims Comm'n 1926).

24. *Id.* at 60.

intelligent investigation in prosecuting Paul Neer's killing."[25] Crucially, however, the Commission took this opportunity to articulate a definitive international standard for the treatment of aliens, the violation of which would constitute an internationally wrongful act:[26]

> [T]he treatment of an alien, in order to constitute an international delinquency, 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.[27]

This formulation has become the canonical articulation of MST in customary international law and occupies a central place in the conventional account of the origins of FET. Under this narrative, the modern FET obligation is frequently portrayed as either reflecting or evolving from this baseline rule governing the treatment of aliens. Yet this interpretation rests largely on retrospective doctrinal reasoning rather than contemporaneous evidence linking the two standards at the time FET provisions were first introduced in treaty practice.[28] Interestingly, the contemporaneous archives are entirely silent on *Neer*,

25. *Id.* at 61.

26. *Id.* at 61–62.

27. Subsequent commission decisions have also referred to the *Neer* standard, although these subsequent decisions do not necessarily rely on *Neer* as an articulation of *the* international minimum standard. *See* Gertrude Parker Massey v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. Docket No. 352, ¶ 21 (Gen. Claims Comm'n 1927) ("Citation is made in the Mexican brief to the Neer case, Docket No. 136, decided by this Commission. In that case it was contended on behalf of the United States that proper steps had not been taken to apprehend persons who had killed an American citizen. The Commission, while being of the opinion that more effective measures might have been employed, held that the record did not disclose evidence of such a gross degree of negligence as would warrant the Commission in finding that the Mexican Government was chargeable with a denial of justice."); H.G. Venable v. Mexico (U.S. v. Mex.), 4 R.I.A.A. Docket No. 603, ¶ 14 (Gen. Claims Comm'n 1927) ("No fault can be imputed to the court, and certainly not a defective administration of justice amounting to an outrage, bad faith, wilful neglect of duty, or apparently insufficient governmental action (see paragraph 4 of the Commission's opinion in the Neer case, Docket No. 136, rendered October 15, 1926).").

28. The association between MST and the formulation articulated in *Neer v. Mexico* appears to have been consolidated in the modern literature through Ian Brownlie's influential 1966 treatise on public international law. Ian Brownlie, Principles of Public International Law 425–26 (1966) ("Since the beginning of the present century legal doctrine has opposed an 'international minimum standard,' 'a moral standard for civilized states' to the principle of national treatment. . . . The standard has also enjoyed the support of many tribunals and claims commissions. Thus, in the Neer Claim the General Claims Commission set up by the United States and Mexico expressed the law as follows: [quotes the *Neer* standard].''). It was during the North American Free Trade Agreement ("NAFTA") era that the NAFTA Parties advanced the position—albeit with limited historical support—that FET was synonymous with MST under customary international law. As they explained, "from its first use in investment agreements, 'fair and equitable treatment' was no more than a shorthand reference to elements of the developed body of customary international law governing the responsibility of a State for its treatment of the nationals of another State. It is in this sense, moreover, that the United

and contain no reference to the decision in connection with the formulation of FET at any stage. While certain materials do refer more generally to international law and the need to anchor particular treaty obligations in international legal standards, those references arise exclusively in relation to the protection and security clause and never in connection with the FET provision.[29] This absence is notable, particularly given the subsequent doctrinal assumption that FET derived from MST as articulated in *Neer*.

II. Excavating the Mercantile Roots of FET: The Unexplored Trade Dimension

The historical record suggests that the roots of FET lie not in abstract doctrinal development but in the pragmatic commercial diplomacy that reshaped U.S. treaty practice in the mid-twentieth century. A key transformation in the evolution of FET occurred during the Franklin D. Roosevelt Administration. It was in this period that FET first emerged as a distinct and purposive principle of treaty design: an instrument of economic governance rather than a reflection of pre-existing customary law, as will be discussed below. Indeed, an archival study reveals that FET was born during the Roosevelt Administration's reconfiguration of U.S. trade and economic diplomacy. The concept took shape within the broader framework of the RTAA of 1934.[30]

States incorporated 'fair and equitable treatment' into its various bilateral investment treaties ('BITs')." Methanex Corp. v. United States of America, UNCITRAL, Memorial on Jurisdiction and Admissibility of Respondent, at 40–41 (Nov. 13, 2000).

29. *See*, *e.g.*, Treaty of Friendship, Commerce and Consular Rights art. I, Est.-U.S., Dec. 23, 1925, T.S. No. 736 ("The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, *the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law . . . "*) (emphasis added). A draft of the treaty with Estonia, for example, provides a valuable internal comment describing the U.S. views on why international law should apply for the propriety of the treatment to foreign investors: "It is believed that it may prove highly useful to acknowledge that the test of the propriety of the treatment due [to] the resident aliens that accorded by international law, rather than by the standards fixed by the state of residence in dealing with its own nationals. The United States finds it constantly necessary to invoke the international law test in dealing with countries whose treatment of their own nationals is arbitrary and unjust." Draft of Treaty of Friendship, Commerce and Consular Rights between the United States of America and Esthonia (n.d.) (on file with U.S. Nat'l Archives, File No. 711/60i2/5A) (Esthonia was the contemporaneous spelling of Estonia). The goal here was to reject the prevailing Calvo doctrine and to anchor the protection and security clause in international standards. However, at no stage do the archival materials make any comparable observation in relation to FET. The negotiators plainly demonstrated that they knew how to anchor treaty standards expressly in international law when they intended to do so, yet they did not adopt such language with respect to the FET provision.

30. Reciprocal Trade Agreements Act of 1934, 19 U.S.C. §§ 1351–54 (1934).

Indeed, this archival study demonstrates that the Roosevelt Administration's treaty practice embedded fairness and equity as guiding standards of economic behavior, particularly in three domains long resisting international legal discipline: state monopolies, foreign exchange controls, and public procurement. These three recurring treaty patterns are particularly instructive. First, in circumstances where a state maintained monopolistic control over certain business activities, the Roosevelt Administration introduced FET obligations to require that states conduct such activities on commercial terms, thus affording U.S. entities a fair and equitable opportunity to participate in the economic activity in question. Second, FET was invoked in the context of foreign exchange controls, where states could subject the allocation of currency and trade quotas to discretionary control.[31] Here, the FET obligation functioned as a restraint on arbitrary allocation practices that might otherwise disadvantage U.S. traders. Third, FET appeared in the context of public procurement, particularly in clauses linking FET to most-favored-nation ("MFN") treatment in the awarding of public works or supply contracts. The archival record is silent as to the precise rationale behind this linkage, though it is plausible that the United States reframed MFN obligations through the lexicon of fairness in order to render them more palatable to treaty partners wary of overt market liberalization. A press release in 1935 from the State Department accompanying this trade program made clear that these were the key arenas in which foreign governments' discretionary power most threatened commercial reciprocity.[32] The inclusion of FET-like provisions thus reflected a conscious effort to ensure that government measures affecting trade and investment would be exercised on a commercially reasonable basis.

Viewed in this light, the Roosevelt period represents the foundational moment in FET's doctrinal evolution—the point at which fairness and equity were first deployed as normative principles governing economic relations between states. This stands in marked contrast to the narrative that traces FET's origins to the *Neer v. Mexico* decision and the customary MST.[33] The *Neer*

31. Letter from Cordell Hull, U.S. Secretary of State, to Diplomatic and Consular Officers (June 6, 1935) (on file with Foreign Relations of the United States, Diplomatic Papers, 1935, General, the Near East and Africa, vol. I, Doc. 419), https://history.state.gov/historicaldocuments/frus1935v01/d419 [https://perma.cc/V3MS-42AD].

32. *Id.*

33. *See, e.g.*, Andrew Newcombe & Luís Paradell, Law and Practice of Investment Treaties 268 (2009) ("There is some state practice amongst major capital exporting states suggesting that fair and equitable treatment was viewed as reflecting, and as synonymous with, the minimum standard of treatment. For example, some elements of US, UK, Swiss and Canadian treaty practice suggest that these states considered that fair and equitable treatment reflected the minimum standard of treatment."); *id.* ("This view [of the 1967 Draft OECD Convention on the Protection of Foreign Property] was reconfirmed by the OECD's Committee on International Investment and Multinational Enterprises in 1984. Accordingly, it is arguable that when

formulation was rooted in a narrow conception of state responsibility and diplomatic protection, addressing only instances of truly egregious or "outrageous" conduct.[34] And contemporary archival records make no reference anywhere to *Neer* or to the MST when describing FET. By contrast, as is discussed below, the Roosevelt-era treaties recast fairness as a structural principle: a means of organizing economic activity and constraining sovereign discretion.

FET's early role, therefore, should not be seen as derivative of MST in the *Neer* sense, but rather as an autonomous instrument of economic diplomacy, deployed to discipline sovereign conduct in ways that would eventually crystallize into substantive protections for foreign investors. This historical reframing has important implications for contemporary treaty interpretation, as it suggests that FET was conceived from the outset as a broader normative standard governing state conduct in economic relations, rather than merely a restatement of the narrow customary MST.

III. The Reciprocal Trade Agreements Act ("RTAA"): A Legal Inflection Point in the Historical Formation of FET

Before turning to the treaty practice of the Roosevelt Administration, it is necessary to situate these developments within the broader transformation of U.S. trade policy during the interwar period. The emergence of FET cannot be understood in isolation from the profound economic and institutional changes that reshaped the United States' approach to international economic relations during the 1930s. This Part therefore examines the policy context in which the concept first took shape. Section A discusses the transformation of U.S. trade

incorporating the fair and equitable treatment standard into their BITs, OECD states were guided by the meaning ascribed to that language by the intergovernmental organization (IGO) of which they were members."); Organisation for Economic Co-operation and Development [OECD], Draft Convention on the Protection of Foreign Property art. 1 (1967) ("The phrase 'fair and equitable treatment,' customary in relevant bilateral agreements, indicates the standard set by international law for the treatment due by each State with regard to the property of foreign nationals. . . . The standard required conforms in effect to the 'minimum standard' which forms part of customary international law."); Graham Mayeda, *Playing Fair: The Meaning of Fair and Equitable Treatment in Bilateral Investment Treaties*, 41 J. WORLD TRADE 273, 274–75 (2007) (explaining that the interpretation of FET "does not accord with the case-law or State practice, which suggest that fair and equitable treatment should be equivalent to the minimum standard and provide protection for procedural fairness and duly diligent consideration of the effects of a proposed government policy on foreign investors").

34. L.F.H. Neer v. United Mexican States (U.S. v. Mex.), 4 R.I.A.A. 60, 61–62 (Gen. Claims Comm'n 1926).

policy during the Roosevelt Administration and the enactment of the RTAA, while Section B examines the 1935 State Department press release in which the language of "fair and equitable treatment" first appeared in connection with U.S. commercial treaty practice.

A. A Change in U.S. Trade Policy

This Note argues that the Roosevelt Administration fundamentally recalibrated U.S. trade policy in response to the collapse of global economic liberalism and the limits of protectionist retrenchment. This shift culminated in the enactment of the RTAA and generated the institutional and normative conditions under which FET, as a principle of international economic conduct, could begin to take root. The seismic economic disruptions of the interwar period fundamentally altered the intellectual and policy foundations of U.S. trade governance. It is within this recalibrated policy framework that the earliest contours of FET began to emerge. At this stage, however, the concept did not appear as a formally articulated doctrinal standard of investment protection. Rather, it functioned as a pragmatic instrument of economic policy, reflecting the Roosevelt Administration's effort to stabilize and structure international economic relations in response to the severe disruptions of the preceding decade.

In the mid-to-late 1930s, the global economy remained in profound upheaval following the collapse of the liberal economic order during the Great Depression, as protectionism, currency instability, and the breakdown of international trade channels disrupted economic relations across Europe and beyond.[35] There was a large increase in nationalism and protectionism, and the economic and political uncertainty of the situation further weakened faith in the system.[36] The Great Depression marked the beginning of a period of severe economic dislocation, leading to the collapse of the gold standard, significant currency instability, and the widespread imposition of national controls over trade and exchange.[37] States increasingly resorted to quantitative restrictions, exchange controls, and discriminatory commercial practices, while long-standing commitments to free trade—most notably in the United Kingdom—were abandoned in favor of

35. Todd S. Shenkin, *Trade-Related Investment Measures in Bilateral Investment Treaties and the GATT: Moving Toward a Multilateral Investment Treaty*, 55 U. Pitt. L. Rev. 541, 552–53 (1994) (quoting Clair Wilcox, an American negotiator in the ITO and GATT).

36. *Id.*

37. *Id; see also* Thomas E. Hall & J. David Ferguson, The Great Depression: An International Disaster of Perverse Economic Policies 76 (1998) ("At each stage of the decline there were new factors contributing to the changes: the stock market crash, the Smoot-Hawley tariff increase of 1930, unwise Federal Reserve policy throughout the decade, the very existence of the gold standard, the British end to the gold standard in 1931, the U.S. end to the gold standard in 1933, bank failures throughout the period, maintenance of high wages by the government, and the inaction of the Hoover administration from 1929 to 1932.").

generalized tariff regimes. The period from 1930 to 1934 was thus marked by a sharp deterioration in international economic relations, characterized by protectionism, exclusionary policies, and systematic discrimination against foreign interests, including the exclusion of foreign traders, the non-payment of foreign creditors, and the marginalization of non-national actors.[38] Significantly, this environment made foreign investors more susceptible to discriminatory and unpredictable state measures, as governments increasingly imposed protectionist regulations and controls over trade and currency. This heightened exposure helps explain the contemporaneous emergence of standards such as FET, which sought to articulate baseline expectations of fairness in the treatment of foreign economic actors.

These developments were unlikely to have been the result of pure global self-interest. Rather, Abraham Berglund, writing contemporaneously, offered two explanations for the emergence of these conditions. First, wartime disruptions encouraged the local development of industries that had previously depended on foreign supply, creating new opportunities for domestic producers.[39] The restoration of peaceful economic relations and the reopening of international trade therefore threatened these newly established national industries. Second, the war contributed to a broader rise in economic nationalism, as it intensified devotion to what were perceived as national interests and sharpened each state's awareness of its own economic claims and priorities.[40]

Following the Great Depression, in keeping with global trends, the United States enacted its own protectionist legislation to guard its domestic interests. In 1930, Congress enacted the Smoot-Hawley Tariff Act,[41] which "rais[ed] duties to the highest level in its history"[42] and prompted trade retaliation from other countries.[43] This surge of protectionism soon proved counterproductive, deepening the global economic downturn and setting the stage for a profound

38. Shenkin, *supra* note 35, at 552–53; *see also* Gerard Clarfield, United States Diplomatic History: The Age of Ascendancy 298 (1992) ("England, after nearly a century, abandoned her free-trade policy, and the following year went off the gold standard.").

39. Clarfield, *supra* note 38, at 298.

40. *Id.* at 413.

41. *Smoot-Hawley Tariff Act*, Britannica, https://www.britannica.com/topic/Smoot-Hawley-Tariff-Act [https://perma.cc/EU2K-D49X]. The Tariff Act of 1930 (also known as the "Smoot-Hawley Tariff Act") introduced protectionist trade policies in the United States. *See* Tariff Act of 1930, 19 U.S.C. §§ 1202–1683. The Smoot-Hawley Tariff Act "raised import duties to protect American business and farmers, adding considerable strain to the international economic climate of the Great Depression." Clarfield, *supra* note 38, at 298.

42. Shenkin, *supra* note 35, at 553.

43. Douglas A. Irwin, Peddling Protectionism 144 (2011) ("In the three years after the Smoot-Hawley tariff was enacted, protectionist trade measures proliferated, world trade collapsed, and the Depression intensified around the world. . . . [T]he Smoot-Hawley tariff was very damaging from the standpoint of U.S. commerce because it led other countries to pursue trade policies that explicitly discriminated against the United States.").

political realignment within the United States, one that would bring Franklin D. Roosevelt to power and usher in a new era of economic governance. The 1932 U.S. presidential election, contested by Democratic then-Governor Roosevelt and the incumbent Republican President Herbert Hoover, resulted in a landslide election for Roosevelt.[44] The United States was in the midst of the Great Depression, and Roosevelt implemented a series of measures to reduce the burdens of the economic crisis in a series of measures popularly described as the "New Deal."[45] While the New Deal encompassed wide-ranging domestic reforms, its significance to FET lies in a change in economic policy in terms of negotiating treaties.

In response to the worsening economic and trade conditions that persisted after World War I, the Smoot-Hawley Tariff Act, and the broader rise of global economic nationalism, Roosevelt and the seventy-third Congress sought to recalibrate U.S. trade policy through the passage of the RTAA. This agreement conferred upon the President expansive authority to negotiate bilateral reciprocal trade agreements with friendly nations. The return to power of the Democrats, who had traditionally opposed high tariffs, saw the appointment of Secretary of State Cordell Hull, a committed advocate of trade liberalization.[46] Hull, who "was convinced that low tariffs were not only beneficial to nations collectively but were also conducive to peace," played a pivotal role in advancing the RTAA and shaping its implementation.[47] It was this shift in trade policy

44. William E. Leuchtenburg, *Franklin D. Roosevelt: Campaigns and Elections*, UVA Miller Ctr., https://millercenter.org/president/fdroosevelt/campaigns-and-elections [https://perma.cc/3XLG-EP8Y].

45. *Id; see also* Karen E. Schnietz, *The Institutional Foundation of U.S. Trade Policy: Revisiting Explanations for the 1934 Reciprocal Trade Agreements Act*, 12 J. Pol'y History 417, 418 (2000) ("The disastrous economic consequences of the [Smoot-Hawley Tariff] were widely believed to have contributed to the defeat to the Republican party in the 1932 elections.").

46. Off. of the Hist., *See Biographies of the Secretaries of State: Cordell Hull (1871–1955)*, U.S. Dep't of State, https://history.state.gov/departmenthistory/people/hull-cordell [https://perma.cc/S9SW-5TBM]) ("Hull nonetheless achieved prominence as an advocate of trade liberalization, closer relations with Latin America, and a postwar multinational institution to promote peace and security."); *see also* Kenneth W. Dam, *Cordell Hull, The Reciprocal Trade Agreement Act, and the WTO* 1 (John M. Olin L. & Econ., Working Paper No. 228, 2004) ("Cordell Hull was a Democrat from Tennessee. He was therefore from his beginning adult years a low tariff proponent as fit the pattern for Democrats not just in those days but from the earliest days of the Republic.").

47. Fred W. Wellborn, Diplomatic History of the United States 300 (1962). Secretary Hull also presented a statement before the Committee on Ways and Means in support of the RTAA. *Reciprocal Trade Agreements: Hearings on H.R. 8430 Before the H. Comm. on Ways and Means*, 73d Cong. 3 (1934) (statement of Cordell Hull, U.S. Secretary of State) ("The bill would authorize the executive branch of the Government to enter into reciprocal commercial agreements with other governments for the purpose of restoring international trade. If it is once agreed that a normal amount of trade among nations is a vital and necessary factor in the restoration of full and stable prosperity, the conclusion seems clear that the proposed policy of bilateral trade agreements offers virtually the only feasible and practicable step in this direction.").

that brought about another change: the emergence of a form of the "Fair and Equitable Treatment" provisions in U.S. treaty practice.[48] While not yet articulated as a standalone investment standard, the logic underlying FET—fairness, reciprocity, and protection against discrimination—had begun to surface. Although the friendship, commerce and navigation ("FCN") and friendship, commerce, and consular rights ("FCCR") treaties were not the primary focus at this stage, the influence of FET as developed in reciprocal trage agreements ("RTAs") increasingly permeated these commercial treaty frameworks, shaping their drafting trajectories.[49]

A careful examination of the historical context surrounding the enactment of the RTAA illuminates the contours of this pivotal transformation. In December 1931, the American Exporters and Importers Association prepared a proposal to move the trade policy away from "special interest groups plaguing congressional policymaking" to the Executive branch.[50] Roosevelt invited Hull to prepare the draft version of the RTAA.[51] The legislative history of the RTAA provides interesting insights into the considerations that influenced the RTAA. In his 1938 book on the reciprocal trade policy of the United States, Henry Tasca recounts the legislative history preceding the Act. He attributes three factors to the push of greater executive bargaining power over tariffs.[52] First, the Democratic Party had long advocated bilateral efforts to reduce international trade barriers.[53] Second, the growing proliferation of trade restrictions following the failure of the London Economic Conference created an urgent need to halt the escalating cycle of protectionist measures.[54] Third, the deteriorating

48. *See, e.g.*, Simon Lester, *The Role of the International Trade Regime in Global Governance*, 16 UCLA J. Int'l L. & Foreign Affs. 209, 219 (2011) ("These agreements had a number of components: tariff bindings; a general prohibition on quotas; . . . [and] a requirement that state monopolies offer *fair and equitable treatment* . . . ") (emphasis added).

49. Weiler, *supra* note 21, at 194 ("Over the first half of the 20th Century, FET language was also commonly employed in its reciprocal trade treaties, in addition to its commerce treaties.").

50. Nitsan Chorev, Remaking U.S. Trade Policy 46 (2011).

51. *Id.* at 46–47 ("Roosevelt asked his Secretary of State, Cordell Hull, rather than his foreign trade advisor, the protectionist George Peek, to prepare a draft of the trade legislation. Hull believed that there was a direct relationship between an open international economy and a peaceful, cooperative world political order.").

52. Henry Tasca, The Reciprocal Trade Policy of the United States: A Study in Trade Philosophy 29 (1938).

53. *See* Schnietz, *supra* note 45, at 419 ("[A]lmost all members eligible to vote on both the Smoot-Hawley Tariff and the RTAA consistently voted along partisan lines: Republicans supporting the protectionist Smoot-Hawley Tariff and opposing the trade-liberalizing RTAA, and Democrats opposing the Smoot-Hawley Tariff and supporting the RTAA. Indeed, this voting simply extended the almost-century-long pattern of Republicans favoring high tariffs to protect their largely industrial constituents from foreign competition, and Democrats favoring low tariffs to help their largely southern, agriculture constituents acquire manufactured goods cheaply.").

54. Tasca, *supra* note 52, at 29.

domestic and global economic situation during the Great Depression—including contracting trade flows, unstable currencies, and mounting protectionism—generated a widespread recognition that the executive branch required greater flexibility and discretionary authority to respond effectively to rapidly changing economic conditions.[55]

After some consideration about what type of request the President would make to Congress in this field, Roosevelt ultimately transmitted the following message to Congress requesting authority to negotiate executive commercial agreements with foreign countries.[56] He wrote:

> I am requesting the Congress to authorize the Executive to enter into executive commercial agreements with foreign nations; and in pursuance thereof within carefully guarded limits to modify existing duties and import restrictions in such a way as will benefit American agricultures and industry . . . . How much greater, how much more violent is the shifting [of trade currents] in these times of change and of stress is clear from the record of current history . . . . *If the American Government is not in a position to make fair offers for fair opportunities, its trade will be superseded*. If it is not in a position at any given moment rapidly to alter the terms on which it is willing to deal with other countries, it cannot adequately protect its trade against discriminations and against bargains injurious to its interests. Furthermore, a promise to which prompt effect cannot be given is not an inducement which can pass current at part in commercial negotiations.[57]

As is apparent from the wording of Roosevelt's speech, fairness in trade was identified as an important aspect of U.S. policy. A bill was transmitted to the House of Representatives from the Ways and Means Committee shortly thereafter. The Committee highlighted six core parts of the bill,[58] one of which was likely related to the impetus of FET clauses, and is, as such, of particular import to this chapter.[59] While the President would be given broader abilities

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55. *Id.*

56. Schnietz, *supra* note 45, at 425–26 ("Hull drafted the first version of the RTAA in early 1933, and Roosevelt announced on April 2 that he would pursue tariff legislation during the first session of the 73d Congress, but Roosevelt ultimately refused to send the bill to Congress. Roosevelt's priority during his first year as President was the National Recovery Act, and he feared that introducing tariff legislation would jeopardize its passage. . . . In late December 1933, Roosevelt announced he would submit the RTAA during the second session of the 73d Congress.").

57. Franklin D. Roosevelt, *Message to Congress Requesting Authority Regarding Foreign Trade* (Mar. 2, 1934), *reprinted by* The American Presidency Project, https://www.presidency.ucsb.edu/documents/message-congress-requesting-authority-regarding-foreign-trade [https://perma.cc/QA25-A4U9] (emphasis added).

58. Tasca, *supra* note 52, at 31.

59. *Id.* at 32 (listing the other five as: "1. To assist in correcting the prevailing economic maladjustments, the President was empowered to 'regulate the admission of foreign goods' in order to provide markets for American exports. 2. With this aim in view, he might negotiate foreign trade agreements reducing or increasing import barriers whenever he found that American

to enter into bilateral agreements with other nations regarding trade, he had to maintain the unconditional MFN policy of the United States.[60] The early emphasis on MFN thus reflects an emerging concern with ensuring that foreign economic actors were treated on a non-discriminatory basis in commercial relations, a principle that would later be reinforced through the parallel articulation of fairness and equity in treaty language.[61]

The bill eventually passed in the House, but not without objection and not without modification.[62] One objection was that it was unwise to vest such extensive authority in a single individual. A separate concern was that the proposed framework lacked provisions for public notice and hearings, meaning that industries potentially "sacrificed" through trade agreements would have little opportunity to be heard, thereby injecting further instability into an already maladjusted economic situation.[63] After further debate and proposed amendments, the RTAA was signed into law on June 6, 1934.[64]

The RTAA was passed as an amendment to the Tariff Act of 1930, undoing much of what the Smoot-Hawley Act allowed. The Act gave the President the power to do several core things in relation to international trade, including entering into foreign trade agreements with other governments for the "purpose of expanding foreign markets for the products of the United States."[65] However,

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customs restrictions were 'unduly burdening and restricting' the foreign trade of the United States or that the objective above would be aided. 3. As limitations upon the delegated powers, the President could not increase or decrease any existing duties by more than 50 percent; nor could he transfer any article between the free and dutiable lists. 4. [provision cited above] 5. The contingent duties provisions of the Hawley-Smoot Act were to be repealed along with the equalization of costs provision (section 336). 6. Each agreement was to have a maximum life of three years, although if due notice were not given at that time for its termination, it might operate indefinitely subject to not more than six months notice. . .").

60. *Id.* This is also reflected in the archival documents where the United States sought to maintain its policy of unconditional MFN. *See, e.g.*, Telegram from William Dawson, U.S. Ambassador to Uruguay, to Cordell Hull, U.S. Secretary of State (July 21, 1942) (on file with U.S. Archives, File No. 611.3331/483) ("Guani and I made brief remarks both stressing importance of unconditional most favored nation clause as means of assuring improved trade relations in better future world. Guani paid tribute to our trade agreement policy."); Telegram from Cordell Hull, U.S. Secretary of State, to Boaz Walton Long, U.S. Minister in Ecuador (April 15, 1938) (on file with U.S. Archives, File No. 611.2231/226) ("With regard to the obstacle which developed in the negotiations, namely, the requested inclusion in the agreement of a trade balance clause, Dr. Banda has suggested that this difficulty might be overcome by *Ecuador's accepting the unconditional most-favored-nation principle in the agreement* and this Government's undertaking in an exchange of notes that in the event that the trade balance between the two countries should be 'unfavorable' to Ecuador the enjoyment of the minimum tariff by the United States would be suspended.") (emphasis added).

61. Tasca, *supra* note 52, at 32.

62. *Id.* at 33–38.

63. *Id.* at 35.

64. *Id.* at 38.

65. Act to amend the Tariff Act of 1930 (Reciprocal Trade Agreements Act), ch. 474, Pub. L. No. 73-316, § 350, 48 Stat. 943, 943 (1934) (codified at 19 U.S.C. §§ 1351–1354) ("Sec. 350. (a)

the Act did provide some substantive limits as well.[66] In the subsequent provisions, it specifies that no proclamation shall be made increasing or decreasing by more than fifty percent any existing rate of duty, or transferring any article between the dutiable and free lists.[67] As per the Senate amendment, the authority was also set to expire three years after its enactment.[68] Furthermore, before the President took action to enter into an agreement, he needed to give reasonable public notice of the intention to negotiate the agreement so that interested parties would have an opportunity to present their views and seek advice from relevant departments.[69] This would allow prospective U.S. investors looking to invest outside the country the opportunity to comment and lobby on any of the changes proposed. Indeed, investor protections would also be contained within such regional trade agreements ("RTAs").

This Act is described as the "first piece of legislation in the history of the American tariff" to advance the thesis that "flourishing international trade is vital to domestic prosperity."[70] In this era, protecting U.S. interests by

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For the purpose of expanding foreign markets for the products of the United States (as a means of assisting in the present emergency in restoring the American standard of living, in overcoming domestic unemployment and the present economic depression, in increasing the purchasing power of the American public, and in establishing and maintaining a better relationship among various branches of American agriculture, industry, mining, and commerce) by regulating the admission of foreign goods into the United States in accordance with the characteristics and needs of various branches of American production so that foreign markets will be made available to those branches of American production which require and are capable of developing such outlets by affording corresponding market opportunities for foreign products in the United States, the President, whenever he finds as a fact that any existing duties or other import restrictions of the United States or any foreign country are unduly burdening and restricting the foreign trade of the United States and that the purpose above declared will be promoted by the means hereinafter specified, is authorized from time to time: — (1) To enter into foreign trade agreements with foreign governments or instrumentalities thereof; and (2) To proclaim such modifications of existing duties and other import restrictions, or such additional import restrictions, or such continuance, and for such minimum periods, of existing customs or excise treatment of any article covered by foreign trade agreements, as are required or appropriate to carry out any foreign trade agreement that the President has entered into hereunder.").

66. Abraham Berglund, *The Reciprocal Trade Agreements Act of 1934*, 25 Am. Econ. Rev. 411, 412 (1935).

67. *Id.* at 416; Reciprocal Trade Agreements Act § 350(a)(2).

68. Berglund, *supra* note 56, at 416; Reciprocal Trade Agreements Act § 2(b).

69. Berglund, *supra* note 56, at 416 ("There was also imposed an obligation to give reasonable public notice of the intention to negotiate an agreement in order that any interested person may have an opportunity to present his views and seek information and advice from the United States Tariff Commission, the Departments of State, Agriculture and Commerce, and from such other sources as the President may deem appropriate. A committee known as the Committee for Reciprocity Information was established by Executive Order to receive information and views from parties interested."); Reciprocal Trade Agreements Act § 2(b).

70. Tasca, *supra* note 52, at 39. Secretary Hull also testified on this point before the Committee on Ways and Means. *See Reciprocal Trade Agreements: Hearings on H.R. 8430 Before the H. Comm. on Ways and Means*, 73d Cong. 12 (1934) (statement of Cordell Hull, U.S. Secretary of State)

maintaining a fair and flourishing trade regime was pivotal. In order to expand the foreign market in pursuance of that goal, Henry Tasca highlighted two crucial objectives that "must be sought."[71] First, "[a] mitigation and removal of international trade barriers" must be pursued to facilitate the expansion of trade.[72] Second, and more important for our consideration, "[e]quality of treatment of American exports" must be ensured in foreign markets.[73] While the words "fair" and "equitable" do not appear in the legislative history of the bill itself, or even in Tasca's account, the impetus for the standard that ultimately appeared in RTAs are reflected in the emphasis on non-discrimination and protecting U.S. interests.[74] Indeed, it is important to note at this early stage that the RTAA was a firm departure from U.S. presidential practice and trade policy. As such, members of Congress would have been looking for assurances that such a shift would more than likely benefit the United States. The inclusion of FET provisions might therefore be responsive to that desire as an additional safeguard against the inequitable dealings of other nations.

B. The 1935 Press Release

Up to this point, this Note's account of the historical backdrop of the RTAA has not yet touched upon the inclusion of a "fair and equitable treatment" standard. This Section now turns to the early policy articulation of the United States under the RTAA and examines how the State Department's contemporaneous statements—particularly its April 1, 1935, press release—revealed the

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("Mr. Hull. If you will pardon me, in order to make a full statement, I would like to refer back to my written statement in which I undertook to set out the attitude of the executive branch, which is that certain other countries, probably 25 in number cannot hope to avoid economic annihilation practically, unless international trade is restored; whereas a country like ours, with its surplus-producing capacity, cannot restore full stability and permanent measure of business prosperity that the average citizen is accustomed to, or that would be necessary year in and year out for his comfort.

Mr. McCormack. In addition to the foreign trade, the purposes are also to preserve the American standard of living and assure adequate protection to American industry, consisting of a foreign trade policy which would be for the general welfare of our people.

Mr. Hull. The purpose, of course, is *to promote primarily our domestic prosperity; that is the primary and paramount purpose.*") (emphasis added).

71. TASCA, *supra* note 52, at 39.

72. *Id.*

73. *Id.*

74. *See, e.g.*, U.S. Dep't of State, Draft Statement Prepared in the Division of Far Eastern Affairs (Nov. 14, 1941), *reprinted by* DEP'T OF STATE OFF. OF THE HIST., https://history.state.gov/historicaldocuments/frus1941v04/d439 [https://perma.cc/J5AQ-PZFY] (stating at a later point that "[i]n the economic field trade restrictions, many of them discriminatory, have been removed so that today United States commerce enjoys unconditionally the treatment of the most-favored-nation. *Today, fair and equitable treatment is the rule for United States interests, whereas formerly those interests encountered many stumbling blocks*") (emphasis added).

emerging principles that would later inform the development of FET in U.S. commercial treaty practice.

Indeed, the Act itself does not mention anything to this effect. However, on April 1, 1935, the State Department delivered a press release concerning the generalization of tariff concessions made under trade agreements and set the tone for the U.S. position in relation to these agreements.[75] At the outset, the State Department emphasized that a core policy of the United States must be to accomplish "the removal or prevention of discriminations against American commerce."[76] It further provided:

> *Equality of treatment is the keynote of the foreign commercial policy of the Government of the United States.* The United States neither seeks nor accords preferential, discriminatory treatment—it only asks that a foreign country treat American commerce no worse than it treats the commerce of any third country and, in turn, accords equality of treatment to the commerce of foreign countries. . . . *The Government of the United States does not presume to say what should be the tariff or other commercial policy of any foreign country, provided merely that it is nondiscriminatory and insures fair and equitable treatment to American commerce.*[77]

From this, it is clear that at this stage, the U.S. government prioritized equality of treatment as a cornerstone of its foreign policy. Notably, this early conception of FET was linked to MFN, as reflected in the terms "no worse than it treats the commerce of any third country," though the archival record offers no explicit rationale for this connection.[78] The invocation of equality may have been a strategic choice, softening the standard's language to enhance its acceptability to treaty counterparts.

It was during this period that RTAs assumed particular significance over other forms of treaty negotiations and the RTAs generally influenced particular significance in this period.[79] Between 1935 and 1945, the United States entered into around twenty RTAs with twenty different states, including Sweden and Canada in 1935; Honduras, the Netherlands, Switzerland, Nicaragua, France, Finland, El Salvador, Czechoslovakia, Ecuador, and Canada in 1938; and the United Kingdom, Venezuela, Argentina, Peru, Uruguay, Mexico, Iran, and

75. U.S. Dep't of State, Statement Issued to the Press, April 1, 1935 on the Policy of the United States Concerning the Generalization of Tariff Concessions Under Trade Agreements (June 6, 1935), *reprinted by* Dep't of State Off. of the Hist., https://history.state.gov/historicaldocuments/frus1935v01/d419 [https://perma.cc/RGZ4-3D6X][hereinafter 1935 Press Release].

76. *Id.*

77. *Id.* (emphasis added).

78. *Id.*

79. *See generally* Vandevelde, *supra* note 21.

Iceland in subsequent years.[80] While this early edition of the FET standard bears resemblance to FET's modern iteration insofar as this was the first formal use of the term "FET," the RTAs' FET provisions were limited in scope. Instead, trade provisions primarily facilitated market access for U.S. investors and offered only limited investor protections. During the Roosevelt era, the United States sought FET in areas where states otherwise had broad discretion (such as public procurement, monopolies, and exchange controls). This use introduced FET as a means to restrict state discretion and anchor it in a standard (albeit one that was facially imprecise). Over time, this targeted application of FET would lay the foundation for its eventual emergence as a freestanding treaty obligation, a development the next Part explores.

Each of the FET provisions in these treaties broadly followed one of three model provisions released alongside the State Department's press release, which

80. Reciprocal Trade Agreement Between the United States of America and Sweden, Swed.-U.S., May 25, 1935, 49 Stat. 3755 [hereinafter U.S.–Sweden RTA]; Reciprocal Trade Agreement Between the United States of America and Canada, Can.-U.S., Nov. 15, 1935, 49 Stat. 3960 [hereinafter U.S.–Canada 1935 RTA]; Reciprocal Trade Agreement Between the United States of America and Honduras, Hond.-U.S., Dec. 18, 1935, E.A.S. No. 86 [hereinafter U.S.–Honduras RTA]; Reciprocal Trade Agreement Between the United States and the Netherlands, Neth.-U.S., Dec. 20, 1935, 50 Stat. 1504 [hereinafter U.S.–Netherlands RTA]; Reciprocal Trade Agreement Between the United States of America and Switzerland, Switz.-U.S., Jan. 9, 1936, 49 Stat. 3917 [hereinafter U.S.–Switzerland RTA]; Reciprocal Trade Agreement Between the United States of America and Nicaragua, Nicar.-U.S., Mar. 11, 1936, 50 Stat. 1413 [hereinafter U.S.–Nicaragua RTA]; Reciprocal Trade Agreement and Protocol of Signature Between the United States and France, Fr.-U.S., May 6, 1936, 53 Stat. 2236 [hereinafter U.S.–France RTA]; Reciprocal Trade Agreement Between the United States of America and Finland, Fin.-U.S., May 18, 1936, 50 Stat. 1436 [hereinafter U.S.–Finland RTA]; Reciprocal Trade Agreement Between the United States and El Salvador, El Sal.-U.S., Feb. 19, 1937, 50 Stat. 1564 [hereinafter U.S.–El Salvador RTA]; Reciprocal Trade Agreement Between the United States of America and Czechoslovakia, Czech.-U.S., Mar. 7, 1938, 53 Stat. 2293 [hereinafter U.S.–Czechoslovakia RTA]; Reciprocal Trade Agreement Between the United States and Ecuador, Ecuador-U.S., Aug. 6, 1938, 53 Stat. 1951 [hereinafter U.S.–Ecuador RTA]; Reciprocal Trade Agreement Between the United States and Canada, Can.-U.S., Nov. 17, 1938, 53 Stat. 2348 [hereinafter U.S.–Canada 1938 RTA]; Reciprocal Trade Agreement Between the United States and the United Kingdom of Great Britain and Northern Island, U.K.-U.S., Nov. 17, 1938, 54 Stat. 1897 [hereinafter U.S.–U.K. RTA]; Reciprocal Trade Between the United States and Venezuela, Venez.-U.S., Nov. 6, 1939, 54 Stat. 2375 [hereinafter U.S.–Venezuela RTA]; Reciprocal Trade Agreement and Supplemental Exchanges of Notes Between the United States of America and Argentina, Arg.-U.S., Oct. 14, 1941, 56 Stat. 1685 [hereinafter U.S.–Argentina RTA]; Reciprocal Trade Agreement and Supplemental Exchanges of Notes Between the United States of America and Peru, Peru-U.S., May 7, 1942, 56 Stat. 1509 [hereinafter U.S.–Peru RTA]; Reciprocal Trade Agreement and Supplemental Exchanges of Notes Between the United States of America and Uruguay, Uru.-U.S., July 21, 1942, 56 Stat. 1624 [hereinafter U.S.–Uruguay RTA]; Reciprocal Trade Agreement Between the United States and Mexico, Mex.-U.S., Dec. 23, 1942, 57 Stat. 833 [hereinafter U.S.–Mexico RTA]; Reciprocal Trade Agreement and Supplemental Exchanges of Notes Between the United States and Iran, Iran-U.S., Apr. 8, 1943, 58 Stat. 1322 [hereinafter U.S.–Iran RTA]; Reciprocal Trade Agreement Between the United States of America and Iceland, Ice.-U.S., Aug. 27, 1943, 57 Stat. 1075 [hereinafter U.S.–Iceland RTA].

addressed potential discrimination in three areas: state monopolies, state exchanges, and the awarding of public works contracts.[81] The following sister treaties were negotiated during this period: the United States–Siam FCN Treaty (1938)[82] and the United States–Liberia FCN Treaty (1938).[83] From an investment policy perspective, these investor protections would apply equally in all the commercial treaties, irrespective of the specific form that they took.

By far, the model article which provides for FET in the context of a state maintaining a monopoly is the most prevalent. The draft article provided by the Press Statement read as follows:

> Article [VIII]
>
> In the event that the Government of the United States of America or the Government of [Partner Country here] establishes or maintains a monopoly for the importation, production or sale of a particular commodity or grants exclusive privileges, formally or in effect, to one or more agencies to import, produce or sell a particular commodity, the Government of the country establishing or maintaining such monopoly, or granting such monopoly privileges, agrees that in respect of the foreign purchases of such monopoly or agency the commerce of the other country shall *receive fair and equitable treatment*. To this end it is agreed that in making its foreign purchases of any product such monopoly or agency will be influenced *solely by those considerations*, such as price, quality, marketability, and terms of sale, which would ordinarily be *taken into account by a private commercial enterprise interested solely in purchasing such product on the most favorable terms*.[84]

The commentary by the U.S. Government to the Press Release explained the rationale for this provision as follows:

> If a country establishes or maintains a government monopoly for the importation or sale of a particular commodity or grants exclusive privileges to one or more agencies to import or sell a particular commodity, the Government of the United States believes that such monopoly or agency should not discriminate against American commerce but that it should *accord American suppliers a fair and equitable share of the market as nearly as may be determined by considerations of price, quality, etc., such as would influence a private commercial enterprise*.[85]

This provision reflected the pervasive role played by state instrumentalities in commercial life, frequently exercised through monopolistic control.

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81. 1935 Press Release, *supra* note 75; *see also* WEILER, *supra* note 20, at 195–197.

82. Treaty of Friendship, Commerce and Navigation, Final Protocol and Exchange of Notes Between the United States of America and Siam, Siam (Thai.)-U.S., Nov. 13, 1937, 53 Stat. 1731.

83. Treaty of Friendship, Commerce and Navigation, Between the United States of America and Liberia, Liber.-U.S., Aug. 8, 1938, 54 Stat. 1739.

84. 1935 Press Release, *supra* note 75 (emphasis added).

85. *Id.* (emphasis added).

Accordingly, the U.S. government pressed for FET assurances whenever a foreign government maintained a monopoly, and the clause appeared in all twenty RTAs concluded during this period.[86] The earliest batch of RTAs kept entirely to the model language. However as the years went on, there were slight deviations in the language,[87] although the general thrust of these later provisions stayed consistent with earlier iterations.

Appearing slightly less frequently was the model provision for FET in the allotment of commerce, if the state had any form of control over foreign exchanges. The draft article in the Press Statement read:

> Article [IX]
>
> The tariff advantages and other benefits provided for in this Agreement are granted by the United States of America and [Partner Country here] to each other subject to the condition that if the Government of either country shall establish or maintain, directly or indirectly, any form of control of foreign exchange, it shall administer such control so as to insure that the nationals and commerce of the other country will be granted a *fair and equitable share* in the allotment of exchange.[88]

The commentary to the Press Release described the rationale of this requirement as follows:

> In regard to exchange control measures, the Government of the United States believes that any form of control of foreign exchange should be *administered in such a way as to insure fair and equitable treatment for the nationals and commerce of the United States*. With respect to the exchange made available for commercial transactions, this means that as nearly as may be determined, the share of the total available exchange which is allotted to any foreign country should not be less than the share employed in a previous representative period prior to the establishment of any exchange control for the settlement of commercial obligations to the nationals of the United States. In other words, *the allotment of exchange should be adjusted to the natural flow of trade* and not on the theory that the exchange granted for importations from a particular country should be regulated by the amount

86. *See* U.S.–Sweden RTA, *supra* note 80, art. VIII; U.S.–Canada 1935 RTA, *supra* note 80, art. VII; U.S.–Honduras RTA, *supra* note 80, art. VII; U.S.–Netherlands RTA, *supra* note 80, art. VIII; U.S.–Switzerland RTA, *supra* note 80, art. VIII; U.S.–Nicaragua RTA, *supra* note 80, art. VIII; U.S.–France RTA, *supra* note 80, art. IX; U.S.–Finland RTA, *supra* note 80, art. IX; U.S.-El Salvador RTA, *supra* note 80, art. VIII; U.S.–Czechoslovakia RTA, *supra* note 80, art. IX; U.S.–Ecuador RTA, *supra* note 80, art. IX; U.S.–Canada 1938 RTA, *supra* note 80, art. IV; U.S.–U.K. RTA, *supra* note 80, art. VIII; U.S.–Venezuela RTA, *supra* note 80, art. VIII; U.S.–Argentina RTA, *supra* note 80, art. V; U.S.–Peru RTA, *supra* note 80, art. V; U.S.–Uruguay RTA, *supra* note 80, art. V; U.S.–Mexico RTA, *supra* note 80, art. V (using "exclusive agency" instead of "monopoly"); U.S.–Iran RTA, *supra* note 80, art. V; U.S.–Iceland RTA, *supra* note 80, art. V.

87. *See, e.g.*, U.S.–U.K. RTA, *supra* note 80, art. VIII.

88. 1935 Press Release, *supra* note 75 (emphasis added).

> of exchange created by exports to that country. The latter policy tends to force a bilateral balancing of trade between each pair of countries, and thus tends to prevent the natural triangular or multilateral trade movements and to reduce the total volume of world trade.[89]

These provisions appeared frequently in the first batch of RTAs signed from 1935 to 1937, but not as uniformly as the monopoly provision. In fact, they appeared in RTAs with Sweden,[90] Canada,[91] Honduras,[92] Nicaragua,[93] Finland,[94] and El Salvador,[95] but they were completely absent from every other RTA signed after 1937. On first glance this might have to do with the fact that insuring a "fair and equitable *share*"[96] in a foreign exchange was not as high a priority as ensuring FET in regard to treatment from a state monopoly. It is interesting to note that the 1935 U.S.–Canada RTA included this provision, while the 1938 RTA did not, further signaling that, for some unstated reason, this provision was not serving its goal of improving trade conditions.[97]

The final provision concerned quantitative restrictions. The Press Release provided the following explanation:

> With respect to quantitative restrictions, what is meant by nondiscriminatory treatment, although somewhat less obvious and subject to different interpretations, can be defined with a fair degree of precision. While the undesirability of quotas is generally agreed to it is necessary as long as they are in use to define the term non-discriminatory treatment as applied to them. If quotas can be reconciled with non-discriminatory treatment this term must be defined as meaning the allotment to any foreign country of a share of the total quantity of any article permitted to be imported equivalent to the proportion of the total importation of the article which that foreign country supplied during a previous representative period. By "representative" period, is meant a series of years during which trade in the particular article under consideration was free from restrictive measures of a discriminatory character, and was not affected by unusual circumstances such as, for example, a crop failure in the case of an agricultural product. The term "representative" is thus flexible enough to take into account all circumstances affecting the trade in any given commodity with any particular country.[98]

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89. *Id.* (emphasis added).
90. U.S.–Sweden RTA, *supra* note 80, art. IX.
91. U.S.–Canada 1935 RTA, *supra* note 80, art. IX.
92. U.S.–Honduras RTA, *supra* note 80, art. VIII.
93. U.S.–Nicaragua RTA, *supra* note 80, art. IX.
94. U.S.–Finland RTA, *supra* note 80, art. X.
95. U.S.–El Salvador RTA, *supra* note 80, art. IX.
96. 1935 Press Release, *supra* note 75 (emphasis added).
97. *Compare* U.S.–Canada 1935 RTA, *supra* note 80, art. IX, *with* U.S.–Canada 1938 RTA, *supra* note 80.
98. 1935 Press Release, *supra* note 75 (emphasis added).

The 1936 U.S.–France RTA included a provision detailing FET guarantees that each state was required to provide if either state established quantitative restrictions on, or regulations of, the importation or sale of any product.[99] The U.S.–Finland RTA signed just two weeks later included a similar, albeit slightly different provision.[100] One year later, Czechoslovakia entered into an RTA with the United States that included a note relating to its monopoly provision, which provided that FET applied to quantitative restrictions.[101]

1941 saw the resurgence of RTAs with a new standard clause geared towards the awarding of public works contracts. Between 1941 and 1946, every RTA had a provision along these lines, usually appearing in the same article as the monopoly provision. The new provision stated:

> ARTICLE V
>
> ***
>
> 2. The Government of each country, in the awarding of contracts for public works and generally in the purchase of supplies, shall accord fair and equitable treatment to the commerce of the other country as compared with the treatment accorded to the commerce of other foreign countries.[102]

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99. U.S.–France RTA, *supra* note 80, art. VI(5) ("Regulation of the importation or sale of such product, unless it is mutually agreed to dispense with such allotment. The basic period selected shall be such as to result in a *fair and equitable allotment*.") (emphasis added).

100. U.S.–Finland RTA, *supra* note 80, art. VIII ("1. If the Government of the United States of America or the Government of Finland establishes or maintains any form of quantitative restriction or control of the importation or sale of any article in which the other country has an interest, or imposes a lower import duty or charge on the importation or sale of a specified quantity of any such article than the duty or charge imposed on importations in excess of such quantity, the Government taking such action shall: (a) Give public notice of the total quantity, or any change therein, of any such article permitted to be imported or sold, or permitted to be imported or sold at such lower duty or charge, during a specified period; (b) Unless otherwise mutually agreed, allot to the other country for such specified period a share of such total quantity as originally established, or subsequently changed in any manner, equivalent to the proportion of the total importation of such article which such other country supplied during a previous period, such period to be such as to result in a *fair and equitable allotment to the other country*.") (emphasis added).

101. U.S.–Czechoslovakia RTA, *supra* note 80, 53. Stat. at 2335 ("EXCELLENCY: With reference to Article IX of the Trade Agreement signed this day on behalf of the United States of America and the Czechoslovak Republic, I have the honor to inform Your Excellency that pursuant to the understanding reached in the course of the negotiations of the said Agreement, the Czechoslovak Tobacco Monopoly will make every effort to increase the purchases of leaf tobacco of United States origin and provenance, particularly those types used for cigarettes. The Government of the Czechoslovak Republic also engages that any quantitative restriction it may establish on imports of wheaten flour shall take the form of an unallocated global quota, which shall be announced and shall be administered in such a way as to permit the full utilization thereof on a fair and equitable basis as between exporters in the several supplying countries.").

102. U.S.–Iran RTA, *supra* note 80, art. V.

Here, FET was linked to MFN in the context of awarding contracts for public works or supplies. The United States therefore sought to prevent discrimination between countries.

Taking stock of the practice of these RTAs over this eleven-year period shows that there was some evolution in the presence of FET standards in different provisions, although their presence in monopoly provisions was incredibly consistent. It can therefore be seen, at these early stages, that FET clauses were malleable: They took on a slightly different meaning depending on what type of provision in which they were present. In monopoly provisions, the article instructed the states to solely be influenced by price, quality, marketability, and terms of sale. For foreign exchange provisions, the states were guided to consider what would be a fair and equitable share in the allotment of the exchange. Although silent on how that should be considered, the State Department's Press Release signaled that such considerations should be based "as nearly as may be determined, the share of the total available exchange which is allotted to any foreign country should not be less than the share employed in a previous representative period prior to the establishment of any exchange control for the settlement of commercial obligations to the nationals of the United States."[103] And lastly, for the contracting of public works, the provisions clarify that the states should be accorded fair and equitable treatment "compared with the treatment accorded to the commerce of other foreign countries,"[104] taking on a quasi-MFN quality.[105]

A key takeaway from this period is that, although there was no freestanding FET provision, express references to FET appeared in certain specified contexts, which had not been present in the pre-Roosevelt Administration period. All of these provisions were negotiated within the framework of trade agreements. However, a recurring theme in the history of international treaties is the movement of concepts from the trade domain into investment agreements. For instance, principles such as MFN and national treatment, initially rooted in trade law, eventually became key protections afforded to foreign investors. This gradual expansion highlights the dynamic interplay between trade and investment norms. It is best understood within the broader policy vision that

103. 1935 Press Release, *supra* note 75 (emphasis added).

104. *Id.*

105. Edward A. Laing, *Equal Access/Non-Discrimination and Legitimate Discrimination in International Economic Law*, 14 Wis. Int'l L.J. 246, 261 n.64 (1996) ("Snyder notes that even though the phrase 'seems to dominate clauses dealing with quotas, monopolies and exchange control, it is justifiable to count the latter among the important new developments in most-favored-nation treatment, for if the phrase has any meaning at all, it must mean treatment which will not place one nation at a disadvantage in relation to another. This is never an exact proposition even where equality is specified.'") (citing Richard C. Snyder, The Most Favored Nation Clause: An Analysis with Particular Reference to Recent Treaty Practice and Tariffs 85–95 (1948)).

informed early U.S. treaty-making efforts, perhaps most clearly expressed by Hull, the chief architect of the U.S. trade agreements program. Hull repeatedly emphasized the role of trade liberalization in fostering economic growth, stability, and international peace. In a 1943 address to the House Ways and Means Committee, Hull articulated the philosophical and practical underpinnings of the U.S. trade agenda, offering a compelling rationale that would come to influence the structure of commercial and investment treaties for decades to follow:

> In this country we prefer that our combined domestic and international economy rest primarily on a system of free enterprise . . . What the trade agreements program proposes is that this complex system of trade regulation, both our own and that of others, shall be administered and guided, as far as our influence extends, not in the direction of regimentation and scarcity, but in the direction of increased production, better distribution and more abundant consumption . . . That is neither Republican nor Democratic doctrine. It is American doctrine . . . [It would] make possible, in our own hard-headed self-interest, fuller international cooperation against the common scourges of poverty, social and political instability and war, and for greater abundance, social and political stability and secure peace.[106]

Read in context, the paragraph offers a compact theory of the trade program's constitutional and geopolitical function. It presents reciprocal trade liberalization as the external analogue of domestic free enterprise, recasts the administration of tariffs and allied controls as a choice between scarcity-inducing regimentation and abundance-oriented governance, and legitimates the project through a deliberately non-partisan register ("American doctrine"). Simultaneously, it links commercial policy to a broader security agenda. Expanded production and distribution are presented as practical tools for reducing poverty, instability, and the risk of war. They are also portrayed as mechanisms for consolidating prosperity and peace.

IV. The Crystallization of a Discrete FET Norm in the Post-Roosevelt Epoch: The Trade to Investment Nexus

This Part examines the post-Roosevelt policy developments that led to the standardization of U.S. investment policy and ultimately to the emergence of the freestanding FET clause. The historical record demonstrates that, immediately following the Roosevelt era's circumscribed articulation of the standard, a concerted effort to standardize U.S. investment policy catalyzed the genesis of

106. *Extension of Reciprocal Trade Agreements Act: Hearing on H.J. Res. 111 Before H. Comm. on Ways and Means*, 78th Cong. 2, 6 (1943) (statement of Cordell Hull, U.S. Secretary of State).

the freestanding FET clause. Indeed, on July 10, 1945, the Executive Committee on Economic Foreign Policy established an ad hoc Committee on Foreign Investment Policy ("FIP Committee"). The main purpose of that Committee was to "formulate a statement of United States policy with respect to . . . treatment of American capital by foreign governments . . ."[107] The FIP Committee included a representative from the following governmental agencies: Department of State, Department of Treasury, Department of Commerce, Department of Labor, Federal Reserve Board, Securities and Exchange Commission, and Foreign Economic Administration.[108]

As part of its work to propose U.S. strategies and policies on the international scene, the FIP Committee began by diagnosing the state of foreign investor treatment abroad.[109] The FIP Committee concluded that "[n]ationalistic and restrictive measures were found to be common precisely in those undeveloped areas which constitute a natural field for foreign investment."[110] These "nationalistic and restrictive measures" included "measures which (1) restrict the entry of foreign capital; (2) require local participation in management and/or control; (3) discriminate generally against foreign capital as such; and (4) restrict the remittance of profits and/or capital . . ."[111] Using this diagnosis, the FIP Committee decided to formulate its policy.

The FIP Committee's first recommendation was to seek the removal of restrictions on foreign investments.[112] The FIP Committee further recommended "the elimination of unnecessary obstacles to the flow of private foreign investment and the regulation of private foreign investment to the extent

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107. Letter from Willard L. Thorp, Vice Chairman, Exec. Comm. on Econ. Foreign Pol'y, to Ganson Purcell, Chairman, Sec. & Exch. Comm'n (July 13, 1945) (on file with U.S. Nat'l Archives, File No. 760090).

108. *Id.*

109. *See, e.g.*, Memorandum from Alfred Hill, Sec. & Exch. Comm'n, to Walter C. Louchheim, Jr., Advisor on Foreign Invs., Sec. & Exch. Comm'n (Dec. 20, 1945) (on file with U.S. Nat'l Archives, File No. 760090).

110. *Id.*

111. *Id.*

112. *See*, *e.g.*, Comm. on Foreign Invs. Policy [FIP Committee] Working Grp., Report on U.S. Policy Toward Joint Participation of Am. & Local Cap. in Foreign Inv. (Nov. 10, 1945) (on file with U.S. Nat'l Archives, File No. 760090). The FIP Committee's recommendations encompass three key points. First, the United States should advocate the removal of restrictions on joint participation of American capital with local partners in foreign ventures while avoiding any perception of seeking privileged treatment for its nationals. Second, in cases involving monopoly privileges or nationalization, the United States should maintain a stance of passive neutrality but assert the right to ensure protection for American investors, non-discriminatory treatment for American nationals, and adherence to principles of unencumbered, multilateral trade. Finally, the United States should support voluntary joint participation by American and local capital and management, with the caveat that it does not endorse arrangements that restrict international trade, access to international markets, or foster monopolistic control, and does not grant special privileges to nationals of a specific country. *Id.*

necessary to eliminate abuses detrimental to international relations."[113] Albeit in the trade context, the U.S. investment policy discussions identified "just and equitable treatment" as a criterion for the treatment of foreign enterprise and capital in the draft commercial treaty program.[114] The United States explicitly articulated this within the context of the Inter-American Conference on Problems of War and Peace:

> Just and Equitable Treatment for Foreign Enterprise and Capital. To act individually, and jointly with each other and with other nations by means of treaties, executive agreements or other arrangements, *to assure just and equitable treatment and encouragement for the enterprises, skills and capital brought from one country to another.* The American Republics will undertake to afford ample facilities for the free movement and investment of capital *giving equal treatment to national and foreign capital, except when the investment of the latter would be contrary to the fundamental principle of public interest.*[115]

The FET standard was explicitly tied to national treatment and was carefully delineated to preserve a state's ability to regulate in the public interest. But, at this stage, FET was still concerned with trade issues (for example, access to markets or unconditional MFN) and not specifically with investor protection.

In June 1949, the National Advisory Council on International Monetary and Financial Problems ("NAC") Staff Committee drafted a memorandum entitled "Treaty Provisions Covering Protection of United States Foreign Investment" for the NAC.[116] This Memorandum described the balance the Committee sought to strike in treaties: "(a) commitments which are sufficiently strong to encourage new investments, (b) commitments which have a reasonable prospect of being acceptable to foreign countries, (c) commitments which are feasible from the standpoint of U.S. laws and probable congressional views, and (d) commitments which are considered fair and reasonable from the standpoint of both parties."[117] The Committee then set forth its "recommendation as to the principles which should be incorporated in investment clauses" in five main headings:

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113. U.S. Dep't of State, Report on Reconstruction & Related Probs. (May 24, 1944) (on file with U.S. Nat'l Archives, File No. 760090).

114. Excerpt from Final Act of the Inter-American Conference on Problems of War & Peace Relating to the Foreign Investment Policy of the U.S. (Sept. 24, 1945) (on file with U.S. Nat'l Archives, File No. 760090) ("That the American Republics will undertake to afford ample facilities for the free movement and Investment of capital, giving; equal treatment to national and foreign capital, except when the Investment of the latter would be contrary to the fundamental principles of public interest.").

115. *Id.* (emphasis added).

116. Memorandum from Nat'l Advisory Council on Int'l Monetary and Fin. Probs. [NAC] Staff Comm. to NAC (June 13, 1949) (on file with NAC, NAC Doc. No. 838).

117. *Id.*

1. *Equitable treatment.*
2. Reasonable freedom to operate, control, and manage an enterprise.
3. Expropriation and compensation therefor.
4. Withdrawal of funds and exchange restrictions.
5. Taxation.[118]

In the Minutes of a Meeting of the NAC on June 14, 1949, the Committee described the scope of the term "Equitable Treatment" as follows:

> *1. Equitable treatment.—There was a general statement that United States investors should be accorded non-discriminatory treatment.* This would mean that United States investors would obtain national treatment with respect to investments in all lines except banking, extractive and public utility activities. With respect to the latter categories United States investors would receive most-favored-nation treatment. *One broad exception related to measures concerned with national security.* There was also a general provision for consultation on questions as to what would constitute equitable treatment.[119]

The United States' understanding of equitable treatment centered on non-discrimination. At the same time, it preserved regulatory authority in specific sectors by allowing states to limit national treatment in areas such as banking, extractive industries, and public utilities, while also recognizing an exception for measures taken in the interest of national security. But, as was already observed, there were concerns as to what would constitute "equitable treatment." The archives do not provide any further guidance about any consultations about the meaning of equitable treatment. Instead, at the meeting, an outline for the "Equitable Treatment" provision was provided:

> I. Equitable treatment.
>
> United States investors shall at all times be *accorded non-discriminatory, reasonable, fair and equitable treatment*. In particular they shall be accorded national treatment as a minimum with respect to the right to establish and engage in all economic activities except fiduciary, deposit banking, extractive, transport, communications and public utility activities.
>
> They shall be accorded most-favored-nation treatment as a minimum for the excepted activities noted above, and also for all activities enjoying national treatment whenever most-favored-nation treatment is more favorable than national treatment.
>
> This treaty shall not preclude the application of measures necessary to fulfill the obligations of a Party for the maintenance or restoration of

118. *Id.*

119. Minutes of Meeting (No. 130) of the NAC (June 14, 1949) (on file with NAC, NAC Files, Lot 60D137).

> international peace and security, or necessary to protect its essential security interests. . . .[120]

At this juncture, it appears that the "Equitable Treatment" standard encompassed three distinct but interrelated components: (i) a non-discriminatory and reasonable conception of FET; (ii) national treatment ("NT"); and (iii) MFN. Each of these components was calibrated to preserve the sovereign prerogative of states to adopt measures necessary for maintaining peace, security, and essential national interests. Notably, the archival record reveals no explicit invocation of the MST or broader international law. Rather, the available materials suggest that the standard remained deliberately circumscribed and policy-driven, reflecting a framework designed to safeguard regulatory sovereignty. The articulation of "reasonable" alongside FET further implies the existence of an implicit normative yardstick by which state conduct could be assessed. This potentially could enable evaluation against an emerging common international standard notwithstanding the absence of direct MST reference. These interpretive contours significantly informed the formulation of the Draft Model Treaty, embedding a balance between investor protections and state regulatory authority. In 1955, during President Eisenhower's first term, the United States issued the Standard Draft U.S. FCN Treaty. By this time, FET was a firm part of the U.S. investment policy. This is reflected in the very first article of the Standard FCN Treaty:

> Article I
>
> Each party shall at all times accord fair and equitable treatment to the nationals and companies of the other Party, and to their property, enterprises and other interests.[121]

The archival record identifies the inclusion of the FET clause within U.S. FCN treaties but offers limited clarity regarding its substantive content or precise scope. What emerges, however, is the overarching theme of non-discrimination, suggesting that FET may have been designed to address situations in which both foreign and domestic investors were subject to unfair treatment—circumstances where the protections of NT and MFN clauses alone would prove insufficient. Conspicuously absent from the archival record is any invocation of the MST or *Neer* to elucidate the nature of FET. Rather, the historical evidence compels the conclusion that the drafters were guided by the standard's trade-based provenance and its Roosevelt-era framing. This intellectual lineage is further reinforced by the immediate temporal proximity of those antecedents.

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120. *Id.* (emphasis added).

121. *Appendix: Excerpts from the 1955 Standard Draft U.S. FCN Treaty*, *in* VANDEVELDE, *supra* note 21, at 547.

Conclusion

The foregoing analysis has sought to recontextualize the emergence of the FET standard by disentangling it from the well-worn doctrinal lineage that centers on the *Neer v. Mexico* decision. Rather than accepting the retrospective construction of FET as an offshoot of the MST, this Note has uncovered a more nuanced and historically grounded account—one that situates FET within a broader apparatus of regulatory innovation deployed by the United States during a transformative period of trade diplomacy. By examining the specific legal architecture of Roosevelt-era trade agreements, a distinct picture emerges: FET was neither generic nor ornamental, but instead carefully calibrated to circumscribe the discretionary authority of host states in targeted commercial domains.

Through a close reading of archival materials and treaty texts, this Note has demonstrated how FET operated as a functional constraint on sovereign behavior—particularly in areas such as monopolies, currency control, and public procurement—long before it acquired its contemporary identity as a cornerstone of investor protection. In doing so, it served both legal and strategic purposes: embedding norms of commercial fairness into treaty practice while incrementally shaping the expectations of treaty partners regarding acceptable regulatory conduct. This evidentiary recalibration compels a reconsideration of FET's foundational genealogy—not as an extrapolation of customary law but as an instrument of economic statecraft designed to navigate, and ultimately discipline, zones of state-controlled commercial activity.

By illuminating these early treaty practices, this Note contributes to a more historically sensitive understanding of FET's evolution. The U.S. approach to fairness, as traced here, was neither ideologically abstract nor conceptually borrowed from adjudicative precedents: It was operational, adaptive, and embedded in the strategic logics of post-Depression economic diplomacy. This reframing invites a broader reevaluation of how foundational investment protections emerged—not as fixed transplants from international custom, but as dynamic tools of governance responding to the exigencies of their time.