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# THE FULL PROTECTION AND SECURITY STANDARD: AN ANALYSIS OF RELATIONS, EXTENT, AND JURISDICTION

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## ABSTRACT

International investment is administered by specific standards and principles outlined in the Bilateral Investment Treaties (BITs) or international investment agreements. Full Protection and Security is an outright standard of such agreements of foreign investments. This paper examines the evolution and the exegesis of the principle of Full Protection and Security (FPS) through various arbitral decisions, notwithstanding the assortment of language explanations implied in the BITs or investment agreements. The primary goal of this principle is to enforce an obligation on the state to prevent any harm to the foreign investor and investment and provide remedy and justice in the event of a breach. There are certain controversies while interpreting FPS, i.e., whether the standard of FPS is narrowed to the ambit of physical protection only or widened to cover legal protection. Another question is whether FPS overlap and defeat the purpose of Fair and Equitable Treatment; and its relevance with other standards such as Expropriation. Lastly, the crucial argument concerning the degree of state liability in compliance with the FPS, i.e., whether the state has to act with due diligence or strict liability, is imposed. The study involves analytical and descriptive research. Different sources such as international arbitral decisions, BITs, journals, and websites are examined concerning FPS. The paper attempts to study the ubiquitous stance and ramifications of the aforementioned concerns in international investments.

***Keywords-*** *Arbitral Tribunal, Full Protection and Security (FPS), Investor, Investment, Standards of Protections*

## INTRODUCTION

An investor's primary concerns are safety and security. While investing, the investor assures that his investment will not be ruined or damaged. The criteria of security are included in investment treaties. These are the legal protections of foreign investors, which must be protected by the host country and widely known as Standards of Protection. The Bilateral Investment Treaty or

Multilateral Investment Treaty (hereinafter referred as BITs or MITs) set forth terms such as 'Criteria of treatment' or 'protection requirements' to describe the protection standards in investment treaties. are designed to incorporate these standards to ensure that these principles are adhered to by all the respective parties involved in the investment. These principles are split into two felines: one deals with absolute and non-contingent standards, and the other with comparative or relative standards.<sup>1</sup> Expropriation, Fair and Equitable Treatment [FET], Full Protection and Security [FPS], umbrella clauses are examples of absolute norms, whereas most-favored-nation treatment [MFN] and national treatment [NT] are examples of relative standards. Investors and host states alike have the right to seek legal recourse in the event that any of these conditions are violated. Whether investors should be required to adapt to an ever-changing regulatory landscape or should they have the right to a stable environment is the central question at stake.

In Traditional International Law, the state must protect the rights and property of foreigners within its territory, resulting in the evolution of the Principle of FPS. It imposes a dual responsibility upon the state to protect investment and investors against violation and provide for the remedy.<sup>2</sup> Most of the investment treaties include the FPS. However, they all have different interpretations depending upon the intention of the state parties. While deciding the issue of FPS, the Tribunal has taken different stands depending upon the facts and circumstances of the disputes. The first bilateral contract to embrace the FPS was concluded between Germany and Pakistan in 1959<sup>3</sup>. The treaty incorporated Article 3(1) which provided for the enjoyment of a secure and protected environment to investors within its territory. Since then, different contracting parties have included this standard in their investment agreements. The investors started using this standard as a ground of protection in arbitral proceedings.

The Asian Agriculture Products Ltd. V. Republic of Sri Lanka<sup>4</sup> was the first case where the principle of FPS was questioned and decided. In this case, AAPL had 48.2% shares in a Sri Lankan Company, Serendib, cultivating and exporting shrimp. While conducting military operations suppressing the local rebellion, obliterated Serendib's shrimp ranch, and investment suffered harm. AAPL claimed a total of US\$ 8 million for the violation of FPS agreed under Sri Lanka-UK BIT.<sup>5</sup>

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<sup>1</sup>Dolzer R. and Schreuer C., *Principles of International Investment Law* (Oxford University Press, 2008) 119-152.

<sup>2</sup>Junngam N., '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 1.

<sup>3</sup>AES v. Argentina, Decision on Jurisdiction, 26 April 2005.

<sup>4</sup>Asian Agricultural Products Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award, 27 June 1990, 30 ILM 577 (1991).

<sup>5</sup>Alexandrov S. A., 'Chapter 23: The Evolution of the Full Protection and Security Standard', in Kinnear M., Fischer G. R., et al. (eds), *Building International Investment Law: The First 50 Years of ICSID* (Kluwer Law International 2015) 319-330.

The extent of liability was examined. Though the case does not involve the question of limits of FPS, as AAPL invoked the FPS clause on infringement of physical security and protection, it still acted as a significant achievement since it proclaimed the conjuring of these provisions to different circumstances. Following that, various parties in their dispute referred to this decision. With time, the Tribunal's position on the FPS exposition has been changing. While analyzing the FPS following concerns have emerged such as whether the FPS includes protection against physical harm to the investment or it also extends to providing legal protection also to the investments; whether FPS is autonomous from other principles or is aligned with them. There are various situations that require evaluation, and the discussion aims to examine these scenarios.

## **CORRELATION BETWEEN FPS AND OTHER STANDARDS OF PROTECTION**

There are various types of protection principles contained in BITs or MITs such as FET, FPS, Expropriation, MFN, Umbrella clauses. These standards strive to ensure the protection of all parties involved, including the host state, the investor, and their investments, while respecting everyone's rights.<sup>6</sup> Whenever there is a breach or conflict between the rights of the host state and the investor, it is possible for multiple standards to be violated, and a request for a remedy can be made in such cases. Nevertheless, upon examining the definitions and meanings of these standards, along with their scope and nature, there may be occasional instances of overlap. As an example, the concepts of FPS, FET, and Expropriation are often explained and implemented together. When the investor's investment is not safeguarded against damages, vandalism, opportunity of being heard is not given and unlawful seizure by the population of the host state, it is considered a violation of the FET which in itself include FPS and an instance of indirect expropriation.<sup>7</sup>

Professor Juillard proposed that Fair and Equitable Treatment (FET) gives essential assistance to the elucidation of different standards in the agreements and remedy the loopholes in the international agreements.<sup>8</sup> Some of the investment agreements have associated FET standard with

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<sup>6</sup> Grieson-Weiler T. J. and Laird I. A., 'Standards of Treatment', in Muchlinski P., Ortino F., and Schreuer C. (eds.), *The Oxford Handbook of International Investment Law* (Oxford University Press, 2008) 260-302.

<sup>7</sup> *Azurix v. Argentina Award*, 14 July 2006; *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, Award of 8 December 2000; *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.

<sup>8</sup> OECD, "Fair and Equitable Treatment Standard in International Investment Law," OECD Working Papers on International Investment, 2004/03, OECD Publishing, available at <http://dx.doi.org/10.1787/675702255435> (last accessed on 22 August 2024).

FPS, such as BIT between UK and Egypt<sup>9</sup>. In this treaty, Article 2 clearly mentions the principles for the promotion and protection of the investment. Both FPS and FET are mentioned together in this article making it the responsibility of each party to maintain, protect and promote the investment and not to do anything which might be discriminatory or unreasonable. There are also instances where they are mentioned individually. In *National Grid v. Argentina*<sup>10</sup>, the FPS clause was interpreted alongside the FET clause, both of which are covered by the UK-Argentina BIT. FPS's scope was once again expanded and made applicable beyond physical protection. This case along with various other tribunal decisions emphasized that, there are situations in which these may be interpreted independently of one another and each may have its own purpose and interpretation such as in the case of *AES v. Argentina*,<sup>11</sup> the Arbitral Tribunal held that the FES and FPS are two distinct protection standards and must be interpreted as per the facts and circumstances of each case. It was widely accepted and used as a reference in various decisions. They argue that in agreements where different clauses related to FES and FPS are provided, they cannot have the same meaning. In some cases, FET may be violated but not FPS and vice-versa, so the decision must be based on the event and situation of the case. In several cases, it is opined that FPS does not apply to the legal violation as it comes within the scope of FET, and it results in overlapping of FET. A new perspective can be added to interpret the relation of FES and FPS by applying the principle of harmonious construction. Both standards can work with each other, and flaws in one standard can be completed by the other.

Another aspect is the relation of FPS with Expropriation. When the host state unlawfully expropriates the investment of a foreign state, it leads to the violation of the FPS. The FPS standard imposes a duty on the state to create a secure environment for investors and investments. For instance, in the case of *Wena Hotels v. Egypt*,<sup>12</sup> the Claimant was unlawfully removed from the hotels. The staff and guests were ejected from the premises. The Egyptian Government failed to protect the investment. The unlawful Expropriation (seizure of both hotels) resulted in the violation of the FPS. Expropriation and FPS are directly proportional to each other. If the standard of FPS is followed, then it is lawful Expropriation. The Tribunal, *Burlington Resources Inc. v. The Republic of Ecuador*<sup>13</sup> case, observed that if the Tribunal has jurisdiction to decide the question

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<sup>9</sup> Treaty Series No. 97 (1976), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/1122/download> (last accessed on 18 August 2024).

<sup>10</sup> *National Grid v. The Argentine Republic*, UNCITRAL case, Award of 3 November 2008.

<sup>11</sup> *AES v. Argentina*, Decision on Jurisdiction, 26 April 2005.

<sup>12</sup> *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, award of 8 December 2000.

<sup>13</sup> *Burlington Resources Inc. v. Republic of Ecuador*, ICSID Case No. ARB/08/5.

of Expropriation and not of (*ratione materiae*) independent FPS, it still can look into the compliance of the FPS standard.

The FPS has a cordial and non-violative relationship with other standards. The application of the FPS in conjunction with another standard must be interpreted in such a way that the essence of both standards is preserved without jeopardizing one another.

## **HOST STATE OBLIGATION TO INVESTOR AND INVESTMENT: STRICT LIABILITY OR DUE DILIGENCE**

Another issue is with the extent of the state's liability towards the investors and investments. Various decisions of the Tribunals have tried to establish the liability of the state. Generally, the state's responsibility is determined according to the person violating the security and protection of the investment. If the damage was done by state or state entities, the state is liable to answer directly, but liability issues arise in the case of a third party. The state must act with due diligence. It is anticipated that reasonable actions must be taken as a state organization acting in the same power would have taken. The Arbitral Tribunal discussed the liability in *Asian Agriculture Products Ltd. V. Republic of Sri Lanka*<sup>14</sup> whether state responsibility is act with due diligence or strict liability is imposed? Whether the state had the opportunity to prevent the damage? The Tribunal considered where the state could prevent destruction to investment, and if it does not do so, it has breached its responsibility to protect the investors and investment. It was concluded that the state withered from its duty to function with due diligence. This decision recognized that the liability of the state is extended to due diligence, not strict liability.

In *Noble Ventures v. The Republic of Romania*<sup>15</sup>, it was manifested that FPS is not absolute and does not obligate the state with strict standard but to undertake actions with due diligence. Due diligence can be explained as the treatment of investors or investments in compliance with international law<sup>16</sup>. In various cases where the BITs are silent, tribunals have applied the principles of international law. Similarly, in case of determination of the extent of liability, these can be invoked. In the case of *Wena Hotels v. Egypt*<sup>17</sup>, the Ministry of Tourism was aware of the seizures of hotels, but the Government did not take any steps to prevent the seizures. The illegal and forceful removal of employees, guests from the hotels, destruction of premises, and auction of the

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<sup>14</sup> *Asian Agricultural Products Ltd. v. The Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 30 ILM 577 (1991).

<sup>15</sup> *Noble Ventures Inc. v. Republic of Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

<sup>16</sup> Miljenic O., 'Full Protection and Security Standard in International Investment Law' (2019) 35 *Pravni Vjesnik* 35.

<sup>17</sup> *Wena Hotels v. Egypt*, ICSID Case No. ARB/98/4, award of 8 December 2000.

property of hotels amounts to a violation of FPS. The Egyptian Government did not act with due diligence, and hence, state responsibility emanates.

The onus of proof is on the investor. He has to establish a violation of the principle of due diligence. In *Tecmed v. Mexico*,<sup>18</sup> the Claimant contended that Respondent failed to take appropriate measures to safeguard their investment and also encouraged protestors. The Tribunal refused the contention and held that there is no sufficient evidence to show that state-aided in the destruction of investment. The Tribunal concurred with Respondent and upheld the notion of due diligence.

Due diligence can be explained as providing a secure environment and taking necessary measures to prevent any harm. In case of infringement or failure, access to justice must be provided. While determining the state's responsibility, the Tribunal should emphasize the violation and damage done to the investor and investment. The question is whether the state could prevent the harm and whether it acted and expended all of its resources to provide a secure and protected environment for foreign investment.

## **THE JURISDICTION OF FPS- RESTRICTED TO PHYSICAL PROTECTION OR INCLUDE LEGAL DEFENSE**

The scope of FPS is always a debatable issue. There are different views regarding this issue. First, FPS extends to physical protection only. Some Tribunals have affirmed that the FPS principle involves protection and security from physical injury. The Tribunal, in the case of *AAPL v. Sri Lanka*,<sup>19</sup> applied the FPS to physical harm and violence. The decision of *Saluka Investment v. The Czech Republic*<sup>20</sup> employed FPS to damage done by civil strife and physical violence to the foreign investment. In the case of *AMT V. Zaire*,<sup>21</sup> the state (Zaire) was held liable for the dereliction of its responsibility to prevent damage to foreign investment. The looting of premises by Zairian Soldiers shows the inability of the state to create a protective and secure environment for the

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<sup>18</sup> *Technicas Medioambientales Tecmed S.A. v. The United Mexican States*, Award, ICSID Case No. ARB (AF)/00/2, 29 May 2003.

<sup>19</sup> *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990, 30 ILM 577 (1991).

<sup>20</sup> *Saluka Investment v. Czech Republic*, available at <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf> (last accessed on 13 August 2024).

<sup>21</sup> *American Manufacturing & Trading, Inc. v. Republic of Zaire*, Award, 21 February 1997, available at <https://jsumundi.com/en/document/decision/en-american-manufacturing-trading-inc-v-republic-of-zaire-award-friday-21st-february-1997> (last accessed on 23 August 2024).

investment or investors. Certain BITs specifically state physical protection and security, such as Netherland Model BIT, 2019.<sup>22</sup>

Second, the FPS can be applied beyond physical protection. The FPS standard creates a dual obligation on the state to prevent the damage, and another is in case of damage to provide a remedy. In *CME v. the Czech Republic*<sup>23</sup>, the realm of the FPS extended and covered legal security and protection within it. The Tribunal concluded that it is the state's responsibility to guarantee that the amendment in the laws settled by the parties does not diminish the value of the investment. If they depreciate the investment value, it breaches the FPS clause. Many BITs explicitly provide for legal security as well, such as Germany-Argentina BIT, 1991<sup>24</sup>. In *Azurix v. Argentina*<sup>25</sup>, the Claimant contended that there was no physical violation of investment, but it suffered legal breaches such as interference in tariff, non-compliance with infrastructural repairs, and non-payment of bills by customers. The Tribunal established that even if no physical harm or violence is done, the FPS standard can be breached in case of a disrupted legal order.

Traditionally, the FPS standard was limited to physical protection and security. Over time, the Tribunal widened the meaning of "Full Protection and Security" by applying it beyond physical violation and included legal security. The difference of opinions on FPS standard scope, the explanation of Tribunal in *PSEG v. Turkey*<sup>26</sup> seems relevant. It recognized the FPS standard in the context of physical aspects and only, in extraordinary circumstances such as negative consequences of changes in the law, it extends to the legal arena. It reasoned that legal issues could be dealt with in other standards like FET. The FPS standard can be interpreted according to the context of the case. If other standards cover the legal infringement of investors' rights or investment, then invocation of FPS is not required.<sup>27</sup>

These three issues are inextricably linked to one another. If FPS overlaps FET, it implies that FPS is being used for purposes other than physical destruction, such as legal infringement of investment or investor rights. Even though FPS is involved in most awards, the rationale for the decision is

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<sup>22</sup> Netherlands Model Investment Agreement, Article 9 (22 March 2019), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download> (last accessed on 14 August 2024).

<sup>23</sup> *CME v. Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121.

<sup>24</sup> BIT\_0006-Argentina-Germany BIT (1991), Article 4(1), available at [https://www.investorstatelawguide.com/documents/documents/BIT-0006%20-%20Argentina-Germany%20BIT%20\(1991\)%20%5Benglish%20translation%5D%20UNTS.pdf](https://www.investorstatelawguide.com/documents/documents/BIT-0006%20-%20Argentina-Germany%20BIT%20(1991)%20%5Benglish%20translation%5D%20UNTS.pdf) (last accessed on 13 August 2024).

<sup>25</sup> *Azurix v. Argentina*, Award, 14 July 2006.

<sup>26</sup> *PSEG v. Turkey*, ICSID Case No. ARB/02/5, Award (19 January 2007).

<sup>27</sup> Snider T. and Nair A., 'A Trap for the Unwary: Delineating Physical and Legal Protection under Full Protection and Security Clauses' (2020) 9 Indian J Arb L 24.



the violation of other agreement standards such as FET and Expropriation. The emphasis on FPS is significantly less. The state is expected to act with due diligence when the third party's violation is caused to investors or investment, whether physical or legal. The main reason for the confusion while implementing FPS is the vague language. In *Pantechniki v. Albania*<sup>28</sup>, the Tribunal distinguished the state's responsibility in accordance with the availability of its resources. When there is a breach of legal protection, then the availability and extent of state resources are irrelevant, whereas, in the case of physical protection, it is a relevant factor. When the language itself does not clarify the intentions of the party as to how far they will go and to what extent they will provide the protection to the foreign investors or investments. If the agreement uses clear words such as legal security and protection or physical protection and security only, then there will be no issues regarding the applicability of FPS.

## CONCLUSION

The Full Protection and Security (FPS) clause is a crucial aspect of International Investment Law, with a primary focus on ensuring the safety and security of foreign investments, both in terms of physical and legal protection. In today's ever-changing global economy, the understanding and implementation of the FPS clause have undergone significant growth, mirroring the intricate dynamics of contemporary investment landscapes. In the past, it was commonly accepted that the FPS clause required host states to ensure the safety of foreign investments by safeguarding them from physical harm, such as civil disturbances, insurrections, and other violent incidents. Nevertheless, the jurisprudence of international investment tribunals has expanded the scope of the FPS clause to encompass not only physical protection, but also legal and regulatory security.

The inclusion of the FPS clause demonstrates the ever-changing landscape of international investment law, where it is crucial to adjust the safeguarding of investor rights to meet present-day obstacles. This expanded interpretation implies that host states have the responsibility to not only prevent physical harm to investments, but also to establish a stable, secure, and predictable legal environment. This involves safeguarding investments from unjust or biased actions by the state and its institutions, as well as addressing issues in the legal system, such as the denial of fair treatment or inadequate legal recourse.

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<sup>28</sup> *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

The changing understanding of the FPS clause highlights the significance of taking a fair and impartial approach that takes into account the rights of investors as well as the valid regulatory concerns of host states. Although the clause places important responsibilities on states to safeguard investments, it does not provide an absolute assurance against any kind of harm or loss. States have a responsibility to diligently protect investments by taking appropriate measures within their capacity. The level of protection needed can differ based on the particular circumstances, including the host state's resources and capabilities.

In addition, there has been a growing connection between the FPS clause and the idea of fair and equitable treatment (FET), with certain tribunals viewing these standards as interconnected or even overlapping. This convergence indicates that the FPS clause can be understood to encompass more than just physical and legal security. It also covers the safeguarding of legitimate expectations, transparency, and the stability of the legal and regulatory framework.

Nevertheless, there is ongoing debate surrounding the expanding reach of the FPS clause. Some critics believe that a broad interpretation of certain regulations could potentially limit the ability of host states to make decisions in important areas like public health, environmental protection, and human rights. There is a concern that if interpretations are too broad, it could result in favoring investor rights over public interests, which may hinder states from pursuing their legitimate policy objectives. There is a continuous discussion surrounding the delicate equilibrium between safeguarding foreign investments and upholding the regulatory authority of states.

The issues mentioned above are scrutinized regularly. The interpretation of the FPS varies and shifts in response to the decisions of various Tribunals. The decision was made solely based on the facts and circumstances of the cases. In some cases, the Tribunals broadened the scope, while in others, it was narrowed. The Full and Security standards are not precisely defined. Parties to invoke the FPS standard refer to the awards delivered. In the first case, the FPSs are not in conflict with any other standards. It may overlap with another standard, but this does not prevent it from being used. Establishing explicit definitions of standards such as FET and FPS is impractical because they are based on international law and are constantly evolving. The second issue, state responsibility, should be decided based on the amount of damage and harm done to investors. It should not be dependent on the person committing the crime. The award must be based on the principle of due diligence, which refers to the steps or actions taken by the state to protect foreign investment. Lastly, the standard's applicability should be evaluated in terms of both physical and legal infringement. The FPS includes legal protection and security in the case of intangible investments. As a result, limiting it to physical harm defeats the purpose of FPS.

FPS is a broad term containing different interpretations. Parties, while drafting investment agreements, must specify their intention regarding FPS standards. The language of the FPS standard should include in itself whether it applies to legal protection, physical protection, or both aspects. A detailed and precise draft of the investment agreement is a possible solution to resolve the issue related to the FPS.

Ultimately, the Full Protection and Security clause in international investment law has undergone significant changes, expanding from its original purpose of ensuring physical security to encompass a broader range of legal and regulatory safeguards. This transformation demonstrates the shifting landscape of worldwide investment and the imperative to tackle the intricate obstacles encountered by investors and states alike. Although the expanded interpretation of the FPS clause offers enhanced protection for investors, it also prompts significant inquiries regarding the delicate equilibrium between investor rights and state sovereignty. As international investment law evolves, it is essential to maintain a fair, balanced, and responsive application of the FPS clause that addresses the interests of both investors and host states.

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