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THE FULL PROTECTION AND SECURITY STANDARD IN INTERNATIONAL INVESTMENT LAW: WHAT AND WHO IS INVESTMENT FULLY[?] PROTECTED AND SECURED FROM?

NARTNIRUN JUNNGAM*

Foreigners, as long as they live in alien territory, ought to be safe from every injury, and the ruler of the state is bound to defend them against it, that is, security is to be assured to foreigners living in alien territory.

—CHRISTIAN WOLFF

The international duty of a government in respect of the property of foreigners cannot be dissevered from its international duty in relation to foreigners in other respects. It is, at least, difficult to suggest that a different standard of duty applies for the security of property and for the security of persons. . . . But the duty of a government towards individuals in respect of their property varies with each successive stage of civilization; it is not the same in the modern world as in ancient or medieval societies, nor is it the same in all countries [today]. A lawmaker should hesitate long before decreeing any absolute rule as a dogma exempt from the relativity which is the condition of human organizations.

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The axis of this Article is a preferred interpretation and application of the full protection and security ("FPS") standard in contemporary international investment law. By carrying out the intellectual tasks of jurists proposed by the New Haven School of International Law, its findings are that the FPS standard covers both physical and legal harms to investments caused by state organs and/or third parties and that due diligence is decisive for determining the observation of the standard. To write up these findings, the Article first repudiates the conventional wisdom that the FPS standard owes its origin to treaties of friendship, commerce, and navigation ("FCN") concluded in the nineteenth century. It then relies on a historical analysis to refute the position that the FPS standard has historically applied exclusively to physical harms. It argues that the concept of the FPS standard since its genesis has been tied with legal protection, notably, administration of justice, and such a tie has not necessarily been established upon physical harms. Thus, based on the customary international law duty to provide foreigners with full protection and security, one is justified in interpreting the treaty-based FPS standard to cover legal harms that are even more delicate and wider in scope, given the context and conditions of international investment. By finding that the FPS standard covers legal harms, its overlap with the fair and equitable treatment ("FET") standard occurs and blurs their distinction in practice. Regardless of whether physical and legal harms are caused by state organs or by third parties, this Article advocates for a modified objective test of due diligence to determine whether host states comply with the FPS standard. To hold that the acts of state organs are wrongful as such without enquiring whether such organs were diligent or not is unconvincing on its own terms and not even consistent with the minimum standard of treatment. Host states' economic, social, and political realities bear relevance to their compliance with the FPS standard in both physical and legal contexts. Absence of due diligence is a contextual conclusion based on an assessment of what is "due" in the actual context. Therefore, host states can fail the due diligence test without intending to cause harms (dolus).

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I. INTRODUCTION

The full protection and security (“FPS”) standard is one of the “non-contingent” or “absolute” standards of treatment, a standard that is not dependent on the host state’s treatment of other investments or investors. It has been guaranteed in most international investment treaties, typically in the form of a full protection and security clause. Although its textual expression varies from treaty to treaty, “protection” and “security” are usually at its core. Traditionally, this standard has been construed as obliging host states to adopt measures protective of investments and investors from physical harms. In this respect, the standard is not especially nebulous. Subsequently, it has been expanded to cover legal protection and security for investments and investors, that is, in the case of infringement of the investors’ rights. If the applicable FPS clause refers explicitly to full protection and legal security, such an expansion is nothing more than a result of a textual interpretation that is neither “ambiguous or obscure” nor “manifestly absurd or unreasonable.” However, if the standard were crafted in a broad and general fashion as containing, for instance, “full protection


and security,” then the interpretative issue related to its coverage arises and provokes discussion. Although investors have frequently invoked the standard, regarding it as serving their objectives better, host states have been opposed to its extended scope. Given this conflict, international investment tribunals maintain different perspectives. As a result, the jurisprudence on the FPS standard is highly controversial. This observation is not an exaggeration. One arbitral tribunal even acknowledged that the FPS standard has been “diversely interpreted” by its fellow tribunals. From an academic perspective, even now, the standard has known no consensus. Thus, it is essential to clear a path through the tangled jurisprudence constante of international investment tribunals to systematically address this standard of treatment.

A prima facie examination of such jurisprudence highlights the core question of this Article as to whether it is appropriate to expand the so-called conventional coverage of the FPS standard, which has traditionally been limited to physical protection against violence, to include legal and regulatory protection and stability? Two seminal cases initially analyzed this


10. See WANG, supra note 4, at 309 (observing that “[t]here is no consensus in arbitration practice on its interpretation and application, however”); see also Ralph Alexander Lorz, Protection and Security (Including the NAFTA Approach), in INTERNATIONAL INVESTMENT LAW 764, 781 (Mare Bungenberg et al. eds., 2015) (noting that “[t]he arbitral tribunals are highly divergent on this matter”); Moss, supra note 7, at 142 (admitting that “[t]he question remains rather controversial”); STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 79 (2009) (noting that the exact content of the FPS standard “has not been authoritatively determined and remains contested”); SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 67 (2008) (noting that “[t]here is no generally agreed definition of this term and different parties have claimed different levels of protection under this [FPS] principle”); Elizabeth Whitsitt & Nigel Bankes, The Evolution of International Investment Law and Its Application to the Energy Sector, 51 ALTA. L. REV. 207, 231 (2013) (noting that “[s]ome of the most contested issues with respect to the standard of full protection and security are whether or not it extends beyond the physical security of the investor or its investment is compromised, its relationship to other substantive disciplines within IIAs, and its relationship to customary international law”).
question: *Asian Agricultural Products Ltd. v. Sri Lanka*\(^{11}\) and *CME Czech Republic B.V. v. Czech Republic.*\(^{12}\) While the former applied the FPS standard to physical violence, the latter extended its scope to cover legal infringement of investment. To this day, both arbitral decisions have had persuasive authority on subsequent tribunals’ consideration of the standard. A second question relates to the precise degree of protection and security: how full is full enough for protection and security? Should the FPS standard continue to entail an obligation of due diligence or an obligation of conduct in every case, or should it give rise to strict liability in certain cases?

To answer these questions, this Article tries to take on the five intellectual tasks of jurists put forward by the New Haven School of International Law:

1. Goal clarification—an end sought to secure—is a preferred interpretation and application of the FPS standard that serves its very purpose.

2. A trend analysis is used to examine the degree to which an interpretation and application of the FPS standard has been achieved in past decisions and performs a historical function that identifies and organizes trends in pertinent past decisions in terms of the application thereof.

3. A factor analysis warrants the correlation of past decisions with conditions that influenced them and a consideration of whether the context of those conditions has changed materially and pertinently.

4. Predictions, possibly made by different techniques, are used to see the future results of actors’ election. Surveying different decision options and scrutinizing the prospective aggregate-value consequences of each in terms of an interpretation and application of the FPS standard allow jurists to select and adjust specific recommendations in order that they may increase the probability of the eventuation of a preferred future.

5. Invention of alternatives and recommendations is not merely a summary of the rules of the past. Instead, it involves exploration of alternative arrangements to increase such probability.\(^{13}\)

Although the protection and security of persons and property in international investment treaties in its broadest sense can be found in more than one context, this Article will focus only on the FPS standard as it is manifested in the form of FPS clauses and, thus, it will refrain from examining specific clauses in other relevant contexts—for example, access

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to courts and international tribunals, expropriation, and compensation.\textsuperscript{14} Its discussion proceeds as follows: Part II offers a historical development of the FPS standard. It examines how the early concept of the standard was formed in various contexts and ultimately crystalized into the contemporary FPS standard. Part III presents an understanding of the FPS standard from scholarly and judicial perspectives at both the domestic and international levels, considering how scholars, domestic courts, and international courts and tribunals have approached the FPS standard. Specifically, Part III examines judgments of the United States Supreme Court and decisions by the International Court of Justice ("ICJ") and the Iran-United States Claims Tribunal ("IUSCT"). Part IV focuses exclusively on the interpretation and application of the FPS standard by investment tribunals under \textit{ad hoc} arbitration pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Arbitrations Rules and institutional arbitration, such as the International Centre for Settlement of Investment Disputes ("ICSID Centre"), the Permanent Court of Arbitration ("PCA"), the London Court of International Arbitration ("LCIA"), and the Stockholm Chamber of Commerce ("SCC"). It systematically categorizes all salient arbitral findings about the FPS standard as follows: the treaty-based FPS standard and customary international law; its nature of protection and security; the materiality of terminological variations; its scope \textit{ratione materiae}, its scope \textit{ratione personae}, and its relation to other standards and principles in order to see a cumulative application of standards and principles of international investment law.\textsuperscript{15} Part V offers an overarching analysis and several recommendations with respect to the genesis of the FPS standard, terminological variations, covered harms, covered perpetrators, due diligence, and the relation between the FPS standard and customary international law, as well as, the fair and equitable treatment ("FET") standard.

\section*{II. A HISTORICAL ACCOUNT OF THE FULL PROTECTION AND SECURITY STANDARD}

As is rightly said, "[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."\textsuperscript{16} This part of our trend analysis is thus

\textsuperscript{14} ROBERT RENBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 106-07 (1960).

\textsuperscript{15} See Schwarzenberger, supra note 3, at 69-70.

devoted to the historical development of attitudes toward and treatment of foreigners, the granting of protection and security in various treaties, the emergence of the customary international law that provides protection and security, and, ultimately, the inclusion of modern FPS clauses in investment and other treaties. It presents a historical account, arranged chronologically, of full protection and security in both economic and political contexts according to the following timeline of five historical periods: Greece, Rome, the Middle Ages, the Renaissance to World War I, and World War I to the present. The core of this Section aims to illustrate that the FPS standard is rooted deeper in legal history than has been estimated by previous literature, which reports that the FPS standard’s origin can be traced back to the nineteenth and early twentieth centuries. Actually, it dates to at least ancient Greece, if not further. Moreover, this Section will show that since its very beginnings, the concept of protection and security has not been limited only to physical protection and security.

A. Greece

Foreigners in Greece included Greeks of other cities domiciling in a state, Greek travelers or visitors staying in a state temporarily, and “barbarians” (non-Hellenes). The Greek’s initial antagonism toward foreigners was eventually mitigated by commercial exigencies and war followed by subsequent peaceful adjustments and alliances. Inter-Greek treaties, normally in the form of political conventions, granted personal liberty and protection of property to their parties’ citizens, allowing them, inter alia, to acquire real estate. Punishment for treaty violation was also introduced therein. The “isopolity” treaties of the Greeks, which allowed for the reciprocal granting of citizenship, placed citizens on roughly the same footing as nationals. Where such treaties did not exist, it was still possible for citizens of one Greek state to receive equal rights or special protection from another state by virtue of their sense of kinship.

MANNERING ch. XXXVII (P.D. Garside ed., 1839)).


18. 1 COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 125-26 (1911) [hereinafter 1 PHILLIPSON].

19. Id. at 140-42; ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 5-6 (1954).

20. NUSSBAUM, supra note 19, at 6.
Despite their having treaties with Greece, non-Hellenic communities were regarded as barbarians destined to become enemies and slaves, and Greece’s wars against them were once considered by Aristotle as a hunt and as “just by nature.” Nonetheless, non-Hellenes were not without legal status and protection. Legally recognized foreigners who resided permanently in Greece and formally registered as such, called metoikoi, received full juridical protection (i.e., access to courts) while having neither political rights nor a right to acquire real estate. Unless prohibited by treaties, Greeks could launch private reprisals against the property of foreigners who were accused of wrongdoing or enact androlepsia against their fellows. Foreign judges were permitted to participate during foreign litigation. Foreigners were also protected by the institution of proxenia, in which a proxenos, a prominent Greek or foreign citizen, was officially entrusted by a foreign state or a protecting state with protecting its citizens. This institution was often regarded as the earliest form of consulate authority.

Eventually, restrictions against foreigners in Greece were gradually removed, and most Greeks were in favor of foreigners. As a result, foreigners received protection and large concessions in most Greek states, especially in Athens. Free foreigners’ persons and property and ransomed prisoners of war were each protected. In addition to proxenia, foreigners were also protected by the institution of private and public hospitality (hospitium privatum and hospitium publicum). Entered into by foreigners and their hosts, such hospitality was held to be a sacred bond to be passed from father to son. The positive attitude toward foreigners underlying such protection was well-recorded. In the Odyssey, Homer wrote that “strangers and the poor came from Zeus [and] suppliants were under his special protection,” and as Alcinous asserts to Odysseus, “[A]nyone with even a moderate share of right feeling is fully aware that it is his duty to treat a guest

21. *Id.* at 5.
22. *Id.* at 6.
23. *Id.* at 8; 1 Phillipson, *supra* note 18, at 141 (discussing reprisals and androlepsia in Greece); 2 Coleman Phillipson, The International Law and Custom of Ancient Greece and Rome 349-366 (1911) [hereinafter 2 Phillipson].
25. See 1 Phillipson, *supra* note 18, at 128-32 (stating that Greeks not only liked foreigners, but in most Greek states, laws protected foreigners’ persons and property).
26. *Id.* at 148-49.
and a suppliant just as though he were his own brother.”\(^\text{27}\) There was also a law sanctioning citizens who denied foreigners’ requests for accommodation after sundown; a table reservation and a prioritized meal-serving order for strangers at common meals; and public imprecation against those found liable for not showing the way to travelers who had strayed.\(^\text{28}\) Various hostelries were established in Greece where food and shelter were available. These included inns, stopping places, lodgings, guest chambers, resting places, and the like.\(^\text{29}\) According to *The Laws*, Plato’s longest dialogue, “arbitrary offences committed against strangers were liable to the vengeance of the gods . . . the foreigner having no kindred and friends is all the more an object of sympathy both of gods and men.”\(^\text{30}\) Notably, foreigners enjoyed freedom of speech and movement, the latter of which could not be exercised at places reserved for citizens’ performance of their sacred rites.\(^\text{31}\) In addition, foreigners were given leave to freely exercise their national form of worship.\(^\text{32}\)

As noted earlier, although granted official protection by a patron under Athenian law, the *metoikoi* had no right to own immovable property unless authorized to do so by a special decree. Nonetheless, their other interests concerning their persons and property were guaranteed by the Athenian government, even when they were temporarily absent. Only when they were exiled was their property confiscated.\(^\text{33}\) For non-domiciled aliens, their persons and property received adequate protection as well.\(^\text{34}\)

### B. Rome

According to Phillipson, the Romans had less national pride than the Greeks, and their attitude toward foreigners “was marked by less exclusiveness and greater liberality of a systematic character than that of the Greek race.”\(^\text{35}\) As Nussbaum also observes, “one may say that in contradistinction to the Greeks, the Roman did not live in a state of latent hostility with the rest of the world.”\(^\text{36}\) Only in its prehistoric times did they

\(^{27}\) *Id.* at 131.

\(^{28}\) *Id.* at 132.

\(^{29}\) *Id.* at 133.

\(^{30}\) *Id.*

\(^{31}\) *Id.* at 136.

\(^{32}\) *Id.* at 169.

\(^{33}\) *See id.* at 145-46, 166, 172.

\(^{34}\) *Id.* at 146-47.

\(^{35}\) *Id.* at 213.

\(^{36}\) NUSBAUM, *supra* note 19, at 12 (footnote omitted).
consider every stranger to be an enemy or hostis.\textsuperscript{37}

Foreigners in Rome were legally protected, having some independent and
dependent juridical capacity. For the former, they could exert it on their
own. For the latter, they needed intervention through explicit pacts,
conventions, or treaties to make it applicable and effective.\textsuperscript{38} Foreigners
received protection from their Roman patrons, who took care of their general
interests pursuant to private hospitality, an institution borrowed from the
Greeks. By this purely voluntary, reciprocal, and hereditary guest tie,
foreigners were guarded by their protector if they were ill, were cremated if
dead, and were advised as well as assisted if involved in legal proceedings.
They were regarded as sacred and putting them to death was a heinous crime
that was as serious as parricide.\textsuperscript{39} Such private hospitality was extended by
a public hospitality.\textsuperscript{40} Accordingly, when residing in Rome, foreigners
received, \textit{inter alia}, a gratis lodging, utensils necessary for showering and
cooking, gifts of gold or silverware, clothing, arms, and horses. This public
hospitality was of great importance for the protection of foreigners, since it
served as the foundation of the provisions in subsequent treaties and
represented “the minimum of mutual rights and obligations laid down in an
international compact.”\textsuperscript{41}

However, barbarians (or \textit{alienigen}), as potential enemies, were not in the
adequate confines of legal protection from the cradle to the grave. Denied
admission to Roman territory on a regular basis, they were only rarely
allowed to be in Rome, and when they were, they could do so only by an
extraordinary concession on a case-by-case basis or occasionally by special
compacts that allowed them to settle only in certain areas. Their commercial
relationships with Romans were largely restricted. Theoretically, they did
not receive any rights whatsoever, nor were they under \textit{jus gentium} but rather
inherent subjugation. Notably, their property was without protection,
considered to be \textit{res nullius} that might be acquired by anyone through simple
occupation. If defeated, they might be enslaved. When buried, barbarians’
graves received less protection than those of slaves and were not \textit{res
religiosa}.\textsuperscript{42} Similarly, \textit{dediticii}, conquered people who were degraded to this
status, had only as much political and civil capacity as their conquerors
conferred upon them. Their former rights and privileges were taken away,

\textsuperscript{37} THOMAS ALFRED WALKER, \textit{HISTORY OF THE LAW OF NATIONS: FROM THE
EARLIEST TIMES TO THE PEACE OF WESTPHALIA}, 1648 44 (1899) [hereinafter \textit{1 WALKER}].
\textsuperscript{38} See \textit{1 PHILLIPSON}, supra note 18, at 213-14.
\textsuperscript{39} See \textit{id.} at 218-19.
\textsuperscript{40} \textit{1 WALKER}, supra note 37, at 45.
\textsuperscript{41} \textit{1 PHILLIPSON}, supra note 18, at 225-26.
\textsuperscript{42} \textit{Id.} at 230-31.
and they themselves, along with their things, human and divine, such as arms, cities, territory, temples, and property, were at their conquerors’ disposal. However, for both alienigen and dediticii, broader conceptions and accommodating practices enabled them to receive better treatment than what the law prescribed.\(^{43}\)

As for ordinary peregrines, or free subjects, comprised primarily of subjects from foreign states with friendly ties to Rome, they remained theoretically outside the confines of Roman civil jurisprudence, or \textit{ius civile}, unless there existed subsequent extensions or conventions granting them special concessions.\(^{44}\) They did not have political rights or the most important private rights.\(^{45}\) Among the rights denied to them were the right to vote, the right to marry, and the right to inherit \textit{ab intestato}.\(^{46}\) They could not claim \textit{jus commercii} and its corollaries, that is, quiritty ownership, except in case of provincial land and certain modes of property acquisition.\(^{47}\) If granted \textit{commercium}, they would have the right to enter into bilateral arrangements to acquire, hold, and transfer all manner of property pursuant to civil law.\(^{48}\) If \textit{commercium} was not granted, their daily intercourse, including commercial, was still possible under the regulations of a special magistrate, \textit{praetor peregrinus}.\(^{49}\) The creation of this magistrate in 242 B.C. marked official Roman recognition of foreigners’ status, executing their litigation through appointed judges.\(^{50}\) As a more permanent, comprehensive, and effective jurisdiction, the \textit{praetor peregrinus} was created to protect all classes of peregrines, serving a similar function as the \textit{xenodikai} did in Greece.\(^{51}\) The rights of peregrines whose cities had entered into treaties with Rome would be even more secure. Latin peregrines, for example, could enjoy \textit{recuperatio}, \textit{jus commercii}, and \textit{jus connubii} while in Rome.\(^{52}\) These peregrines occupied and enjoyed “an intermediate juridical position between the Roman citizens and peregrins proper” in accordance with the class they belonged.\(^{53}\)

Later, treatment toward ordinary peregrines was ameliorated by \textit{jus

\(^{43}\) Id. at 232.
\(^{44}\) Id.
\(^{45}\) See id. (explaining that the Roman system was limited to only citizens).
\(^{46}\) Id. at 233-35.
\(^{47}\) Id.
\(^{48}\) Id.
\(^{49}\) Id. at 234.
\(^{50}\) NUSSBAUM, supra note 19, at 13.
\(^{51}\) I PHILLIPSON, supra note 18, at 267.
\(^{52}\) Id. at 240.
\(^{53}\) Id.
gentium, comprising its new provisions and jus praetorium. In the event that the provisions of jus gentium were not enough to protect them substantively and procedurally, their law of origin (lex peregrinorum) could apply. In other words, peregrines were protected by certain Roman civil provisions by way of express extension, jus gentium,\textsuperscript{54} and lex peregrinorum. Thus, their private rights regarding marital and family matters were recognized. Jus gentium, the evolution of which symbolizes Roman openness to foreigners, allowed them to acquire property through its various modes and enjoy rights in rem as well as in personam. As to their procedural protection, they were allowed to submit criminal claims of the civil law, such as theft and damage to property.\textsuperscript{55} Protection of property had long been regarded as being included in jus gentium.\textsuperscript{56} Romans also established recuperatores to consider foreigners’ disputes, as was the praetor peregrinus.\textsuperscript{57}

C. The Middle Ages

Alien residents during the Middle Ages received different but somewhat lenient treatment depending on their countries of residence and the prevailing policy. In some countries, foreigners were protected in life and limb and entitled to appear before ordinary courts.\textsuperscript{58} As suitors, they received the privilege of a jury de medietate linguae, having both fellow foreigners and citizens listen to their cases.\textsuperscript{59} Care provided by a special host remained in practice.\textsuperscript{60}

Articulate legal rules were not always necessary to ensure the safety of foreigners’ persons and goods.\textsuperscript{61} Unwritten customs evolved and served their purpose well. Reference to such customs can be found, for example, in a letter written by Emperor Charlemagne to the king of Mercia in 796 in which Charlemagne assured protection for the king’s merchants in accordance with “ancient custom of commerce.”\textsuperscript{62} In return, Charlemagne requested equal protection for his merchants in Mercia; should they be the victims of injustice, local rulers and courts should give them redress.\textsuperscript{63} This

\textsuperscript{54}. See Nussbaum, supra note 19, at 14.
\textsuperscript{55}. Id. (including laws regarding marriage, property, and damages into jus gentium); 1 Phillipson, supra note 18, at 235-39.
\textsuperscript{56}. Nussbaum, supra note 19, at 14.
\textsuperscript{57}. 1 Phillipson, supra note 18, at 267.
\textsuperscript{58}. 1 Walker, supra note 37, at 119.
\textsuperscript{59}. Id.
\textsuperscript{60}. See id.
\textsuperscript{61}. Nussbaum, supra note 19, at 27.
\textsuperscript{62}. Id.
\textsuperscript{63}. Id.
generally represented a unilateral grant of franchise effective in protecting merchants and their goods.\textsuperscript{64} Considered a “man of the Emperor,” foreign merchants were gladly welcomed by rulers, who physically defended them from attacks while taxing them in an appropriate and proportionate manner.\textsuperscript{65} Legally, they could come from a foreign land to claim the heritage of their ancestors upon a payment of tax, otherwise known as \textit{a droit de detraction}.\textsuperscript{66} In case of their own death, “it commonly happened that the vultures of the Crown swooped down once more, and robbed the alien heir under the name of the \textit{droit d’aubaine}).”\textsuperscript{67}

Foreign merchants in England benefited from statutes enacted to comfort and protect them. In times of peace, they could enter and leave the country without hindrance. Their transactions were without disturbance.\textsuperscript{68} When acting as a plaintiff or a respondent, their fellow countrymen were included on their jury.\textsuperscript{69} “In one particular alone was English law strict against the alien. He might hold and acquire personal property within the realm, and maintain a personal action; but he was forbidden property in real estate.”\textsuperscript{70}

Still, at the forefront of foreigners’ concern was the use of reprisals.\textsuperscript{71} As an obnoxious legal institution, reprisals were eventually suppressed by autonomous legislation and treaties that were more developed than those applicable in Greece.\textsuperscript{72} Foreseeing possible danger caused by their subjects’ reprisals, rulers, particularly those in Italy, found it necessary to control reprisals, enacting legislation that conditioned reprisals on government authorization.\textsuperscript{73} Known in English as a “letter of reprisals,” such authorization would be permitted if statutory requirements were fulfilled and only for the recovery of a specified amount.\textsuperscript{74} Besides private reprisals, there existed town-to-town reprisals that were prohibited by the British Parliament in 1275.\textsuperscript{75} As Walker describes:

\begin{quote}
Amongst the special risks of his trading the merchant stranger of the Middle Ages numbered the liability to attachment in person or property in
\end{quote}
respect of the debts of a defaulting fellow-countryman, and the liability to
the exercise of reprisals. Accordingly, by a statute of Edw. III, it was
enacted that a Lombard company should be responsible for the debts of
any of its merchants left unpaid within the realm, "o that any merchant,
"which is not of the company, should not be thereby "grieved or
impeached." And the grant of special reprisals, being the formal
authorisation [sic] by his sovereign of a person judging himself wronged
by a foreign power to indemnify himself by the seizure of property
belonging to any subject of that power, was no uncommon occurrence.\textsuperscript{76}

Internationally, Italian governments led in concluding treaties that
restrained reprisals. Legislations and treaties for this purpose had something
in common, requiring claimants to have suffered denial of justice in foreign
countries where they first presented their claims.\textsuperscript{77} By the end of the Middle
Ages, a foreigner's protection and security was improved when the practice
of private reprisals was abandoned, thereby strengthening the safety of the
foreigner's person and goods, a condition indispensable for both the
exchange of goods and for rulers' financial improvement through collection
of duties and fees from foreign merchants.\textsuperscript{78}

Apart from legislations and treaties suppressing reprisals, the Middle Ages
witnessed other legislation, institutions, commercial comity of nations, and
treaties protective of foreigners in general and of foreign merchants in
particular.\textsuperscript{79} For instance, the code of the Visigoths in 654 allowed foreign
merchants to settle disputes among themselves using their own magistrates
and law.\textsuperscript{80} Such legislation increased in number in the last three centuries of
the era and included the Magna Carta of 1215, the \textit{Carta Mercatoria} of 1303,
and the Statute of the Staple of 1353.\textsuperscript{81}

On the Continent, Emperor Frederick II's \textit{Authentica Omnes peregrini} of
1220 conferred upon all foreigners the freedom to dispose of their property
by contract of will.\textsuperscript{82} This famous, but futile decree, abdicated local rulers' right to seize foreigners' property upon death (i.e., \textit{jus albinagii, droit d' aubaine}).\textsuperscript{83} Enhancing protection of foreign merchants in such places as
Champagne and Lyons, elaborate franchises, given by the state and the
church, provided foreign merchants with procedural protection by

\textsuperscript{76} 1 \textsc{walker}, \textit{supra} note 37, at 121.
\textsuperscript{77} \textsc{nussbaum}, \textit{supra} note 19, at 25-27.
\textsuperscript{78} \textit{Id.}
\textsuperscript{79} \textit{Id.} at 28.
\textsuperscript{80} \textit{Id.}
\textsuperscript{81} \textit{Id.}; \textsc{schwarzenberger}, \textit{supra} note 3, at 22.
\textsuperscript{82} \textsc{nussbaum}, \textit{supra} note 19, at 29.
\textsuperscript{83} \textit{Id.}
establishing mercantile courts. “Furthermore, permanent mercantile courts frequented by foreign parties appeared about the middle of the twelfth century in Italian city-states (Milan, Pisa) and later in other Mediterranean trade centers such as Narbonne and Barcelona.”

Medieval guest courts (so-called Gastgerichte) were also established in German towns for similar purposes. Because of its great achievements and influence, the Hanseatic League was able to secure extensive franchises in important markets, thereby strengthening safety for persons and goods and the freedom of commerce and navigation. The conditional right to have buildings for personal and commercial purposes, landing places, churches, and graveyards were also established. Diplomatic protection, as an institution of modern public international law since the Middle Ages, was also exercised by countries, with variations in terminology and concept, to protect their mistreated nationals in other countries. One example of commercial comity of nations is the granting of protection and privilege to the men of Cologne by Richard I of England in 1194. Commercial treaties, especially inter-Italian ones, contained provisions regarding safe communication, travel, and stay, even granting protection to certain foreigners by way of national treatment (“NT”) and most-favored-nation (“MFN”) clauses.

D. The Renaissance to World War I

Protection and security of foreigners and their property was continually improved, mainly through treaties, custom, and municipal law. As a typical example of a political-commercial treaty, the Intercursus Magnus of 1496 between England and the house of Burgundy, which then controlled the Low

84. See id. at 21-22, 29.
85. Id. at 29.
87. NUSBAUM, supra note 19, at 34.
88. Id.
89. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 522 (7th ed. 2008). But see CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION 8 (2008) (noting that there existed no recorded examples of possible exercise of diplomatic protection before the late eighteenth and early nineteenth centuries).
90. See GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 211 (1928) (stating that they were permitted to trade freely and did not have to pay London tolls).
91. NUSBAUM, supra note 19, at 32.
92. Id. at 33.
Countries, together with its alteration, the *Intercursus Malus* of 1506, assured the subjects of the contracting parties the protection of their lives, property, and commercial activities. From the late 1570s to the early 1580s, generally recognized commercial custom led the rulers of the Low Countries to extend their protection to all Portuguese merchants doing business with Lowlanders, rendering those merchants more secure from all injury. Even in time of war, such merchants were not without protection. As Grotius explains:

> When the situation at home grew unsettled, the States-General of the Low Countries provided documentary ratification of the arrangement in behalf of the Portuguese merchants, with the specific purpose of safeguarding the latter from the adverse treatment that might be accorded them under the pretext of war-time license. *Thus the Portuguese, with their wives, their children, and the other members of their household, were taken under the guardianship of the state, as were their domestic furnishings, merchandise, other possessions and all rights properly pertaining to them*, regardless of whether or not they were present in person. For they were empowered to enter, depart from, or remain within the territory of the Low Countries, and to import or export their merchandise, by land or by sea. Orders were even given to all of the military commanders and soldiers, instructing them to safeguard the personal welfare and the goods of Portuguese dwelling in the said territory. Moreover, after the Lowlanders had repudiated the rule of Philip, and the Portuguese, on the other hand, had acknowledged his sovereignty, with the result that the two peoples became enemies, that same States-General (acting at the request of the Portuguese who were residing or doing business in the Low Countries, and moved by the consideration that it was to the interest of the natives that commerce should be cherished in security rather than impeded by war), nevertheless confirmed its earlier rescript and exempted the Portuguese from the laws of war to the extent indicated in the following provision: that all Portuguese who might wish to do so, should without danger to life or property enjoy safe passage to and from, residence, and the practice of commerce, among the people of the Low Countries.

Turning to the relation between Oriental and European rulers in the sixteenth century, their treaties—the so-called *capitulations*—conferring upon foreign merchants the right to settle their disputes under their specific

95. Id. (emphasis added).
laws and usages and the freedom of religion.\footnote{Hailbronner & Gogolin, supra note 86, ¶ 9.} Again, at the outbreak of war, foreigners, as enemy individuals, as well as their property, were protected by treaties of commerce that were concluded in this period.\footnote{Id. at 197.} Because of increasing hostilities, protection and security in time of war was more valuable than protection and security in time of peace.\footnote{Id. at 196.}

At the beginning of the eighteenth century, foreigners were not favored by states’ customary law, either substantively or procedurally. Enemy individuals might be imprisoned or violently expelled, and their property, personal, real, or mercantile might be confiscated. In addition, their debtors might be released and their \textit{locus standi} in civil courts removed.\footnote{Id. at 196, 222, 488.} It was treaties of commerce, the number of which had increased significantly in the seventeenth and eighteenth centuries, that saved them from such treatment.\footnote{Id. at 197.} In the France-Savoy treaty of 1713, for instance, the confiscation of enemy property was no longer tolerated.\footnote{Id. at 197-98, 218.}

In the second half of the eighteenth century, full protection and security was not a novel concept. As Butler and Maccoby noted, several treaties of commerce and navigation of the century “protected more fully the person and property.”\footnote{Id.} To illustrate, the Russia-Naples Treaty of 1787 permitted enemy subjects to finish their business in one year, free of government interference with their property removal.\footnote{Id. at 197.} Other treaties further permitted enemy aliens to continue their peaceful residence and exempted their assets from seizure. In the United States-Prussia Treaty of 1785, a period of nine months after the declaration of war was granted to merchants for similar purposes.\footnote{Id.} More importantly, it also contained “brief and cryptic reference” to protection of foreign merchants, providing that “the citizens or subjects of either party . . . shall be received, protected, and treated with humanity and kindness.”\footnote{George K. Foster, Recovering “Protection and Security”': The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance, 45 \textit{VAND. J. TRANSNAT’L L.} 1095, 1118, 1118 n.6 (2012) (citing Treaty of Amity and Commerce, art. XVIII, Prussia-U.S., Sept. 10, 1785, 8 Stat. 84).} Later, the United States was more elaborate on this point as evident from Article XIV of the Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and the United States of
1794, in which merchants and traders on each side received "the most complete protection and security for their commerce."106 With few exceptions, this trend of leniency toward enemy persons and property continued in the nineteenth century.107 Another important theme in treaties concluded in the seventeenth and eighteenth centuries was the abolition of the droit d’aubaine.108 Modern diplomatic protection was also exercised in the late eighteenth century, when the authorizations of private reprisals disappeared.109 Notably, in the seventeenth century, the concept of protection and security in foreign affairs clearly went beyond physical protection of persons and property, though this extension might be limited to certain types of persons and property. Such a concept sometimes included the protection of reputation. This is evident in the earliest municipal law on persons of diplomatic status of the Netherlands in 1651, which prohibited:

"[Offending, damaging, injuring by word, act or manner, the ambassadors, residents, agents, or other ministers of the kings, princes, republics, or others having the quality of public ministers; or to do them injury or insult directly or indirectly, in any fashion or manner whatever, in their own persons, gentlemen of their suite, their domestic servants, dwellings, carriages, etc., under penalty of being corporeally punished as violators of the law of nations and disturbers of the public peace."

Later, especially since the period of the Congress of Vienna (1814–1815), numerous instruments commonly (albeit loosely) called commercial treaties inherited from preceding treaties what may be called an "international bill of rights."111 Consequently, the nationals or subjects of both parties to treaties, when in the territory of the other contracting party and when in compliance with the laws and regulations of the country, usually enjoyed freedom to enter and depart the country and settle in it, full protection and security for their persons, goods, and property, free sojourn, admission and establishment, protection from discriminatory treatment in taxation and the like, free access to courts, freedom of worship, and exemption from military service.112

107. BUTLER & MACCOBY, supra note 90, at 198.
108. Id. at 198-99.
109. BROWNLIE, supra note 89, at 522.
111. NUSSBAUM, supra note 19, at 204.
112. See id. (emphasizing the reciprocity of rights citizens of contracting states enjoy); INTERNATIONAL LABOR OFFICE, LEAGUE OF NATIONS, EMIGRATION AND IMMIGRATION LEGISLATION AND TREATIES 356 (1922) [hereinafter INTERNATIONAL LABOR OFFICE]
Particular provisions for the protection of persons and private property rights in those commercial treaties were normally found in more than one context, commonly occurring in contexts relating to “(1) access to courts, (2) embargoes and detentions, (3) general statements as to protection and security, and (4) specific references to expropriation and compensation.”113

For the last context, the exact phrases used in such statements in the nineteenth century included “‘special protection’ of private property,”114 “special protection to the persons and property of the citizens of each other,”115 “constant protection and security,”116 “the most constant protection and security for their persons and property,”117 “the most constant security and protection for their persons and property and for their rights,”118 “the same security and protection that is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides,”119 “full and complete protection and security,”120 and “full and perfect protection for their persons and property.”121

Suffice it to say that it was in the nineteenth century that the FPS standard, though various in its expression, was widely included as a regular clause in “Treaty of Friendship and Commerce,” “Treaty of (Friendship), Commerce, and Establishment,” or “Treaty of (Friendship), Commerce, and Navigation (FCN)”122—the new titles reflecting the fact that other non-commercial matters had also been included therein.123 Its concept accounted for strong states insisting on obtaining the right of extraterritoriality to protect their nationals’ persons and property in the territory of weak ones.124

An example of the interpretation of FPS clauses in the nineteenth century that went beyond physical protection and security can be found in An

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113. WILSON, supra note 14, at 106-07.
114. Id. at 106.
116. WILSON, supra note 14, at 109 n.68.
117. Id.
118. Id.
119. Id.
120. Treaty with Borneo, art. 3, Borneo-U.S., June 23, 1850, 10 U.S.T. 909; WILSON, supra note 14, at 111 n.74.
122. NUSSBAUM, supra note 19, at 204-05.
123. MONTT, supra note 17, at 67.
124. 2 HACKWORTH, supra note 121, at 528.
Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation of 1832 between the United States and Chile of 1833. In Article II of the 1833 Additional and Explanatory Convention, the parties clarified the meaning of the FPS clause that appeared in Article X of the original Treaty of Peace, Amity, Commerce and Navigation of 1832 as follows:

It being agreed by the [tenth] article of the aforesaid treaty, that the citizens of the United States of America, personally or by their agents, shall have the right of being present at the decisions and sentences of the tribunals, *in all cases which may concern them*, and at the examination of witnesses and declarations that may be taken in their trials . . . . 125

Apart from FCN treaties, there are other relevant treaties that should not be overlooked. Treaties concerning the residence of foreigners, concluded in the nineteenth and early twentieth centuries, though small in number, laid down the residence conditions of nationals of one state in the territory of the other state. 126 Of particular relevance, they also granted such nationals free access to courts and constant and complete protection and security for their person and property. 127 Treaties relating to emigration that were made during the same period should also be mentioned because of their protection of emigrants. 128 Peace treaties produced similar effects. For example, according to the Treaty of Paris of 1898, which ended the Spanish-American War, the United States held Cuba under a trust relation for the inhabitants of the island, thus exercising the powers and functions consistent with its “duties as a trustee for the protection and security of persons and property.” 129

E. World War I to the Present

From the nineteenth century to the World War I period, the FPS standard still secured its place in commercial treaties that had continuously increased in number. 130 However, the war years (1914–1918) had seen the departure from the standard, since the practice regarding enemy aliens and property

126. See 1 INTERNATIONAL LABOR OFFICE, *supra* note 112, at 360-62 (providing examples of countries that agreed to provide foreigners rights via treaties).
127. *Id.*
128. *See id.* at 328, 331-32 (originating with emigration resulting from the African slave trade).
129. 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 157 (1940) [hereinafter 1 HACKWORTH].
130. See 1 INTERNATIONAL LABOR OFFICE, *supra* note 112, at 357.
was understandably more severe. Enemy aliens were imprisoned or expelled for security and strategic reasons in most belligerent states, while enemy property was placed under a custodian and frequently liquidated.\footnote{131}

The situation was improved at the end of the war. As part of a series of the peace treaties of 1919 and 1920 that put an end to World War I, Article 277 of the Treaty of Versailles of 1919, for instance, contains the provision that “\[t\]he nationals of the Allied and Associated Powers shall enjoy in German territory a constant protection for their persons and for their property, rights and interests, and shall have free access to the courts of law.”\footnote{132} Actually, the rest of the treaties in the series all provide for “the free enjoyment and protection of the life and liberty of all inhabitants.”\footnote{133} Similarly, Article 10 of the 1919 convention that revised the General Act of Berlin of 1885 and the General Act of Brussels of 1890 provides that “[t]he Signatory Powers acknowledge their obligation to maintain in the regions under their control actual authority and police forces sufficient to insure protection for persons and property and, if the case should arise, freedom for commerce and transit.”\footnote{134} In the context of League of Nations mandates elaborated in Article 22 of the Covenant of the League of Nations, the FPS standard was not disregarded. Each mandatory was required “to secure to all nationals of states members of the League the same rights as are enjoyed by its own nationals with respect to entry into and residence in the territory, protection, acquisition of property, exercise of professions and trades, transit, and complete economic, commercial, and industrial equality.”\footnote{135}

Thereafter, an FPS clause remained a regular part of treaties but with more clarification; the parties to the treaties more explicitly determined the degree of the FPS standard. For instance, besides granting “the most constant protection and security for their persons and property” to the nationals of each party, Article I of the United States-Germany Treaty of 1923 also referred to “that degree of protection that is required by international law.”\footnote{136} This type of FPS clause was later included in other treaties.\footnote{137} Again, as was

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\begin{itemize}
  \item \textit{131.} BUTLER \& MACCOBY, supra note 90, at 198.
  \item \textit{132.} Treaty of Peace with Germany art. 277, June 28, 1919, Ger.-Gr. Brit., T.S. No.4 (1919) (Cd.153) [hereinafter Treaty of Versailles]; \textit{see} 1 \textsc{International Labor Office, supra} note 112, at 355.
  \item \textit{133.} WILLIAM EDWARD HALL, \textsc{A Treatise on International Law} 63 (A. Pearce Higgins ed., Oxford Univ. Press 8th ed. 1924).
  \item \textit{134.} 1 HACKWORTH, supra note 129, at 403.
  \item \textit{135.} \textit{Id.} at 122.
  \item \textit{137.} 3 \textsc{Green Haywood Hackworth, Digest of International Law} 630, 653 (1942) [hereinafter 3 HACKWORTH].
\end{itemize}
the situation in the seventeenth century, an understanding of protection and security in international relations of this period was not limited to physical concerns. Under the title “Personal Protection and Security,” Article 17 of the Harvard Draft Convention on Diplomatic Privileges and Immunities includes interference with security, peace, or dignity in the concept of protection and security.\(^{138}\)

Shortly after World War II, the FPS standard remained able to save its place in commercial treaties and the failed multilateral trade treaty. Its significance was also evident in international relations as a new government’s intention to provide “adequate protection of foreign property under international practice” was critical for considering whether recognition of that government should be granted.\(^{139}\)

The first post-World War II treaty between the United States and China of 1946 adopted, as its predecessors had, “the most constant protection and security.” However, “that degree of protection that is required by international law” was changed to “the full protection and security required by international law.”\(^{140}\) The object of protection of the standard was clarified by a separate provision that defined “property” as including “interests held directly or indirectly,”\(^{141}\) which by 1957 had become a general understanding and standard practice of the United States.\(^{142}\) Still, such a terminological change connecting full protection and security with international law did not make its way to all treaties. As is the case with the U.S.-Uruguay Treaty of Friendship, Commerce, and Economic Development, the degree of protection and security was still connected with the national treatment standard.\(^{143}\) Placing great emphasis on protection and security for property, this treaty also contained a separate clause dealing especially with property.\(^{144}\) So did the U.S.-Ireland Treaty.\(^{145}\) As Wilson concluded, the “most constant protection and security” for property was included in all postwar treaties that the U.S. signed up to the end of 1958, except for the treaty with Muscat, in which “all possible protection and security” was used. Only four of its treaties—those with China, Italy, Ireland, and Iran—link the degree of protection specifically to international

\(^{138}\) Grant & Barker, supra note 110, app. 4, at 449.

\(^{139}\) 1 Hackworth, supra note 129, at 232.

\(^{140}\) Wilson, supra note 14, at 116.

\(^{141}\) Id. at 117.

\(^{142}\) Id. at 120.

\(^{143}\) See id. at 118.

\(^{144}\) Id.

\(^{145}\) Id. at 119.
Multilaterally, the abortive Havana Charter of 1948 intended to establish the International Trade Organization (“ITO”) also contained an obligation to grant “adequate security for existing and future investments.” 1

In 1959, the FPS standard was incorporated into the first bilateral investment treaty (“BIT”) specifically designated for investment protection, the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 1959. Its Article 3(1) reads “[i]nvestments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party.” 1 Since then, the protection and security of investment has been an intrinsic part of numerous BITs and other international investment agreements (“IIAs”). Article 10(1) of the Energy Charter Treaty 1 and Article 11(1), (2)(b), of the Association of Southeast Asian Nations (“ASEAN”) Comprehensive Investment Agreement (“ACIA”) 1 serve as good examples.

The proliferation of investment treaties, especially BITs, was accompanied by a corresponding lack of uniformity. The FPS standard’s exact formulations and patterns vary from treaty to treaty. “Full protection and security,” 1 “full security and protection,” 1 “full and complete protection and security,” 1 “most constant protection and security,” 1

146. Id. at 119-20.
149. SALACUSE, supra note 4, at 233; KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 244-47 (2010).
150. Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 100 (“Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.”).
151. ASEAN Comprehensive Investment Agreement, art. 11(1)-(2), Feb. 26, 2009 (“Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security. (2) For greater certainty: ... (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.”).
“broad and full protection and security,”156 “full protection and legal security,”157 “full physical protection and security,”158 “full legal protection,”159 “full protection,”160 “adequate protection and security,”161 “protection and constant security”162 and “protection”163 are illustrative of this diversity in treaty language.

It should be noted, too, that besides the “full protection and security” clause, some BITs also contain the “full protection” clause in a separate article at the beginning of the treaty. For instance, while Article 2(3) of the Czech-Germany BIT requires that “[i]nvestments and revenue arising hereof and in the event of their re-investment such revenue shall enjoy full protection,” its Article 4(1) further provides that “[i]nvestments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.”164 Even in the complete absence of “full protection and security” and the like, the FPS standard can still be part of investment treaties. An equivalent of such a phrase is, for example, “[i]nvestments . . . shall be fully and completely protected and safeguarded” or “[e]ach Party shall protect . . . investments.”165 In terms of its scope

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158. Agreement on Encouragement and Reciprocal Protection of Investments art. 3(1), Neth.-Rom., Oct. 27, 1983.
159. Agreement on Encouragement and Reciprocal Protection of Investments art. 2.2, Mong.-Russ., Nov. 29, 1995; Agreement for the Reciprocal Promotion and Protection of Investments art. 3(2), Arg.-Mex., Nov. 13, 1996, 2033 U.N.T.S. 1-35107.2.2.
161. Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference art. 2.2, June 5, 1981.
164. See Treaty for the Promotion and Mutual Protection of Investments art. 4(1), Czech-Ger., Oct. 2, 1990; see also Agreement on the Promotion and Reciprocal Protection of Investments art. 2(3), 4(1), Italy-Leb., Nov. 7, 1997 (emphasis added) (“Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments . . . “[i]nvestments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party.”).
165. Agreement on the Reciprocal Promotion and Protection of Investments art. 5(1), Arg.-Fr., July 3, 1991, 1728 U.N.T.S. 281; Agreement on the Reciprocal Promotion and
ratione tertius, the FPS standard applies in the territory of the other party or in the territory and maritime area of the other contracting party.166

In some investment treaties, the FPS standard has been referred to as a separate and independent standard.167 In others, it has been explicitly tied to general or customary international law—disallowing protection and security that is “less favourable than that required by international law”168 or not “in accordance with international law”169—and/or supplemented by the national treatment and the most-favored-nation treatment.170 In still other investment treaties, the FPS standard has clearly been treated as a core element of the minimum standard of treatment,171 as is the case, for example, with Article 1105 of the North American Free Trade Agreement (“NAFTA”), captioned as “Minimum Standard of Treatment.”172 For greater clarity, the three parties to NAFTA have stated in their binding interpretation note that “full protection and security” contained in Article 1105 is nothing more than a reflection of customary international law.173 Thus, it is not an autonomous treaty norm that requires more than what is required by the minimum

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170. See, e.g., Agreement on Encouragement and Reciprocal Protection of Investments art.3(2), Neth.-Czech, Apr. 29, 1991 (“More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.”).


172. NAFTA art. 1105(1).

standard,¹⁷⁴ nor is it a “free-standing obligation.”¹⁷⁵

Similarly, the Australia-United States Free Trade Agreement clarifies that the FPS standard merely requires the level of police protection in accordance with customary international law.¹⁷⁶ Also for clarification, but in the opposite direction, some treaties specifically refer to both protection and legal security as falling within the scope of the FPS standard, as is the case with the Germany-Argentina BIT of 1991.¹⁷⁷ In addition, host states’ provision of full protection and security is not merely for determining their observation of the FPS standard per se. It is also for the purpose of determining the lawfulness of expropriation carried out by the host states. This is because the parties to investment treaties expressly condition such lawfulness on compliance with the FPS standard.¹⁷⁸ Regarding its exception, the FPS is not applicable in certain circumstances, for example, war, armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot in the territory, as the parties agreed.¹⁷⁹


¹⁷⁵ See Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶ 128 (June 26, 2003) (explaining that “fair and equitable treatment” and “full protection and security” are not a “free standing obligation”).

¹⁷⁶ See Free Trade Agreement art. 11(5), Aus.-U.S., May 18, 2004, S. Treaty Doc. No. 4759; see also Free Trade Agreement art. 10.5, C.A.-Dom. Rep.-U.S., Aug. 5, 2004, S. Treaty Doc. No. 1307 (“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.”); Free Trade Agreement art. 10.4, Chile-U.S., June 6, 2003, S. Treaty Doc. No. 2738 (clarifying that security standards and fair treatment standards “do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights”).


Beneficiaries or objects of protection of the FPS standard in investment treaties can be investors and/or investments, depending on the parties thereto. “Investment” has regularly been adopted as corresponding to “property” in commercial treaties. Now, “property” is of more historical importance. Modeled on the 1959 Abs-Shawcross Draft Convention on Investment Abroad but with a number of modifications, the 1962 Organization for Economic Co-operation and Development (“OECD”) Draft Convention on the Protection of Foreign Property, adopted in 1967, contains in its Article 1 each party’s obligation to accord within its territory “the most constant protection and security” to “the property of the nationals of the other Parties.” By “property,” it means, as Article 9(c) defines, “all property, rights and interests, whether held directly or indirectly.” Such a definition is consistent with customary international law and international law as applied by international courts and tribunals. And by “the most constant protection and security,” it refers to “the obligation of each Party to exercise due diligence as regards actions by public authorities as well as others in relation to such property.” For the relation between “property” and “investment,” the former includes, but is not limited to, the latter. In other words, “investment” is currently used as pars pro toto.

Besides investment treaties containing FPS clauses, the period after World War II witnessed human rights instruments that concern, in their own context and fashion, investment protection. Although their primary purpose is not to protect investment, their relevance to investment protection cannot be denied. For example, the Universal Declaration of Human Rights of 1948 endorses, inter alia, security of person, the right to own property, and non-arbitrary deprivation of property. With binding force, Article I of the Protocol to the Convention for the Protection of Human Rights and

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183. See id. 114, 157 (using “property” as an example that includes “all property, rights and interests whether held directly or indirectly”).
185. Id. at 43.
Fundamental Freedoms (Protocol I of 1952) provides that “[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law.” Common Article 1 of the 1966 Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights recognizes a collective right of “all peoples” to “freely dispose of their natural wealth and resources.” The beneficiaries of such recognition include both aliens and nationals within the state parties’ territory and subject to their jurisdiction. Providing for aliens’ fundamental human, economic, and social rights, the Declaration on Human Rights of Individuals who are not Nationals of the Country in which They Live of 1985 prohibits, for instance, the subjection of aliens to torture or to cruel, inhuman, or degrading treatment and arbitrary deprivation of aliens’ lawfully acquired assets.

III. THE FULL PROTECTION AND SECURITY STANDARD AS ADDRESSED BY SCHOLARS AND APPLIED BY COURTS AND TRIBUNALS

The preceding historical account reveals states’ long law-making practice of utilizing the FPS standard in conducting their international relations. This Section will deal with the standard from academic and law-applying perspectives, considering the relevant legal literature and judicial decisions that touch upon protection and security of foreigners and their property, which is the converse way to describe responsibility of states for injuries to foreigners. Its purpose is to examine the degree to which an interpretation and application of the FPS standard has been accomplished in pertinent past decisions to see trends therein.

A. Scholarly View

1. Protection and Security in General

One reasonable and prevalent answer to the question of why it is essential
to grant protection to the persons and property of foreigners—indeed, to those of every human being—can be discerned from the great “Lockean trinity” of human rights, which is formed by linking property with life and liberty. In this view, property was not limited to assets having a cash value; it also included “all that belongs to a person, especially the rights he wished to preserve.”

The answer was also reflected in the Virginia Declaration of Rights, in which George Mason proclaimed that:

[A]ll men are created equally free and independent, and have certain inherent natural rights of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

In the absence of property, in rem and in personam, “one could not enjoy life or liberty, and could not be free and independent. Only the property holder could make independent decisions and choices because he was not beholden to anyone; he had no need to be subservient.” Theoretically, this remains true no matter where human beings live and what their status is. Neither in their own motherland as citizens, nor in an alien land as foreigners shall they be without protection of personal and property rights.

2. Protection and Security in International Law

In the realm of international law, there are two conflicting claims regarding the protection of the persons and property of aliens, both of which are equally based on state sovereignty, as Lauterpacht pointed out. On the one hand, national states insist that while their subjects are abroad, their personal rights and property shall be respected. On the other hand, territorial states plead that they have full freedom to legislate and administrate so long as they do not discriminate against foreigners, thus putting them on the same footing as their own subjects. The following discussion highlighting works of prominent international law scholars will serve to illustrate these two claims, which had been discussed for centuries.

According to Grotius, although the sovereign’s power of eminent domain was unlimited over its own subjects, it did not have control over the property

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195. Id. at 173.
196. Id. at 175.
of foreigners. For Wolff, foreigners as temporary citizens ought to be safe from every injury, and the rulers of the states in which they live are bound to defend them against such injury. Such rulers ought to shield foreigners from physical and nonphysical harms caused by their subjects; they "ought not to allow any one of [their] subjects to cause a loss or do a wrong to the citizen of another nation." Having failed to do so, they ought to punish those subjects and require them to repair the harms unless the rulers cause that loss or do that wrong by their tacit approval of the act, rendering the states themselves under the assumption of having done the wrong or inflicted the injury. This duty to provide protection and security was based on a tacit agreement between foreigners and the rulers of the states, by which the former promises temporary obedience of the law of the latter, who promises protection. Wolff's use of "injury," "loss," and "wrong" suggests quite strongly that he did not limit states' duty to defend foreigners to physical protection. Later, Vattel observed that when receiving foreigners, states engage to protect them as their own subjects and to "afford them perfect security." As to a foreigner's property, Vattel considered it "a part of the aggregate wealth of his nation. Any power, therefore, which the lord of the territory might claim over the property of a foreigner would be equally derogatory to the rights of the individual owner and to those of the nation of which he is a member." In contrast to Bynkershoek, who considered the confiscation of alien property at the outbreak of war to be legal, Vattel opined that such property in land had special claims on the protection of the sovereign and ought not to be seized unless there was debt or money due to foreigners. But when it comes to the expulsion of alien residents, both scholars agree that foreigners should be allowed to delay their departure to wrap up their business.

Calvo put forward what was later known as the Calvo Doctrine, according to which foreigners are entitled to treatment that is not different or better than that accorded to the citizens of the country in which they live. Thus, the protection of their persons and property is dependent on that of the citizens. In cases of personal and proprietary grievance, citizens cannot seek recourse

199. WOLFF, supra note 1, at 536.
200. Id. at 537.
202. Id. at 174.
203. BUTLER & MACCObY, supra note 90, at 196-97.
to diplomatic protection; neither can foreigners.\textsuperscript{204} Borchard, in his treatise on diplomatic protection, observed that states are not “a guarantor of the safety of aliens.”\textsuperscript{205} Providing administrative and judicial machinery normally protecting the alien in his rights is simply what states are bound to do. This remains the case even when there exists a treaty that provides “special protection”; the treaty is not “an insurance against all injury” but an instrument that places aliens on the same footing as citizens. States simply have to protect aliens as much as their actual ability to protect permits.\textsuperscript{206} In favor of the national treatment standard, Sir John Williams noted that “it becomes difficult to see why the standard of the duty of a government in relation to this particular class of individuals [foreigners], and that normally a small class, should be different from the standard of its duty to its own citizens.”\textsuperscript{207} Both protection of foreigners’ property and protection of foreigners in other respects do not require a different standard of duty.\textsuperscript{208} For Eagleton, although a state has control over its own territory, it is not always incumbent upon it to be responsible for any injury occurring therein. It cannot be considered “as an absolute guarantor of the proper conduct of all persons within its bounds.”\textsuperscript{209} And “[t]he law of nations does not make the state a guarantor of life and property.”\textsuperscript{210} In Freeman’s view, “[t]he State into which an alien has entered . . . is not an insurer or a guarantor of his security, any more than that of its own citizens. It does not, and could hardly be asked to, accept an absolute liability for all injuries to foreigners.”\textsuperscript{211} In Hall’s treatise on international law, it was once reaffirmed that the concept of protection of subjects of states that were abroad is not limited to a physical dimension but extended to “the justice of the courts.”\textsuperscript{212}

In protecting aliens, writers have generally agreed that states have been


\textsuperscript{205} EDWIN M. BORCHARD, \textit{THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS} 179 (1916).

\textsuperscript{206} \textit{Id}.

\textsuperscript{207} Williams, \textit{supra} note 2, at 15.

\textsuperscript{208} See \textit{id}. (noting that the practice with citizens differs from theory).

\textsuperscript{209} CLYDE EAGLETON, \textit{THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW} 77 (1928).

\textsuperscript{210} \textit{Id}. at 8.

\textsuperscript{211} ALWYN V. FREEMAN, \textit{RESPONSIBILITY OF STATES FOR UNLAWFUL ACTS OF THEIR ARMED FORCES} 14 (A.W. Sijthoff ed., 1957).

\textsuperscript{212} HALL, \textit{supra} note 133, at 331-33.
required to exercise due diligence.\textsuperscript{213} By defining “due diligence” as “nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances,” it follows naturally that “[t]he precise degree of such vigilance is not necessarily the same for all situations.”\textsuperscript{214} Still, due diligence has been disputed by international law authorities as to who should really serve as \textit{tertium comparationis} (a common comparative denominator) in such situations; there could be either a subjective or objective denominator. For the former, “the relatively limited existing possibilities of local authorities in a given context” is to be considered, while, for the latter, “what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State” takes precedence as the quoted definition suggests.\textsuperscript{215} In Brierly’s view, it is a reasonable state that serves as a denominator. The standard it has to obey “is not an exacting one, nor does it require a uniform degree of governmental efficiency irrespective of circumstances.”\textsuperscript{216} For Brownlie, it is a state in such situations itself that serves as a referee: “Where a reasonable care or due diligence standard is applicable, then \textit{diligentia quan in suis} might be employed . . . [it] would allow for the variations in wealth and educational standards between the various states of the world.”\textsuperscript{217}

According to Oppenheim’s \textit{International Law}, the very first point in understanding protection and security of foreigners seems to be marked by

\begin{footnotesize}
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\item \textsuperscript{213} \textsc{Freeman, supra} note 211, at 15-16; \textsc{Ian Brownlie, System of the Law of Nations: State Responsibility (Part I)} 162, 168 (1986) [hereinafter \textsc{Brownlie 1986}]; see \textsc{Brownlie, supra} note 89, at 455 (indicating the existence of writers’ general agreement that “the rule of non-responsibility cannot apply where the government concerned has failed to show due diligence”).
\item \textsuperscript{214} \textsc{Freeman, supra} note 211, at 15-16.
\item \textsuperscript{215} \textsc{Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 77 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ital034.pdf.}
\item \textsuperscript{216} \textsc{J. L. Brierly, The Law of Nations: An Introduction to International Law of Peace} 280 (Humphrey Waldock ed., 6th ed. 1963) (1928) (further exemplifying that “measures of police protection which would be reasonable in a capital city cannot fairly be demanded in a sparsely populated territory, and a security which is normal in times of tranquility cannot be expected in a time of temporary disorder such as may occasionally occur even in a well-ordered state”).
\item \textsuperscript{217} \textsc{Brownlie, supra} note 89, at 526 (footnote omitted); see also Pierre Dupuy, \textit{Due Diligence in the International Law of Liability, in Legal Aspects of Transfrontier Pollution} 369, 375 (OECD ed., 1977) (noting that “factors may exist . . . which lead to the relaxation and adaption of the minimum standard of behaviour, connected not with the circumstances in which the damage occurred, but with the status of the defendant State itself”); \textsc{Brian Smith, State Responsibility and the Marine Environment: The Rules of Decision} 40 (1988) (concluding that “the diligence of the state will be considered in light of its particular capacities and practices”).
\end{enumerate}
\end{footnotesize}
customary international law that leaves the reception of foreigners to states’ discretion, unless there are treaties that provide otherwise.218 Next, upon entering a state, foreigners on the one hand fall under the territorial jurisdiction of the state while remaining under personal jurisdiction of their national states. Thus, they are responsible to the state for all acts they commit on its territory.219 On the other hand, protection must be afforded to the persons and property of foreigners by the territorial state. Such a state has to grant foreigners’ persons and property “at least that level of protection which is sufficient to meet those minimum international standards prescribed by international law, and must grant [them] at least equality before the law with its own nationals as far as safety of person and property is concerned.”220

In other words, foreigners must not be wronged in person or property by the officials or courts of states, arrested by the police without just cause, arbitrarily treated by administrative officials, or unjustly treated by courts inconsistent with the law.221 For their property, the same treatise puts it the following way:

A state must not, through its officials or courts, injure an alien through injury to his property, an alien must be allowed access to the courts in order to protect his property, and have equality before the law in doing so; a state’s duty to protect aliens applied as much to their property as to their persons; a state’s obligation to observe in its treatment of aliens certain minimum international standards applies also in respect of their property. The rule is clearly established that a state is bound to respect the property of aliens, and that for their part aliens have the right to the peaceful use and enjoyment of their property.222

However, protection of their property is by no means absolute. As territorial states and foreign property are politically, socially, and economically connected and the former can determine their relations with the latter to produce certain results, property rights of the latter can thus be diminished or extinguished.223

It is worth turning back to the second conflicting claim referred to earlier, that territorial states have full freedom to legislate and administrate so long as they do not discriminate against foreigners as compared with their nationals. The prevailing counterclaim is that they are not free to wield their

218. See OPPENHEIM’S INTERNATIONAL LAW, supra note 191, at 897-98.
219. Id. at 904.
220. Id. at 910; see also 3 HACKWORTH, supra note 137, at 630, 660.
221. OPPENHEIM’S INTERNATIONAL LAW, supra note 191, at 910-11.
222. Id. at 912.
223. Id.
legislative and administrative powers to avoid their international obligations. States cannot plead that their own law and practice do not consider a disputed act as involving discrimination against foreigners as compared with their own nationals. In this case, it is the customary international law minimum standard of treatment that takes precedence over domestic law in determining whether states incur international responsibility.\footnote{224} Two relevant questions arise at this point: (1) is the FPS standard contained in investment treaties of exactly the same content as that of the customary international law obligation to provide full protection and security; and (2), how fully does the treaty-based FPS standard protect and secure investment? The debate on these two questions brings together international law experts with conflicting views.

For the first question, some scholars, for example, Sacerdoti, opine that the FPS standard manifested in the form of a standard clause “does not add to the protection to which foreigners are entitled as to their persons and assets abroad under international law.”\footnote{225} By contrast, others, for example, Dolzer and Schreuer, hold that the FPS standard “represents an autonomous treaty standard that is independent of the international minimum standard under customary international law.”\footnote{226} Between these two positions is Lorz’s position that the FPS standard is “the bottom line of protection and security, unless the State parties to the treaty at issue have clearly stated their intent to stall the development of the treaty standard at this point.”\footnote{227} For Subedi, the qualifying phrase—“as required by international law”—that accompanies the FPS standard plays a role in determining its level of protection. In the absence of reference to international law, the level of protection and security would be as high as the provisions in investment treaties indicate, which is often higher than customary international law.\footnote{228} Accordingly, there are two conflicting views on the scope of the FPS standard. Conservatively, the FPS standard has been interpreted as exclusively or principally covering physical violence as uncontestably required by customary international law.\footnote{229}

\footnote{224. \textit{Id.} at 931.}
\footnote{225. Giorgio Sacerdoti, \textit{Bilateral Treaties and Multilateral Instruments on Investment Protection}, 269 RECUEIL DES COURS 251, 347 (1997); see \textit{VANDEVELDE}, supra note 149, at 243.}
\footnote{226. Schreuer, supra note 3, at 364.}
\footnote{227. Lorz, supra note 10, at 773.}
\footnote{228. Surya P. Subedi, \textit{The Challenge of Reconciling the Competing Principles Within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term “Expropriation,”} 40 INT’L L. 121, 125-26 (2006).}
\footnote{229. McLACHLAN ET AL., supra note 4, at 247; SALACUSE, supra note 4, at 239-40; SCHILL, supra note 10, at 81; SUBEDI, supra note 10, at 67; ANDREAS F. LOWENFELD, \textit{INTERNATIONAL ECONOMIC LAW} 558 (2d ed. 2008).}
Liberally, it has been viewed as extending beyond physical protection to legal protection. In discussing physical protection, there are two different views as to whether legal remedies for physical harms remain within the traditional scope of the FPS standard or should be considered as an extension of the traditional scope. Moss considers “[t]he protection that the legal systems affords in order to prevent or prosecute actions that threaten or impair the physical safety of the investment” as “an extension of... physical security.” Lorz, on the other hand, does not view the provision of legal remedies as really constituting such an extension “as long as the availability of the judicial system in particular to remedy and to prosecute stays connected with a physical impairment of the investment.” In describing legal protection, Wälde included economic regulatory powers in the scope of the FPS standard, “the omission of the State to intervene where it had the power and duty to do so to protect the normal ability of the investor’s business to function.” But the FPS standard is not intended to protect an investment from threats that it contributed.

For the second question regarding liability standards, although there is a view that the FPS standard imposes strict liability in cases of damage by state organs, most commentators agree that it does not do so. For them, the FPS standard does not grant investments absolute but rather reasonable protection and security determined by “due diligence,” the very dogmatic definition of which would be inappropriate, since it is to be determined dependent on the circumstances. Host states thus owe an obligation of conduct or obligation of means in lieu of an obligation of result. “[O]bligations of due


231. Moss, supra note 7, at 131.
232. Lorz, supra note 10, at 782.
235. Lorz, supra note 10, at 778.
236. DOLZER & STEVENS, supra note 230, at 61; DOLZER & SCHREUER, supra note 17, at 161; VANDEVELDE, supra note 149, at 243-44; Moss, supra note 7, at 139.
237. BROWNLIE, supra note 89, at 455.
diligence are relative.” 238 Once again, as has been the case under customary international law, there is an open question as to the relevance of host states’ level of development to a determination of the precise level of due diligence. Some hold that due diligence is objective and not affected by host states’ level of development. 239 Others insist that due diligence is subjective and dependent on host states’ development, stability, capacity, and resources. 240

B. Local Judicial Perspective

The United States, because of its well-recognized role in developing customary international law serving as a basis for the FPS standard, is exemplary of local decisions that are in line with the “Lockean trinity” of human rights, 241 having continued to shed light on the standard through its treaties, legislations, and judicial judgments. Internationally, the United States has led in the making of treaties protective of its nationals’ persons and property abroad through FCNs and BITs. 242 In its making of FCNs, the United States made it clear that the intent of the FPS standard was to “commit the government to that measure of security which its legal, judicial and protective agencies are capable of ensuring” and that it extended to “government protection against violence or persecution at private hands.” 243 Later, in some of its investment treaties, the United States is more specific in limiting the standard to police protection. 244 Nationally, the previously

238. Crawford, supra note 193, at 227.
241. See Sornarajah, supra note 230, at 359; see also Foster, supra note 105, at 1142.
242. See Vandevelde, supra note 17, at 203; Subedi, supra note 228, at 125.
244. See supra note 176 and accompanying text; 2012 U.S. Model Bilateral
noted Virginia Declaration of Rights’ proclamation was proposed and accepted as the first article of the U.S. Bill of Rights. Property rights have been explicitly protected by the United States Constitution by its Fourth, Fifth, Seventh, and Fourteenth Amendments, as well as by the contract clause of Article I, section 10. In particular, the taking of private property for public use “without just compensation” is prohibited by the Fifth Amendment.  

Judicially, the United States Supreme Court has had occasion to address FPS-related issues that remain particularly relevant to a contemporary understanding of the standard. First, in *Barbier v. Connolly*, the Court confirmed that all persons should have equal protection and security for their persons and property regardless of whether they are citizens or aliens:

The fourteenth amendment, in declaring that no State “shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,” undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.  

The above statement was approvingly quoted and applied to aliens in *Yick Wo v. Hopkins* to invalidate the conviction of an alien for violation of an ordinance that was administered discriminately against persons of Chinese descent. In *Lynch v. Household Finance Corp.*, the Court explained the link between property and rights as follows:

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245. FRANCK, supra note 187, at 453.
246. 113 U.S. 27 (1884).
247. Id. at 31 (emphasis added).
248. 118 U.S. 356 (1886).
249. Id. at 367-68.
[T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right of speak or the right to travel, is in truth a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.\(^{251}\)

Of immediate relevance to an understanding of the FPS standard is *Maiorano v. Baltimore and Ohio Railroad Co.*\(^ {252}\) In this case, the Court shed light on the scope *ratione tertii, ratione personae, and ratione materiae* of the FPS clause in the Treaty of Commerce and Navigation between the United States of America and His Majesty the King of Italy of 1871.*\(^ {253}\) The plaintiff was an Italian resident and subject of the King of Italy who brought action in a Pennsylvania court to recover damages for the death of her husband caused by the defendant’s negligence.*\(^ {254}\) The Supreme Court of Pennsylvania held, prior to this case, that the applicable law of Pennsylvania gave the right of action to the deceased’s relatives, except those who were non-resident aliens.*\(^ {255}\) The U.S. Supreme Court found no reason to depart from that holding.*\(^ {256}\) Thus, she was denied the right of action due to her non-resident–alien status. Nonetheless, the plaintiff based her right to recover not only on that applicable law but also on the aforementioned treaty.*\(^ {257}\) In particular, emphasis was placed on its Article 3, which accorded the citizens of each party in the territory of the other “the most constant protection and security of person and property.”*\(^ {258}\) Since the plaintiff and her property had never been within the territory of the United States, she herself was found outside the *ratione tertii* reach of the clause, being incompetent to claim protection and security for her person or property.*\(^ {259}\)

Still, there was another argument that “if the right of action for her husband’s death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him.”*\(^ {260}\) Although the Court accepted that the argument was

\(^{251}\) Id. at 552.
\(^{252}\) 213 U.S. 268 (1909).
\(^{253}\) Id. at 272.
\(^{254}\) Id. at 271.
\(^{255}\) Id. (noting that the Pennsylvania statute at-issue “does not give to relatives of the deceased, who are nonresident aliens, the right of action therein provided for”).
\(^{256}\) Id. at 275.
\(^{257}\) Id. at 271-72.
\(^{258}\) Id. at 273.
\(^{259}\) Id. at 271-74.
\(^{260}\) Id. at 274.
not completely without weight, it was of the opinion "that the protection and security thus afforded are so indirect and remote that the contracting powers can not [sic] fairly be thought to have had them in contemplation."261 The Court accordingly found that the scope ratione personae of the FPS clause under consideration was limited to an Italian subject residing in the United States and not extended to his non-resident relatives.262 Regarding the scope ratione materiae of the clause, the Court did not limit it to physical harms, construing it as including rights of actions that did not necessarily stem from physical harms. In the Court’s own words:

If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including all rights of actions for himself or his personal representatives to safeguard the protection, and security, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.263

Barbier, Yick Wo, and Maiorano can thus be read to confirm that from the United States’s perspective, the FPS standard had not been limited to physical violence. Legal protection and entitlement relating to the protection and security for persons or property thus fall within the scope thereof as much as the language used in the treaty permits. This has been confirmed in other judgments issued by the Court and other courts. For example, in Asakura v. City of Seattle,264 the Court found that an ordinance prohibiting a Japanese subject from getting a license to engage in the business of pawnbroking, as included in the treaty meaning of “trade,” violated the FPS clause in the treaty between the United States and Japan of 1911.265 The Court found that such an ordinance was inconsistent with the parties’ intention to accord the citizens or subjects of either side liberty in the territory

261. Id. at 274-75.
262. Id. at 275 (explaining that the treaty affords Italian subjects a right of action, not non-resident relatives).
263. Id. (emphasis added).
264. 265 U.S. 332 (1924).
265. Id. at 343.
of the other to engage in "trade." Additionally, in *In re Estate of Yano*, the Supreme Court of California confirmed that the FPS standard was only available to alien subjects in a matter that directly related to their persons and property. In this case, a Japanese subject was denied the right to be appointed as a guardian of his minor daughter who was a United States citizen by reasons of domestic laws. It was contended that such denial was in violation of the FPS clause in the same treaty discussed in *Asakura*. However, the Supreme Court of California found otherwise, rendering such a right unnecessary for the security or protection for persons or property:

The rights and privileges which [the treaty] declares the Japanese citizen shall enjoy here are such rights and privileges only as may be necessary for the protection and security of his own person or property. It cannot be said that it is necessary for the security or protection of either the person or the property of a parent that he should become the guardian of his own child. Eligibility to appointment as guardian is not property, nor is it a right of property. It pertains exclusively to the person. It may be given or withheld by the law of the state in which the parent and child reside. The withholding thereof from all parents would be within the power of the state. Undoubtedly, when given, it is a privilege pertaining to the individual parent, but it is not a privilege which enhances his own personal security or which assists him in protecting his property. A deprivation of the privilege would in no manner endanger the person of the parent, or jeopardize his property.

Both in *Patsone v. Pennsylvania* and *Heim v. McCall*, the U.S. Supreme Court made it clear that the equality of rights assured by the FPS clause was not without limit. It emphasized "that the equality of rights that it [the treaty] assures is equality only in respect of protection and security for persons and property." Equality of rights in all respects is not the case.

266. See id. at 342-43; see also Ohio v. Deckebach, 274 U.S. 392, 395-96 (1927) (holding that the city of Cincinnati’s ordinance that prohibited the issuance of pool room licenses to aliens did not violate Article I of the treaty of commerce of 1815 between the United States and Great Britain, which provided that the nationals of each in the territory of the other shall “enjoy the most complete protection and security for their commerce.” This is because the proprietor of the pool room did not “engage in commerce within the meaning of a treaty which merely extends to ‘merchants and traders’ ‘protection and security for their commerce’”).

267. 206 P. 995 (Cal. 1922).

268. See generally id. at 997-1003.

269. Id. at 999.

270. Id. at 999-1000.


272. 239 U.S. 175 (1915).

Accordingly, the law that illegalized the killing of wild game by unnaturolized foreign-born residents and their possession of shotguns and rifles for that killing, as discussed in the former case, did not violate the FPS standard. Nor did the law that prohibit the employment of aliens upon public works and required that preference be given to citizens of a particular state over others as deliberated in the latter case.

C. International Judicial Perspective

In interpreting and applying the FPS standard in investment treaties, decisions of other judicial bodies discussing certain fundamentals for treating aliens and state responsibility can serve as a guideline for investment tribunals. Made either in the general international context or in the specific contexts of protectorate and of friendship, commerce, and navigation, they can be informative of how past participants had addressed protection of foreigners and construed some issues that have turned to be critical for determining host states’ compliance with the FPS standard nowadays in the context of international investment.

The first context gave rise to “the historical starting point” for a discussion on the international standard of treatment for foreigners. It is in Neer v. Mexico, wherein such a point was made and has later been regarded as declarative of the customary international law minimum standard of treatment of aliens. Presented with the murder of a U.S. national in Mexico, the General Claims Commission had to decide if the Mexican authorities lacked diligence in apprehending or punishing those guilty of murder as alleged by the United States. In its finding that a lack of diligence on the part of the Mexican authorities was not established and that the claim was disallowed, the Commission stated that “the treatment of an alien to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”

Although Neer did not concern foreign investment, it illustrates the traditional threshold of the international standard of treatment of foreigners. Having been criticized for its height, the Neer threshold still does not impose strict liability on states.

For the second context, Spanish Zone of Morocco Claims (Great Britain

274. Id. at 145-46.
275. 239 U.S. at 194.
276. DOLZER & SCHREUER, supra note 17, at 139.
278. Id. at 61-62.
v. Spain)\textsuperscript{279} is worth mentioning. In adjudicating claims for damage to British subjects or protected persons’ life or property against the Spanish authorities in the Spanish Zone of Morocco, Arbitrator Max Huber laid down some principles relating to state responsibility. Of particular relevance here are the following: (1) although states are not responsible for the occurrence of a war or revolt, they can be found responsible for their authorities’ acts or omissions to stop it as far as possible, by using appropriate diligence in giving help or adopting preventive or protective measures; (2) regarding acts of plunder not tantamount to a state of rebellion, states are responsible if they fail by an appreciable margin to exercise \textit{diligentia quam in suis} (one is required to exercise a level of care that he exercises in his own affairs); and (3) states can be responsible for their failure to prosecute wrongdoers causing harms to aliens or to apply proper civil sanctions.\textsuperscript{280} From this decision, current participants have learned—and made use of the opinion—that diligence applies and is to be determined by various factors.

In the third context, the Sambiaggio Case (Italy v. Venezuela),\textsuperscript{281} decided by the Italy-Venezuela Mixed Claims Commission, also offers an insight on the standard of liability. In determining whether Venezuela was responsible to Mr. Salvatore Sambiaggio, an Italian citizen, for damage caused by revolutionists’ acts in its territory, Umpire Jackson H. Ralston had to consider Article 4 of the Italy-Venezuela Treaty of Friendship, Commerce, and Navigation of 1861, which promised each party’s citizens and subjects “the fullest measure of protection and security of person and property.”\textsuperscript{282} The umpire “accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damage from being inflicted by revolutionists, that country should be held responsible.”\textsuperscript{283} Since no lack of due diligence had been alleged or proved, the claim was dismissed.\textsuperscript{284}

Besides Sambiaggio, there are other cases that dealt with the FPS standard in the context of FCN treaties before other judicial fora, for example, the International Court of Justice and the Iran-United States Claims Tribunal. Thus, let us turn now to their treatment of the standard.

\textit{1. The International Court of Justice}

Searching through the dockets of the Permanent Court of International

\textsuperscript{279} 2 R.I.A.A. 615 (1924).
\textsuperscript{280} \textit{Id. at} 615.
\textsuperscript{281} 10 R.I.A.A. 499 (Mixed Claims Comm’n 1903).
\textsuperscript{282} \textit{Id. at} 518.
\textsuperscript{283} \textit{Id. at} 524.
\textsuperscript{284} \textit{Id. at} 512, 524.
Justice ("PCIJ") and the International Court of Justice ("ICJ") shows that the FPS standard was rarely raised before the world’s most senior international court. There appear to be only two cases in which the ICJ addressed “the most constant protection and security": United States Diplomatic and Consular Staff in Tehran and Elettronica Sicula S.p.A. (ELSI). Other judgments or opinions just referred to the standard in passing.285

The Islamic Revolution in late 1978 and early 1979 entailed a number of legal disputes among various international law participants of different levels. At the interstate level, one of those disputes concerning the climax of the revolution, Iranian demonstrators’ invasion of the U.S. Embassy compound,286 was brought before the ICJ in United States Diplomatic and Consular Staff in Tehran.287 Therein, the United States claimed that in respect of the two private U.S. individuals said to be held hostage during the seizure of the U.S. Embassy in Tehran and its Consulates in Tabriz and Shiraz by the invading demonstrators (“Muslim Student Followers of the Imam’s Policy”), Iran violated Article II(4) of the Treaty of Amity, Economic Relations, and Consular Rights of 1955.288 According to the article, it was a duty of the parties to the treaty to provide “the most constant protection and security” to each party’s nationals in the territory of the other.289 The Court found that in the presence of the Iranian government’s inaction, the seizure of those individuals as hostages by the invading demonstrators incidentally entailed a breach of Iran’s obligations both under the aforesaid article and general international law.290 This was consistent with the purpose of treaties of this kind, that is, “to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other’s territory.”291

In Elettronica Sicula S.p.A. ("ELSI") lies the most frequently cited, and probably most authoritative,292 ICJ pronouncement on the FPS standard. The United States argued that Italy violated its obligations under Article V of the


288. Id. at 6, 13.

289. Id. at 32.

290. Id. at 13-14, 17, 27-28, 32.

291. Id. at 28.

292. SALACUSE, supra note 4, at 232.
Treaty of Friendship, Commerce, and Navigation between Italy and United States of 1948, which required the granting of the full protection and security required by international law and supplemented by the national treatment and the most-favored-nation treatment. According to paragraph 1 thereof, the nationals of one party in the territory of the other party shall receive “the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection required by international law.”293 And as continued in paragraph 3, such protection and security shall not be less than that granted to the nationals, corporations, and associations of the other party or of any third country. The United States claimed that by allowing workers at ELSI, an Italian company wholly owned by two U.S. corporations, to occupy the plant belonging to ELSI, Italy breached its obligations.294

A Chamber of the Court found that the reference to “constant protection and security” was not of absolute force, rendering it incapable of being construed as “the giving of a warranty that property shall never in any circumstances be occupied or disturbed.”295 This statement is consistent with the court’s prior conclusion in Corfu Channel (U.K. v. Albania)296 that under customary international law, a state that exercised control over its territory does not bear prima facie responsibility.297 Having considered the reasonable foreseeability of the protest and the occupation by those dismissed workers, a failure to establish that any deterioration in the plant and machinery was caused by the workers’ presence, and the Italian authorities’ ability to protect the plant and in some measure to continue production, the Chamber thus ruled that the protection so provided could be regarded as falling below neither the full protection and security required by international law nor the national and most-favored-nation treatments. In addition, the unlawfulness of the occupation pronounced by the competent domestic court per se did not necessarily suggest that the national treatment had been violated. Instead, it was the local law in book and in practice that did. In the absence of the establishment that such law had treated U.S. nationals less well than Italian nationals, the Chamber thus found no violation of both paragraphs 1 and 3 of Article V.298

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295. Id. at 65.
297. Id. at 18.
Notably, in addition to the physical occupation of the plant, the United States further referred to a sixteen-month period before the Prefect decided ELSI’s administrative appeal against the requisition order as violating the FPS obligation.\textsuperscript{299} Having considered the circumstances concerned, the Chamber found that “[i]t must be doubted whether in all the circumstances, the delay in the Prefect’s ruling in this case can be regarded as falling below that standard.”\textsuperscript{300} It noted that the FPS standard in the present case that was supplemented by reference to international law “may go further” than what general international law requires.\textsuperscript{301} Reference to international law does not limit the FPS standard to the minimum standard of treatment. It serves as a threshold below which the FPS cannot fall.

2. The Iran-United States Claims Tribunal

In addition to giving rise to \textit{United States Diplomatic and Consular Staff in Tehran}, the Islamic Revolution led to the establishment of the Iran-United States Claims Tribunal (“IUSCT”) in 1981. As an arbitral body, its purpose was to settle disputes that arose during the revolution between United States nationals and Iran, Iranian nationals and the United States, and the two governments, as the United States waived any right to submit its disputes concerning the hostages to the ICJ or other fora.\textsuperscript{302} One of the issues submitted was related to the interpretation of the FPS standard in their treaty.

In \textit{Rankin v. Iran},\textsuperscript{303} a Chamber of the IUSCT suggested that both violence and harassment of various types against foreigners and their property resulting from the anti-American statements could violate the FPS standard. It also confirmed that protection and security has been part of customary international law. Put in the Chamber’s own words:

The statements . . . of the leaders of the Revolution could, however, have reasonably been expected to initiate or prompt the types of harassment and violence that were suffered by individual U.S. nationals and other foreigners. . . . These statements, which clearly are attributable to the Revolutionary Movement and thereby to the Iranian State . . . , were inconsistent with the requirements of the Treaty of Amity and customary international law to accord protection and security to foreigners and their property.\textsuperscript{304}

Claiming for compensation for lost property and property rights (lost

\textsuperscript{299} Id.
\textsuperscript{300} Id. ¶ 111.
\textsuperscript{301} Id.
\textsuperscript{302} See Brower, \textit{supra} note 286, at 135.
\textsuperscript{303} Case No. 10913, 17 Iran-U.S. Cl. Trib. Rep. 135 (1987).
\textsuperscript{304} Id. ¶ 30 (emphasis added).
salary and other employment-related benefits) arising from alleged wrongful expulsion from Iran, the claimant could not release its burden of proof. It failed to show that its departure was caused by the alleged wrongful acts of Iran. Accordingly, the claim was dismissed.\(^\text{305}\) In *Starrett Housing Corp. v. Iran*,\(^\text{306}\) a Chamber held that “interests in property” was “sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States national.”\(^\text{307}\)

Additionally, there are dissenting opinions in which FPS-related issues were addressed. In *Lillian Byrdine Grimm v. Iran*,\(^\text{308}\) Judge Holtzmann opined that a widow’s right to financial support from her husband who was assassinated in Iran constituted property that Iran was obliged to accord the most constant protection and security.\(^\text{309}\) In *Ina Corp. v. Iran*,\(^\text{310}\) Judge Ameli considered the United States blockage of property and interests in property of Iran, the prohibition on exports to and imports from Iran, and the armed invasion of Iran as the United States’ failure to comply with its most constant protection and security obligation.\(^\text{311}\)

**IV. THE FULL PROTECTION AND SECURITY STANDARD AS APPLIED BY INTERNATIONAL INVESTMENT TRIBUNALS**

Our task in this Section is to continue our trend analysis. To project arbitral trends in dealing with the FPS standard, we will examine the degree to which an interpretation and application of the FPS standard has been achieved in investment awards. Although the 1990s witnessed the first two international investment law cases addressing the FPS standard, the decades that followed saw an increase in the number of cases touching upon the same standard. Those cases, from 1990 to early 2017, serve as our first platform from which to consider how tribunals have construed the FPS standard. We find that arbitral tribunals have interpreted the FPS standard in diverse ways. Their divergent interpretations serve as our basis for systematically categorizing them. Thus, in this part, all salient aspects of arbitral treatment of the FPS standard will be presented analytically. Also, a factor analysis will now be conducted, along with our ongoing trend analysis, to correlate past decisions with conditions that influenced them and consider whether the context of such conditions has changed in a meaningful way.

\(^\text{305}\) Id. ¶¶ 38-39.  
\(^\text{307}\) Id. ¶ 262.  
\(^\text{308}\) Case No. 71, 2 Iran-U.S. Cl. Trib. Rep. 78 (1983).  
\(^\text{309}\) Id. at 81, 86 (Holtzmann, J., dissenting).  
\(^\text{311}\) Id. at 438-39 (Ameli, J., dissenting).
Our review of arbitral awards reveals that the extant body of international investment law jurisprudence on the treaty-based FPS standard sheds light on its relation to customary international law, its nature of protection and security, the materiality of terminological variations, its scope *ratione materiae*, its scope *ratione personae*, and its relation to other standards and principles, that is, the FET standard, the principles of effectiveness and procedural economy, the MFN treatment, protection against unreasonable or discriminatory measures, expropriation, and full protection crafted in general terms at the beginning of BITs.

A. Treaty-Based FPS Standard and Customary International Law

A careful reading of the awards reveals contradictions between tribunals’ views on the relation between the treaty-based FPS standard and a customary international law duty to provide full protection and security. There are skeptics, opponents, and advocates of the independence of the FPS clause from customary international law.

For skeptics, it seems unclear whether the FPS standard as manifested in the form of an FPS clause in investment treaties can be understood as having a wider scope than the general duty of due diligence to provide foreign nationals with full protection and security found in customary international law.\(^{312}\)

For opponents, the FPS standard is not an autonomous treaty norm that imposes more requirements than does the minimum standard. It is “no more than the traditional obligation to protect aliens under international customary law.”\(^{313}\) This has also been confirmed indirectly: by first finding that the FET standard is indistinguishable from the customary international minimum standard and then ruling that a violation of the FET standard is enough to prove a breach of the FPS standard,\(^{314}\) the customary international law minimum standard and the FPS are considered alike.\(^{315}\) The opponents’ opinion has been passed even in the absence of any specific reference to general or customary international law in the FPS clause.

*A fortiori*, the dependence of the FPS standard has been established when the FPS clause was formulated in a way that explicitly reduced it to part of

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315. Id. ¶¶ 514-26.
the customary international law minimum standard of treatment of aliens, the explanatory note of which clarifies that the minimum standard neither requires treatment additional to or beyond treatment required by customary international law nor creates additional substantive rights.\textsuperscript{316} Thus, a threshold for its breach is relatively high.\textsuperscript{317} In this case, the minimum standard of treatment, the element of which includes the FPS standard, “cannot be interpreted in the expansive fashion in which some autonomous fair and equitable treatment or full protection and security provisions of other treaties have been interpreted.”\textsuperscript{318} To prove a breach of the minimum standard of treatment, the claimant is required to show that the respondent “has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law.”\textsuperscript{319} Since the bar for a breach of the minimum standard of treatment is relatively high, the bar of the FPS standard is elevated to the same level.\textsuperscript{320} Opponents hold that as textually part of the minimum standard of treatment, the FPS standard cannot be interpreted as expansively as can an autonomous FPS clause. Its scope and content are determined by customary international law, the threshold of which was originally high, as set forth in Neer.\textsuperscript{321}

Nonetheless, this does not mean that the FPS standard has been completely frozen in time. Some tribunals, openly accepting that customary international law evolves and is shaped by the conclusion of investment treaties, have adopted an evolutionary interpretation of the FPS standard.\textsuperscript{322}


\textsuperscript{318} Al Tamimi, ICSID Case No. ARB/11/33, ¶ 382; see also ADF Grp. Inc. v. United States, ICSID Case No. ARB(AF)/00/01, Award, ¶ 183 (Jan. 9, 2003), 6 ICSID Rep. 449 (2004) (“We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments.”).

\textsuperscript{319} Al Tamimi, ICSID Case No. ARB/11/33, ¶ 390.

\textsuperscript{320} Id. ¶¶ 394, 448-50.


\textsuperscript{322} Mondev Int’l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 116, 125 (Oct. 11, 2002), 6 ICSID 181 (2004); see also Int’l Thunderbird Gaming Corp. v. Mex., UNCITRAL, Award, ¶ 194 (Jan. 26, 2006), https://www.gob.mx/cms/uploads/attachment/file/29506/260106_Laudo_ING.pdf (holding that “[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving
“[I]t is unconvincing to confine the meaning of . . . ‘full protection and security’ of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien.”

As a result, its threshold may not be as high as it was set by the Neer Commission. Even in cases where specific textual interpretation leads to the conclusion that the FPS standard is a higher standard than the minimum standard of treatment and that the latter serves as a floor rather than a ceiling for the former, both standards could still be found to have substantially similar contents due to their evolution.

Finally, for advocates, the FPS standard is considered a distinct and autonomous treaty standard, regardless of whether it has been qualified by reference to principles of international law. Its content is not the same as that of the minimum standard of treatment. If the FPS standard is qualified by reference to international law, such reference is “to set a floor, not a ceiling.” Thus, the FPS standard can be interpreted textually as a higher standard than required by international law. If it is not qualified by reference to international law, such non-reference serves as support for not equating the FPS standard with customary international law.

Even when the FPS standard has textually been formulated as included in the customary international law minimum standard of treatment, as is the case with NAFTA, one of its possible interpretations is that it goes beyond customary international law. This “additive interpretation,” put forward before the issuance of the FTC’s Notes of Interpretation, treats both the FPS and FET standards (“the fairness elements”) as “additive” to the requirements of international law. Therefore, investors can claim the

international customary law”.

324. Al Tamimi, ICSID Case No. ARB/11/33, Award, ¶ 390.
325. Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 361 (July 14, 2006), 14 ICSID 367 (2009).
327. Azurix, ICSID Case No. ARB/01/12, Award, ¶ 361.
328. Id.
international law minimum standard and the fairness elements\textsuperscript{331}.

Investors are entitled to those elements, no matter what else their entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law.\textellipsis Accordingly, the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be "egregious," "outrageous" or "shocking," or otherwise extraordinary.\textsuperscript{332}

In short, advocates have interpreted the FPS clause as distinct from and more protective of investment than the minimum standard of treatment, especially but not necessarily because of its qualifying term "constant" or "full."\textsuperscript{333}

\textbf{B. Nature of Protection and Security}

Since its debut in investment arbitration in 1990, the FPS standard has been given various interpretations, except for the nature or standard of protection and security it provides. Its relativity has been confirmed by all arbitral awards under consideration here. According to these awards, the FPS standard does not impose on the host state strict liability,\textsuperscript{334} the

\textsuperscript{331} Id. ¶ 110.

\textsuperscript{332} Id. ¶¶ 111, 118 (footnotes omitted).


imposition of which is not allowed in the absence of a specific treaty provision. Rather, in protecting investment as long as it remains in place, the FPS standard requires the host state to fulfill its obligation to exercise due diligence, which has also been referred to as “a best efforts obligation,” prudence, vigilance (and care), or reasonableness. 


against injuries and harassment in response to the circumstance. In *Toto Costruzioni Generali S.p.A. v. Lebanon*, the Tribunal described the standard as requiring that states shall not act negligently in the prevailing circumstance. Pursuant to this obligation, host states must undertake “all possible measures that could be reasonably expected” to protect and secure investment or “take all measures necessary to ensure the full enjoyment of protection and security of . . . investment.” Such measures can be precautionary, preventive, remedial, coercive (against those disrupting investment), and/or responsive in nature. What the FPS standard requires is host states’ active conduct, which is more than “the mere abstention from prejudicial conduct.” All in all, this does not mean that host states must adopt every specific measure proposed by investors. Neither

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344. ICSID Case No. ARB/07/12, Award, ¶ 229 (June 7, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C104/DC2552_En.pdf.

345. *Id.*

346. See *Asian Agric. Prods.*, ICSID Case No. ARB/87/3, ¶ 85(b); Saluka Invest. B.V. v. Czech, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) (holding that the host state was under an obligation to “adopt all reasonable measures to protect assets and property from threats or attacks”); Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, ¶¶ 449, 451 (Nov. 3, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf; Téncnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB (AF)/00/2, Award, ¶ 177 (May 29, 2003), 19 ICSID Rev.—FILJ 158 (2004); *AES Summit Generation Ltd.*, ICSID Case No. ARB/07/22, Award, ¶ 13.3.2.


is their FPS obligation tightened by the fact that they have been parties to other treaties related to the investment at issue but in a different angle, such as environmental treaties.\textsuperscript{354}

In detailed arbitral awards, an obligation of due diligence has been bifurcated as having “a duty of prevention” and “a duty of repression” as its element. Host states are required to use due diligence to, first, prevent the persons or property of aliens from being wrongfully injured within their territory, and second, to punish such injuries if they have failed to prevent them. Failing to perform either duty gives rise to issues of state responsibility and compensation. However, this due diligence obligation does not require host states to prevent all and every risk or injury.\textsuperscript{355} Instead, it requires them to take reasonable acts within their power to prevent the injury, restore the previous situation, and/or punish the author of the injury when states are, or should be, aware of a risk of injury, depending on the prevailing circumstances on a case-by-case basis.\textsuperscript{356} Thus, an arbitral answer to the question of how fully investment is protected and secured is that investment is not under absolute protection and security, but rather under “a certain level of protection.”\textsuperscript{357} This is the point of commonality among many FPS-related issues that investment tribunals have addressed.\textsuperscript{358}

However, in their commonality lies the dichotomy between objectivity and subjectivity. Initially, a debate on due diligence did not receive much attention. The Tribunal in AAPL v. Sri Lanka\textsuperscript{359} shed light on it by adopting

\begin{itemize}
\item \textsuperscript{357} Rumeli Telekom A.S. v. Kaz., ICSID Case No. ARB/05/16, Award, ¶¶ 668-70 (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/italaw728.pdf.
\item \textsuperscript{358} See Alexandrov, supra note 7, at 323 (explaining different FPS-related issues, such as whether the FPS standard is extended to legal security and concluding that the standard demands states to act with due diligence).
\item \textsuperscript{359} ICSID Case No. ARB/87/3, Final Award, ¶ 77 (June 27, 1990), 4 ICSID Rep. 246 (1997).
\end{itemize}
Freeman’s definition, noted previously, that 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.” Therefrom, a well-administered government objectively serves as tertium comparationis (a common comparative denominator) to indicate the reasonable measures expected to be adopted under similar circumstances. Later, the Tribunal in American Manufacturing & Trading, Inc. v. Zaire added that this objective obligation must not be inferior to the international law minimum standard of treatment. In practice, awards dealing with a violation of the FPS standard have not been made in the abstract without mentioning the prevailing circumstance of the case. Still, in so doing, tribunals seem to pay lip service to due diligence. They have not discussed much about due diligence per se.

It is in few cases that the objectivity of due diligence has been discussed. The tribunal in Pantechniki S.A. Contractors & Engineers v. Albania viewed an objective minimum standard of due diligence as “a modified objective standard” of due diligence, bringing it closer to a subjective standard of due diligence. According to this tribunal, in according investment physical protection, due diligence of different host states can be different. What matters is due diligence of the host state at issue. Its level of development and resources is considered to see how due is due enough in exercising due diligence; investors cannot have the same expectation of protection from different host states whose local situation and governance are dissimilar. While a proportionality factor has not been generally accepted in addressing claims of denial of justice, the tribunal believed that it should be accepted in deciding whether the host state fulfills its duty of


362. Id.


365. Id. ¶ 81.

366. Id.

367. Id.
physical protection and security. In other words, the host state’s international responsibility in this regard should be proportional to its resources. Given the claimant’s awareness of “an environment of desolation and lawlessness,” the scale of the disorder, and the police’s inability—not refusal—to protect the claimant’s investment, the tribunal concluded that the respondent had no power under the circumstances and did not breach the FPS standard.

On the contrary, a modified objective standard of due diligence, along with the proportionality test, has recently been denied both in BIT and NAFTA contexts. In the former context, the tribunal in Von Pezold v. Zimbabwe rejected the host state’s argument that its police were overwhelmed as the invasions occurred spontaneously and across the country or that its intervention would have demanded disproportional force given its constraints and would have resulted in many deaths. In the latter setting, the tribunal in Glamis Gold v. United States by its finding that the minimum standard of treatment as a whole did not vary from state to state, implied that the FPS standard as part of the minimum standard of treatment was of the same nature. Otherwise, the protection granted would have no minimum. This denial of a modified objective standard was elaborated in the following terms:

The customary international law minimum standard of treatment (including the FPS standard) is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor.

C. Materiality of Terminological Variations

A critical reading of awards discloses that tribunals’ view on the relevance of terminological differences to an interpretation and application of the FPS standard is bifurcated—there are opponents and proponents of textualism. Their first point of disagreement centers on interpreting various patterns of

368. Id. ¶ 76.
369. Id. ¶¶ 77, 81.
370. Id. ¶¶ 82, 84.
372. Id. ¶¶ 589-91, 596-99.
374. Id. ¶ 615 (emphasis added).
the FPS standard. Their second point centers on interpreting the beneficiary of the standard. For both opponents and proponents, however, it is not necessary to distinguish between “protection” and “security” as it is similarly unnecessary to distinguish “fair” from “equitable” when dealing with “fair and equitable” as a single and unified treatment standard.375

In terms of interpreting patterns of the FPS standard, the majority of tribunals are opposed to textualism, viewing terminological differences among formulations of the FPS standard as immaterial and having no effect on their interpretation and application of FPS clauses. The presence or absence of adjectives such as “full,” “adequate,” and “most constant” does not affect the degree of protection the FPS standard provides.376 Neither does the putting of “protection” before “security,” or vice versa. “Protection” alone can even carry the same weight as “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.”377 “Protection and full security” is regarded as an equivalent of “full protection and security.”378 In spite of their textual difference, “full legal protection” for “investors and their investments” and “full and complete protection and security” for “investments” have been considered substantially similar.379 Even for “most constant,” it does not elevate the level of protection and security to a particularly high standard of treatment but stabilizes it for the period of the investment. As the MNSS B.V. Tribunal explained:

As regards the meaning of “most constant,” the plain meaning of “constant” is “unchanging,” “that remains the same.” Thus, the level of protection and security should not change for the duration of the

375. DOLZER & SCHREUER, supra note 17, at 133.
378. Compañía de Aguas del Aconquija S.A. v. Arg., ICSID Case No. ARB/97/3, Award, ¶¶ 7.4.13, 7.4.17 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf (showing that the phrases “protection and full security” and “full protection and security” are used interchangeably, and therefore mean the same thing).
investment. But the expression “most constant” does not increase the level of protection and security as understood under international law.\(^{380}\)

Unsurprisingly, when the precise wording of the FPS clause is “the most constant protection and security,” it has still been used interchangeably with “full protection and security.”\(^{381}\)

In further regard to this first point of the disagreement, the minority of tribunals emphasize that the precise legal formulations and patterns of FPS clauses are to be taken seriously; such tribunals have come under criticism for an overemphasis on the ordinary meaning.\(^{382}\) They consider the presence of “constant” or “full” as according more protection and security to investment than the minimum standard of treatment.\(^{383}\) “Full protection and security” or “full security” could extend the content of the FPS standard beyond physical security.\(^{384}\) Conversely, one could think that if “protection” and “security” are not qualified by “full,” they are meant to cover physical protection and security. Against an overly extensive interpretation of the FPS standard that might lead to an unnecessary and undesirable overlap with other standards of protection, the Tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A.*, v. Argentina\(^{385}\) explicitly considered the absence of “full,” “fully,” or “legal security” as supporting its interpretation that the FPS standard was limited to physical protection and legal remedies for physically injured investors and their assets. It did not cover a stable and secure legal and commercial environment.\(^{386}\) When the disputed phrase was “full physical security and protection,” its scope was limited to physical


\(^{382}\) MONTT, supra note 17, at 305 n.57.


\(^{384}\) See Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 408 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf; Biwater Gauff Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf.


\(^{386}\) See id. ¶¶ 168-69, 173-76, 179.
full protection and security.\textsuperscript{387} Turning to the second point of their disagreement as to the term “investment” designated as the sole beneficiary or object of FPS clauses, some tribunals have interpreted the term textually and strictly as covering only foreign investment or foreign assets and property in a traditional sense.\textsuperscript{388} Investors per se are not its beneficiaries. Thus, physical violence to investors does not generally breach the FPS standard. “[M]easures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of that standard of protection.”\textsuperscript{389} Nonetheless, if the foreign investment or property at issue was willingly abandoned by an investor, it would not be protected by the FPS standard. As the Tribunal in \textit{Al Tamini v. Oman}\textsuperscript{390} noted that the FPS standard “cannot extend to providing physical protection in perpetuity to an investment that has been expressly ‘abandoned’ by its owners (and over which all property rights have long been extinguished).”\textsuperscript{391} Other tribunals have been less strict, implicitly including “investor” in the meaning of “investment.” They have referred to harm to investors as violating the FPS clause despite the apparent designation of “investments” as the sole bearer of a right to full protection and security.\textsuperscript{392} More clearly, it has been held that full protection and security of investment provides protection against physical harm to persons and property.\textsuperscript{393}

\begin{itemize}
\item \textsuperscript{389} Al-Warraq, UNCITRAL, Final Award, ¶ 629.
\item \textsuperscript{390} ICSID Case No. ARB/11/33, Award, ¶ 1.
\item \textsuperscript{391} See id. ¶ 450.
\item \textsuperscript{393} See Gold Reserve Inc. v. Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶¶
D. Scope Ratione Materiae of the Full Protection and Security Standard

As to the question of what it is that investment is protected and secured from, we have divided relevant cases into three categories: cases whose circumstances and rulings were concerned primarily with physical harms; cases whose circumstances and rulings dealt mainly with legal harms, which includes instances of a host state’s failure to provide legal protection of investment, its modifications of legal and regulatory frameworks, and other regulatory acts negatively affecting the legal security and stability of investment; and cases whose circumstances and rulings concerned both physical and legal harms. If a tribunal, in making its rulings and obiter dicta, gave a clear and general answer to this question of “what,” we also considered that answer a criterion for determining which category the case belongs to.

In any case of harm to be discussed shortly, it is investors’ burden to show how materially detrimental the harms are to their investment and prove that the harms and losses could have been prevented had host states exercised due diligence.394 If they do not show that they suffer damage caused by host states, there will be no basis for awarding damages, even if a breach of the FPS standard is established.395 If their argument is that host states have violated the FPS standard by failing to punish a theft of property committed either by states themselves or by private individuals, investors’ failure to make a criminal complaint at the domestic level could lead the tribunal to reject their claim. Such rejection is to disapprove of a “fundamental double standard,” according to which the same action is regarded as locally immaterial but internationally material.396 Host states, in turn, cannot


disregard international law and rely instead on their own law to derogate their FPS obligation, as is generally the case with their other obligations under international law.\(^\text{397}\)

1. Physical Harm

Led by AAPL,\(^\text{398}\) arbitral awards have traditionally construed the FPS standard as applying exclusively or primarily to physical protection and security of investment, that is, against physical harms to investment in accordance with the ordinary meaning of “protection” and “security.”\(^\text{399}\)

Examples of this type of harm drawn from arbitral awards include (1) civil unrest, civil strife, civil disturbance, and physical violence;\(^\text{400}\) (2) threats and attacks on investment;\(^\text{401}\) (3) physical invasion of business premises or investment sites;\(^\text{402}\) (4) rioting and looting;\(^\text{403}\) (5) attack and seizure of

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\(^{398}\) ICSID Case No. ARB/87/3, Final Award, ¶¶ 77, 86 (June 27, 1990), 4 ICSID Rep. 246 (1997).


property;\(^\text{404}\) (6) impairment affecting the physical integrity of investment by forceful interference;\(^\text{405}\) (7) wrecking, looting, and dismantlement of equipment and property;\(^\text{406}\) (8) forceful expropriation of investment;\(^\text{407}\) (9) killings and destruction of property;\(^\text{408}\) and (10) occupation of a building and physical assault of the CEO.\(^\text{409}\) A novel example of physical harm might be environmental damage to investment, for example, natural damage to an ecotourism site.\(^\text{410}\) On the other hand, harms found not to constitute a breach of the FPS standard include temporary physical obstruction not tantamount to an impairment affecting the physical integrity of investment\(^\text{411}\) and the presence of the host state’s armed contingents and their continued presence at the investment site that was not harassing or threatening but was only for peacekeeping at the site in view of protests by the workers.\(^\text{412}\)

2. Legal Harm

Despite its finding that the host state’s non-physical action (a change in law and administrative proceedings) did not violate the FPS standard, the Tribunal in Lauder v. Czech Republic\(^\text{413}\) stated for the first time in investment


\(^{407}\) Siag v. Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445-48 (June 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf.


\(^{413}\) UNCITRAL, Final Award, 3 (Sept. 3, 2001), https://www.italaw.com/sites/def
arbitration that the standard guaranteed the protection of legal rights through the availability of the host state’s judicial system that endured a proper trial. In doing so, it did not limit the standard to legal rights consequential upon physical harms. As it explained:

The investment treaty created no duty of due diligence on the part of [the Respondent] to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent’s only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law.\textsuperscript{414}

Shortly thereafter, the Tribunal in \textit{CME}\textsuperscript{415} was more affirmative in extending the FPS standard to legal protection. It found that a change in law and administrative proceedings was in violation of the FPS standard. Even in the absence of physical harms, the FPS obligation could be breached if investments were adversely affected by the host state’s regular performance of its functions, notwithstanding its motivation.\textsuperscript{416} The host state deprived the investor of legal protection by reversing its own action that approved the partnership between the investor and its local partner, allowing the latter to terminate the contract upon which the former relied in making its investment.\textsuperscript{417} As it ruled:

The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant’s investment in the Czech Republic. The Media Council’s (possible) motivation to regain control of the operation of the broadcasting after the Media Law had been amended as of January 1, 1996 is irrelevant. The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or devalued.\textsuperscript{418}

Following \textit{CME}, arbitral awards have interpreted the FPS standard as extending to legal protection and security of investment,\textsuperscript{419} that is, against

\textsuperscript{414} Id. ¶ 314 (emphasis added).
\textsuperscript{416} Id. ¶¶ 591-92.
\textsuperscript{417} Id. ¶¶ 107, 119, 132, 474.
\textsuperscript{418} Id. ¶ 613 (emphasis added); see also CME Czech B.V. v. Czech, UNCITRAL, Partial Arbitration Award, 16 (Sept. 11, 2001) (Händl J., dissenting), https://www.italaw.com/sites/default/files/case-documents/ita0179.pdf.
legal harms to investment. A stable and secure legal and commercial environment counts as much, and is as important as, physical security to investors. This is especially the case when “full,” “fully,” or “legal security” is part of the applicable FPS clause. Breaches of investors’ rights are thus covered by the FPS standard. However, that investment is commercially lost or unsuccessful is not a ground for invoking the FPS standard. It has been affirmed that legal protection and security does not have to be associated with physical harms in the first place. The existence of physical harms is not a prerequisite for legal protection and security. In terms of its substance, legal protection and security covers both substantive protection of investments and effective procedural protection in cases of harms against investments. Thus, access to fair and impartial courts—the provision of tools for obtaining redress by the host state (a duty of repression)—in case of nonviolence, such as contractual disputes between investors and private persons or host states, is also within the realm of the FPS standard. By “legal security,” the Tribunal in Siemens v. Argentina defined it as “the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application.” Still, this by no


421. Azurix Corp., ICSID Case No. ARB/01/12, ¶¶ 406-08.


425. See Frontier Petroleum Servs., ¶¶ 263-64, 268.


428. Id. ¶ 303.
means indicates that host states cannot do anything that affects investment. They can only do so with due diligence. If their conduct is beyond reproach, the FPS claim is without merit.\textsuperscript{429}

Shedding more light on a legal and business environment, the Tribunal in \textit{Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania}\textsuperscript{430} accentuated the specificity of instances of harassment as indicating whether the FPS standard is breached. Due diligence is to be exercised in the specific circumstances. As a matter of fact, both the host state and the investor were aware of smuggling, fuel adulteration, and tax evasion.\textsuperscript{431} Still, the investor decided to make its investment under these insecure conditions.\textsuperscript{432} The Tribunal regarded such illegal activities as part of the general business environment and investment conditions that had existed before the making of investment.\textsuperscript{433} Therefore, the activities were not specific to the investor’s investment, and the allegation that they distorted the investment conditions after the making of the investment was incorrect.\textsuperscript{434} The investor could only expect to be protected from specific instances of harassment as opposed to the general insecurity inherent to the investment climate:

General insecurity was also a consequence of weak government structures and institutions at the time of the investment. [The Respondent] was confronted with the general duty to confirm itself as a State and build efficient institutions to combat criminality in general and smuggling, fuel adulteration and tax evasion in particular. This is all the more so since the incriminated activities particularly prejudiced Respondent itself. . . . \textit{While Claimant might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Respondent would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment}.\textsuperscript{435}

As the investor was not injured by such acts and the host state made both national and international attempts to seriously combat them, the FPS standard was not breached under the prevailing circumstances.\textsuperscript{436} Similar to

\textsuperscript{429} Plama Consortium Ltd v. Bulg., ICSID Case No. ARB/03/24, Award, ¶¶ 265-71 (Aug. 27, 2008), \url{https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf}.
\textsuperscript{430} ICSID Case No. ARB/11/24, Award, ¶ 1, at 1 (Mar. 30, 2015), \url{https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf}.
\textsuperscript{431} \textit{Id.} ¶ 823.
\textsuperscript{432} \textit{Id.}
\textsuperscript{433} \textit{Id.}
\textsuperscript{434} \textit{Id.} ¶¶ 822-23.
\textsuperscript{435} \textit{Id.} ¶ 824 (emphasis added).
\textsuperscript{436} \textit{Id.} ¶¶ 825-29.
this separation between generality and specificity of harassment instances is that between “an objective requirement of stability, certainty and foreseeability” and “a subjective standard reduced to the protection of [investors’] specific expectations.”

In addition to the host state’s failure to keep its judicial system available for the investor to bring claims and the host state’s change of the legal framework making the investor susceptible to negative acts by private persons, other possible examples of legal harms include the following:

- the host state’s conferral of immunity from suit for public authorities’ assaults of the investor’s staff
- the host state’s refusal to honor a “cover losses” provision in its written agreement with the investor
- the host state’s change in its tax law interpretation and refusal to reimburse value-added tax (VAT) paid by the investor
- the host state’s failure to apply the regulatory framework and the concession agreement
- the host state’s illicit deprivation of the investor’s access to foreign currency indispensable for the daily operations of its subsidiaries
- measures that deprive investors of or restrict property or that have similar effects
- the host state’s allowance of wrongful application of new legislation by its agency, failure to comply with domestic law, and breach of the provisions of the investment agreement


439. Id. at ¶¶ 153-54.


444. AES Corp. v. Kaz., ICSID Case No. ARB/10/16, Award, ¶¶ 337-39 (Nov. 1, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw8205_0.pdf (noting, however, the Claimants failed to substantiate their FPS claim).
- judicial wrongs (the whole trial and resultant judgments)\textsuperscript{445}
- court decisions that lack independence and impartiality\textsuperscript{446}
- "the initiation of the renegotiation of the Contract [by the host state] for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of [the investor’s] investment"\textsuperscript{447}
- the changes made to the regulatory framework by the host state’s measures adopted to address its crisis, which resulted in the effective dismantlement of the framework and the uncertainty reigning\textsuperscript{448}
- the denial of procedural protection of the investor’s right to recover effective participation in the capital equity, the non-compliance of the host state’s court judgments by other state organs, the inability of the host state’s legal system to correct its error, or the alleged insufficiency of its courts, and the involvement of the host state’s legislative and executive branches in decreasing the impartiality of the host state’s judges or courts\textsuperscript{449}
- the amendments of the law or administrative actions causing negative effects on investment\textsuperscript{450}
- the removal of the management and the seizure of the premises by the host state not associated with use of force but unnecessary and abusive\textsuperscript{451}

From the list above, the amendment of law and the efficiency of the host state’s legal system, including the availability of tools for obtaining redress, have been elaborated with reserve. First, the FPS standard does not completely prevent the host state from exercising its right to legislate or regulate. Even though its legislation or regulation might adversely affect

\begin{itemize}
\item \textsuperscript{446} Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 228 (Jan. 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C45/DC2872_En.pdf.
\item \textsuperscript{450} PSEG Glob. v. Turk., ICSID Case No. ARB/02/5, Award, ¶¶ 257-59 (Jan. 19, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C212/DC630_En.pdf.
\item \textsuperscript{451} Biwater Gauff Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 731 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf.
\end{itemize}
investment, the host state is not prevented from seeking recourse to it, given that its acts are circumstantially reasonable for the purpose of reaching its “objectively rational public policy goals.” 452

To conclude that the right to constant protection and security implies that no change in law that affects the investor’s rights could take place, would be practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.453

Second, for the efficiency of the host state’s legal system, “[t]he question is not whether the host State[‘s] legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security.”454

Making a functioning system of courts and legal redress available is also not without qualification:

[N]ot every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is “wrong” would not automatically lead to state responsibility as long as the courts have acted in good faith and have reached decisions that are reasonably tenable. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated.455

Turning now to acts that have been found not to breach the FPS standard on a case-by-case basis, the list includes the following:

- the host state’s conferral of limited immunity from suit for public authorities’ tortious interference with contractual relations456
- the bailout of the bank where investment was made, which is a permissible preventive measure under the investment treaty and “falls within the reasonable measures expected from a well administered government in similar circumstances”457

452. AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 13.3.2 (Sept. 23, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C114/DC1730_En.pdf
453. Id. ¶ 13.3.5.
- the host state’s violations of the investor’s due process rights (even when the sole beneficiary of the FPS clause is investment not investor)\(^4\)\(^5\)\(^8\)
- the regulation of the sale and export of gold and the elimination of a swap market that did not breach the FET standard\(^4\)\(^5\)\(^9\)
- the declaration of bankruptcy of the company in which the investor invested and other acts and omissions of the bankruptcy judge, the sale of the company’s asset by the bankruptcy trustee, the deletion of the company from the commercial registry, and the failure of the host state’s police and state attorneys to carry out the criminal proceedings against the bankruptcy trustee\(^4\)\(^6\)\(^0\)
- the host state’s refusal to guarantee against a price reduction caused by its instructions\(^4\)\(^6\)\(^1\)
- the host state’s passiveness toward its municipality’s breach of an agreement with the investor (the nonintervention in the legal dispute between the investor and its municipality)\(^4\)\(^6\)\(^2\)
- the amendment and implement of law on rational public policy grounds\(^4\)\(^6\)\(^3\)
- the actions that are merely against domestic law\(^4\)\(^6\)\(^4\)
- the termination of the investment contract by the host state’s agency\(^4\)\(^6\)\(^5\)

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458. Id. ¶ 630.
463. AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶¶ 13.3.5-13.3.6 (Sept. 23, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOB/OnlineAwards/C114/DC1730_En.pdf.
3. Physical and Legal Harms

Last, there are awards in which the FPS standard has clearly been interpreted as covering both physical and legal protection and security, that is, against physical and legal harms (“adverse action”). Although the standard has historically been applied and developed in physical contexts to protect the company’s officials, employees, or installations, it might, as a matter of principle, apply in other contexts, such as “the broader ambit of the legal and political system,” overlapping in content with the FET standard and expropriation. Both physical violence and “the disregard of legal rights” are contrary to the FPS standard. Textually, “full protection and security” alone is enough to cover both physical and legal protection, given that the definition of covered investment also includes intangible assets. There is no rationale for limiting the application of the FPS standard only to physical interferences in the absence of the contracting parties’ restriction to that effect. It covers more generally “the rights of investors.” Any act or measure depriving investment of protection and full security counts; harassment without physical harm or seizure is not out of its reach. As the Tribunal in Siemens noted:

As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the


468. Vanessa Ventures Ltd., ICSID Case No. ARB(AF)/04/6, ¶ 223.


472. Compañía, ICSID Case No. ARB/97/3, ¶¶ 7.4.15, 7.4.17.
obligation to provide full protection and security is wider than “physical” protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.473

When the applicable FPS clause contains “full protection and legal security,” it is possible to interpret “full protection” as covering physical security” and “legal security” as targeting legal harms.474

An illustrative example of a case in which both physical and legal harms were discussed in tandem is Copper Mesa Mining Corp. v. Ecuador.475 In this case, the investor, a concessionaire of mining concessions, suffered from both physical hindrance by a third party and legal impossibility caused by the host state.476 Because of the host state’s failure to ensure the investor’s access to its concessions, which resulted from the anti-miners’ physical blockade of the concessions, to complete its required consultations and do required activities for an environmental impact study (“EIS”), the Tribunal ruled that the host state breached the FPS standard together with the FET standard. This flowed from the facts that (1) the risk from anti-miners in the concession area had long existed and had been evident even before the concessions were granted to the investor and that (2) the host state’s presence in the concession area, including its police, was invariably weak, intermittent, and ineffective.477 Although the local government “could hardly have declared war on its own people, . . . it could not do nothing.”478 Furthermore, the Tribunal found that the host state did exactly what it could not do under the BIT: it worsened the investor’s already difficult situation by making it legally impossible for the investor to carry out its EIS and do other required activities, adopting the Suspension Resolution containing such suspended acts, the violation of which would be criminally penalized. In other words, the host state added legal force to the factual effect of the physical possibility (blockade of the concessions by the anti-miners) the investor had already suffered.479 So doing “was arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners as to make it impossible, both legally and physically, for the [investor] to complete its EIS, with inevitable consequences.”480

473. Siemens A.G., ICSID Case No. ARB/02/8, ¶ 302.
474. Id. ¶ 303.
476. Id. ¶ 6.81.
477. Id. ¶ 6.83.
478. Id.
479. Id. ¶¶ 1.106, 4.300, 6.83, 6.84.
480. Id. ¶ 6.84.
E. Scope Ratione Personae of the Full Protection and Security Standard

As per the question of whom investment is protected and secured from, the answer found in arbitral awards is trifurcated. Persons whose acts have been rendered to violate the FPS standard include state organs and other entities whose acts are attributable to states; third parties; and both state organs and third parties. By the same logic as was used in determining the scope ratione materiae of the FPS standard, these three categories of covered perpetrators are based on circumstances, rulings, and obiter dicta of the cases. In every single case, the host state, of course, is the respondent. However, in defining the categories, we first focus on the primary perpetrators who cause harms to foreign investment, whether it is states themselves, third parties, or both.

1. States

State organs and entities whose acts are attributable to them, can harm investment. Their action, inaction, approval, and omission count. Examples include harms perpetrated by military, security forces, armed contingents of the national guard or police force, courts, commercial registers, government authorities, and employees of state entities.


487. Id. ¶ 452.


489. Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, ¶ 84 (Dec. 8, 2000),
Host states’ executive, legislative, and judicial branches are all capable of causing harms to investment. For instance, it was found that “complaints about lack of due process [against the host state’s courts] in disputes with private parties are better dealt with in the context of the full protection and security standard.”

2. Third Parties

Some tribunals have limited the FPS standard to third parties in general terms or have considered it as covering third parties in accordance with the parties’ argument presented on a case-specific basis. The tribunal in El Paso Energy Co. v. Argentina stated clearly that the FPS standard “is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party.” In Loewen Group, Inc. v. United States, the standard was extended to “the protection of foreign investors from private parties when they act through the judicial organs of the State.” Examples of third parties are community, demonstrators, unpaid and disgruntled employees, “mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force.”


492. ICSID Case No. ARB/03/15, Award, I (Oct. 31, 2011).
493. Id. ¶ 522.
495. Id. ¶ 58.
By their failure to prevent third parties’ actions that need to be prevented, host states fail to accord full security and protection to investment.499

3. States and Third Parties

The FPS standard has also been interpreted as applying equally to states and third parties.500 Emphasis may be placed on how host states respond to harms inflicted either by themselves or third parties. As the Tribunal in Ampal-American Israel Corp. v. Egypt501 elaborated:

The duty imposed by the international standard is one that rests upon the State. However, since it concerns an obligation of diligence, the Tribunal is of the view that the operation of the standard does not depend upon whether the acts that give rise to the damage to the Claimants’ investment are committed by agents of State (which are thus directly attributable to the State) or by third parties. Rather the focus is on the acts or omissions of the State in addressing the unrest that gives rise to the damage.502

Compared with the FET standard, which requires host states to behave fairly and equitably, the FPS standard requires host states to provide “a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs.”503

F. Relation to Other Standards and Principles

In arbitral awards, the FPS standard has been found to be closely related

499. Id.
501. ICSID Case No. ARB/12/11, ¶ 1.
502. Id. ¶ 245 (emphasis added) (footnote omitted).
to or even “integrated” with other standards of treatment,\textsuperscript{504} for example, the FET standard, the MFN treatment standard, the protection against unreasonable or discriminatory measures, expropriation, and the general provision on protection. Whether tribunals would deal with their relation in detail or deny doing so \textit{ab initio} has largely depended on the principle they adopted, that is, the principle of effectiveness or procedural economy, respectively.

\textit{1. Fair and Equitable Treatment}

Besides the customary international law minimum standard of treatment discussed earlier, it is the FET standard that is often cited as relevant to the FPS standard. Before considering how they are related, it is indispensable to have a basic understanding of the former sufficient to allow for a comparative analysis. For this purpose, we adopt the widely accepted and influential explanation put forward in \textit{Técnicas Medioambientales Tecmed, S.A. v. Mexico},\textsuperscript{505} according to which the FET standard was described in the following terms:

The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will governs its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . . . The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor for its investment without the required compensation.\textsuperscript{506}

Similar to our prior discussion on the relation between the FPS standard


\textsuperscript{505} ICSID Case No. ARB (AF)/00/2, Award, 1 (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

\textsuperscript{506} Id. ¶ 154.
and customary international law, awards deliberating the FPS and FET standards are trifurcated. Advocates, opponents, and passivists of the distinction between the FPS standard and the FET standard have their own ways of addressing them.

For advocates, the two standards are distinct. A finding that the FET standard is violated does not necessarily entail a breach of the FPS standard, and vice versa. Thus, it is incumbent upon claimants to separately prove that the FPS standard is also violated after a breach of the FET has been established. To hold otherwise would be contradictory to the principles of treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT"). Rejection of an FET claim does not dictate that of the FPS standard.

In applying BITs where both standards were clearly addressed in separate articles, a tribunal strongly rejected an argument that if the FET standard was breached, the FPS standard was ipso facto violated. Having failed to prove how the respondent’s acts and omissions were in breach of its obligation, the claimant was unsuccessful in making its FPS claim.

Having affirmed that the two standards are not coterminous but complementary, several tribunals rendered each of them applicable to a different perpetrator of harm. Unless the applicable BIT provides otherwise, the FET standard protects investment against a state’s acts, whereas the FPS

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standard protects against those of a third party not attributable to the state in the context of use of force.\textsuperscript{512} The latter does not guarantee investment against unfair and inequitable treatment caused by a third party, including state-owned commercial entities that operate independently in accordance with commercial law and practice.\textsuperscript{513}

Specifically presented with the phrase “fully and completely protected . . . in accordance with the principle of just and equitable treatment in Article 3” in one applicable BIT, the Tribunal in \textit{Suez} considered whether breaches of the FET and FPS standards are necessarily simultaneous.\textsuperscript{514} It found that they were not, saying that:

\begin{quote}
[T]he concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the . . . BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security . . . . [I]t is possible for [the Respondent] to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.\textsuperscript{515}
\end{quote}

The same tribunal ruled that the FET and FPS standards were separate and applicable to different situations. The former applies to business environment and legal security while the latter is aimed at physical harm, punishment, and remedies:

The fact that the . . . BIT employs the fair and equitable treatment standard and the full protections and security standard in two distinct articles and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things. Thus, in interpreting these two standards of investor treatment it is desirable to give effect to that intention by giving the two concepts distinct meanings and fields of application.\textsuperscript{516}


\textsuperscript{513} Oxus Gold, UNCITRAL, Final Award, ¶¶ 353-54.


\textsuperscript{515} Id. ¶ 171.

\textsuperscript{516} Id. ¶ 172.
The Tribunal continued:

In this respect, this Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, while the full protection and security standard primarily seeks to protect investment from physical harm. This said, this latter standard may also include an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor.\(^{517}\)

For opponents, it is unnecessary to distinguish between the FPS and FET standards. A breach of one shows a breach of the other. One tribunal regarded the obligations imposed by the two standards as legally distinct but unnecessary to be distinguished.\(^{518}\) Unfair and inequitable treatment also breaches the FPS standard.\(^{519}\) To exemplify, by undermining the stability of the legal and business framework of the investment through changes in tax law, which were followed by ambiguity and inconsistency, one respondent was found to be in violation of its FET obligation. And such violation simultaneously indicated its failure to comply with the FPS standard: \(^{520}\) “[A] treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.” \(^{521}\) In contrast, measures formalized in laws and regulations that are not in breach of the FET standard do not imply a breach of the FPS standard.\(^{522}\)

Conversely, the host state’s violation of the FPS standard automatically breaches the FET standard.\(^{523}\) When the wording used is “investments . . . shall enjoy . . . protection and full security in accordance with the principle of fair and equitable treatment,” it covers “any act or measure which deprives an investor’s investment of protection and full security, providing . . . the act

\(^{517}\) Id. ¶ 173 (emphasis added).


\(^{521}\) Id. ¶ 187.


or measure also constitutes unfair and inequitable treatment."

The relational explanation suggests the trend toward the integration of standards of treatment, viewing the FET and FPS standards, along with other standards, as integrated. One possible interpretation of the FPS standard that was preceded by the FET standard in the same BIT is that the FET standard is "a more general standard which finds its specific application in, *inter alia*, the duty to provide full protection and security."525

Ultimately, passivists have no need to delve into a discussion of the relation between the FPS and FET standards. They have found it unnecessary to deal with the FPS standard separately after a violation of the FET standard has been established, and vice versa. This is the case regardless of whether the claimant referred to the same facts already giving rise to a breach of the FET standard or different facts specifically alleged as in breach of the FPS standard.526 An arbitral finding that the host state violated the FET standard by adopting the ban on profits and the ban on transfers of portfolio that deprived the claimant of access to the commercial value of its investment disposes of the FPS claim.527 However, passivists have not denied the possible relation between them in *toto*. As observed in *Binder v. Czech Republic*,528 “[i]n so far as the ‘full protection and security’ clause should be considered to provide further protection, it is difficult to see how such protection would go beyond that of the clause on ‘fair and equitable treatment.’”529

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Having found that the respondent violated the FET standard by its "string of measures of coordinated harassment by [its] various institutions," the Tribunal in *Stati v. Kazakhstan* deemed it superfluous to consider the claimant’s argument that the "most constant protection and security" standard was stronger than "full protection and security" and extended to both physical protection and legal security. This is because once the relief was granted on the basis of the FET standard, it was no longer necessary to further consider if the same relief would to be granted on the basis of the FPS standard in the absence of any other relief not entailed by the violation of the FET standard. The tribunal admitted that the FET and FPS standards overlapped. However, to what extent they did so remains arguable.

2. Effectiveness and Procedural Economy

Whether in dealing with the FPS and FET standards separately or in refusing to address them in tandem, tribunals have not lacked for underlying principles. In ruling that the two standards are not coterminous, tribunals have referred to the principle of effectiveness (*la règle de l’effet utile*) to justify their distinction. According to the principle:

[All provisions of the treaty . . . must be supposed to have been intended to have significance and to be necessary to convey the intended meaning; that an interpretation which reduces some part of the text to the status of a pleonasm, or mere surplusage, is prima facie suspect.]

Construing the FPS standard more extensively entails its overlap with the FET standard, depriving the latter of its meaning. So doing is thus

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531. *Id.* ¶ 1.

532. *See id.* ¶ 1233-43.

533. *See id.* ¶ 1254-57.

534. *See Hugh Thirlway, The Law and Procedure of the International Court of Justice: Fifty Years of Jurisprudence* 293 (2013) (explaining that the other meaning of the principle of effectiveness (*la règle de l’efficacité*) is that “the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end, and that an interpretation which would make the text ineffective to achieve the object in view is, again, prima facie suspect. . . . [I]t is however also conveniently defined by the adage ut res magis valeat quam pereat”); James R. Fox, *Dictionary of International and Comparative Law* 97 (3d ed. 2003) (defining *effet utile* as a teleological interpretation, according to which the object and purpose of a treaty, as well as the context thereof, will be considered in interpreting its terms in a way that furthers the object and purpose to make the treaty more effective); see also John P. Grant & J. Craig Barker, *Parry & Grant Encyclopedic Dictionary of International Law* 177 (3d ed. 2009).
inconsistent with the principle of effet utile. To comply with it, the distinction between them is to be maintained.

To deny addressing the FPS and FET standards separately, tribunals’ justification rests on the principle of procedural economy, according to which any unnecessary repetition of proceedings and judicial organs’ waste of energy should be avoided. Similar to other international courts that have also applied the principle, investment tribunals have sought recourse to it in refusing to address the FET standard after establishing a violation of the FPS standard, and vice versa. Their application of the principle may be accompanied by (1) the absence of greater relief sought by claimants relying specifically on the FPS standard and/or (2) the non-impact of tribunals’ further findings on the determination of the resulting damages.

3. Most-Favored-Nation Treatment

If the FPS standard under consideration is in the form of a narrow FPS clause, the most-favored-nation treatment can be invoked. Claimants’ typical argument would be that their narrowly worded FPS clause in the BIT could be broadened by the operation of the MFN clause in the same BIT. As a result, they could avail themselves of the broadly worded FPS clause


538. Luca Mezzetti, Human Rights, Between Supreme Court, Constitutional; Court and Supranational Courts: The Italian Experience, in THE CONVERGENCE OF THE FUNDAMENTAL RIGHTS PROTECTION IN EUROPE 29, 51 (Rainer Arnold ed. 2016).


contained in another BIT. This tends to be the case if tribunals take terminological variations seriously. For instance, “protection and security” could be replaced by “full protection and security.” Also, “adequate protection and security” in one BIT could be replaced by seemingly more favorable “full protection and security” in another BIT by virtue of the MFN clause. After such replacement, however, it does not necessarily mean that there would be a substantive difference in the degree of protection.\footnote{See Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 630 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.}

Similarly, as between full protection and security that is qualified by reference to international law and unqualified full protection and security, it has been found unnecessary to consider whether they are replaceable through the MFN clause. This is because there is no sufficient evidence that their interpretation would be different.\footnote{See Crystallex Int’l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 632, n.862 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.}

4. Protection Against Unreasonable or Discriminatory Measures

Tribunals have either discouraged or encouraged distinguishing between a provision on protection against unreasonable or discriminatory measures and the FPS standard. In arguing against making such a distinction, the Tribunal in \textit{Lauder} referred to its prior finding on prohibition against arbitrary and discriminatory measures as also applying to its consideration of whether the FPS standard was fulfilled.\footnote{Lauder v. Czech, UNCITRAL, Final Award, ¶ 310 (Sept. 3, 2001), https://www.italaw.com/sites/default/files/case-documents/italaw8674.pdf.} For the Tribunal in \textit{Noble Ventures, Inc. v. Romania},\footnote{ICSID Case No. ARB/01/11, Award, ¶ 2, at 9 (Oct. 12, 2005), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.} both the prohibition against arbitrary and discriminatory measures and the FPS standard were equally specific applications of the FET standard.\footnote{See id. ¶ 182.} However, the Tribunal in \textit{Eureko B.V. v. Slovak Republic},\footnote{PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶¶ 1-4, at 1. (Oct. 26, 2010), https://www.italaw.com/sites/default/files/case-documents/italaw0309.pdf.} implied that the two standards were not always the same, noting that “[t]he right to full protection and security subsists for as long as the investment remains in place . . . no matter whether or not the treatment complained of is discriminatory.”\footnote{Id. ¶ 260.}
5. Expropriation

At least four types of relationships between the FPS standard and expropriation have been established by arbitral tribunals: (1) the compliance with the FPS standard is an element of lawful expropriation; (2) the FPS standard need not be addressed if expropriation is confirmed, and vice versa; (3) the FPS standard is breached if expropriation is established; and (4) the FPS standard is not automatically violated by the mere existence of expropriation. Each type of relationship has been explained in the following way.

In some BITs, a host state’s granting of full protection and security is not only for fulfilling its FPS obligation per se but also for determining the lawfulness of its expropriation, because the compliance with the FPS standard, inter alia, is a decisive factor of lawful expropriation. Thus, it could be the case that although a tribunal has found that it had no jurisdiction ratione materiae over an investor’s separate FPS claim, it could consider whether the FPS standard was observed. This is because the tribunal has jurisdiction over an expropriation claim, the consideration of which dictated, in accordance with effet utile, against ignoring whether the FPS standard was breached. Still, doing so is not to allow the investor to revive its FPS claim “through the back door.”

A second type of relationship between the FPS standard and expropriation arises out of the argument that the host state unlawfully expropriated investment and breached the FPS standard. In such a situation, the investor in Vestey Group Ltd. v. Venezuela, for instance, stated that if the tribunal upheld its unlawful expropriation claim “with the natural damages consequences,” it did not need to decide the FPS claim. For the host state, the FPS claim was subsumed in the unlawful expropriation claim “as, once compensation is determined for the taking, ‘there can be, virtually by definition, no loss or damage left to be compensated separately based on a breach of other, lesser standards.’” Based on the investor’s statement and the principle of procedural economy as well as its finding of the host state’s unlawful expropriation, the Tribunal found it unnecessary to address the FPS

551. Id. ¶ 207.
552. Id. ¶ 317 (footnote omitted).
and other claims. Conversely, a finding that the host state violated the FPS standard could render the tribunal’s consideration of an expropriation claim unnecessary.

A third type of relationship arises when unlawful expropriation itself is considered as constituting a breach of the FPS standard. There is a case in which the host state allowed the investors’ investment to be forcibly expropriated regardless of their explicit pleas for police protection and failed to return it to them in accordance with its own courts’ decisions affirming the illegality of the expropriation. Therein, the Tribunal found that the host state violated its obligation to provide full protection.

As for the last type of relationship, the existence of expropriation has been found not to indicate that there had been a breach of the FPS standard.

6. Full Protection and the Full Protection and Security Standard

As noted in Part II, Section E, some investment treaties have two separate full protection clauses. The first is articulated first, at the beginning of the treaty, providing investments with “full protection.” The second clause follows, granting investments “full protection and security.” The Tribunal in Binder expressed doubt as to why the two clauses were included in the same treaty. Regarding their relation, the Tribunal in Toto Costruzioni Generali S.p.A. v. Lebanon opined that the latter strongly overlapped the former. The claim that did not fall within the scope of full protection was also outside of that of full protection and security.

553. Id. ¶318.
556. Id. ¶448.
560. Agreement on the Promotion and Reciprocal Protection of Investments art. 2.3 n. 431, n.272 supp. 292, Italy-Leb., Nov. 19, 1999 (noting that “[e]ach Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments . . . [i]nvestments by investors of either
V. Overall Analysis and Recommendations

We start this part with our factor analysis, correlating past decisions that addressed the FPS standard, mainly in the FCN and BITs contexts, with conditions that influenced them. Then we consider whether such contexts have changed significantly and whether they have affected an interpretation and application of the FPS standard. Next, we will predict which international law participants should or will act. Our survey of different decision options and our scrutiny of the prospective aggregate value consequences of each act in terms of the interpretation and application of the FPS standard allow us to select and adjust specific recommendations. Finally, we will propose alternatives and recommendations on how the FPS standard should be understood. Salient and problematic issues will be analyzed and accompanied by preferred policy alternatives and recommendations. They are related to the genesis of the FPS standard, terminological variations, covered harms, covered perpetrators, due diligence, and the relation of the FPS standard to other standards.

A. The Genesis of the Full Protection and Security Standard

Our historical review leads us to the conclusion that the FPS standard existed earlier than previously estimated in mainstream literature on the topic. Early civilizations were antagonistic to foreigners, viewing them unfavorably as outsiders, enemies, and, sometimes, non-human beings, bearing no rights or legal capacity. This antagonism arose from physical and psychological causes, such as their population density, natural conditions, racial distinction, moral and intellectual capacity, religious motives, culture, and national exclusivity. However, political and economic necessities were among the factors that ameliorated the treatment of foreigners and set the trend toward internationalism, encouraging “an increasingly liberal grant of individual safe-conducts.”

Thus, in ancient political and economic contexts, the seed of the FPS standard was planted no later than during the making of treaties in ancient
Greece. It then germinated for millennia, having grown steadily in various kinds of treaties, especially treaties of commerce. Next, there emerged in the customary international law of aliens a general duty to provide foreign nationals with full protection and security. In general, this lengthy process is accurately described by Schwarzenberger in the following way:

[T]he detailed clauses, in which provision was made for the protection of the person, dignity, life and property of foreign merchants gradually coalesced into a wider rule. Originally, on a treaty basis and, subsequently, under international customary law, it came to cover all nationals abroad and be known as the minimum standard of international law on the treatment of foreign nationals.

In particular, in the field of international investment law, one example of an application of such customary international law was described as follows:

It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens . . . . If such acts are committed with the active assistance of state-organs a breach of international law occurs.

The FPS standard has continued to make its way into modern treaties of FCN and investment treaties as a treaty provision either with or without reference to international law. From this, it can be said that the FPS standard has overlapped with the customary international law minimum standard of treatment. Based on our historical findings, we conclude that it is not true that treaties protecting aliens and their property were only recently developed. Nor is it true that the FPS standard had its origin in post-war bilateral treaties.

To be more specific about its early appearance, while it has been asserted elsewhere that “the FPS standard was seen as early as the 1833 Friendship, Commerce and Navigation Treaty between the United States and Chile,”

565. Id. at 67 (describing the lengthy process).
566. Amco Asia Corp. v. Indon., ICSID Case No ARB/81/1, Award, ¶ 172 (Nov. 20, 1984), 1 ICSID Rep. 413.
567. VANDEVELDE, supra note 149, at 226, 243.
568. But see FRANCK, supra note 187, at 457 (arguing that the treaties protecting aliens and their property originated later in time).
archival research indicates otherwise. The preceding century had already witnessed the FPS standard being included in treaties of commerce and navigation that were concluded in the latter part of the eighteenth century. One example is the Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and the United States of 1794, Article XIV of which provided merchants and traders on each side with "the most complete protection and security for their commerce."

The identical phrase appeared in Article I of A Convention to Regulate the Commerce between the Territories of the United States and of his Britannick Majesty of 1815 and Article III of A Treaty of Amity, Commerce, and Navigation between the United States of America and the United Mexican States of 1831. Similar phrases—"the most complete security and protection for the transaction of their business" and "the same security and protection as the natives of the country wherein they reside"—were included in Article I of the Treaty of Friendship and Commerce between the United States and Sweden and Norway of 1816 and Article I of the treaty of 1828 between the United States and Prussia, respectively. In brief, our historical account showing the existence of ancient treaties and the foregoing 1794 treaty run counter to the mainstream position that the root of the FPS standard can be traced back to the nineteenth and early twentieth centuries.

B. Terminological Variations

Literally, it can be seen that "protection and security," "full protection and security," "adequate protection and security," "constant protection and security," "most constant protection and security," among others, are not identical and seems to carry unequal weight. On the face of it, such different formulations intuitively suggest difference in degree of protection and security provided. However, they do not necessarily produce significantly different results. This is because the quintessence of the terms used remains "protection and security," which is, as we will see shortly, enough to protect and secure investments. Greater emphasis should be place on "protection and security" rather than their positive adjectives, which should be

575. 3 HACKWORTH, supra note 137, at 571.
576. See SALACUSE, supra note 4, at 231; DOLZER & SCHREUER, supra note 17, at 161; MONTT, supra note 17, at 69-70, 302 n.40; Van de Velde, supra note 17, at 204.
interpreted as enhancing, not reducing, the protection and security provided by the FPS standard. Alternatively, if various formulations of FPS clauses were drafted in a way that really lead to their different meaning, the MFN clause in the same BITs could properly modify the scope of the FPS standard by importing a more favorable FPS clause from another BIT. For instance, if the FPS clause in BIT A is clearly limited to physical harms, it can be extended to legal harms that are covered by the FPS clause in BIT B through the operation of the MFN clause in BIT A.

As for the beneficiary of the FPS standard or the object of protection, the ordinary meaning of “investment” and “investor” should be maintained in accordance with the nature of international investment protection.

When “investment” has been designated as the sole bearer of the right to full protection and security, investors should not benefit therefrom especially in relation to their personal or human aspects unless harms to them also adversely affect their investment. Thus, it is right to hold that “measures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of standard of protection [granted only to its investment].”577 In this scenario, it is still possible and consistent with legal methodology for investors to enjoy protection and security by invoking customary international law or to invoke the MFN clause to avail themselves of personal protection. Had host states intended to extend treaty-based full protection and security to investors, they could easily have done so by explicitly referring to both “investors and their investments,” as is the case with some BITs.578

When “investor” has been made the beneficiary of the FPS standard, it is by no means manifestly absurd or unreasonable to give protection to their investments. This is nothing more than protecting investors in accordance with the nature of things, giving them protection of life, liberty, and property (investment), as the great “Lockean trinity” calls for. Still, for the sake of clarity, the parties to BITs could be more specific in nominating the beneficiary of the FPS standard.

C. Covered Harms

It perhaps goes without saying that drafting FPS clauses as clearly as possible is highly recommended. This recommendation is blunt but practical. Parties to investment treaties can limit the FPS standard to either

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578. See, e.g., Gemplus S.A. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-12 (June 16, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C41/DC2112_En.pdf.
a physical or legal aspect of protection and security. Otherwise, the FPS standard should be interpreted as applying to both physical and legal harms as much as the nature of covered investments and/or investors permits them to be so protected and secured. Measures that destabilize investments’ legal and business environments count as much as measures that physically harm them. In our view, legal protection and security can be either consequential upon or independent of physical harms; it is not limited only to preventing or prosecuting acts that threaten or impair the physical safety of investments. This remains our position even in cases where “protection and security” alone is used in the applicable FPS clause. Our position is based on (1) the ordinary meaning of “protection” and “security,” their context, and the object and purpose of investment treaties; (2) a historical analysis of the FPS standard; and (3) past domestic and international judicial decisions that rationally found the FPS standard applicable beyond physical harms.

Regarding the ordinary meanings of “protection” and “security,” the terms adopted to express the intention of the parties to investment treaties, each is too broad to exclusively mean physical harms. The ordinary meaning of “protection” is “[t]he action of protecting, or the state of being protected.”

For “security,” its ordinary meaning is “[t]he state of being free from danger or threat.” “Protecting” and “being protected” are not qualified by “physically” or “legally.” Likewise, neither “danger” nor “threat” is qualified by “physical” or “legal.” Thus, there is no compelling reason to interpret the FPS standard to cover only one side of protection and security. Even without seeking recourse to the evolutionary interpretation of treaties, according to which the meaning of treaty terms can evolve over times, our interpretation is sustained. A fortiori, if brought into play, such interpretation can concretize our position, given the velocity of changes in the international investment law context.

Considering the ordinary meaning of “protection” and “security” in their context and in light of the object and purpose of investment treaties confirms our position. As part of their context, the definition of covered investments includes both tangible and intangible assets. Protection and security granted to them have to correspond to their nature. It is difficult to discern how intangible investments, such as claims to money and intellectual properties, given their intangibility, can enjoy physical protection and security. The protection and security that their intangibility allows them to receive is a


legal one. This is in line with the argument that the FPS standard should apply to digital assets, safeguarding investors in the twenty-first century against modern security threats.582

Of course, we are aware that other provisions in the same investment treaties that provide for other standards of treatment, especially the FET standard, are also part of the context as much as is the definition of investments. And we do not suggest that one context outweighs another or should receive more attention; they all should be considered.583 In light of the prototypical object and purpose of investment treaties usually found in their preamble, to mutually promote or encourage and protect foreign investment, the ordinarily broad meaning of “protection” and “security” in their context are at least not barred or at most affirmed. When the object and purpose of investment treaties is to create and maintain favorable conditions for investments, our position remains the same, i.e., the FPS standard should cover legal protection. This is because, as Professor Reisman rightly elaborates, such conditions “are comprised of more than natural phenomena, such as climate, ecology, geography, and natural and human resources. Critically, ‘favorable conditions’ must also encompass appropriate internal legal, administrative, and regulatory arrangements, conducted through procedures designed to ensure that the arrangements are applied as they are supposed to be applied.”584 Thus, while it has been held elsewhere that including within the FPS standard legal protection cannot be induced by the wording of the treaty but “a distinct philosophy of property protection,”585 we believe otherwise. It is the wording of the treaties read in its context considering the object and purpose of the treaties that can properly produce such inclusion. They do not leave the meaning of the FPS standard ambiguous or obscure. Nor do they lead to a result that is manifestly absurd or unreasonable. Thus, there is no need to seek recourse to supplementary means of interpretation, considering the preparatory work of investment treaties and the circumstances of their conclusion.

Second, contrary to the traditional view that the FPS standard has exclusively applied to physical security, our research shows that the FPS standard has also related to legal protection since its origin in the treaties of ancient Greece. It has not been limited to physical harms to persons and

582. See Collins, supra note 570, at 225.
583. But see Lorz, supra note 10, at 770 (referring only to other standards of protection when explaining the context of a treaty).
property of foreigners. Criticizing other tribunals for failing to take a historical analysis of the concept of the FPS standard into account, the Tribunal in *Suez* itself did what it blamed others for doing. Relying on its incomplete historical analysis of the FPS standard, the Tribunal ruled that the standard applies only to physical harms and, at most, to legal redress consequential upon such harms.\(^{586}\) Had it thoroughly surveyed the FPS concept, it could have seen that the FPS standard has also been tied to legal protection. Notably, foreigners’ access to local courts in general is among the various kinds of legal protection that have also been part of the concept of the FPS standard at the outset. Others falling well within the same realm include their right to be heard by their own foreign judges, to freedom of speech, movement, and religion, and to safe communication.

Ancient Rome’s *jus gentium* serves well as evidence of its openness to foreigners, allowing them to enjoy both rights in *rem* and in *personam*. Foreigners could claim the heritage of their forerunners located in another land upon a payment of tax. Legal protection in ancient political and commercial contexts was not necessarily a consequence of physical harms.\(^{587}\) In the subsequent political and commercial contexts where FCN treaties incidentally protected investment, legal protection was already beyond doubt. An important piece of historical evidence that the FPS standard was understood as covering legal protection can be found in An Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation of 1832 between the United States and Chile of 1833. Therein, the parties clarified the meaning of the FPS clause in Article X of the Treaty of Peace, Amity, Commerce and Navigation of 1832 in Article II as follows:

> It being agreed by the [tenth] article of the aforesaid treaty, that the citizens of the United States of America, personally or by their agents, shall have the right of being present at the decisions and sentences of the tribunals, *in all cases which may concern them*, and at the examination of witnesses and declarations that may be taken in their trials...\(^{588}\)

Thus, we do not subscribe to the view that the historical origins of the FPS standard support limiting its application only to physical harms.\(^{589}\) In the present context of international investment in which investment treaties


\(^{587}\) See generally supra Part II.A and B.

\(^{588}\) An Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation, supra note 125, art. 2.

\(^{589}\) But see VANDEVELDE, supra note 149, at 253.
purposely protect investment, legal protection is even more secured and can be wider in its scope.

Third, our position that the FPS standard applies to both physical and legal protection finds support from domestic and international judicial decisions. According to the U.S. Supreme Court’s judgment interpreting the FPS standard in U.S. treaties, protection and security includes legal entitlement and “all rights of actions for himself or his personal representatives to safeguard the protection, and security.”590 Turning to the ICJ, never has it affirmatively ruled that the FPS standard is limited exclusively to physical harms. In its first case, the ICJ simply decided the FPS claim in the context of physical harms as presented by the parties, giving no ruling in general terms that the FPS standard was reserved for physical harms only.591 In its second case, a chamber of the Court was also presented with a non-physical harm, that is, the delay in the local dispute settlement procedure. It did not reject at the outset that such delay was not within the scope of the FPS standard. Instead, having considered all circumstances concerned, it implied that the application of the FPS standard was not limited only to physical harms.592 Had it been limited strictly to physical harms, the chamber could have stated clearly and dismissed the claim at the beginning without considering the circumstances concerned.593 Our next judicial support for applying the FPS standard to legal protection is derived from the RSCT. In its most relevant case, its chamber included both violence and various types of harassment in the scope thereof.594

Given the number and outcome of investment law cases dealing with the FPS standard, it may no longer be true that interpreting FPS clauses to protect more specifically the physical integrity of investments against interference by use of force is the prevailing interpretation.595 Although it might be too early to tell in 2007 whether extending the FPS standard to legal protection would form a new pattern in investor-state dispute settlement practice, such a pattern is evident now. As presented earlier, there are many arbitral awards

that applied the FPS standard to legal protection and security.\textsuperscript{596}

While it has been said elsewhere that the seminal and earliest case illustrative of an application of the FPS standard to legal protection and security is \textit{CME},\textsuperscript{597} our research suggests otherwise. The first case supporting such an application of the FPS standard is \textit{Lauder}, which was decided days earlier. Although the facts presented in both cases are the same, their tribunals reached different conclusions. The Tribunal in \textit{Lauder}, though admitting that legal harms in principle could trigger the operation of the FPS standard, found that the facts referred to did not constitute legal harms and thus that the FPS standard was not breached. The Tribunal in \textit{CME} held the same view regarding the application of the FPS standard to legal harms but found that such harms existed and adversely affected the investment to the extent that it violated the FPS standard. Thus, it is misleading to read the two cases as contradictory and representing divergent interpretations of the FPS standard, as did the Tribunal in \textit{Suez}\textsuperscript{598} and the Respondent in \textit{Sempra Energy International v. Argentine Republic}.\textsuperscript{599}

Actually, they shared the same view about the applicability of the FPS standard to legal protection. But it was their different assessments of the facts that led them to draw different conclusions. Although legal acts, such as law amendment and administrative proceedings, are within the prospective reach of the FPS standard, only those deemed to be detrimental to investments may breach the standard.

In short, it is submitted that the FPS standard covers both physical and legal harms. And by legal harms, it is not limited to the unavailability of a judicial system for investors to bring their claims. It includes other non-physical acts that adversely affect investments in the prevailing circumstances where host states fail to exercise due diligence. We do not regard this interpretation as outlining the scope of the FPS standard too broadly.\textsuperscript{600}

\textbf{D. Covered Perpetrators}

To avoid ambiguity, it might be advisable to limit an application of the

\textsuperscript{596} \textit{See supra} Part IV.D.2.

\textsuperscript{597} Parra, \textit{supra} note 181, at 393.


\textsuperscript{599} ICSID Case No. ARB/02/16, \\textit{Award}, \textit{¶} 4, at 3 (Sept. 28, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8/DC694 En.pdf; \textit{see id. ¶} 322.

\textsuperscript{600} \textit{But see} Foster, \textit{supra} note 105, at 1149-50.
FPS standard only to harms perpetrated by third parties. However, so doing is not supported by the ordinary meanings of the terms “protection” and “security.” As discussed earlier, the meanings are not limited to physical or legal aspects of protection and security. Neither are they limited to specific perpetrators of harms. Thus, our position here is that the FPS standard protects and secures investments from both state organs and third parties regardless of whether they act individually or collectively.

Limiting the FPS standard to either state organs or third parties also lacks support from our historical analysis. Since the early history of the FPS standard in the period of ancient Greece, foreigners have been protected against both territorial states’ and their people’s actions. On the one hand, states promised foreigners protection and security of persons and property against their own authorities. On the other hand, androlepsia and private reprisals serve well as historical examples of harms that were perpetrated by local people on foreigners’ fellows and property but were suppressed by states.601 Our position is consistent with the 1962 OECD Draft Convention on the Protection of Foreign Property. According to its notes and comments, the FPS standard covers “actions by public authorities as well as others.”602 In reality, there are cases in which harms caused by states and by third parties were presented together as previously demonstrated.603

E. Due Diligence

The FPS standard requires host states to exercise due diligence regarding their own acts and acts by third parties rather than imposing strict liability upon them.604 Regardless of whether such acts cause physical or legal harms, we propose that due diligence is still the standard of liability.605 We do not recommend that the liability standard should be distinguished from the beginning, that is to say, strict liability in case of harms perpetrated by state organs and due diligence in case of harms inflicted by third parties.606 It should not be the case that host states bear strict liability because of the mere fact that harms are caused by their own organs. Although host states must abstain from conducts harmful to investments, their failure to do so should not automatically entail strict liability.607 The statement that 4he acts of state

601. See supra Part II.A.
602. OECD, supra note 184, at 9.
603. See supra Part IV.D.3.
604. Schreuer, supra note 3, at 354.
605. But see Brabandere, supra note 240, at 345-46 (noting that due diligence is not applicable to the FPS standard in relation to legal protection and security).
606. But see Lorz, supra note 10, at 777-78.
607. But see id. at 777.
organs that injure investment are wrongful as such without considering whether they exercise due diligence\textsuperscript{608} is unconvincing on its own terms and not even consistent with \textit{Neer}. If such organs exercise due diligence but cannot avoid causing harms to investment, there should be no breach of the FPS standard.\textsuperscript{609} For example, if host states use force to suppress armed demonstrators who occupy the investment site as a shelter or occupy a base near the investment site, their exercise of due diligence in the prevailing circumstance should prevent them from breaching the FPS standard, even if the investment site is physically impaired. And investors should not be able to claim that the FPS standard is breached. Absence of due diligence is a contextual conclusion based on an assessment of what is “due” in the actual context. States can fail the due diligence test without intending to cause harms.

As to the issue of objectivity or subjectivity of due diligence, it is proposed that a modified objective standard of due diligence should take precedence. In so doing, we fully understand that it brings due diligence closer to subjectivity and, more importantly, reality in the international community. Although a full consideration of host states’ varying development, stability, and other resources as relevant for determining whether they have exercised due diligence\textsuperscript{610} could run the risk of violating the minimum standard of treatment and deprive the FPS standard of its value, we still support a modified objective standard if it is not below the threshold of the minimum standard of international law. Such a threshold can be raised but cannot be lowered by the national treatment standard and the most-favored-nation treatment standard, whichever standard or combination of standards is likely to produce the most beneficial results for investments.\textsuperscript{611} To elaborate, only if host states exercise extra due diligence in dealing with their own nationals’ investments, foreign investors’ investments have to be dealt with in the same manner to ensure inland parity. In cases where investments of investors having one foreign nationality receive extra due diligence from host states, those of other investors having a different foreign nationality will receive that due diligence to ensure foreign parity. Thus, it does not seem correct to assume in general terms that the FPS standard provides no more protection than the national treatment and the most-favored-nation treatment.\textsuperscript{612} This assumption is only true if the treatment accorded by both standards is not

\textsuperscript{608} Brabandere, \textit{supra} note 240, at 324, 333-34, 337, 360.

\textsuperscript{609} \textit{But see id.} at 345-46.

\textsuperscript{610} \textit{NEWCOMBE \& PARADELL, supra} note 240, at 310.

\textsuperscript{611} See Schwarzenberger, \textit{supra} note 3, at 80.

\textsuperscript{612} \textit{But see DOLZER \& SCHREUER, supra} note 17, at 162 (citing LESI \textit{v. Alg.}, Award, ¶ 174 (Nov. 12, 2008).
below the minimum standard of international law.

At this point, we would like to confirm our position that due diligence applies to cases of both physical and legal harms. Then, in determining whether host states exercise due diligence, a modified objective standard is to be considered. For us, it is not convincing to argue that host states’ varying development and stability should be considered only in case of physical protection but not in case of legal protection, including, but not limited to, host states’ failure to keep its judicial system available and effective for investors to bring their claims. Even assuming (quod non) that legal protection is not concerned with physical infrastructure that some host states might lack, legal protection is obviously related to legal resources that they might not have in their administration of justice, such as sufficiently trained judges and other officials as well as instrumentalities for carriage of justice. Physical harms might be more visible than legal harms, but both types of harms could equally be inflicted by lack of resources. Physical and legal infrastructures are equally in need of resources to build them. From this, there is no compelling reason to consider host states’ development, stability, and resources only in the physical context but disregard them in the legal context.613

Only in a hypothetical case in which it had been possible to build up judicial systems in the abstract at no cost might it be true that “[d]ue process standards like the right to be heard or to have an independent and impartial tribunal should not depend on the economic or political situation prevailing in a country.”614 On this point, we are in agreement with Garro that the FPS obligation “should be measured in accordance with the range of responses most realistic in light of the host country’s judicial and legal infrastructure” and “[t]here should, then, be a standard of due diligence on the part of the investor - a standard which . . . is sensitive to the resources available to the host country to provide full protection and security.”615

F. Relation to Customary International Law and Fair and Equitable Treatment

For the sake of certainty, we recommend that the parties to investment treaties attempt to reduce the ambiguity surrounding the FPS standard as early in their treaty-making processes as possible. This is because, to a certain degree, the relation between the FPS standard and others depends on

613. But see Lorz, supra note 10, at 780; Brabandere, supra note 240, at 325 (citing Riccardo Pisillo-Mazzeschi, The Due Diligence Rule and the Nature of the International Responsibility of States, 35 GER. Y.B. INT’L L. 9 (1992)).
614. Kriebaum, supra note 240, at 403.
the exact wording used to describe them. At the outset, the parties can either distinguish the FPS standard from the customary international law minimum standard or regard it and the FET standard as part of the minimum standard.\textsuperscript{616} Then, they can elaborate the scope of the FPS standard and the FET standard. For instance, they can determine that the former only provides investments with physical protection, together with legal remedies for physical harms, in accordance with the principle of due diligence while the latter grants them legal protection pursuant to the principle of due process.

In the absence of the foregoing attempts, our position is that the treaty-based FPS standard as such is independent of but still related to customary international law and the FET standard. Let us start with customary international law. As earlier noted in Part III.A.2, considerable debate has surrounded the issue of whether the FPS standard merely restates customary international law or is an autonomous standard additive to it.\textsuperscript{617} From a textual perspective, we concur with Schreuer that it is hardly understandable why the parties to the treaty would refer to “full protection and security” in expressing their intention of granting the “minimum standard under customary international law,” especially when the same treaty also contains another reference to general international law.\textsuperscript{618}

Based on our earlier conclusion that ancient treaty provisions concerning protection and security of aliens paved the way for the customary international law regarding their protection and security, we will see next how today, the FPS standard and such customary international law are related to each other. Generally, treaties can contribute to the formation of customary international law. It can confirm and/or modify preexisting customary international law that is not part of \textit{jus cogens}. When the intention of the parties is expressed in the form of treaty, it is the text of the treaty that primarily declares such an intention. Even though we conclude that the FPS standard overlaps with customary international law, the standard can have its own content as conveyed by the language used to express it.

Of course, customary international law as referred to in the same treaty or as “relevant rules of international law applicable in the relations between the parties”\textsuperscript{619} shall be taken into account in interpreting the FPS standard. Thus,

\textsuperscript{616} E.g., Catharine Titi, \textit{Full Protection and Security, Arbitrary or Discriminatory Treatment and the Invisible EU Model BIT}, 15 \textit{J. WORLD INV. & TRADE} 534, 544, 550 (2014) (supporting an unqualified full protection and security provision that is not linked to the minimum international standard in the EU investment treaty model).
\textsuperscript{617} See \textit{supra} Part III.A.2.
\textsuperscript{618} Schreuer, \textit{supra} note 3, at 364.
\textsuperscript{619} VCLT art. 31(3), \textit{supra} note 6.
we view customary international law as a threshold not a ceiling. In our view, it should not matter what the FPS standard was intended by states to mean. Neither should it decide whether the FPS clause at issue was intended to confirm or modify preexisting customary international law. Our attention does not go to whether the treaty “intended, merely, to consolidate the preexisting rules of international law, or, on the contrary, it tended to innovate by imposing on the host state a higher standard of international responsibility.”

What deserves our attention is the meaning and content of the FPS standard conveyed by its texts. As our support, we recall the following view of the ICJ regarding treaty interpretation: “the attitude of the Court to a text is not, primarily, to ask itself what was this text intended to mean (still less of course what ought it to mean, or to be made to mean), but what does it in fact mean on its actual wording?”

Turning to the FET standard, we opine that its textual appearance distinguishes it from the FPS standard. “Full protection and security” and “fair and equitable treatment” should not be interpreted as having the same content, especially given that they were listed separately. Still, our finding indicates that the FET standard overlaps with the FPS standard, but it is not yet replaced by the FPS standard in its entirety. Both standards tighten the security of foreign investment and are protective of commercial and business activities of investors. Given that the specific applications of the FET standard have been confirmed in situations concerning stability, transparency, investors’ legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith, and freedom from coercion and harassment, the overlap between the two standards is evident. This is especially the case when the FPS standard applies to legal harms caused by state organs. In other words, where there are legal harms caused by state organs that breach the FPS standard, there could be a violation of the FET standard as well. But legal harms caused by third parties—for example, domestic private cartels against foreign investment—that are not diligently responded to by host states should constitute a breach of the FPS standard. In this sense, while the FPS standard protects investment against physical and legal harms caused by state organs and by third parties, the FET standard protects investment against legal


623. DOLZER & SCHREUER, supra note 17, at 145-60.
harms caused only by state organs. Thus, it is arguable whether it is correct to maintain that the FPS standard is more restrictive in scope than the FET standard, especially from a historical perspective. Bearing in mind the relation between the FPS and FET standards, it is understandable if tribunals wish to avoid dealing with both standards in tandem by referring to the principle of procedural economy. Still, if they insist on addressing them both, they might be able to do so consistently with the principle of effectiveness. To find that the FPS and FET standards partly overlap is not the same as to deprive the FET standard of its meaning entirely.

VI. CONCLUSION

The current health of the international investment law jurisprudence on the FPS standard is not flawless—as is usually the case with jurisprudence on other standards. Neither is it irreversibly frail. The FPS standard is notably marked by a sharp division between two extremes: on one side, it has been limited to physical harms; on the other side, it has been extended to legal harms. Incentivized thereby, this Article strives to propose a preferred interpretation and application of the FPS standard.

Starting with its historical development, we find that the seed of the FPS standard dates back to ancient Greece, if not earlier. Initially, the concept of full protection and security has already been tied to both physical and legal protection and security for foreigners. Scholarly debates and judicial decisions at both the domestic and international levels lend support for our position. Then, we turn to international investment tribunals and find both proponents and opponents of the position. Having correlated past decisions with conditions that affected them, and having considered that the context of those conditions has changed materially, we conclude that an interpretation of the FPS standard to cover legal harms is preferred. In prior political and commercial contexts surrounding the making of FCN treaties, for example, foreign investment was incidentally protected. Even with such incidental protection, legal protection was granted. Thus, in the context of contemporary international investment, in which investment treaties have been concluded to specifically protect investment, it is even more justifiable to interpret “protection and security” in accordance with the VCLT rules to cover both physical and legal harms caused by state organs and third parties, either acting individually or collectively.

Regarding the relation between the treaty-based FPS standard and customary international law, the former can be more far-reaching and has the latter as its threshold. As a lex specialis, its scope is not entirely determined

624. But see Montt, supra note 17, at 302 n.40.
by customary international law as a lex generalis. It can go beyond physical and some legal protection already embedded in customary international law. Still, the observation of the treaty-based FPS standard is measured by due diligence, as is the case with the customary international law duty to provide aliens with full protection and security. In our view, due diligence is to be determined in accordance with a modified objective standard, considering host states’ level of development, capacity, stability, and resources. Although the FPS standard is a distinct treaty standard, it overlaps with other standards, especially with the FET standard when the FPS standard is considered in the context of legal harms. Whether to deal with such overlap or to ignore it is an open issue and a matter of policy that is not without supporting principles, that is, the principles of effectiveness and procedural economy, respectively. Another issue that can be further debated is whether we should put a limit on legal harms covered by the FPS standard. For instance, the categorization of legal harms that should be within the scope of either the FPS standard or the FET standard can be called into question.