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Full Protection and Security Standard: The Interpretation Challenge in Investment Treaty Arbitration

DHRUVEE PATEL[1]

ABSTRACT

The Full Protection and Security Standard has gained significant importance in International Investment Law as majority of the treaties have now incorporated Protection and Security clause in their investment agreements. The paper studies the evolution of the standard from the medieval period to the modern times, exhibiting the numerous challenges that emerged because of the diversified views of the Tribunals in interpreting the standard. Some Tribunals hold that the state's responsibility is restricted to providing only physical protection towards the foreign investor and their investment, while others have held that it extends to legal and economic standards. Some contend that the protection and security standard is similar to Fair and Equitable Standard, while the others differentiate the two. Also, a few have insisted that the standard be limited to the minimum standard of protection as defined under the Customary International Law, while others consider it independent and beyond Customary International Law. The Tribunals have divergent views on whether the standard of liability should be strict liability or the due diligence standard. This uncertainty caused due to the inconsistent approach of Arbitral Tribunals has created persistent controversies in the international investment law. The paper highlights the complications and attempts at providing suggestions for reducing the extensive gap in analysis of the standard.

Keywords: *"protection and security", "investment", "minimum standard", "due diligence", "capacity".*

I. INTRODUCTION

There has been a long-standing debate for reforming the Investment State Dispute Settlement mechanism, because of the complications due to disparity among the arbitral tribunals, treaty-picking under Most Favoured Nations ["MFN"], partial and bias approach of tribunals and the inconsistent Fair and Equitable Treatment ["FET"]. In recent times, the standard of Full

[1] Author is a student at O. P. Jindal Global University, India.

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Protection and Security ["FPS"] has emanated as one of the most controversial debates in International Investment Law.

The FPS standard lays an obligation on the host state:

a) to protect the investors and their investments from the acts of the private parties, for instance, civil unrest cases, and also, protects against the actions or inactions of the State's authorities, organs or agents; and

b) to not harm the investors or their investments by performing such actions that are attributable to the State.

Majority of the investment treaties now include the FPS provision.[2] It is also referred in different forms like 'constant protection and security', 'continuous protection and security', 'protection and security', 'physical protection and security'. The FPS standard assures the investors that they are protected at all times within the territory of the host state against all illegitimate or objectionable actions on behalf of the State, which may violate the rights or legal expectations of the investor. All FPS provisions were earlier treated to protect the investor's investments within the territory of the host state against all physical violence and breach. It was however, no later than the controversies emerged - in defining the standard, application of due diligence standard, establishing a threshold for the obligation - within the FPS standard.

Part I of the paper comprises of the evolution of FPS standard in the Customary International Law ["CIL"] and Treaties. Part II discusses the standard of due diligence, by studying its development and suggests for formulation of clear parameters. Part III interprets the FPS standard, if it is restricted to only physical breaches or extends to legal and economic breaches. Part IV draws the comparison between the FET and FPS standards. Lastly, Part V concludes by giving recommendations and attached caveats.

II. Full Protection and Security under Customary International Law and Treaties

In order to contemplate the evolution of the obligation of FPS, it is pertinent to know if the Tribunals apply the standard of CIL or of Multilateral and Bilateral Treaties and additionally, to understand if the Tribunals rely directly or indirectly, on the CIL while practicing treaty standards.

[2] Christoph Schreuer, *Full Protection and Security*, Journal of International Dispute Settlement, 1 (2010).

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(A) The Birth and Evolution of FPS in Customary International Law

The origin of the Protection and Security Obligation is traced back to the 18th century. The Book written by Christian Wolff, a German Professor, provided that the obligation of the host state towards the aliens is to protect them from injuries, and security must be afforded in their jurisdiction.[3] It is relevant to mention here that the use of words like injuries, losses and wrongs, by Wolff imply that the State's obligation under FPS extends to the standard of non-physical protection. Another eminent scholar, Vattel based his arguments on the similar grounds, presenting the standard of relative treatment which provides that the State's responsibility to protect the aliens is measured to the protection guaranteed to State's own subjects.[4] Vattel also rooted Woff's stand on the obligation of Protection and Security being extended to more than a physical standard, and further states that this obligation should be extended to alien properties.

The important developments of the 19th century as given by scholars have expanded the limits of protection and security by including within the ambit, principles of access to court, just and equitable treatment by state authorities and equal protection of law.[5] Additionally, the international standards began to be referred to, rather than the national standards. Since the 20th century, reports are formed on state responsibility by International Law Commission ["ILC"].[6] The Tribunals have in parallel practiced the protection and security obligation. They determined that both host states and its organs are responsible for the FPS obligation. The obligation gives rise to two connotations - one, where the state should refrain from enacting activities that may infringe the security of aliens and other, where the state has a duty of protecting the aliens in its territory.

(B) FPS under Multilateral Treaties and Bilateral Investment Treaties ["BIT"]

Majority of the investments incorporate FPS clause in treaties. Some of the examples of multilateral treaty having in-built FPS clause are the Energy Charter Treaty ["ECT"] and NAFTA.

Article 10 of the ECT states that:

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[3] Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), *reprinted in 2* The Classics of International Law 9 (James Brown Scott ed., Joseph H. Drake trans., 1934).
[4] Emmerich De Vattel, *The Law of Nations or The Principles of Natural Law* (1758), reprinted in 3 The Classics Of International Law 145 (James Brown Scott ed., Charles G. Fenwick trans., 1916).
[5] George K. Foster, *Recovering "Protection and Security": The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vand. J. Transnat'l L., vol. 45, 1099 (2012).
[6] James Crawford, *STATE RESPONSIBILITY*, DOCUMENT A/CN.4/490, First report on State responsibility, Special Rapporteur (12 August 1998).

"*Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. 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. Each Contracting Party shall observe any obligations it has entered into with an Investor or an Investment of an Investor of any other Contracting Party.*"

Article 1105(1) of the NAFTA states that the parties "*Each Party shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.*"

The BITs too comprise of broad but vague FPS clauses. Some BITs, like U.S. Model BIT[7] and Canadian Model BIT[8], attempted to avoid incorporating vague FPS clauses and determined the FPS treaty standard to be CIL minimum standards of protecting aliens. The U.S. BIT restricted the FPS standard to that of protection provided by police under CIL. Another attractive effort made by Association of Southeast East Asian Nations (ASEAN) formulated the FPS standard wherein the States undertake reasonable measures required to assure protection and security to covered investments under the Treaty. As a result of the complications surrounding the interpretation of the FPS standard, a few treaties have not included FPS clause in the treaty.[9]

(C) Is FPS a reflection of Minimum Standard for Treatment of Aliens?

The major point of debate on the FPS obligation is due to the differences of opinion among Tribunals, and what parameter should be determined for defining the primary obligations of FPS or the required standard of due diligence. Consequently, this raises a question if the FPS clauses should be construed in light of minimum standard in CIL for aliens, or the standard is higher and autonomous of CIL. The Tribunals have taken a split opinion - whether the FPS standard is the standard of CIL or BIT Standard. The NAFTA interpretive standard of 2001 clarified the position that FPS is limited to CIL.[10] On the other hand, non-NAFTA tribunals do

[7] Article 5 of the U.S (2004).
[8] Article 5 of the Canadian Model Foreign Investment Promotion and Protection Agreement, (Foreign Affairs and International Trade Canada, 2004).
[9] Southern African Development Community Finance and Investment Protocol (2006); Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area ("COMESA") (2007).
[10] North American Free Trade Agreement, 32 I.L.M. 289, 605 (1993), Article 1105(1).

not rely only on the CIL standard but provide for an independent treaty standard. The Tribunal in the case of *AAPL v. Sri Lanka*,[11] denied that the FPS is limited to such CIL minimum standard. On the contrary, in the case of *Noble v. Romania*,[12] the Tribunal determined that the FPS standard should not be extended beyond the CIL while providing security to aliens. Arbitral Tribunals do not apply CIL standards unless it is expressly mentioned in the treaty, because Tribunals generally assume an intention of assuring wider degree of protection.[13]

It is crucial to question ultimately what the international minimum standard is, rather than determining whether the FPS standard is restricted to CIL standard or provides protection beyond it. This has now become an academic inquiry because the Tribunals have majorly held that the customary standard of minimum protection is significantly evolving and developing into the BIT standard.[14]

III. EVOLUTION OF DUE DILIGENCE STANDARD

The due diligence standard has a very old presence in the international law. The term was first formed in the 17th century by the Jurist Hugo Grotius, which has now gained recognition worldwide.[15] The historical cases on due diligence did not provide a standard definition, they have however formulated a series of components for determining the contours such as degree of foreseeability, degree of effectiveness and degree of predictability. The concept of due diligence is now used frequently and has in the later years included within its jurisprudence certain features such as obligation of 'reasonable care'[16], 'prudence'[17], 'vigilance'[18] or 'best efforts'[19].

(A) What standard of liability is imposed on States: Strict Liability v. Due Diligence?

The degree of protection and security that the host state is obliged to provide the investors and their investments is not absolute. If there is no specific treaty clause that provides for the loss

[11] Asian Agriculture Products Ltd. v. Republic of Sri Lanka (AAPL), ICSID Case No. ARB/87/3, Final Award (June 27, 1990).
[12] Noble Venture Inc v Romania, ICSID Case No ARB/01/11, Award (12 October 2005).
[13] Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?*, IISD, 2 (Nov. 2011).
[14] Gold Reserve Inc. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB(AF)/09/1, Award (22 September 2014).
[15] International Law Association Study Group on Due Diligence in International Law, First Report (7 March 2014) <http://www.ila-hq.org/index.php/study-groups>.
[16] Allard v. Government of Barbados, PCA Case No. 2012-06, Award (27 June 2016).
[17] OI European Group B.V. v. Bolivarian Republic of Venezuela, ICSID Case No. ARB/11/25, Award (10 March 2015).
[18] Paushok and others v. Government of Mongolia, UNCITRAL, Award on Jurisdiction and Liability (28 April 2011); El Paso Energy International Company v. The Argentine Republic, ICSID Case No. ARB/03/15, Award (31 October 2011); Ulysseas, Inc. v. Republic of Ecuador, UNCITRAL, Final Award (12 June 2012).
[19] Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/09/2, Award (31 October 2012).

protection to foreign investment due to the actions of such parties that are not attributable to the state, the host state will not be liable for protecting the investment against such violence or injuries. It would instead be necessary for the state to employ due diligence norms.

The scope of FPS is not defined in majority of the provisions, and accordingly, most of the times, the Tribunal has considered it be a due diligence standard. In *AAPL v. Sri Lanka*, the argument that FPS standard is a strict liability standard was rejected by the Tribunal and held that the due diligence standard is applicable. This interpretation is mostly followed by all the tribunals.[20] The host state is also required to imbibe methods that a diligent state would for catching and punishing the liable parties. In *Parkerings v. Lithuania*,[21] the Tribunal determined that the host state had complied with the due diligence standard, as against the claim that the police authorities had failed to find the culprit. In *Frontier v. Czech Republic*,[22] the Tribunal did not agree that the police authorities were negligent and acted in bad faith, instead it was dismissed on the grounds that due diligence standard was observed.

(B) The recent transformational cases: Should due diligence be considered in light of host state's capacity?

The FPS standard has developed a specific set of norms for the responsibility of the state towards the foreign investment in its territory. However, this is not as simple as it seems, as there is a wide debate on the topic - if the capacity of the host states shall be considered while determining its responsibility of obligation as per the due diligence standard. The Tribunals have over the period taken a diversified approach to understand if the compliance of the standards under FPS should be tailored in consonance of the stability of the host state.

In *Pantechniki v. Albania*,[23] the Albanian state authorities has failed to provide protection to the construction project of the investor. The reason being that the authorities did not have enough power and the police force was not able to avert the losses caused. The Tribunals held the state was not responsible in such circumstances as it lacked relevant resources.

In *Ampal v. Egypt*,[24] a pipeline managed by EMG was majorly owned by Ampal, for delivering natural gas to Israel, which was attacked thirteen times by the terrorists. The area where the pipeline was located was prone to such attacks. The attacks took place during the time of radical political party change in the country. Accordingly, the legislative and executive authorities

[20] Stephan W. Schill, *International Investment Law and Comparative Public Law*, 193 Oxford University Press (2010).
[21] Parkerings Compagniet AS v. Republic of Lithuania, ICSID Case No. ARB/or/8, Award, (11 September 2007).
[22] Frontier Petroleum Servs. Ltd. v. Czech Republic, UNCITRAL, Final Award, para. 423 (12 November 2010).
[23] Pantechniki Contactor & Engineers v Albania, ICSID Case No. ARB/07/21, Award (30 July 2009).
[24] Ampal v Arab Republic of Egypt, ICSID Case No. ARB/12/11.

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were replaced by the Supreme Council of Armed Forces to be the governing body. Further, it also replaced the police forces in order to maintain the security of Egypt, during the time when the situation on the border was not stable, specially at the location of pipeline. Hence, it can be deduced that the Egyptian military was unable to function at full capacity as they had been overloaded by political responsibilities. Lastly, it is pertinent to note that Egypt acknowledged and punished those liable for the attacks.

The view of the Tribunal was however different, it held Egypt liable as per the due diligence standard for its failure to employ reasonable measures. Hence, the Tribunal took into consideration the troubles of pipeline only, without any regard to the exceptional situation prevalent in the State. This raises concerns for the developing states who even after adopting appropriate measures towards the protection of foreign investments would be held responsible for FPS breach, despite their individual state's capacity. This decision revolutionised the face of standard from due diligence to strict liability, consciously or unconsciously.[25]

The Tribunal in the case of *Cengniz v. Libya*,[26] followed the same approach as in the case of *Ampal v. Egypt*. The State of Libya was undergoing certain border disputes and the country lacked resources to provide dynamic protection to the foreign investments in such situation. The Tribunal nevertheless found Libya liable towards the investors project for its failure to provide adequate security. The Tribunal took into consideration that there was very little evidence for the same, it however, held the state responsible because it believed that the military authorities regulated by the Government had destroyed the camps of the investors and also, failed to provide protection against the attacks during civil war. The Tribunal traversed from its stand in the case of *WAY2B v. Libya*,[27] wherein it was stated that "*an FPS provision demanded due diligence on the part of a state to ensure adequate protection and security risks of physical damage caused by third parties*" and further, held that it is the duty of the claimant to develop and prove that the host state has complied with the required due diligence standard.

It is submitted that the factor of capacity, capability and stability of the state is an extremely crucial factor under the FPS obligation. It would be difficult to formulate a straight-jacket formula for defining the level of protection that each state should provide. This varies on the facts of each case and the Tribunals will have to decide with great precision[28] because, i) the

[25] R. Yacoub, Amin, *The Standard of Due Diligence in Full Protection and Security Obligation: A Pro-Investor Standard?* (April 5, 2018) <https://ssrn.com/abstract=3191547>.
[26] Cengiz v. State of Libya, ICC Case No. 21537/ZF/AYZ, Award (7 November 2018).
[27] Way2B v. State of Libya, ICC Case No. 20971/MCP/DDA Award (24 May 2018).
[28] Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey, ICSID Case No. ARB/11/28, Award (10 March 2014).

state is capable of taking protective actions corresponding to its resources and stability, for instance, an investor who has invested in a state having poor governance or engaged in a civil war cannot expect the same level of protection that would be provided in New York, Japan or London;[29] and ii) the Tribunal cannot be compassionate or sympathetic towards the states as they ought to have complied with the reasonable standard of FPS, and if the Tribunals are lenient, the states would avoid providing protection to the investments wherever possible, for instance, the developing countries would always uphold an excuse of not having sufficient resources to provide security.

IV. INTERPRETATION OF THE STANDARDS OF FPS

A conflicting approach is adopted by the Tribunals in determining if the standard of FPS should only include protection of physical breaches or extend beyond the physical breaches to include legal and economic breaches and cover the acts of third party. Various problems arise because of the application of same due diligence standard of FPS for all the states which does not acknowledge the capability disparity that exists among the states in form of varied hardships such as terrorism, revolutions and insurgencies.

(A) FPS limited to Physical Protection

The Tribunals have been divided in their opinions for years with respect to the question of whether the FPS standard is applicable to physical protection and security. Some Tribunals have determined that the host state is responsible for the protection of violence, injuries or harm caused to the investments by the state or private parties, thereby implying that the FPS standard covers only physical protection.

The Tribunals have restricted the FPS standard to physical breach of security in order to create a difference between the FPS and FET standard. The Tribunal in *Rumeli v. Kazakhstan,*[30] observed that "*it is state obligation to render protection to the foreign investment from any physical damage*".

It was further observed in *Saluka v. Czech Republic,*[31] that:

"*FPS standard is exercised when foreign investment has been affected by civil strife and physical violence, thereby protecting the physical integrity of the investment by use of force*."

[29] Andrew Newcombe and Luis Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Kluwer Law International, (2009).
[30] Rumeli Telekom v. Kazakhstan, ICSID Case No. ARB/05/16, Award (29 July 2008).
[31] Saluka Investment BV (The Netherlands) v. Czech Republic, UNCITRAL, Partial Award (17 March 2006).

In *BG Group v. Argentina*,[32] it has also been held that the FPS standard was limited to physical damage and violence. The Tribunal noted that it was not correct to deviate from the accepted and applied standard of constant protection and security which seeks to provide physical protection.

(B) FPS extends to cover Acts of Third Party

The State's obligation of FPS standard is not restricted to acts performed by the host state or its authorities, rather extends to include all the acts performed by the third party. This unique approach of the FPS adds an additional duty on the host duty to prevent any harm or injury to the investments by the third party.

It is pertinent to note the case of *Eastern Sugar v. Czech Republic*,[33] which provided that the FPS standard constitutes third party acts. However, the capacity of the host states needs to be looked at while corresponding to the due diligence standard required to achieve the FPS standard towards third parties. In *Wena Hotels v. Egypt*,[34] the Tribunal held the state responsible as the police failed to prevent the seizure and thereby, violating the FPS standard. While in *Tecmed v. Mexico*[35] and *Noble Ventures v. Romania*,[36] the Tribunal did not hold the state responsible as the states had performed reasonably and no specific failure could be determined respectively.

Hence, it appears that the Tribunals have applied the FPS under BITs in a similar manner as construed under the CIL. It is however crucial to contemplate the capacity of the government and their response in tackling the case.

(C) FPS extending the Limit to Legal and Economic Protection

The Tribunals have extended the scope of FPS standard in the subsequent awards to include within its purview all types of protection measures. In certain ICSID cases, the Tribunal has expanded the FPS standard to include the legal and economic breach. This increases the burden on the states as they have to adhere to additional norms, on different grounds other than FET standard. The FPS standard under the ECT, imbibes that it comprises of economic regulatory powers, which gives out the positive and negative obligations. In *Siag v. Egypt*,[37] the Tribunal

[32] BG Group Plc v. Republic of Argentina, UNCITRAL, Award (24 December 2007).
[33] Eastern Sugar B.V. (The Netherlands) v. The Czech Republic, SCC Case No. 088/2004, Partial Award (27 March 2007).
[34] Wena Hotels Ltd v. Arab Republic of Egypt, ICSID case No ARB/98/4, Award (8 December 2000).
[35] Tecnicas Medioambientale TECMED SA v. United Mexican States, ICSID Case No. ARB (AF)/00/2, Award (29 May 2003).
[36] Noble Venture Inc v. Romania, ICSID Case No ARB/01/11, Award (12 October 2005).
[37] Siag v. Egypt, ICSID Case No. ARB/05/15.

adopted the FPS standard breach on a legal basis, rather than physical ground. Even in *CME v. Czech Republic*,[38] only legal grounds were considered. The Tribunal in *Biwater v. Tanzania*,[39] found that *"FPS implies a State's guarantee of stability in a secure environment, both physical, commercial and legal".*

In *Siemens v. Argentina*,[40] the Tribunal has creatively extended the FPS standard by interpreting that the definition of investment includes intangible assets and hence, found the state responsible under FPS. It held that:

"the initiation of renegotiations for the sole purpose of reducing costs for the host State, unsupported by any declaration of public interest, affected the legal security of Siemens ' investment."

In *AES v. Hungary*,[41] the Tribunal again upheld that the FPS standard extends beyond the physical protection, and it additionally cleared that State cannot be restricted from adopting any such policy or regulation that may be detrimental to the investment projects, if the state has acted reasonably for the interest of public.

Hence, it is conclusively submitted that the Tribunals have adopted highly inconsistent approach towards the determination of the application of FPS standard.

V. RELATIONSHIP BETWEEN FET AND FPS STANDARD

The provisions have constantly caused troubles in interpreting the limit and boundaries between the FPS and FET principle. There are instances where the action may breach both the standards of FET and FPS, but their evaluation may differ. The FPS standard applies where the state does not follow due diligence in adopting required measures to provide security to investors and investment, and also, to provide sufficient legal mechanism. On the other hand, the FET standard deals with the action of the state towards the investment and expects that the state behave honestly and rationally, in good faith. Many a times, the Tribunals have held that both the principles are alike and covers all actions that are unjust and unwarranted,[42] while certain Tribunals have considered the standards to be different from each other.

[38] CME v. Czech Republic, UNCITRAL Arbitration Tribunal, Final Award (14 March 2003).
[39] Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award (22 July 2008).
[40] Siemens A.G. v. Argentina Republic, ICSID Case No. ARB/02/6, Award (6 February 2007).
[41] AES Generations Ltd. V. Hungary., ICSID Case No. ARB/07/22, Award (23 September 2010).
[42] Fiona Marshal, *Fair and Equitable Treatment in International Agreement*, Int'l Inst. For Sustainable Dev., 2, 7 (2007) <http://www.iisd.org/pfd/2007/inv_fair_treatment.pdf>.

In *Wena Hotels v. Egypt*, the Tribunal considered both the standards together without differentiating between FET and FPS. Also, in the case of *PSEG v. Turkey*,[43] the Tribunal held that only in certain circumstances, the FPS standard enhances from physical protection, and in that case, it becomes very similar to FET. In *Occidental v. Ecuador*,[44] the Tribunal observed no difference between the standards, and held the party liable under both the standards.

On the contrary, the Tribunal in *Mamidoil Jetoil v. Albania*,[45] determined that the FPS standard should not be countered with FET standard, as both are unique. In *Oxus v Uzbekistan*,[46] the Tribunal held that the FPS standard provides for the FET standard, where protection requires extension towards the conduct of third parties. In *Azurix v Argentina*,[47] the Tribunal noted that both the standards are penned in detail as separate obligations in the treaty, and hence, they should be exemplified distinctly.

It is however noticed that Tribunals have in modern times reversed the focus on physical protection when differentiating between the FET and FPS standard. For instance, in the recent case of *OperaFund and Schwab v. Spain*,[48] the Tribunal interpreted the difference in the ECT's constant protection and security standard and the FET standard, to mean that it does not follow the strict liability standard and instead follows the due diligence standard by obliging state to provide protection and security to the investments. On the same note, the Tribunal in the case of *BayWa r.e. v. Spain*,[49] opined that the ECT provides for protection of physical breach, which is different from the FET standard.

It is desirable to contemplate the two standards distinctly as a different obligation, even if they overlap sometimes. It is also the vague wording of the treaty, that creates confusion before the Tribunals, and hence, it is pertinent and sensible to define both the standards. Thereby, the Tribunals cannot be fully blamed for their diverse opinions, as they deal with the factual disparity among various cases. However, this cannot act as an excuse for the prevailing disorientation, that requires to be settled. Lastly, if both the standards are to be perceived in a similar manner, it would render the existence of FPS completely unfruitful and useless.

[43] PSEG v. Turkey, ICSID Case No. ARB/02/5, Award (19 January 2007).
[44] Occidental Exploration & Products v. Republic of Ecuador (Oxy I), LCIA Case No. UN3467, Award (2004).
[45] Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v. Republic of Albania, ICSID Case No. ARB/11/24, Award (30 March 2015).
[46] Oxus Gold Plc v. Republic of Uzbekistan, UNCITRAL, Final Award (17 December 2015).
[47] Azurix Corp v. Argentine Republic, ICSID Case No. ARB/01/12, Final Award (14 July 2006).
[48] OperaFund Eco-Invest SICAV PLC and Schwab Holding AG v. Kingdom of Spain, ICSID Case No. ARB/15/36, Award (6 September 2019).
[49] BayWa r.e. Renewable Energy GmbH and BayWa r.e. Asset Holding GmbH v. Spain, ICSID Case No. ARB/15/16, Decision on Jurisdiction, Liability and Directions on Quantum (2 December 2019).

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(A) Relation between FPS and Legitimate Expectation

The concept of legitimate expectation is one of the most important elements of FET standard, whereby the host state is committed to provide such degree of measures that are legitimately expected by the investor. Basically, it is the fundamental anticipation of the investors towards their investment in the host state. Hence, it is pertinent to study the relation between FPS and legitimate expectations while understanding the relation between FPS and FET standards, as FET standard is majorly deciphered on the basis of legitimate expectation.

The test of legitimate expectation provides that the Tribunals will have to apply different standards of protection to different states, because the investors expectation from the state would have to rely on the capacity of the state to provide adequate resources. It was argued in *AMT v. Zaire,*[50] that "*the legitimate expectation of the investor would not be lower than the minimum standard of vigilance under international law*." The Tribunals shall, however, not neglect the capacity and stability of the states while analysing the due diligence standard.

It is can accordingly be concluded that it is unjust to consider the legitimate expectation of the investors instead of the proportional measures undertaken by the state for protecting the investment in consonance with its resources to meet the due diligence standard. Nonetheless, the legitimate expectation principle may be contemplated while determining the damages of FPS breach.

VI. CONCLUSION

The FPS standard was earlier the least developed principle, which has now become a vital clause in the law. It is expanding its ambits correspondingly with the higher recognition that it gains in the investment agreements. For instance, as understood above that historically, the FPS standard applied to only physical protection, which is now settled regardless of the varying opinions of the Tribunal. The Tribunals have pressed on the importance of protecting the investors beyond the physical breach, by extending the horizon of FPS to legal and economic breach on part of the host state. There is not much difference in considering the FPS standard under CIL or treaties, as both have neglected the primary obligations of the host state. The paper demonstrates that there is a huge gap in the protection of investment in host state territories under FPS standard, which needs to be reduced by the joint efforts of states and arbitral tribunals by determining the factors necessary to provide protection and security to the investments. It is expected that the FPS standard will grow even further, by potentially gaining

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

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an important role in the investment law. There are various modern issues that pose danger to the investments, such as environmental pollution, cyberattack and health concerns. This crisis may be averted by the FPS standard as it has the capacity to control these threats by creating obligations on the State.

(A) RECOMMENDATIONS AND CAVEATS

There are certain improvements that the States may consider while incorporating the FPS standard and similarly, for the Tribunals while adjudicating those standards.

- The states shall define the standard of FPS obligation in detail while incorporation, as leaving it undefined provides the Tribunal wide amplitudes to include regulatory, legal and commercial security obligations.

- The Tribunals shall consider the capacity of different states, while applying the due diligence standard.

- The Tribunals should inculcate the foreseeability principle in determining if the circumstances like insurgency, terrorism, civil strife, armed conflicts could be anticipated by the states and the proportionality test to decipher if adequate measures were undertaken by the State towards the protection of investment in such situations in light of their resources to strike a balance.

- The Tribunals should also keep in mind the relative treatment test, if the state provides a lower level of protection to foreign investors as compare to their nationals.

However, there exist two caveats to the adoption of such measures.

- The investors would lose interest for investing in the developing states given the stringent provision adopted by the States for their FPS obligations, which in consequence acts detrimental to the interests of developing states seeking for foreign investments.

- The consideration or leniency provided by the Tribunals would stimulate the developing states to not take any actions towards the protection to foreign investors and their investment. Instead, if the developing state is repeatedly charged with damages for not complying with the standard, it would be forced to raise its standard of protection.

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