Chapter 2.3.3
Full Protection and Security (FPS)

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A. INTRODUCTION AND HISTORICAL ORIGIN

Full Protection and Security (FPS) is one of the 'non-contingent' standards of treatment guaranteed in the vast majority of international investment agreements (IIAs).[1] It is non-contingent since – in contrast to 'National Treatment' (Chapter 2.3.1) or the 'Most Favored Nation Treatment' standards (Chapter 2.3.1) – its level of protection is not dependent on the treatment of other investors,[2] except to the extent a treaty provides otherwise.[3] The FPS standard is closely connected (and potentially overlapping) with the Fair and Equitable Treatment (FET) standard (Chapter 2.3.2). One possible distinction is that the FET standard is conceptually primarily prohibiting active harm done by the host state itself, while the FPS standard obliges the host state to take active measures in protecting investors of another contracting party from adverse effects that stem from the unlawful acts of its citizens.[4] In other words, the standard requires the host state to protect foreign investors and investments from third-party interference.[5] However, in *Biwater Gauff v. Tanzania*, it was stated that '[t]he Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.'[6]

Historically, the FPS standard has been interpreted as obliging a host state to adopt measures protective of investments and investors from physical harm.[7] However, over the years it has been expanded to include legal protection and security for investors and investments.[8] This expansion from the traditional conception of FPS has not gone without controversy, creating conflicting jurisprudence about the application of the standard. On one hand, some tribunals maintain the FPS standard should be restricted to its recognized traditional roots i.e. protection

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1 Art. IV Mexico – Spain BIT (2006); Art. 3 Cuba – Lebanon BIT (1995); Art. 3 Oman – Pakistan BIT (2007); Art. 5(1) Algeria – Jordan BIT (1996); For further examples see: Reinisch, *International Protection of Investment* (2021), pp. 536 et seq.

2 Junngam, *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From* (2018) 7 *AM. U. Bus. L. REV*., pp. 1-100 (4).

3 See, Art. VI(6) Columbia Model BIT (2011), conditioning the FPS to the NT standard: ('The "full protection and security" standard requires each Party to provide a level of police protection that in no case shall be higher than that afforded to nationals of the Contracting Party where the investment has been made').

4 See, *Frontier v. Czech* Republic, PCA Case No. 2008-09, Final Award (12 November 2010), para. 261.

5 Schefer, *International Investment Law, Text, Cases and Materials* (2020), p. 384.

6 *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 730.

7 Junngam, above, note 2, p. 4.

8 Ibid.

against physical harm.[9] On the other hand, some tribunals have latched on to the ordinary meaning of the adjective 'full' to extend the FPS standard to non-physical harm i.e. legal protection and security.[10] The purpose of this chapter is not to address the dichotomy in the application of the FPS standard in practice, but rather to introduce this non-contingent standard of treatment owed to investors, and how it has been applied in arbitral practice.

The origins of the FPS standard can be traced back to the rules governing the treatment of aliens under customary international law.[11] According to the international minimum standard on the treatment of aliens, a state has a duty to provide for the protection and security of foreign nationals.[12] With the evolution of time, this customary international law duty started gaining treaty recognition in the late 18th century through the commerce and navigation treaties entered into by the United States with foreign governments.[13] This treaty recognition continued into the 19th and 20th centuries.[14] On the European continent, the 1959 *Hermann Abs* and *Lord Shawcross* draft proposal for negotiating a multilateral agreement to protect private foreign investment became a blueprint for negotiating European BITs and contained a provision on 'constant protection and security' to foreign property.[15] Likewise, the 1967 OECD Draft Convention on the Protection of Foreign Property contained an FPS provision, with the similar formula 'constant protection and security'.[16] From the FCN treaty days to the current generation of investment treaties, the FPS standard has become one of the most popular substantive obligations in investment treaty-making across nations for the protection of foreign investors and their investments.

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9 *Eurus Energy v. Spain*, ICSID Case No. ARB/16/4, Decision on Jurisdiction and Liability (17 March 2021), para. 385; see also *Gold Reserve v. Venezuela*, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014), paras. 622f; *Vivendi v. Argentina (II)*, ICSID Case No. ARB/03/19, Decision on Liability (30 July 2010), para.179.

10 *CME Czech Republic v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 613; *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020), paras. 664 f; *Anglo American Plc v. Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019), para. 482.

11 See, in general, Borchard, *The Protection of Citizens Abroad and Change of Original Nationality* (1934) 43(3) *TYLJ*, pp. 359-39; Lorz*, Protection and Security,* in Bungenberg et. al. (eds), 'Handbook on International Investment Law' (2015), pp. 764-789 (766).

12 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005), para. 164.

13 See, Art. XVIII Treaty of Amity and Commerce between the United States and Kingdom of Prussia, 10 September 1785; Art. II and XIV Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America, 19 November 1794.

14 *Suez v. Argentina*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010), para. 155; See also, K. Vandevelde, *The Bilateral Investment Treaty Program of the United States* (1988) 21 *Cornell Int'l L.J.*, pp. 201-276 (204).

15 Art. 1, Abs-Shawcross Draft Convention on Investments Abroad, April 1959, available in Emmert (ed): *World Trade and Investment Law - Documents*, CILP 2018, pp. 3-5.

16 OECD Draft Convention on the Protection of Foreign Property of 1967 (1968) 7 ILM 117, 119.

The following sections will first shed light on how the FPS standard has developed in treaty practice (Section B); then touch upon the standard of Review (Section C); before drawing a conclusion to this chapter (Section D).

B. FPS IN TREATY PRACTICE

I. Textual Formulation

1. Qualifying Adjectives ('full', 'constant', 'complete', 'continuous')

One important factor to note about the FPS standard is that the treaty language on the provision varies across treaties.[17] This is exemplified in the choice of words used in incorporating the standard. While 'full protection and security' is considered the most common expression,[18] some treaties provide different expressions such as: 'most constant protection and security',[19] 'full and complete protection',[20] or 'continuous protection and security'[21]. A less common expression is the term 'full legal protection and full legal security'[22] or 'full legal protection'.[23]

Regardless of the diversity in treaty expressions, the majority of tribunals agree that the textual variation in FPS formulation is immaterial and with no effect on the interpretation and application of the FPS clause.[24] In particular, the inclusion or exclusion of adjectives such as 'full', 'constant', 'complete', 'continuous' before the term 'protection and security' does not change the nature of the obligation or the ensuing responsibility of a state under international law. For example, as held by the *AAPL v. Sri Lanka* tribunal – the first to render an investment treaty award on FPS:

> *In the opinion of the present Arbitral Tribunal, the addition of words like 'constant' or 'full' to strengthen the required standards of 'protection and security' could justifiably indicate the Parties' intention to require within their treaty relationship a standard of 'due diligence' higher than the 'minimum standard' of general international law. But, the nature of both*

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17 See, Newcombe and Paradell, *Law and Practice of Investment Treaties* (2009), p. 308; Salacuse, *The Law of Investment Treaties* (2010), p. 207.

18 Malik, *The Full Protection and Security Standard Comes of Age: Yet Another Challenge for States in Investment Treaty Arbitration?* (IISD), p. 2 available at: https://www.iisd.org/system (accessed 12 December 2021).

19 Art. 3(3) Japan – Russian Federation BIT (1998); Art. 2(2) Finland – Panama BIT (1998).

20 Art. 2(2) China – Uganda BIT (2004); Art. 5(1) Finland – United Arab Emirates BIT (1996); Art. 6(1) France Model BIT (2006).

21 Art. 3(1) BLEU (Belgium-Luxembourg Economic Union) – Guatemala BIT; Art. 3(2) BLEU – Egypt BIT (1999).

22 Art. 4(1) Germany – Argentina BIT (1991).

23 Art. IV(2) Ecuador – El Salvador BIT (1994).

24 *Frontier v. Czech Republic*, above, note 4, para. 260; *Parking v. Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 354; Junngam, above, note 2, p. 57.

> *the obligation and ensuing responsibility remains unchanged, since the added words 'constant' or 'full' are by themselves not sufficient to establish that the Parties intended to transform their mutual obligation into a 'strict liability'.*[25]

In *Parkerings v. Lithuania*, the FPS provision in the underlying treaty only referred to the word 'protection'.[26] The tribunal nevertheless interpreted the word 'protection' as also meaning 'full protection and security':

> *Article III of the Treaty only mentions the term protection. In a number of decisions, Tribunals make reference to the standard of 'full protection and security'. It is generally accepted that the variation of language between the formulation 'protection' and 'full protection and security' does not make a significant difference in the level of protection a host State is to provide. Moreover, in casu, the Parties make systematically reference to the standard of 'full protection and security'. Therefore, the Arbitral Tribunal intends to apply the standard of 'full protection and security'.*[27]

Similarly, the tribunal in *MNSS v. Montenegro,* faced with a treaty FPS clause phrased as 'most constant protection and security', held that the expression 'most constant' does not change/increase the level of protection and security as understood under international law.[28]

However, contrary to the majority of tribunals concluding that textual variations are insignificant to the meaning of the FPS obligation, some tribunals disagree with this view. For example, a number of tribunals has taken advantage of the adjective 'full' to extend the scope of the FPS standard beyond its traditional conception i.e. protection of foreign investment against physical harm.[29]

2. References to Customary International Law (CIL)

Besides qualifying adjectives, another textual variation that may affect how the FPS provision is interpreted is the reference to customary international law.

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[25] *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), para. 50.

[26] Art. III Lithuania – Norway BIT (1992).

[27] *Parkerings-Compagniet AS v. Rep. of Lithuania*, ICSID Case No. ARB/05/8, Award (11 September 2007), para. 354.

[28] *MNSS B.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016), para. 351; See further on the non-significance of textual variation – Reinisch, *International Protection of Investment* (2021), pp. 543.

[29] *CME Czech Republic v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 613; *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020), paras. 664 f; *Anglo American Plc v. Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019), para. 482; *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 729; *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (2 July 2018), para. 652.

A state's duty to protect foreign property from the unlawful acts of its citizens is an established duty under customary international law (CIL) and independent of any treaty obligation.[30] Today, IIAs often incorporate an FPS provision with an explicit reference to CIL.[31] Some treaties equate treaty standard and customary international law standard, while others provide customary international law as a floor or ceiling.

a. CIL as Equivalent or Ceiling to FPS Standard

Several treaties have incorporated the FPS provision in a way that suggests the intention to equate the treaty obligation to the standard of treatment accorded under CIL. Article 5(1) United States (US) – Rwanda BIT (2011) presents a good example of such an approach. It provides:

> *Article 5: Minimum Standard of Treatment*
>
> *1. Each Party shall accord to covered investments treatment **in accordance with customary international law**, including fair and equitable treatment and full protection and security.*
>
> *2. For greater certainty, **paragraph 1 prescribes the customary international law minimum standard of treatment** of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "**full protection and security" do not require treatment in addition to or beyond that which is required by that standard**, and do not create additional substantive rights. The obligation in paragraph 1 to provide […] b): "full protection and security" requires each Party to provide the level of police protection required under customary international law.*

This treaty language is common in treaties negotiated under the US Model BITs of 2004 and 2012.[32] However, this treaty practice is not limited to the US.[33] When a treaty incorporates an FPS duty with a language such as the example given above, this has been held as referring to the CIL minimum standard of treatment on the protection of foreign property, and not an autonomous treaty standard.[34] In other words, the provision simply codifies an existing duty under international law, without foreseeing an intention to add to or go beyond the duty that already exists. In *Koch v Venezuela*,[35] the tribunal interpreted Art. 4(1) Switzerland – Venezuala BIT (1993) which incorporated FPS '[i]n accordance with the rules and principles of international

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30 Reinisch, *International Protection of Investment* (2021), p. 545, para. 27.

31 Blanco, *Full Protection and Security in International Investment law* (2019), p. 498.

32 Ibid., p. 499.

33 See, Art. 12.5(1)(2)(b) China – Korea FTA (2015); Art. 10.05(1) and (2)(b) China (Taiwan) – Nicaragua FTA (2006); Art. 7(1) and 2(b) Nigeria – Morrocco IPA (2016); Art. 9.5(1) and 2(b) Korea – Peru FTA (2010).

34 *Adel A Hamadi Al Tamimi v. Sultanate of Oman*, ICSID Case No. ARB/11/33, Award (3 November 2015), para. 380.

35 *Koch Minerals Sàrl and Koch Nitrogen International Sàrl v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/19, Award (30 October 2017).

law'. The tribunal concluded that 'these words import the customary international law minimum standards, rather than any autonomous higher standards'.[36]

Similarly, the tribunal in *Modev v United States,* considering the NAFTA FPS provision, concluded that Article 1105 NAFTA with the reference 'treatment in accordance with international law' incorporates the principles of CIL.[37] Further clarifying this point was the NAFTA Free Trade Commission (FTC) with the power to issue binding interpretation notes on the NAFTA.[38] The FTC's interpretative note on Article 1105 clarified that 'treatment in accordance with international law' means that FPS '[does] not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment to aliens'.[39]

When a treaty expresses an FPS provision as shown above, by a literal interpretation, it puts a cap on the level of protection a state owes foreign investors. Hence, a state would have no international obligation to provide investors a level of protection beyond what it would already owe any foreigner under customary international law. Under CIL, the well-settled understanding is that FPS is 'confined to physical protection to aliens against acts of third persons not attributable to the host state'[40]. To satisfy this duty, an exercise of reasonable diligence on the part of the host state is sufficient.[41]

In contrast, this narrow reading of the FPS standard may not apply if the treaty's textual formulation permits a broader interpretation of the duty beyond what is settled under CIL.

b. CIL as a Floor

International Law only provides for a 'minimum standard' in the treatment of aliens. As a result, a state's obligation to offer the minimum treatment under CIL for the protection of foreign property may not necessarily exclude the obligation to protect beyond the minimum expected under CIL. In other words, CIL only acts as a floor in accessing the host state's fulfillment of its FPS duty to an investor, but not as a ceiling. Such an interpretation is plausible if the FPS standard is formulated as an obligation '**no less'** than the protection afforded under CIL. A relevant example is found in Article 10(1) of the Energy Charter Treaty. There it is required that in fulfilling the FPS obligation to an investment – '**[i]n no case** shall such Investments be

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36 Ibid., para 8.42.

37 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB(AF)/99/2, Award (11 October 2002), paras. 111 f.

38 See, Art. 1131(2) NAFTA.

39 NAFTA FTC, Notes of Interpretation on Chapter 11, available at: https://www.international.gc.ca/trade-agreements-accord (last accessed 7 April 2022).

40 *Koch v. Venezuela*, → fn 35. para. 8.46.

41 Ibid.; see further on this below in (Section C).

accorded treatment **less favourable** than that required by international law, including treaty obligations'.[42]

Another relevant example is found in Article II.2(a) of the US – Argentina BIT (1991). It states: 'Investment shall […] enjoy full protection and security and shall **in no case** be accorded treatment **less than** that required by international law'.

In *Azurix v. Argentina,*[43] the tribunal, in interpreting the above provision, concluded that Article II.2(a) permitted the FPS to be interpreted as a higher standard beyond what is required under international law.[44] In particular, 'the third sentence is to set a floor, not a ceiling, in order to avoid a possible interpretation of the [FPS] below what is required by international law.[45]

Also in *AMT v. Zaire*[46], the tribunal considered Article II(4) of the United States – DR Congo BIT (1984) which required that an FPS treatment 'may not be less than that recognized by international law'. The tribunal interpreted this standard as an 'objective obligation which must not be **inferior** to the minimum standard of vigilance and of care required by international law'[47]. This conclusion is equally consistent with the decision rendered in *Azurix*. Meaning that qualifying the FPS obligation as 'no less than what is required under CIL' only sets the CIL as a floor below which a state's treatment of an investor must not go. Hence by deduction, satisfying the minimum treatment under CIL may not automatically exclude a state's FPS liability if it is possible to interpret the duty as going beyond.

Notably, in contrast to the *Azurix* decision, the *El Paso v Argentina*[48] tribunal also deciding under Article II.2(a) of the US – Argentina BIT concluded that the treaty's FPS obligation 'is no more than the traditional obligation to protect aliens under international customary law'.[49]

In *Noble Ventures v. Romania*[50], Article II(2)(a) of the US – Romania BIT (1992) was in focus. It states: 'Investment shall […] enjoy full protection and security and shall **in no case** be accorded treatment less than that required by international law'. In interpreting this BIT provision identical to that in *Azurix*, the tribunal declined to construe the FPS provision as demanding a duty

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42 See Art. 10(1) Energy Charter Treaty (1994); see also, Art. II(4) United States – DR Congo BIT (1984).

43 *Azurix Corp. v. Argentine*, ICSID Case No. ARB/01/12, Award (14 July 2006).

44 Ibid., para. 361.

45 Ibid.

46 *American Manufacturing & Trading (AMT), Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997).

47 Ibid., para. 6.06.

48 *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011).

49 Ibid., para. 322.

50 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award (12 October 2005).

beyond what is expected under CIL. The tribunal noted: '[I]t seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens'.[51]

The above decisions further illustrate the legal uncertainty which looms over the interpretation of the FPS standard in practice, particularly concerning its connection to CIL. Without dwelling on the drawbacks of these inconsistencies, the important lesson to draw from this discussion is that whenever a treaty FPS standard is expressed as 'no less than the treatment accorded under CIL', there is a chance to successfully persuade a tribunal that the respondent state owes an FPS duty beyond what is expected under CIL. For example, an investor could argue that the duty to provide legal protection also exists under the FPS standard in such a case.

3. References to Domestic Law

In a much uncommon treaty practice, FPS provisions have been textually formulated with reference to domestic law. In this regard, two approaches can be observed:

- FPS with reference to both domestic and international law;
- FPS with reference to domestic law only.

Concerning the first approach, a model example can be found in Article II(4) of the United States – DR Congo BIT (1984). It provides: '[…] The treatment, protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized by international law'.

In *AMT v. Zaire*, where the above provision was under consideration, the tribunal appeared to have given less weight to the domestic law reference since ultimately the international law reference is the most fundamental requirement in assessing the compliance of a state with the FPS duty.[52] Further, the tribunal held that the respondent is not permitted to use its own domestic law to escape its FPS duty under international law.[53]

Another example of an FPS provision with reference to both domestic and international law is Article II(4) of the United States – Egypt BIT (1986) which provides: 'The treatment protection and security of investments shall never be less than that required by international law and national legislation'.

The much more complex situation to deal with comes with the second approach. When treaties explicitly incorporate an FPS standard to domestic law without reference to CIL, this may imply

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51 Ibid., para. 164.

52 See, *AMT v. Zaire*, above, note 46, para. 606.

53 Ibid., para. 605.

that parties have chosen to simply limit their FPS duty to comply with domestic law. Examples of such treaty formulations are common in Russian BITs.[54]

In *Bogdanov v. Moldova*,[55] Article 2(2) of the Russia – Moldova BIT (1998) under consideration provided: 'Each Contracting Party shall guarantee, in accordance with its law full and unconditional legal protection for investments of investors of the other Contracting Party'. The tribunal construed this provision as requiring Moldova's FPS obligation fulfilled, once its adopted measures complied with its domestic law.[56] For the tribunal, the explicit reference to 'unconditional legal protection' in the BIT does not negate this conclusion.[57]

Another plausible interpretation for this type of clause was provided by the tribunal in *Tatneft v. Ukraine.*[58] Under consideration was Article 2(2) of Ukraine – Russia BIT (1998) which incorporates an FPS provision similar to that in the Russia – Moldova BIT. While the tribunal appeared to have sided with the conclusion in *Bogdanov* that a legislative act may not necessarily breach the FPS duty, as long as it complies with domestic law, it further held that this 'might happen in the context of how the legislation is implemented or applied'.[59]

What remains unclear is whether FPS provisions with explicit reference to domestic law and no mention of CIL exclude the applicability of the international minimum standard on the treatment of aliens. The pragmatic answer is that this question has to be determined on a case-by-case basis, depending on the textual formulation of the specific treaty provision. However, as rightly observed by Blanco, this issue appears to be of less importance in practice. Very rarely does the protection afforded under domestic law fall below the international minimum standard.[60] On the contrary, most legal systems formally afford protection to foreign properties beyond the minimum standard.[61]

Thus, even when there is no reference to CIL, this does not necessarily degrade the level of protection. States typically fall short not on the level of the available protection under their domestic laws, but on the implementation of such laws that they have adopted for the protection

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54 Art. 2(2) Russia – Moldova BIT (1998); Article 2(2) Russia – Ukraine BIT (1998); Art. 2(2) Russia – Cyprus BIT (1997).

55 *Iurii Bogdanov, Agurdino-Invest Ltd. and Agurdino-Chimia JSC v. Republic of Moldova*, SCC Case No. 093/2004, Award (22 September 2005).

56 Ibid., p. 15.

57 Ibid.

58 *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award (29 July 2014).

59 Ibid., para. 425.

60 Blanco, *Full Protection and Security in International Investment law* (2019), p. 515.

61 Ibid.

of foreign investment. For such failures, as reasoned in *Tatneft*,[62] international responsibility may apply.

II. Scope of Obligations in Practice

1. Protection Against Physical Harm

The protection against physical harm is the undisputed primary objective of the FPS standard. From its traditional roots, the standard seeks to protect foreign investors from various forms of physical violence, including bodily injury, damage to property, harassment, or threat of harassment – essentially protecting the physical integrity of foreign investors and their investments from adverse third party actions.[63] Some investment treaties have explicitly limited the scope of the FPS standard to physical security,[64] to curtail any arbitral interpretation that the standard may extend beyond physical protection. Importantly, a host state's duty to offer physical security to an investor against injurious third-party actions covers both physical harm by private actors (a) and physical harm by public actors (b).

a. Physical Harm by Private Actors

The *ELSI* case[65] is a seminal case when considering a host state's obligation in protecting a foreign investor from physical harm by private actors. In this case, the ICJ decided on an FPS claim brought by the United States (on behalf of its corporate national - *ELSI*) against Italy, under Article V of the FCN Treaty between the U.S. and Italy – which granted investors 'the most constant protection and security'. The US alleged *inter alia* that Italy had breached its FPS obligation under the FCN Treaty when Italian authorities allowed workers to occupy the claimant's factory in the aftermath of a contested requisition. Although the ICJ took judicial notice of the finding by an Italian court that the occupation was unlawful,[66] the ICJ did not find Italy in breach of the FPS provision. The ICJ held that: 'The reference in Article V to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed'.[67]

The ICJ reasoning in *ELSI* resonates with the widely accepted view that, under the law of state responsibility, a host state is not placed under strict liability for failing to prevent harm to an

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62 *OAO Tatneft v. Ukraine*, → fn. 58, para. 425.

63 *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (12 January 2016), para.157; *Border Timbers v. Zimbabwe*, ICSID Case No. ARB/10/25, Award (28 July 2015), para.596; *Saluka v. Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), paras. 483f.

64 Art. 8.10(5) CETA; Art. 2.4(5) EU – Singapore IPA (2018); Art. 2.5(5) EU – Vietnam IPA (2019).

65 *ELSI Case*, Judgement, 20 July 1989, ICJ Reports (1989), 15.

66 Ibid., para 108.

67 Ibid.

investor by a third party.[68] What matters is whether – under the factual circumstances – the host state's response in protecting the investor against harm from private persons was adequate. In ELSI, the ICJ found the Italian authority's response as not falling short of this standard.

Tecmed v. Mexico[69] is another illustrative example. Tecmed had alleged that Mexican authorities failed to adequately prevent protesters from social demonstrations and disturbances at the site of its investment, a landfill under dispute. These adverse demonstrations, according to the claimant, not only disrupted its investment operations but also endangered the personal security or freedom to move about of staff members related to the landfill.[70] The relevant treaty provision provides for 'full protection and security to the investments […] in accordance with international law'. The tribunal absolved Mexico of an FPS violation after finding that there was no evidence to prove the Mexican authorities had encouraged, fostered, or contributed to the actions in question,[71] but on the contrary, found the Mexican authorities had responded reasonably:

> *The Arbitral Tribunal agrees with the Respondent, and with the case law quoted by it, in that the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it. At any rate, the Arbitral Tribunal holds that there is not sufficient evidence supporting the allegation that the Mexican authorities, whether municipal, state, or federal, have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill.*[72]

While both cases referenced above were decided in favour of the respondent states, *Wena Hotels v. Egypt*[73] provides an example where a state has been held responsible for harm caused to an investor by actions of private persons. In this case, two private actors executed a forceful seizure of the claimant's two hotels in Egypt. Although no government official had engaged in the forceful takeover, neither did the Egyptian police nor its enforcement agencies take steps to prevent the illegal action or steps to remedy it after it occurred. For the tribunal, this was a clear violation of the FPS duty under the applicable treaty which provides that investments 'shall enjoy full protection and security'.[74] Despite finding the non-involvement of Egyptian authorities in the forceful takeover, several culpable acts of the Egyptian authorities constituted the FPS violation as found by the tribunal:

> *1) Egypt was aware of EHC's intentions to seize the hotels and did nothing to prevent those seizures, 2) the police, although responding to the seizures, did nothing to protect*

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68 Dolzer and Schreuer, *Principles of International Invetment law* (2012), p. 149.

69 *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003).

70 Ibid., para. 175.

71 Ibid., para. 176.

72 Ibid., para. 177.

73 *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Award (8 December 2000).

74 Ibid., para. 84.

> *Wena's investments; 3) for almost one year, Egypt (despite its control over EHC both before and after April 1991) did nothing to restore the hotels to Wena; 4) Egypt failed to prevent damage to the hotels before their return to Wena; 5) Egypt failed to impose any substantial sanctions on EHC (or its senior officials responsible for the seizures), suggesting its approval of EHC's actions; and 6) Egypt refused to compensate Wena for the losses it suffered.*[75]

In another award involving Egypt, the tribunal in *Ampal-American v. Egypt*[76] found Egypt to be in violation of the FPS provision in Article II(4) of the Egypt – US BIT which provides for 'the protection and security of investments'. Due to civil unrest during the Arab Spring Revolution, the claimant suffered a series of attacks on its pipelines damaging the lifeline of its investment. While this would not have sufficed to constitute an FPS breach on its own, the tribunal found Egypt responsible due to 'failure by State security forces in the Northern Sinai to take any steps to stop saboteurs from damaging the lifeline of the Claimants' investment, whether preventive or reactive'.[77] On this basis, the tribunal concluded that failure to take 'any concrete steps to protect the Claimants' investment from damage in reaction to third party attacks' constitutes a breach of its FPS obligation to the Claimant.[78]

The Egyptian cases illustrate the importance of state police protection to foreign investments, especially in the event of civil unrest at the location of the investor and/or investment. Besides the Egyptian cases, other investment tribunals have found a state's failure to provide adequate police protection a violation of the FPS standard.[79]

b. Physical Harm by Public Organs

According to Article 4 of the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA):[80]

> *(1) The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other function […].*
>
> *(2) An organ includes any person or entity which has that status in accordance with the internal law of the State.*

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75 Ibid., para 82.

76 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017).

77 Ibid., para. 288.

78 Ibid., paras. 290f.

79 *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award on the Merits (29 July 2014), para. 428; *Pezold v. Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), para. 597; *MNSS v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016), paras. 352, 355 f..

80 Responsibility of States for Internationally Wrongful Acts, available at: **Responsibility of States for Internationally Wrongful Acts (2001) (un.org)**(accessed 16 Oct 2021).

Given the above provision, the international responsibility of a state for acts or omissions of its organs that violate the physical integrity of an investor and/or its investment is likewise guaranteed under international law. As opined by the *Biwater Gauff v. Tanzania* tribunal: 'The Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself'.[81]

The above reasoning by the *Biwater* tribunal was also noted in *Tenaris v. Venezuela* where the tribunal accepted the claimant's submission on the FPS obligation that: 'the obligation is not exclusively limited to physical protection from third parties'.[82]

The *AAPL v. Sri Lanka*[83] case is a seminal example of a state found in breach of its FPS obligation due to the adverse actions of one of its organs. During a counter-insurgency operation to regain control over a rebel-controlled area in the respondent's territory, the Sri Lankan armed forces had caused the destruction of the claimant's investment (a shrimp farm) located in the rebel-held area. Upon reviewing all the factual circumstances leading to the destruction of the claimant's shrimp farm, the tribunal found the respondent had failed to take all reasonable measures that could have minimized the risk and destruction to the claimant's investment during the counter-insurgency operation. Accordingly, the tribunal held:

> *[T]he Respondent through said inaction and omission violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions.*[84]

On this basis, the tribunal found Sri Lanka's responsibility under international law established, for a breach of Article 2(2) of the Sri Lanka–United Kingdom BIT which provides that foreign investments 'shall enjoy full protection and security'.

Similarly, in another FPS decision related to the actions of a state military force, the tribunal in *AMT v. Zaire*[85] found the host state responsible for the actions of members of its armed forces who engaged in the destruction and looting of the claimant's investment (an industrial complex where it produced automotive and dry battery cells). Article II(4) of the United States – Zaire BIT provided that investments 'shall enjoy protection and security'. Upon considering the factual circumstances surrounding the alleged FPS breach, the tribunal found Zaire in manifest breach of Article II(4) of the BIT for taking 'no measure that would serve to ensure the protection and

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81 *Biwater Gauff v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 730.

82 *Tenaris v. Venezuela [I]*, ICSID Case No. ARB/11/26, Award (29 January 2016), para. 439.

83 *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Award (27 June 1990).

84 Ibid., para. 85 (B).

85 *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (21 February 1997), para. 6.04.

security of the investment in question',[86] and thus held Zaire responsible for the destruction and lootings by members of its armed forces which crippled the physical integrity of the claimant's investment.

2. Protection Against Non-Physical Harm

Some ISDS tribunals have recognised the FPS standard in IIAs as including protection against non-physical harm, i.e. legal security. As shown in the case references below, this recognition is least doubtful for tribunals when treaty parties have expressly included 'legal security' in the FPS treaty provision. However, some ISDS tribunals have interpreted the FPS obligation as including legal security even when the treaty is silent on this.

a. Treaties with Express Inclusion of Legal Security

Although not common, some IIAs include an express treaty provision obliging treaty parties to provide legal security to covered investors and investments in their territory.[87] The *Siemens v. Argentina*[88] decision is a case example based upon such an explicit treaty provision. In 1998, after a competitive bidding process, Argentina awarded Siemens (claimant) a renewable six-year contract for the provision of immigration control, personal identification, and electoral information systems.[89] This contract was later suspended and renegotiated at the instance of the State on new terms which the claimant accepted in November 2000. In May 2001, Siemens received another draft proposal on the contract different from the renegotiated terms earlier agreed to and was informed the new terms were non-negotiable. This led to Siemens' FPS claim before ICSID for the undue frustration and abrupt termination of its contract.

The ICSID tribunal decided the FPS claim against Argentina under Article 4(1) of the Germany-Argentina BIT which granted investors '**full legal protection and full legal security**'. Argentina argued that the term 'security' is limited to physical security,[90] and that Siemens' FPS claim should accordingly fail. However, the tribunal disagreed, noting that Argentina failed to address the fact that the term 'security' in the treaty text is explicitly qualified by the word 'legal'.[91] This to the tribunal indicates the treaty parties' intention to extend their FPS obligation beyond physical security. Moreso, the tribunal reasoned that since the definition of an investment includes both tangible and intangible assets, it is unable to conceive how the physical security of an intangible asset could be achieved,[92] if not by legal security as expressly included in the treaty. After

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86 Ibid., para. 6.08.

87 Art. 4(1) Germany – Argentina BIT (1991); Art. IV(2) Ecuador - El Salvador BIT (1994); Article 2(2) Mongolia – Russia BIT (1995); Article 2.2 Russia – Ukraine BIT (1998).

88 *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Award (17 Jan 2007).

89 Ibid., para. 81ff.

90 Ibid., para. 301.

91 Ibid., para 302.

92 Ibid., para. 303.

finding that the BIT's FPS provision extends to legal security, the tribunal concluded upon the facts that Argentina's renegotiation of the contract – without any declaration of public interest – violated the legal security guarantees provided to Siemens, and was in breach of its FPS obligation to the claimant.

Similarly, in *Paushok v. Mongolia,*[93] the UNCITRAL based tribunal had to interpret the scope of Article 2(2) of the Russia-Mogolia BIT which guaranteed 'full legal protection to investments of investors of the other Contracting Party'. Given the explicit reference to '**full legal protection**', the tribunal took no issues in finding that the treaty's FPS obligation extends beyond mere physical protection.[94]

Also, in *Tatneft v. Ukraine*,[95] an explicit reference to '**unconditional legal protection**' under Article 2.2 of the Ukraine-Russia BIT offered the tribunal no doubt as to the inclusion of legal security under the treaty's FPS provision.[96]

Certainly, where it is clear from the text of the treaty that parties have included legal security within their FPS scope of obligation, it is implausible that a tribunal will be in error for interpreting the words according to their ordinary meaning. The controversial cases are more related to treaties that are silent on legal security but yet found to exist.

b. Treaties Without Express Inclusion of Legal Security

Notwithstanding treaty silence, the FPS obligation may yet extend to the provision of legal security for investors. The origin of such an expansive reading can be traced as far back as the *ELSI* case. In *ELSI*, while the ICJ reviewed the conduct of Italy in providing physical security to ELSI's factory occupied by protesting workers, the ICJ also considered whether Italy's judicial system had failed to conclude the appeal against the company's requisition promptly, thus denying ELSI legal security. Despite no express mention of 'legal security' in Article V of the US-Italy FCN Treaty,[97] the ICJ nevertheless reasoned that such an obligation exists, but did not find Italy in violation of this duty, based on the adduced evidence.[98]

Post *ELSI*, a significant number of ISDS tribunals have equally found legal security as included within the FPS scope, despite the underlying treaty's silence.[99] Oftentimes, the justification for

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93 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2001).

94 Ibid., para. 326.

95 *OAO Tatneft v. Ukraine*, PCA Case No. 2008-8, Award (29 July 2014).

96 Ibid., para. 425.

97 Article V, US – Italy FCN Treaty (1948). The provision only made reference to 'constant protection and security'.

98 *ELSI Case*, Judgement of 20 July 1989, ICJ Reports (1989), p. 15, paras. 109 et seq.

99 See for instance, *Saluka Investments BV v. The Czech Republic*, PCA Case No. 2001-04, Partial Award (17

such rulings is based on the qualification of the relevant treaty provision with the adjective 'full'.[100] For instance, the *Azurix v. Argentina* tribunal held: 'when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security'[101].

Similarly, the *Biwater v. Tanzania* tribunal followed the *Azurix* tribunal's reasoning by holding that: 'when the terms "protection" and "security" are qualified by "full", the content of the standard may extend to matters other than physical security'.[102] Also relying on the *Azurix* and *Biwater* tribunal decision, the tribunal in *Krederi v. Ukraine* held *inter alia*:

> *[I]n regard to protection that goes beyond physical protection, it is widely accepted that in formulations like the one in the Treaty at hand, according to which host States have to accord "full" protection and security, such qualifier indicates that the standard goes beyond physical security.*[103]

Even when an FPS provision is not qualified with the word 'full', a tribunal may yet find legal security as covered if the treaty's FPS standard is found to be connected to the fair and equitable treatment standard. Notably, the majority of IIAs formulate the FPS and FET standards closely together,[104] separated by a comma, or the word 'and'.[105] If the FPS and FET standards are interpreted as connected as opposed to two distinct standards, a tribunal may justifiably interpret such FPS standard as including legal security since the closely connected FET standard is not limited to physical security. This has been another source of diverging interpretations on the scope of FPS. Two cases i.e. *BG Group v. Argentina*,[106] and *National Grid v. Argentina*,[107] exemplify this divergence. Both cases involved an FPS claim brought under the UK-Argentina BIT and related to the same governmental measures. Article 2(1) of the UK-Argentina BIT provides that: 'Investments of investors of each Contracting Party shall at all

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March 2006), paras. 483, 484; *RSM Production Corporation and others v. Grenada*, ICSID Case No. ARB/10/6, Award (10 December 2010), paras. 7.2.16 ff; *Jürgen Wirtgen, Stefan Wirtgen, Gisela Wirtgen and JSW Solar (zwei) GmbH & Co. KG v. Czech Republic*, PCA Case No. 2014-03, Final Award (11 October2017), paras. 449 ff.

100 *CME Czech Republic v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 613; *Global Telecom Holding v. Canada*, ICSID Case No. ARB/16/16, Award (27 March 2020), paras. 664 f; *Anglo American Plc v. Venezuela*, ICSID Case No. ARB(AF)/14/1, Award (18 January 2019), para. 482.

101 *Azurix Corp. v. Argentine*, ICSID Case No. ARB/01/12, Award (14 July 2006), para. 408.

102 *Biwater Gauff (Tanzania) Ltd. v. Tanzania*, ICSID Case No. ARB/05/22, Award (24 July 2008), para. 729.

103 *Krederi Ltd. v. Ukraine*, ICSID Case No. ARB/14/17, Award (2 July 2018), para. 652.

104 Reinisch, *International Protection of Investment* (2021), p. 550, para. 48.

105 Ibid., para. 52.

106 *BG Group Plc. v. The Republic of Argentina*, UNCITRAL, Final Award (24 December 2007).

107 *National Grid plc v. The Argentine Republic*, UNCITRAL, Final Award (3 November 2008).

times be accorded **fair and equitable treatment and shall enjoy protection and constant security** in the territory of the other Contracting Party'.

While the tribunals in both cases had to determine the scope of the FPS obligation worded as 'protection and constant security', the *BG* tribunal decided that the FPS provision is limited to physical security.[108] In contrast, the *National Grid* tribunal decided that since the FPS provision is connected to FET, it cannot be limited to physical security as the FET standard is not.[109]

In *Vivendi II v. Argentina,*[110] Article 5(1) of the Argentina – France BIT (1991) provided that '[…] investments … shall enjoy … **protection and full security in accordance with the principle of fair and equitable treatment**'.[111] The tribunal noted that the treaty's specific wording does not indicate the contracting parties' intention to limit their FPS obligation to physical interference. Citing *Azurix*, the tribunal held that 'the inter-relationship of the two standards (fair and equitable treatment and full protection and security) "indicates that full protection and security may be breached even if no physical violence or damage occurs […]"'.[112]

Following the above discussions, one important lesson to be drawn is that treaty silence is not enough to rule out legal security as included in a state's FPS obligation to investors. Tribunals will not only consider the textual but also the contextual formulation of a treaty in determining whether a state's FPS obligation is limited to physical security. This is also in line with their interpretative mandate as per Article 31 of the Vienna Convention on the Law of Treaties.

Given the inconsistent decisions that have emanated over the years on the exact scope of the FPS obligation, some states now adopt a much more precise and clearer language in formulating the FPS treaty provision. This is to curtail the ability of tribunals to interpret the FPS provision beyond the intended limit clearly defined by the parties. One notable example is Article 8.10(5) CETA which provides that: 'For greater certainty, "full protection and security" refers to the Party's obligations relating to the physical security of investors and covered investments'.[113]

C. STANDARD OF REVIEW

One aspect of the FPS duty where consistency appears to be present to a certain degree concerns the standard of review (SOR). Generally, investment tribunals have recognised 'due diligence' as the SOR needed to assess a state's satisfaction or breach

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108 *BG Group v. Argentina*, → fn. 106, para. 323 ff.

109 *National Grid v. Argentina*, → fn. 107, para. 187 ff.

110 *Compañiá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award (20 August 2007).

111 Ibid., para. 7.4.13.

112 Ibid., paras. 7.4.15 f.

113 See also, Art. 2.4(5) EU – Singapore IPA (2018); and Art. 2.5(5) EU – Vietnam IPA (2019).

of the FPS duty. Further, some tribunals have also deemed relevant the 'effect of a state's economic and social conditions' on its ability to provide FPS. These two factors are now considered.

I. Due Diligence

As held by the ICJ in *ELSI*, the FPS duty 'cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed'.[114] In other words, a state cannot provide a guarantee that no harm will befall a foreign property in its territory, it is only obliged to exercise **due diligence** in preventing such harm, or bringing the perpetrators to justice.[115] Post *ELSI*, several investment tribunals have followed the conclusion that the FPS standard is not an absolute obligation.[116] For example in *AAPL v. Sri Lanka*, the tribunal rejected the contention that the BIT FPS provision created a 'strict liability' which renders the respondent liable for *any* destruction to the claimant's investment:

> *The Arbitral Tribunal is not aware of any case in which the obligation assumed by the host State to provide the nationals of the other Contracting State with "full protection and security" was construed as absolute obligation which guarantees that no damages will be suffered, in the sense that any violation thereof creates automatically a "strict liability" on behalf of the host State.*[117]

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114 *ELSI Case*, Judgement, 20 July 1989, ICJ Reports (1989), 15, para. 108.

115 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2001), para. 324 f.

116 *CME Czech Republic v. Czech Republic*, UNCITRAL, Partial Award (13 September 2001), para. 353*; Saluka Investments BV (The Netherlands) v. Czech Republic*, PCA Case No. 2001-04, Partial Award (17 March 2006), para. 484; *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award (27 August 2008), para. 181; *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award (1 June 2009), para. 447; *Mohammad Ammar Al-Bahloul v. The Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award onJurisdiction and Liability (2 September 2009), para. 246; *Suez and Interagua v. The Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (30 July 2010), paras. 157 f.; *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Final Award (12 November 2010), paras. 269 f.; *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award (7 December 2011), para. 322; *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6, Award (16 January 2013), para. 223; *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award (10 March 2014), para. 430; *Mobil Exploration and Development Inc. Suc. Argentina and Mobil Argentina S.A. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013), para. 1002; *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), para. 625; *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), para. 596; *MNSS v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award (4 May 2016), para. 351.

117 *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (27 June 1990), para. 48.

Similarly in *Tecmed v. Mexico*, the tribunal concurred with the respondent's argument that: '[T]he guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it'.[118]

In exercising its due diligence towards the protection of foreign property from harmful third-party interference (physical or non-physical), a state is only expected to provide protective measures that are '**reasonable under the circumstances**'.[119] As noted by the tribunal in *Pezold v. Zimbabwe*, the FPS standard is not a strict liability test, but an 'all reasonable measures' standard.[120] The word 'reasonable' connotes an objective standard. In performing this objective assessment, the tribunal in *AAPL v. Sri Lanka* relied on Professor *Freeman's* 1957 Lectures at the Hague Academy of International Law where he opined: 'The 'due diligence' is nothing more nor less than the reasonable measures of prevention which **a well-administered government** could be expected to exercise under similar circumstances'.[121]

Accordingly, a host state is not obliged to provide just any protection that in the investor's view is necessary to protect its investment.[122] Rather, a host state's conduct is assessed based on the protective measures that can be expected of a 'well-administered government' placed in the same situation as the host state. Post *AAPL*, *Freeman's* formula on what a 'well-administered government' will do under a similar circumstance has been widely adopted by investment tribunals in assessing the objectivity (reasonableness) of a state's conduct in fulfilling its FPS duties.[123]

Notably, the 'reasonableness assessment' based on what a 'well-administered government' will do to protect foreign property from third party harm does not suggest the existence of an 'ideal state' under international law. Each state comes with its uniqueness and peculiarities which every tribunal must respect and not substitute for a hypothetical 'ideal state'.

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118 *Tecmed v. Mexico*, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003), para. 177

119 See, Ronald S. Lauder v. Czech Republic, UNCITRAL, Final Award (3 September 2001), para. 308; *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (12 January 2016), para. 161.

120 *Bernhard von Pezold and others v. Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award (28 July 2015), para. 596.

121 *AAPL v. Sri Lanka*, see above, note 117, para. 77.

122 *Peter A. Allard v. Government of Barbados*, PCA Case No. 2012-06, Award (27 June 2016), para. 244.

123 *AES Summit Generation Limited and AES-Tisza Erömü Kft v. The Republic of Hungary*, ICSID Case No. ARB/07/22, Award (23 September 2010), para. 13.3.3; *El Paso Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award (31 October 2011), para. 522; *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award (15 December 2014), paras. 625 et seq.; *Mobil Exploration and Development Inc. v. Argentine Republic*, ICSID Case No. ARB/04/16, Decision on Jurisdiction and Liability (10 April 2013) paras. 999-1000; *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2001), para. 323.

Unless the treaty indicates otherwise, a state is only obliged to provide protective measures to investments not falling below the international minimum standard recognised under CIL. The threshold for satisfying this duty is quite low, while conversely, the threshold for breaching the duty is quite high.[124] Therefore, the assessment of due diligence based on what a 'well-administered government' will do cannot be too strict.[125] While guided by the 'well-administered government' theory, the factual circumstances of each case would determine the degree of care of what is 'reasonable' or 'due'.[126]

II. Effect of a State's Economic and Social Conditions on the FPS Duty

As already discussed, the degree of diligence that is 'reasonable' or 'due' on the part of a state will depend on the factual circumstances of each case. Today, one of those circumstantial factors recognised in measuring the degree of care owed by a state is its 'economic and social conditions'. This approach is commonly called the 'modified objective standard' credited to Newcombe and Paradell. According to these two legal scholars:

> *The extent of due diligence an investor may expect will vary […] according to local conditions. This means that due diligence is limited by a state's capacity to act – a state will not be responsible when an action would have been impossible […]. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo.*[127]

Accordingly, a state's ability to offer due diligence in the protection of foreign property should be measured against its available resources, including the political and economic conditions prevalent in the state.[128] In *Pantechniki v. Albania*[129], the modified objective standard approach was applied by the tribunal. Relying on the claimant's star witness testimony, the tribunal stated that:

> *[The claimant's star witness] depicted in striking terms an environment of desolation and lawlessness which she and her team encountered upon arrival in 1994 […]. She testified that the police said they were unable to intervene. That is crucially different from a refusal*

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124 Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award (3 November 2015), paras. 382 f; *Joseph Houben v. Republic of Burundi*, ICSID Case No. ARB/13/7, Award (12 January 2016), para. 175.

125 Blanco, *Full Protection and Security in International Investment law* (2019), p. 439.

126 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on Jurisdiction and Liability (28 April 2001), para. 325.

127 See, Newcombe and Paradell, *Law and Practice of Investment Treaties* (2009), p. 310; Blanco, → fn. 125, p. 449.

128 Reinisch, *International Protection of Investment* (2021), p. 584, para 188.

129 *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21, Award (30 July 2009).

> *to intervene given the scale of the looting. I conclude that the Albanian authorities were powerless in the face of social unrest of this magnitude.*[130]

Following *Pantechniki*, the tribunal in *Ampal v. Egypt*[131] also opined that: 'the adequacy of the State's response should be assessed in the light of the scale of the disorder and the extent of its resources'.[132] An investor may not legitimately expect a level of protection beyond what was within the obvious capacity of the state at the time the investment was made. For example, in *Mamidoil v. Albania,*[133] the tribunal found that the claimant was aware of insecurity situations such as smuggling, fuel adulteration, and tax evasion, before its investment. Nevertheless, they went ahead with the investment. Under such insecure conditions, the claimant cannot legitimately expect to receive effective protection that was not there at the time the investment was made.[134]

The duty to take into consideration the economic and social conditions of a state may be easier to argue when the nature of the claim involves physical protection. In cases involving legal protection – for instance denial of justice (DOJ) – the application of the modified objective standard in assessing a state FPS liability becomes more controversial. In *Pantechniki v. Albania*, the tribunal differentiated claims involving physical protection from that involving DOJ. For the latter, the proportionality assessment between a state's resources and its international responsibility should not apply. The tribunal provided two rationales for this position. *First*, the international responsibility for a DOJ breach does not relate to physical infrastructure but simply obedience to the rule of law, protecting foreigners from xenophobic or arbitrary decisions.[135] Arguably, this is a universal rule of law concept that should not be overridden in the name of economic and social conditions. Secondly, if the modified objective standard were to apply, there would be no incentive for states to seek improvement of their judicial system.[136] That way, states could simply leave their judicial system in an underdeveloped state just to limit or exclude potential liability for DOJ under international law.

Despite the validity of this point, the ability of a state's justice system to diligently offer investors protection and remedies against third-party induced harm may arguably be subject to its available resources. For instance, during the Covid 19 pandemic, a global lockdown and an alteration in the conventional mode of doing business took place across the globe with severe

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130 Ibid., para. 82.

131 *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss (21 February 2017)

132 Ibid., para. 244.

133 *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24, Award (30 March 2015)

134 Ibid., para. 823 f.

135 *Pantechniki v. Albania*, → fn. 129, para. 76.

136 Ibid.

social and economic restrictions. In this period, while many state courts across the globe (especially in advanced economies) transitioned online to continue their daily judicial business, some other state courts could not or could not do so efficiently due to limited financial, intellectual, and technological resources at their disposal. In this latter situation, the failure of a state court to afford the necessary legal protection or relief to an investor for injuries induced by a third party may not necessarily amount to an FPS breach. For this, the reasoning in *Pantechniki v. Albania* may apply, since being 'unable to intervene […] is crucially different from a refusal to intervene'.[137]

D. CONCLUSION

This chapter has focused on introducing the FPS standard right from its customary international law roots to its formation in international investment agreements. As understood under CIL, the FPS standard is limited in scope to the protection of foreign property from physical harm due to third-party interference. This traditional understanding remains the undisputed subject matter of the FPS clause common across IIAs. Notably, as shown in the case laws referenced in this chapter, this traditional conception may be varied depending on the textual formulation of the FPS standard in a treaty. In particular, the FPS standard may extend to protection against non-physical harm, if the treaty language so permits.

However, one aspect of the FPS standard where jurisprudence appears to be consistent irrespective of treaty language is with the standard of review. It is generally accepted that the FPS standard is not a guarantee that an investor will suffer no harm in the host state. The standard does not impose a strict liability duty on a state but simply a duty of vigilance and due diligence, taking into consideration the circumstances and resources at the disposal of a state. The evaluative objective test is what a 'well-administered government' would have done in a similar situation, given the same resources as the host state. The answer to this question will determine the degree of care or diligence required to fulfill the FPS duty. Sometimes, the answer may be that the state could do nothing in fulfillment of its FPS duty, not because it failed to be diligent, but because the socio-economic conditions prevalent in the state did not permit it to intervene.

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137 *Pantechniki v. Albania*, → fn. 129, para. 82.