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## FULL PROTECTION AND SECURITY STANDARD IN INTERNATIONAL INVESTMENT LAW

**Summary:** *The subject of the study is the analysis of the application of the Standard of Full Protection and Security of Foreign Investments in international arbitral practice. It is an absolute standard that is contained in almost all international investment agreements and that has been established through arbitration practice, regardless of the variety of language expressions referred to in investment agreements. The objects of protection under this Standard can be both investors and investments and it establishes a dual obligation for the states. On the one hand, there is the obligation of active action to prevent and remedy a violation or to punish perpetrators, and on the other hand, there is the obligation to refrain from any activities that may hurt foreign investment. This paper deals in particular with the three issues that are decisive for the application of the Standard in practice. The first is the issue of the relationship between this Standard and other standards of protection of foreign investments, in particular the Standard of Fair and Equitable Treatment, as well as to the minimum standard of protection enjoyed by foreign investors and their investment under international customary law. The second is the issue of standard content, whether it applies only to physical protection and security, or includes wider, legal protection and regulatory protection, security and stability. The third question relates to the degree of protection and security, i.e. whether this Standard implies the objective liability of the host country or whether it has to deal with due diligence, depending on the circumstances of each case. The paper analyses all publicly available decisions of international arbitration tribunals as well as scientific literature dealing with this Standard and points out the prevailing attitudes about these three key issues as well as their implications for the protection of foreign investments.*

**Keywords:** *standard of full protection and security, international investment law, international investment arbitration, due diligence of the recipient countries of investment, physical and legal protection of foreign investment*

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## 1. INTRODUCTION

Most investment contracts contain provisions that guarantee the protection and security of investments<sup>1</sup>. These provisions are in literature referred to as the full protection and security standard (in further text: FPSS). Traditionally, this standard was interpreted as the obligation for the country receiving the investment to implement measures for the protection of the investors and investments against physical threats. Over time, this interpretation was extended so that now the FPSS also includes legal protection and security in case of violation of the investor's rights.<sup>2</sup> This is an absolute standard, which means that it does not depend on how the state receiving the investment treats other investments or investors, and it is one of the most common investment and investor protection standards in international investment contracts.<sup>3</sup> The FPSS establishes a dual obligation for the states: on the one hand, there is the obligation to actively participate in preventing and remedying violations or penalization of the wrongdoer, and on the other hand there is the obligation to refrain from any activities, "direct or indirect, with or without approval, that would infringe the foreign investment".<sup>4</sup> The reach of the FPSS cannot be easily determined, because the standard has evolved and changed over time.<sup>5</sup> The standard has therefore been variously interpreted in the practice of arbitration tribunals,<sup>6</sup> and the developed jurisprudence is controversial<sup>7</sup> so that three key questions arise in the implementation of this standard. The first is the question of relation of this standard to other standards of protection, in particular to the fair and equitable treatment standard (in further text: FETS), and to the minimum standard of protection enjoyed by foreign investors and their investments according to customary international law. The second is the question of the content of the standard – whether the standard refers only to physical protection and security, or whether it also includes a wider, legal protection and regulatory protection, security and stability. The third question refers to the level of protection and security, i.e. whether this standard implies strict liability of the state receiving the investment, or whether the state receiving the investment must act with due diligence, depending on the circumstances in individual cases.

The first question –about the relation of the FPSS to other standards, and the third question –about the types of state liability in arbitration practice have been principally solved and raise no significant controversies. The key and still unresolved question, around which the arbitration practice is still dissenting, is the question about the content of the standard – whether the standard refers only to physical protection and security or whether it also includes a more comprehensive legal protection and regulatory protection, security and stability. This paper deals primarily with the analysis of the opinions of arbitration practice regarding these

1 Scheuer, C., *Full Protection and Security*, Journal of International Dispute Settlement, Vol. 1, No. 2, 2010, p. 1.

2 For more details v.: Junngam, N., *The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From*, American University Business Law Review, Vol. 7, No. 1, 2018, p. 4.

3 Lorz, R. A., Protection and Security, in: Bungenberg, Griebel, Hobe and Reinisch (ed.), *International Investment Law*, C.H. Beck, Hart, Nomos, Baden-Baden, Munchen and Oxford, 2015, p. 764.

4 Sicard-Mirabal, J.; Derains, Y., *Introduction to Investor-State Arbitration*, Kluwer Law International Alphen aan Rijn, 2018, p. 147.

5 *Mondev International Ltd. v. United States of America*, ICSID Case No. ARB (AF)/99/2, Award, para. 124, <https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf>. Accessed on 10 November 2018.

6 *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, Award from 31. 10. 2012, para. 535. <https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf>. Accessed on 11 November 2018.

7 Junngam, *op. cit.* in note 2, p. 5.

three questions and with the implications such practice has on the implementation of the standards. Special emphasis is put precisely on the questions about the content of the standards and on the development of arbitration practice in the direction of expanding the standards' contents, as well as on legal protection of investments and investors.

## 2. GENERAL INFORMATION ABOUT THE STANDARD

This standard has evolved from international customary law, i.e. from a general understanding that every state has the duty to protect the physical integrity and property of foreigners on its territory.<sup>8</sup> Friendship, trade and navigation treaties signed by the USA in the 19<sup>th</sup> century contained this standard<sup>9</sup>, and the USA has significantly contributed to the development and acceptance of this standard by other countries in their bilateral investment contracts.<sup>10</sup> The FPSS was thus also incorporated in the first bilateral investment contract between Germany and Pakistan: "Investments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party."<sup>11</sup> Since then, clauses guaranteeing the investors full protection and security have been incorporated into almost all international investment treaties.<sup>12</sup> The FPSS is ever more frequently used by investors as one of the grounds for seeking protection in arbitration proceedings, so that the first arbitration based on international investment treaties (*AAPL v. Sri Lanka*, Adjudication from 1990) was resolved precisely through the implementation of this standard.<sup>13</sup> It is worth noting that although the use of the FPSS is constantly growing, it is still used far less frequently than the standard of fair and equitable treatment and prohibition of expropriation. Even when the FPSS is applied together with other standards, the decisions are, as a rule, based not on the FPSS but on these other standards.

Formulations used to define the FPSS in international investment treaties vary<sup>14</sup> from "full protection and security",<sup>15</sup> "complete and full protection and security",<sup>16</sup> "highest possible con-

8 For more details about the history of the development of this standard v.: Junngam, *op. cit.* in note 2, pp. 7–29.

9 Collins, D., *Applying the Full Protection and Security Standard of Investment International Law to Digital Assets*, *Journal of World Investment and Trade*, Vol. 12, No. 2, 2011, p. 228.

10 W. J., *The Law of Investment Treaties*, 2nd ed., Oxford University Press, Oxford, 2015, p. 231.

11 Art. 3 of the Treaty for the Promotion and Protection of Investments between Germany and Pakistan from 1959, <https://treaties.un.org/doc/Publication/UNTS/Volume%20457/volume-457-I-6575-English.pdf>. Accessed on 11 October 2018.

12 Zeitler, H. E., Full Protection and Security, in: Stephan W. Schill (ed.), *International Law and Comparative Public Law*, Oxford University Press, 2010, p. 183.

13 For more details v.: Alexandrov, A. S., The Evolution of the Full Protection and Security Standard in: Meg Krinear et al. (ed.), *Building International Investment Law: The First 50 Years of ICSID*, Alphan aan den Rijn: Wolters Kluwer, 2015, p. 319.

14 Here, the author gave examples of investment treaties signed by the Republic of Croatia, based on the Croatian versions of these treaties. A comprehensive review of various formulations in the English language is offered, for example, by Junngam, *op. cit.* in note 2, pp. 24–25.

15 Art. 3(1) Ugovora između Vlade Republike Hrvatske i Belgijsko-luksemburške ekonomske unije o uzajamnom poticanju i zaštiti ulaganja [Agreement between the Republic of Croatia and the Belgo-Luxembourg Economic Union on the Reciprocal Promotion and Protection of Investments] from 31 October 2001, Official Gazette, International Part, No. 5/2002.

16 Art. 5(1) Ugovora između Vlade Republike Hrvatske i Vlade Francuske Republike o poticanju i uzajamnoj zaštiti ulaganja [Treaty between the Government of Croatia and the Government of the Republic of France on the Stimulation and Mutual Protection of Investments] from 3 June 1996, Official Gazette, International Part, No. 1/1997.

stant protection and security”,<sup>17</sup> “full protection and full security”,<sup>18</sup> “full physical protection and security”,<sup>19</sup> “full and unconditional legal protection”,<sup>20</sup> “full legal protection”,<sup>21</sup> to simply “protection”.<sup>22</sup> However, these variations in linguistic expressions generally have no effect on the contents of the standard<sup>23</sup> since in interpreting the content of the FPSS the prevailing arbitration practice pays little attention to different linguistic formulations in particular investment contracts, i.e., “the formulation of the contract is not decisive for the scope of implementation of the FPSS”.<sup>24</sup> These linguistic variations are inessential and “have no effect on their (arbitration tribunals’ A/N) interpretation and implementation of the regulations about FPSS”.<sup>25</sup> As the Arbitration Tribunal has established in *Parkerings vs Lithuania*, “it has been generally accepted that linguistic variations have no major effect on the level of protection the host state must provide”.<sup>26</sup> In *AAPL v. Sri Lanka* the Arbitration Tribunal expressed a similar opinion, having concluded that the presence or absence of adjectives such as “full” or “constant” have no effect on the contents and on the level of protection provided by the FPSS.<sup>27</sup> However, there are also examples of different arbitration practice with decisions in which the content of the FPSS is directly connected with the wording referring to this standard in the investment agreement. For example, in *Azurix vs Argentina*, the point of view of the Arbitration Tribunal in interpreting the contents of this standard was that “(...) when the terms “protection and security” are qualified by “full” and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security”.<sup>28</sup> This means that the content of this standard is directly connected with its wording. A similar decision was passed by the Arbitration Tribunal in *Biwater vs Tanzania*: “when the terms “protection”

17 Art. 10(1) Ugovora o energetskej povelji [The Energy Charter Treaty], from 17 December 1994, Official Gazette, International Part, No. 15/1997.

18 Art. 4(1) Ugovora između Republike Hrvatske i Savezne Republike Njemačke o poticanju i uzajamnoj zaštiti ulaganja, [Treaty between the Republic of Croatia and the Federal Republic of Germany on the Stimulation and Mutual Protection of Investments] from 21 March 1998, Official Gazette, International Part, 12/1998.

19 Art. 3(1) Ugovora o poticanju i uzajamnoj zaštiti ulaganja između Republike Hrvatske i Kraljevine Nizozemske, [Agreement on Encouragement and Reciprocal Protection of Investments between the Republic of Croatia and the Kingdom of the Netherlands] drawn up in Zagreb on 28 April 1998, Official Gazette, International Part, 10/1998.

20 Art. 2(2) Sporazuma između Vlade Republike Hrvatske i Vlade Ruske Federacije o poticanju i uzajamnoj zaštiti ulaganja [Agreement between the Government of the Republic of Croatia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments], 20 May 1996, Official Gazette, International Part, No. 13/1996.

21 Art. 3(2) Ugovora o poticanju i uzajamnoj zaštiti ulaganja između Vlade Republike Hrvatske i Vlade Argentinske Republike [Agreement between the Government of the Republic of Croatia and the Government of the Argentine Republic on the Promotion and Reciprocal Protection of Investments], 2 December 1994, Official Gazette, International Part, No. 4/1996.

22 Art. 3(1) Ugovora između Vlade Republike Hrvatske i Vlade Narodne Republike Kine o poticanju i uzajamnoj zaštiti ulaganja [Agreement between the Government of the Republic of Croatia and the Government of People's Republic of China Concerning the Encouragement and Reciprocal Protection of Investments], 7 June 1993, Official Gazette, International Part, No. 2/1994.

23 Alexandrov, *op. cit.* in note 13, p. 319.

24 Cordero Moss, G., Full Protection and Security, in: August Reinisch (ed.) *Standards of Investment Protection*, Oxford University Press, 2008, p. 135.

25 Junngam, *op. cit.* in note 2, p. 57.

26 *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 354. <https://www.italaw.com/sites/default/files/case-documents/ita0619.pdf>. Accessed on 16 November 2018.

27 *Asian Agricultural Products Ltd. v. the Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, para. 50. <https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf>. Accessed on 5 October 2018.

28 *Azurix Corp. v. the Argentine Republic*, ICSID Case No. ARB/01/12, Award, para. 408. <https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf>. Accessed on 6 October 2018.

and “security” are qualified by “full”, the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal”.<sup>29</sup>

Despite the prevailing arbitration Tribunals’ practice, there is the question of regularity of the procedure in which variations in the wording of the standard do not affect its contents, especially regarding the principles of the interpretation of international treaties, and in that framework, regarding specific reference to previous practice in defining the content of the standard, i.e. the reference to previous arbitration awards by which the FPSS has been defined. Such an approach would perhaps even be justifiable if the FPSS were not treated as an individual standard but as a mere reflection of international customary law. Otherwise, if it is an independent standard – and this is the prevailing opinion in practice and theory of international investment law – such practice cannot be justified, since arbitration tribunals pass their decisions based on how other arbitration courts have interpreted an independent standard of protection in another, unrelated treaty.

According to this standard, objects of protection may be investors and/or investments. Some arbitration courts expressed a different opinion according to which only investments, and not investors can be objects of protection; “measures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of that standard of protection (FPSS N/A)”.<sup>30</sup> Still, the prevailing arbitration practice has taken the position that the protection also includes the investor, i.e. that the clause about the protection of investment implicitly protects the investor,<sup>31</sup> as stated by the Arbitration Tribunal in *AWG v. Argentina* “the FPSS obliges Argentina to exercise due diligence to protect investors and investments”.<sup>32</sup>

One of the questions raised if the investor should be included as object of protection is the question of compensation for physical attack on the investor. The question is, namely, what kind of damage such an attack would constitute. If the investor could prove that he had suffered economic damage because of the attack, there should be no problems in awarding him due compensation. It is questionable however, if compensation could be awarded for moral damage that the investor would, as a rule, suffer because of the physical attack. The available arbitration practice offers no examples of such compensation being requested, although the position of the Arbitration Tribunal in *Rompetrol v. Romania* could be taken as a guideline. This tribunal expressed the following view: “moral damages’ cannot be admitted as a proxy for the inability (of the claimant N/A) to prove actual economic damage”.<sup>33</sup> Hence, the investor would have no right for compensation for moral damage suffered as the consequence of a physical attack if he could not also prove the actual economic damage he had suffered.

29 *Bewater Gauff (Tanzania) Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22 Award, para. 729. <https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf>. Accessed on November 2018.

30 *Hesham T. M. Al Warraq v. Republic of Indonesia*, UNCITRAL, Award, para. 629. <https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf>. Accessed on 20 November 2018.

31 Junngam, *op. cit.* in note 2, p. 59.

32 *AWG Group Ltd. v. The Argentine Republic*, UNCITRAL, Conclusion about Responsibility, para. 179. <https://www.italaw.com/sites/default/files/case-documents/ita0055.pdf>. Accessed on 21 November 2018.

33 *The Rompetrol Group N.V. v. Romania*, ICSID Case No. ARB/06/3, Award, para. 293, <https://www.italaw.com/sites/default/files/case-documents/italaw1408.pdf>. Accessed on 28 April 2019.

### 3. RELATION BETWEEN THE FULL PROTECTION AND SECURITY STANDARD AND OTHER INVESTMENT AND INVESTOR PROTECTION STANDARDS

#### 3.1. DISTINGUISHING THE FULL PROTECTION AND SECURITY STANDARD (FPSS) FROM THE FAIR AND EQUITABLE TREATMENT STANDARD (FETS)

These two standards can be regarded as separate standards, but they overlap in many respects. Overlapping of these two standards could be explained by the fact that they both originate from the same norm of international customary law, but in the course of time, different practice has developed in the implementation of these two standards.<sup>34</sup> Thus the FPSS obliges the states receiving investments to act with due diligence, in the amount that can be reasonably expected, in order to protect foreign investments and investors, at the same time putting at their disposal the adequate legal system for their protection.<sup>35</sup> The FETS,<sup>36</sup> on the other hand, is the standard the aim of which is to “fill the gaps that may have been left by other, more concrete standards (including the FPSS N/A) to realize the protection of investors envisaged by the treaties”.<sup>37</sup> The FETS is consisted mainly of the obligation of the recipient country to refrain from certain forms of actions that could prove detrimental for the investor or the investment, whereas the FPSS represents the obligation of the host state to actively work on the creation of an environment that guarantees security of the investor and of the investment. As Scheuer says, it seems to be more justified to regard these two as different standards, since it seems rather unconvincing that these two standards, which are separately stated in the treaties, should have the same meaning.<sup>38</sup> This view was also confirmed by the Arbitration Tribunal in *Jan de Nul v. Egypt* when it concluded that “the notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the bilateral investment treaty (BIT), even if the two guarantees can overlap”.<sup>39</sup>

Arbitration practice has prevalingly assumed the position that these are two distinct standards that do not overlap<sup>40</sup> and thus the “fact that the Tribunal rejected the FET claim

34 For more details v.: Foster, K., G., *Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, Vanderbilt Journal of Transnational Law, Vol. 45, No. 4, 2012, p. 1137.

35 *Ibid.*, p. 1103.

36 The Fair and Equitable Treatment Standard is “today the most frequently invoked standard in investment disputes. It is also the standard with the highest practical relevance since the majority of successful claims pursued in international arbitration are based on a violation of this standard...” (Dolzer, R.; Schreuer, C., *Principles of International Law*, 2nd Ed, Oxford University Press, 2012, p. 130).

37 *Ibid.*, p. 132.

38 Scheuer, *op. cit.* in note 1, p. 13.

39 *Jan de Nul N.V. and Dredging International N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, para. 269, <https://www.italaw.com/sites/default/files/case-documents/ita0440.pdf>. Accessed on 20 November 2018.

40 *Azurix v. Argentine*, *op. cit.* in note 28, para. 407.

does not imply the rejection of the claim for a violation of protection and security”.<sup>41</sup> In *Electrabel v. Hungary*, the Arbitration Tribunal established that, since in the Energy Charter Treaty<sup>42</sup> the FPS and the FET are referred to as two separate standards they must have, by application of the legal principle of “effet utile”,<sup>43</sup> a different scope and role”.<sup>44</sup> A similar opinion was expressed by the Arbitration Tribunal in *Frontier v. The Czech Republic*: “full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the part of the host state to desist from behaviour that is unfair and inequitable”.<sup>45</sup> The Arbitration Tribunal in *AES v. Kazakhstan* also took the position that the FPS and the FET are two separate standards; however, the differences between them depend on the circumstances in each individual case: “In particular, Claimants have not demonstrated that such a claim, which is based ‘on adverse effects of regulatory measure or administrative actions on the investment’, is actually different from the claim raised under the FET standard and the obligation to refrain from unreasonable and arbitrary impairment.”<sup>46</sup>

Very interesting is the opinion of the Arbitration Tribunal in *Oxus v. Uzbekistan* according to which the decisive element for differentiation of these two standards is whether the protection in question is against the activities of the state and its bodies or the activities of third persons. “The FPS standard complements the FET standard by providing protection towards acts of third parties, i.e. non-state parties, which are not covered by the FET standard. Thus, where an incriminated act is done by a State organ, the applicable standard is the FET standard, whereas where such an act is done by a non-state entity, the applicable standard becomes the FPS standard.”<sup>47</sup> Thus, according to the FPS standard, the investor cannot expect the state to secure his fair and equitable treatment by third persons, but he has the right to expect the state to undertake all reasonable measures to prevent any injuries that may come from third persons, and in case injuries are inflicted, to punish the perpetrators.

In *AWG v. Argentina*, the Arbitration Tribunal took the position that an excessively broad interpretation of the FPS standard may result in overlapping with other protection standards, so that the extension of this standard beyond physical protection would make it overlap with the FET standard.<sup>48</sup> In *Plama v. Bulgaria*, the Arbitration Tribunal also determined that this

41 *Mamidoil Jetoil Greek Petroleum Products S.A. v. Republic of Albania*, ICSID Case No. ARB/11/24. Award, para 820, <https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf>. 16 October 2018.

42 For more information on protection standards according to the Energy Charter Treaty v.: Miljениć, O., *Energy Charter Treaty – Standards of Investment Protection*, Croatian International Relations Review, Vol. 24, No. 83, 2012, pp. 52–83.

43 Principle of interpretation of the contract assuming that each provision of the contract has a specific meaning and serves to the realization of a specific goal. (Gazzini, T., *Interpretation of International Investment Treaties*, Hart Publishing, Oxford, 2016, p. 170).

44 *Electrabel S. A. v. Republic of Hungary*, ICSID Case No. ARB/07/19 Award of jurisdiction and applicable law, para. 7.83, <https://www.italaw.com/sites/default/files/case-documents/italaw4495.pdf>. Accessed on 20 November 2018.

45 *Frontier Petroleum Services Ltd. v. The Czech Republic*, UNCITRAL, Award, para. 296. <https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf>. Accessed on 17 November 2018.

46 *AES Corporation and Tau Power B.V. v. Republic of Kazakhstan*, ICSID Case No. ARB/10/16, Award, para. 339. <https://www.italaw.com/sites/default/files/case-documents/italaw8205-0.pdf>. Accessed on 15 November 2018.

47 *Oxus Gold v. Republic of Uzbekistan*, UNCITRAL, Award, para. 353. <https://www.italaw.com/sites/default/files/case-documents/italaw7238-2.pdf>. Accessed on 20 November 2018.

48 *AWG Group v. Argentine*, *op. cit.* in note 32, para. 174.

FPS relates primarily to physical protection, but that the practice frequently interpreted it as also including legal security, which brings it very close to the FET standard.<sup>49</sup> The Arbitration Tribunal in *Spyridon v. Romania* concluded that the FPS standard is “covered” by the FET standard in cases where protection is interpreted as extending beyond the protection against physical attacks.<sup>50</sup>

Some arbitration tribunals equated the contents of these two standards. So, for example, in *Occidental v. Ecuador*, the Arbitration Tribunal, having established the fact that the Respondent had violated the FET standard, found that in the given context “the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment”.<sup>51</sup> Similarly, in *Rusoro v. Venezuela*, the Arbitration Tribunal equated these two standards by establishing that a violation of the investor’s rights that does not constitute a violation of the FET standard “can never imply a breach of the FPS standard, however widely interpreted”.<sup>52</sup>

### 3.2. RELATION TOWARDS THE MINIMUM STANDARD OF PROTECTION AS REGULATED BY INTERNATIONAL CUSTOMARY LAW

The minimum standard of protection derives from the principle of the international customary law according to which the state must secure at least such a level of protection for foreigners and their property on that state’s territory, “that would be sufficient to satisfy the minimum of international standards prescribed by international law, and it must guarantee for them, at least when the security of goods and persons is in question, equality with its own citizens before the law”.<sup>53</sup> As it was defined in the OECD study, “the international minimum standard is a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practices, must respect when dealing with foreign nationals and their property. (...) the international minimum standard sets a number of basic rights established by international law that States must grant to aliens, independent of the treatment accorded to their own citizens”.<sup>54</sup> In the *ELSI* case, the International Court confirmed that the contractual standard of protection must comply with the international minimum standard, but that parties can also

49 *Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, para.180. <https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf>. Accessed on 15 November 2018.

50 *Spyridon Roussalis v. Romania*, ICSID Case No. ARB/06/1, Award, para. 321. <https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf>. Accessed on 20 November 2018.

51 *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, para. 187, <https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf>. Accessed on 20 November 2018.

52 *Rusoro Mining Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5. Award, para. 548, <https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf>. Accessed on 22 November 2018.

53 *Oppenheim’s International Law*, 9<sup>th</sup> ed., Jennings & Watts eds., Oxford University Press, Oxford, 1992, p. 910. For more details about international minimum standard v. e.g. in: Paparinskis, M., *The International Minimum Standard and Fair and Equitable Treatment*, Oxford Scholarship Online, 2013.

54 OECD Working Papers on International Investment 2004/03: *Fair and Equitable Treatment Standard in International Investment Law*, OECD Publishing 2004, pp. 8 and 9.



agree upon greater protection than that provided by the international minimum standard,<sup>55</sup> whereas in the *Noble Ventures* case, the Arbitration Tribunal established that “it seems doubtful whether that provision (that the investment shall enjoy full protection and security N/A) can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens”.<sup>56</sup>

There is, of course, the question of whether the FPS standard from investment treaties has the same content as the standard of protection in international customary law. Scheuer suggests that the FPS is an autonomous standard that is independent of the international minimum standard. As his main point, Scheuer points out that it would be very hard to understand why negotiators of investment treaties would use the term “full protection and security” if, in fact, they had in mind the “minimum” standard according to international customary law”.<sup>57</sup> Unlike Scheuer, some authors took the position that the standards of protection are the same in both cases and that the FPS standard is “an element or the other name for international minimum standard”.<sup>58</sup>

The literature and arbitration practice have developed two possible approaches to the relation between these two standards:<sup>59</sup>

1. The minimum standard represents the lower limit of a state’s obligations if the investment treaty contains the FPS standard clause. This is, for example, how the Arbitration Tribunal approached the case *Azurix v. Argentina*; the Tribunal found that the expression “not less than required by international law” in the investment treaty should be interpreted in the manner that the FPS is a higher standard than that of the international law, since the purpose of such a clause is to set the “floor” and not the “ceiling” to avoid possible interpretation of these standards under the level required by the international law”.<sup>60</sup>

2. The minimum standard and the FPS standard provides the same level of protection. This approach is applied in arbitration procedures conducted on the basis of NAFTA (North American Free Trade Agreement) on grounds of the Interpretative Declaration on Art. 1105(1) following which the minimum standard according to international customary law represents the minimum standard of protection of investors and investments under NAFTA, and the FPS standard “does not require the treatment that would be added or that would exceed the requirements of the minimum standard of international customary law in the treatment of aliens”.<sup>61</sup> An example of this approach is the case *Noble Ventures v. Romania* in which, in the course of interpretation of the content of the FPS standard, it was established that “it is doubtful whether that provision can be understood as being wider in scope than the general

55 International Court, *Elektronika Sicula S.p.A. (ELSI) (United States of America v. Italy)*, Award from 20 July 1989, para. 111, <https://www.icj-cij.org/files/case-related/76/076-19890720-JUD-01-00-EN.pdf>. Accessed on 24 October 2018.

56 *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, para. 164, <https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf>. Accessed on 22 October 2018.

57 Scheuer, *op. cit.* in note 1, p. 12.

58 Foster, *op. cit.* in note 34, p. 1113.

59 Some authors, such as for example Cordero Moss (*op. cit.* in note 24, pp. 136-137) also add a third approach according to which the international minimum standard would represent the “upper” limit of obligation.

60 *Azurix v. Argentine*, Award, *op. cit.* in note 28, para. 361.

61 North American Free Trade Agreement, Notes of Interpretation of Certain Chapter 11 Provisions. NAFTA Free Trade Commission, July 31, 2001, <http://www.sice.oas.org/tpd/nafta/commission/ch11understanding-e.asp>. Accessed on 22 November 2018.

duty to provide for protection and security of foreign nationals found in the customary international law of aliens”.<sup>62</sup> Similar is the case of *El Paso v. Argentina* where the Arbitration Tribunal took the position that the FPS is not an independent standard that would set up a higher standard of protection than that envisaged by the international minimum standard, “it is no more than the traditional obligation to protect aliens under international customary law”.<sup>63</sup> De Brabandere, on the other hand, says that in the cases when the FPS standard relates only to the protection against violence coming from third persons, this standard overlaps with the international minimum standard.<sup>64</sup>

The most convincing point of view about the FPS is that following which the FPS is a different and independent standard of protection the content of which cannot be identified with the content of the international minimum standard,<sup>65</sup> but the minimum standard can represent the lower limit of obligations that the state has in providing protection and security for investors, unless, of course, it has not been otherwise agreed in the relevant investment treaty.<sup>66</sup> This standpoint was also taken by Salacuse, who says that this standard imposes an objective obligation that must not be lesser than that required by the minimum standard of diligence and care under international law”.<sup>67</sup>

## 4. RESPONSIBILITY STANDARD

### 4.1. RESPONSIBILITY STANDARD IN GENERAL

There is the question of responsibility of the state for the violation of the FPS standard, i.e. the question of what kind of action or omission by the state is required in order that the state answers for the violation of this standard. Two situations must be distinguished here: that when the violation is committed by the states’ bodies or by persons for which the state answers under international law and that when third persons commit the violation. Namely, the FPS standard also refers to situations in which the state would inflict damage on the investor either directly, or through one of its bodies, and situations in which the damage was caused by a third, private person. Thus the Arbitration Tribunal in *Biwater Gauff v. Tanzania* did not consider that “the “full security” standard is limited to a State’s failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself”.<sup>68</sup> In providing this standard, the protection against the actions of state bodies is absolute and

62 *Noble Ventures v. Romania*, *op. cit.* note 56, para. 164.

63 *Energy International Company v. The Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 522, <https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf>. Accessed on 22 November 2018.

64 De Brabandere, E., *Host States’ Due Diligence Obligations in International Investment Law*, *Syracuse Journal of International Law and Commerce*, Vol. 42, No. 2, 2015, p. 331.

65 *Crystallex International Corporation v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/11/2 Award, para. 632, <https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf>. Accessed on 15 November 2018.

66 For more details v.: Lorz, *op. cit.* in note 3, p. 773.

67 Salacuse, *op. cit.* note 10, p. 240.

68 *Biwater v. Tanzania*, *op. cit.* in note 29, para. 730.

the state is always answerable<sup>69</sup>, i.e., there is one type of responsibility, whereas in the accountability of the state for actions of third parties, the standard of the state's "due diligence" is applied. When third persons are involved, the state answers under the principle of due diligence. As Dolzer and Scheuer put it, "whenever state bodies act in a manner that violates this standard or significantly contributes to such violation, the questions of attribution or due diligence are not raised because in these cases the state shall be directly responsible".<sup>70</sup> Hence, when it comes to acts of state or its bodies, the state always answers (provided, of course, that two main conditions are satisfied – that the action can be attributed to the state and that the act is contrary to international law) so that in these cases the application of the standard of due diligence is out of the question. The state receiving the investment must secure that its bodies and other subjects for which it is responsible will refrain from violations of this standard. When it comes to actions of third persons, the host state must act with due diligence to prevent violations and if they do happen, then it must also with due diligence investigate and punish the perpetrators.<sup>71</sup> Investment arbitration practice has taken the position that the due diligence standard is not applied when physical protection and security of the investor or his investment is threatened by the state receiving the investment or by a body for which it is responsible.<sup>72</sup> Regarding the protection against private persons, arbitration practice has developed in the way that the state "only has the duty to apply due diligence in the protection of the investors against violent interference".<sup>73</sup> Objective responsibility of the state for actions of its bodies is characterised by the point of view such as that of the Arbitration Tribunal in *AMT v. Zaire*: the Tribunal ascertained that the responsibility of the state irrefutably arises from the very fact that "Zaire omitted to undertake all necessary measures to protect and secure the safety of investment (...)".<sup>74</sup> The due diligence standard, on the other hand, was defined in the award in the case of *AAPL v. Sri Lanka* as: "nothing less or more than reasonable measures of prevention that could be expected to be taken by a well organized authority under similar circumstances. According to modern doctrine, the violation of international law that includes the responsibility of the state should be considered as established already due to lack or non-existence of due diligence, without the need to determine the existence of intention or negligence."<sup>75</sup> This point of view that the FPS standard binds the state a) to undertake whatever is reasonable under the given circumstances and b) to act on that occasion with due diligence, represents the basic settings that have not changed in the course of implementation of this standard in arbitration practice.<sup>76</sup> In *Paushok v. Mongolia*, the Arbitration Tribunal defined that "states must act with due diligence to prevent unlawful injuries to persons or property of

69 International Law Commission, Draft articles on Responsibility of States for Internationally Wrongful Acts (2001), Art 4 with comments. <http://legal.un.org/ilc/texts/instruments/english/commentaries/9-6-2001.pdf>. Accessed on 5 October 2108.

70 Dolzer, *et. al. op. cit.* in note 36, p. 162.

71 Zeitler, *op. cit.* in note 12, p. 191.

72 De Brabandere, *op. cit.* in note 64, p. 337.

73 For more details v.: Scheuer, *op. cit.* in note 1, p. 17.

74 *American Manufacturing & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, para. 6.11, <https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf>. Accessed on 25 October 2018.

75 *AAPL v. Sri Lanka*, *op. cit.* in note 27, para. 77.

76 Alexandrov, *op. cit.* in note 13, p. 321.

aliens on their territories, and that in case they fail to do so, they must act at least with due diligence in the punishment for such injuries”.<sup>77</sup>

## 4.2. DUE DILIGENCE

There is a general consensus on the obligation of the state receiving an investment to act with due diligence when implementing the FPS standard, i.e. it must apply “such measures in protecting foreign investments that are reasonable under the given circumstances”<sup>78</sup>. The host state has the duty to “adopt all reasonable measures in order to protect the property or ownership against threats or attacks that may specifically relate to aliens or particular groups of aliens”.<sup>79</sup> In *Noble Ventures v. Romania*, the Arbitration Tribunal explicitly stated that “(...) the general duty to provide protection and security for foreign nationals (...) is not a strict standard (what is meant here is the objective responsibility standard, N/A) but a standard requiring the state to act with due diligence”.<sup>80</sup> The Arbitration Tribunal in *Siag v. Egypt* also found that the FPS standard is not absolute and that the state receiving the investment must act with due diligence in preventing investment damage.<sup>81</sup> When it comes to the content of “due diligence” with which recipient states must act, many arbitration tribunals have referred to Freeman’s definition, according to which “due diligence is nothing more nor less than the reasonable measures of prevention that can be expected from a well-managed government under similar circumstances”.<sup>82</sup> Some arbitration tribunals, such as the Tribunal in *AMT v. Zaire*, also added that this objective comparator, i.e., a well-managed government, must not be inferior to the minimum treatment standard under international law.<sup>83</sup>

Of course, here the question arises as to how to estimate what is reasonable, i.e., what to compare the state’s actions to in order to establish whether it was reasonable and hence justified. As stated earlier, the FPS standard belongs to the so-called absolute, i.e., objective investor protection standards, in which the treatment of the investor is not compared to the treatment of another investor but to the treatment required by international law, i.e., to how investors and their investments should be treated under international law. In DeBrabandere’s opinion, this comparator is exactly the standard of due diligence or the acting of a diligent state.<sup>84</sup> With regard to this position, i.e., to the taking of a well-organized government as comparator, it could be concluded, as stated by Salacuse, that the position of the state, i.e., the lack

77 *Sergei Paushok, CJSC Golden East Company and CJSC Vostokneftegaz Company v. The Government of Mongolia*, UNCITRAL, Award on jurisdiction and responsibility, 324, <https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf>. Accessed on 15 November 2018.

78 Dolzer, *et. al. op. cit.* in note 36, p. 161.

79 *Saluka Investment BV v. The Czech Republic*, Partial Award, para. 484, <https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf>. Accessed on 22 October 2018.

80 *Noble Ventures v. Romania*, *op. cit.* in note 56, para. 164.

81 *Waguih Elie George Siag and Clorinda Vecchi v. The Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, para. 447, <https://www.italaw.com/sites/default/files/case-documents/ita0786-0.pdf>. Accessed on 17 November 2018.

82 *AWG v. Argentine*, *op. cit.* in note 32, para. 163.

83 *AMT v. Zaire*, *op. cit.* in note 74, para. 6.06.

84 De Brabandere, *op. cit.* in note 64, p. 329.

of assets or the presence of a crisis, could not serve as an excuse for the state to disregard its obligations under the FPS standard.<sup>85</sup> Newcombe and Paradell advocate the opposite opinion that arbitration tribunals are likely in their practice to take into account “the level of development and stability as relevant circumstances in determining whether the state acted with due diligence. The investor investing in a region with endemic civil strife and poor public administration cannot have the same expectations regarding his physical security as the one investing in London, New York or Tokyo”.<sup>86</sup>

Like the legal theory, arbitration practice about this also varies. So, on the one hand, most of the arbitration practice holds that the FPS standard prescribes a uniform standard of diligence, regardless of the conditions in a particular state. This opinion was followed in the award in *AAPL v. Sri Lanka*, in which the Arbitration Tribunal set up the standard of “reasonably well organized modern State”<sup>87</sup> or, as the Arbitration Tribunal found in *Al Warraq v. Indonesia*, the recipient state has no obligation to provide a higher level of protection than that which “a well administered government could be reasonably expected to exercise in similar circumstances”.<sup>88</sup> Similar was also the finding of the Arbitration Tribunal in *Glamis v. The United States of America*: “It (the FPS standard, A/N) 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”.<sup>89</sup>

According to another approach, the FPS standard “must not be strictly objectified and applicable throughout the world; instead, its content must rather vary depending on the situation in the respective state”<sup>90</sup> - it must take into account the development and stability of a particular state.<sup>91</sup> Thus, the Arbitration Tribunal in *Pantechniki v. Albania* also concluded that the question of whether the state has acted with due diligence must be considered with regard to the conditions in the recipient country and therefore due diligence may differ in different states depending on their level of development and options they have at their disposal. The comparator is, therefore, not an abstract well-organized government, but a state with the same conditions as those in the state receiving the investment.<sup>92</sup> Nevertheless, it must be emphasized that even in such an assessment, there are certain minimum standards under which no state is allowed to go.<sup>93</sup>

85 Salacuse, *op. cit.* in note 10, p. 240.

86 Newcombe, A.; Paradell, L., *Law and Practice of Investment Treaties*, Alphen aan den Rijn, Kluwer Law International, 2009, p. 310.

87 *AAPL v. the Sri Lanka*, *op. cit.* in note 27, para. 77.

88 *Al Warraq v. Indonesia*, *op. cit.* in note 30, para. 625.

89 *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL, Award, para. 615, <https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf>. Accessed on 22 November 2018.

90 Zeitler, *op. cit.* in note 12, p. 201.

91 Lorz, *op. cit.* in note 3, p. 780.

92 *Pantechniki S.A. Contractors & Engineers (Greece) v. The Republic of Albania*, ICSID Case No. ARB/07/21 Award, para. 81, <https://www.italaw.com/sites/default/files/case-documents/ita0618.pdf>. Accessed on 22 November 2018.

93 *Ibid.* para. 79.

The responsibility for violations of the FPS standard by the state receiving the investment should be proportional to its resources.<sup>94</sup> It should be emphasized that the obligation to show “due diligence” does not mean that the State has to prevent any injury whatsoever. Rather, the obligation is generally understood as requiring that the State takes reasonable actions within its power “to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is “reasonable” or “due”, depends in part on the circumstances”.<sup>95</sup>

Very interesting was the approach of the Arbitration Tribunal in *Mamidoil v. Albania*; in determining the existence of a violation of the FPS standard, the Tribunal assessed not only the actions of the state but also the actions of the investor. According to the findings of the Arbitration Tribunal, the constant protection and security standard obliges States to use due diligence to prevent harassment and injuries to investors. The assessment of whether the state had acted with due diligence is conditioned by the circumstances in which it had acted.<sup>96</sup> On the one hand, it is important to determine what the state has done or objectively could have done, and on the other hand it is also important how the investor acted; i.e., if he acted with due diligence in assessing all the circumstances and security conditions prior to his investment.<sup>97</sup>

In arbitration practice, several elements have developed that would constitute the content of due diligence:<sup>98</sup> a) justification of the actions of the recipient state, as defined by the Arbitration Tribunal in *Tecmed v. Mexico*: “the acting of the state was in accordance with the parameters inherent in a democratic state”;<sup>99</sup> b) the state should have been informed about the situation or be aware of the risks, as defined by the Arbitration Tribunal in *Wena Hotels v. Egypt*: “Egypt was aware of the intentions to take over the hotels and took no actions to prevent the seizures or to immediately restore Wena’s control over the hotels”<sup>100</sup> and c) the case where the state acts in bad faith or refuses to implement the necessary measures despite of its awareness of the situation cannot be regarded as acting with due diligence.

#### 4.3. RESPECT OF THE SOVEREIGNTY OF THE HOST COUNTRY

Another question that arises in determining whether the host state acted with due diligence is the question of the “state’s sovereignty”, i.e., to what extent can arbitration tribunals assess a particular state with respect to the measures that need to be taken to prevent a violation of the FPS standard. According to Cordero Moss, arbitration practice has set a very high threshold in determining the existence of a state’s responsibility for the violation of this standard. As a rule, arbitration tribunals accept all measures undertaken by the state

94 *Ibid.* para.77.

95 *Paushok, v. Mongolia, op. cit.* in note 77, para. 325.

96 *Mamidoil v. Albania, op. cit.* in note 41, para. 821.

97 *Ibid.* para. 828.

98 De Brabandere, *op. cit.* in note 64, p. 352.

99 *Técnicas Medioambientales Tecmed, S.A. v. The United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, para. 177, <https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf>. Accessed on 18 November 2018.

100 *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, para. 85, <https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf>. Accessed on 5 November 2018.

as sufficient, and the state's responsibility merits consideration only in the case where the state has failed to take any measures to prevent the violation, remedy its effects or punish the wrongdoers.<sup>101</sup> The issue in question here is the obligation to "act", and not the obligation to "provide results", which means that the state has fulfilled its obligation if it acted with due diligence, even if its acting yielded no results.<sup>102</sup> As stated by the Arbitration Tribunal in *Tecmed v. Mexico*, the FPS standard is not a standard that would establish absolute responsibility of the state that adopts it in its investment treaty.<sup>103</sup> According to Zeitler, general principles of law support the approach under which in the assessment of a state's actions, its sovereignty must be respected and that therefore in the assessment of the applied measures it must also be accepted that every state is in the position to best estimate when and how to intervene.<sup>104</sup>

As a rule, the host state is expected to monitor the situation and to act in accordance with available information about possible threats to the security of the investor or his investment. Thus, in *MNSS v. Montenegro*, the Arbitration Tribunal found that the FPS standard requires the state receiving the investment to act proactively in order to secure the protection of persons and property, especially when it was previously warned about the possibility of violation.<sup>105</sup> This standard does not establish absolute liability of the state receiving the investment, but merely the obligation of "vigilance and due diligence taking into account the circumstances and resources of the host State".<sup>106</sup> Thus also in *Tulip Estate v. Turkey*, the Arbitration Tribunal found that the FPS standard does not immediately establish absolute liability of the State, since the State cannot "secure or guarantee full protection and security of the investment". Therefore, in determining a violation of this standard, the relevant issues are the "facts and degree, responsive to the circumstances of the particular case".<sup>107</sup> The FPS standard does not establish absolute liability of the state<sup>108</sup> but the obligation of the state to act with due diligence<sup>109</sup> in actively developing a "framework that guarantees security".<sup>110</sup> In *Toto Costruzioni v. Lebanon*, the Arbitration Tribunal defined the FPS as the standard seeking to prohibit the state to act negligently in its implementation.<sup>111</sup> Under the FPS standard, the obligation of the host State does not attract strict liability but imposes a lesser duty more akin to the exercise of due diligence. Both standards can require active, and not merely passive, conduct by the host State that may go beyond the mere abstention from prejudicial conduct".<sup>112</sup> In *Electrabel v.*

<sup>101</sup> Cordero Moss, *op. cit.* in note 24, p. 139.

<sup>102</sup> *Ibid.*

<sup>103</sup> *Tecmed v. Mexico*, *op. cit.* in note 99, para. 177.

<sup>104</sup> For more details v.: Zeitler, *op. cit.* in note 12, pp. 203–206.

<sup>105</sup> *MNSS B.V. and Recupero Credito Acciaio N.V. v. Montenegro*, ICSID Case No. ARB(AF)/12/8, Award, para. 356, <https://www.italaw.com/sites/default/files/case-documents/italaw7311-0.pdf>. Accessed on 28 November 2018.

<sup>106</sup> *Ibid.* para. 351.

<sup>107</sup> *Tulip Real Estate and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, para. 430, <https://www.italaw.com/sites/default/files/case-documents/italaw3126.pdf>. Accessed on 20 November 2018.

<sup>108</sup> *Plama v. Bulgaria*, *op. cit.* in note 49, para.180.

<sup>109</sup> *Ibid.* para. 179.

<sup>110</sup> *Ibid.* para. 180.

<sup>111</sup> *Toto Costruzioni Generali S.p.A. v. The Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, para. 229, <https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf>. Accessed on 6 November 2018.

<sup>112</sup> *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA No. 2012-2, Award, para. 6.81, <https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf>. Accessed on 7 November 2018.

*Hungary*, the Arbitration Tribunal found that “by promising full protection and security, Hungary assumed an obligation actively to create and maintain measures that promote security. The necessary measures must be capable of protecting the covered investment against adverse action by private persons”.<sup>113</sup> The Tribunal did not itself determine the standard of securing constant protection and security, but applied the standard from the case *El Paso v. Argentina*, which includes prevention and repression as well as the obligation of the state to act with due diligence: “The minimum standard of vigilance and care set by international law comprises a duty of prevention and a duty of repression. An important aspect of the international standard of treatment is that States must use “due diligence” to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least “due diligence” to punish such injuries. If a State fails to exercise due diligence to prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage. It should be emphasised that the obligation to show “due diligence” does not mean that the State has to prevent each and every injury. This obligation is generally understood as the requirement that the State should take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care and of what is “reasonable” or “due,” depends on the circumstances”.<sup>114</sup>

The requirement that the state should act with due diligence relates to the state’s obligation to prevent and penalize violations of the FPS standard, so that the recipient states must use “due diligence” to prevent wrongful injuries to the investor and/or investment and, if they did not succeed, they must exercise at least “due diligence” to find and punish the wrong doers. Here, it must be pointed out that this obligation does not require the recipient state to prevent each and every injury; the FPS standard does not give the investor “guarantees against every risk”.<sup>115</sup> In the case *Wena Hotels v. Egypt*, the Arbitration Tribunal found that Egypt violated its obligation under the FPS standard since it had information about plans to seize the investment of the foreign investor but did nothing to prevent the seizure or to restore the previous condition<sup>116</sup>. In addition to the above, even when the investment was repossessed by the investor, it was neither repossessed in the condition in which it was seized, nor was any compensation paid to the investor for the inflicted damage.<sup>117</sup> Eventually, the final element in the liability of Egypt was the fact that none of the perpetrators were punished for the violation of the standard; quite contrary, they all advanced in their careers.<sup>118</sup> Therefore, in addition to the protection, the state receiving the investment must also secure the punishment of the perpetrators who attack investors and their investments. Thus, in the case of *Suez v. Argentina*, the Arbitration Tribunal clearly specified that the duty of the state in the implementation of the FPS standard includes both physical protection of the investor and punishment of the perpetrators: “The Full Protection and Security Standard primarily includes the protection of the investment against physical damage. However, this standard can also include the obligation to

<sup>113</sup> *Electrabel v. Hungary*, *op. cit.* in note 44, para. 7.145.

<sup>114</sup> *El Paso v. Argentina*, *op. cit.* in note 53, para. 522–523.

<sup>115</sup> *Vannessa Ventures Ltd. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)04/6 Award, para. 223, <https://www.italaw.com/sites/default/files/case-documents/italaw1250.pdf>. Accessed on 8 November 2018.

<sup>116</sup> *Wena Hotels v. Egypt*, *op. cit.* in note 100, para. 85.

<sup>117</sup> *Ibid.* para. 92–93.

<sup>118</sup> *Ibid.* para. 94.



provide adequate mechanisms and legal remedies for prosecuting the state organs or private parties responsible for the injury caused to the investor”.<sup>119</sup>

## 5. CONTENT OF THE STANDARD

### 5.1. PHYSICAL PROTECTION

The FPS standard has developed primarily in the context of physical security of persons and property<sup>120</sup> and it is undisputable that it relates to physical protection and security of investments,<sup>121</sup> i.e., that this standard comprises two fundamental obligations – the protection against and prevention of physical attacks on investors and punishment of the perpetrators of such attacks.<sup>122</sup> As it was found by the Arbitration Tribunal in *Suez v. Argentina*, the FPS standard relates primarily to protection against physical damage but may also include the obligation to “secure adequate mechanisms and legal remedies for the prosecution of public servants or private persons responsible for the damage caused to the investor”.<sup>123</sup>

The FPS standard is applied when a foreign investment is violated by civil conflicts and physical violence<sup>124</sup> and it obliges the state to provide the “foreign investment with a certain level of protection against physical damage”.<sup>125</sup> The Point of view that the FPS standard relates exclusively to physical protection of persons and property is “a more traditional and commonly adopted view confirmed in numerous cases (...)”.<sup>126</sup> In the case of *Crystallex v. Venezuela*, the Arbitration Tribunal concluded that the FPS standard relates “only to the duty of the state receiving the investment to guarantee physical protection and security”.<sup>127</sup> Equally, in *Liman v. Kazakhstan*, the Arbitration Tribunal found that the standard of constant protection and security does not relate to contractual obligations, but merely to “protection of the integrity of investment against the use of force and specifically against physical harms”.<sup>128</sup>

<sup>119</sup> *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. the Argentine Republic*, ICSID Case No. ARB/03/19, Odluka o odgovornosti, para. 173, <https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf>. Accessed on 10 November 2018.

<sup>120</sup> *Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, para. 258, <https://www.italaw.com/sites/default/files/case-documents/ita0695.pdf>. Accessed on 16 November 2018.

<sup>121</sup> Scheuer, *op. cit.* in note 1, p. 2.

<sup>122</sup> For more details v.: Lorz, *op. cit.* in note 3, pp. 766–768.

<sup>123</sup> *Suez v. Argentine Republic*, *op. cit.* in note 119.

<sup>124</sup> *Saluka v. Czech*, *op. cit.* in note 79, para. 483.

<sup>125</sup> *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 668, <https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf>. Accessed on 10 November 2018.

<sup>126</sup> *Gold Reserve Inc. v. Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/09/1, Award, para 622, <https://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf>. Accessed on 15 November 2018.

<sup>127</sup> *Crystallex v. Venezuela*, *op. cit.* in note 65, para.632.

<sup>128</sup> *Liman Caspian Oil BV and NCL Dutch Investment BV v. Republic of Kazakhstan*, Award, para. 289, <https://www.italaw.com/sites/default/files/case-documents/italaw1429.pdf>. Accessed on 29 November 2018.

Some of the examples of physical violence from arbitration practice mentioned by Junngam are:<sup>129</sup> 1) civil unrest, civil strife, civil disturbance, and physical violence; 2) threats and attacks on investment; 3) physical invasion of business premises or investment sites; 4) rioting and looting; 5) attack and seizure of property; 6) impairment affecting the physical integrity of investment by forceful interference; 7) wrecking, looting, and dismantlement of equipment and property; 8) forceful expropriation of investment; 9) killings and destruction of property; and 10) occupation of a building and physical assault of the CEO. Recently, the possibility was considered to also apply the FPS standard in referring to physical harm inflicted on the environment of the investment, as it was stated by the Arbitration Tribunal in *Allard v. Barbados*: “accepting the Claimant’s articulation of the FPS standard as including an obligation of the host State to protect foreign investments against environmental damage”.<sup>130</sup>

## 5.2. LEGAL PROTECTION

There is another aspect of this standard that has developed over time in the practice of arbitration tribunals: in addition to physical protection and security, it also provides legal protection and security. The practice is rather divided regarding the implementation of such an approach so that many arbitration tribunals follow the traditional approach and they do not agree with the extension of this standard beyond mere physical protection.<sup>131</sup> On the other hand, a number of arbitration awards speak in favour of extending the standard beyond the reach of only physical protection and security. One of the arguments for such an extension of the standard may be the fact that modern investment treaties, as a rule, also protect intellectual property rights<sup>132</sup> that, logically, cannot be infringed by physical injuries and thus would not enjoy protection according to the strict interpretation of the FPS standard. As set out in the case *Siemens v. Argentina*, “As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the 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”.<sup>133</sup>

In the opinion of some authors, the first decision in which the scope of this standard was extended to also include legal protection, i.e. which suggested the existence of an efficient legal system for protection of the investor’s rights was the decision of the International Court in the *ELSI* case, because in this decision the Court implicitly accepted that this standard includes more than just physical protection.<sup>134</sup> However, the first award in investment arbitration that determined that the FPS standard extends beyond physical security was the award in

<sup>129</sup> Junngam, *op. cit.* in note 2, pp. 61–62.

<sup>130</sup> *Peter A. Allard v. The Government of Barbados*, PCA Case No. 2012-06, Award, para. 252, <https://www.italaw.com/sites/default/files/case-documents/italaw7594.pdf>. Accessed on 22 November 2018.

<sup>131</sup> Lorz, *op. cit.* in note 3, p. 781.

<sup>132</sup> E. g. Art. 1(4) (d) *Ugovora o Energetskoj povelji* [The Energy Charter Treaty], *op. cit.* in note 17.

<sup>133</sup> *Siemens A.G. v. the Argentine Republic*, ICSID predmet broj ARB/02/8, Award, para. 303, accessible at <https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf>. Accessed on 16 September 2018.

<sup>134</sup> *Newcombe et. al.*, *op. cit.* in note 86.

the case *CME v. The Czech Republic*, in which the Arbitration Tribunal interpreted this standard by concluding that 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”.<sup>135</sup> A similar example is found in the award in the case *CSOB v. Slovakia*, in which the Arbitration Tribunal explicitly determined that “The Slovak Republic’s denial of CSOB’s title to request from the Slovak Republic that SI’s losses are covered would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic’s commitment to let CSOB ‘enjoy full protection and security’.”<sup>136</sup> The case *Azurix v. Argentina* is important because in it, in a broad and detailed analysis in its Award, the Arbitration Tribunal confirmed that the FPS standard can be infringed not only through physical violence, but also through destabilization of the legal order: “The cases referred to above (*Occidental v. Ecuador* and *Wena Hotels v. Egypt*, A/N) show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor’s point of view”.<sup>137</sup> Thus also in the case *Vivendi v. Argentina*, the Arbitration Tribunal found that the FPS standard “can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized”.<sup>138</sup>

According to interpretations of a number of arbitration tribunals, the FPS also comprises the obligation of the state receiving the investment to secure legal protection of the investor by allowing him legal action in which the investor can state his claim, and by guaranteeing such claim to be analysed under the domestic and international law by an impartial and fair tribunal.<sup>139</sup> The FPS standard also reaches beyond the limits of protection against physical violence and obligates the state also to provide legal protection of the investor.<sup>140</sup> In the case *Siag v. Egypt*, the Arbitration Tribunal found that Egypt infringed the FPS standard in two ways – firstly, by allowing violent dispossession of the investment to take place and secondly, by failing to implement the decisions of Egyptian courts which annulled such dispossession and ordered the return of the investment. In their decision, Egyptian courts confirmed that the FPS standard also includes the obligation to secure legal mechanisms that guarantee legal security of foreign investors.<sup>141</sup> So also in the case *Frontier v The Czech Republic*, the Arbitration Tribunal found that the obligation to provide protection and security also includes the obligation to provide a legal framework that also comprises material legal provisions for protection of the investment as well as adequate mechanisms, i.e. procedures at disposal for the investor to protect his rights.<sup>142</sup> Concretely, when this relates to court actions, it means that the state

135 *CME Czech Republic B.V. v. The Czech Republic*, UNCITRAL, Partial Award, para. 613, <https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf>. Accessed on 22 November 2018.

136 *Ceskoslovenska Obchodni Banka, A.S. (CSOB) v. Slovak Republic*, Award, para. 170, <https://www.italaw.com/sites/default/files/case-documents/ita0146-0.pdf>. Accessed on 1 November 2018.

137 *Azurix v. Argentina*, *op. cit.* in note 28, para. 408.

138 *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, para. 7.4.17, <https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf>. Accessed on 28 October 2018.

139 *Parkerings-Compagniet AS v. Republic of Lithuania*, *op. cit.* in note 26, para. 360.

140 *Spyridon Roussalis v. Romania*, *op. cit.* in note 48, para. 321.

141 *Siag v. Egypt*, *op. cit.* in note 81, para. 448.

142 *Frontier v. Czech*, *op. cit.* in note 45, para. 263.

is under an obligation “to make a functioning system of courts and legal remedies available to the investor”. However, it does not mean that every “wrong” judicial decision is a violation of the standard that would “automatically lead to state responsibility as long as the courts have acted in good faith and have reached decisions that are reasonably tenable”.<sup>143</sup>

In some cases, arbitration tribunals interpreted the FPS standard in such a way that they gave it an extremely broad meaning. For example, in *Occidental Exploration v. Ecuador*, the Arbitration Tribunal found that Ecuador violated this standard when it changed the interpretation of the application of value added tax, because by doing so it violated the obligation to maintain “the stability of legal and business Environment”, thus violating the SPPT which, according to the Tribunal’s conclusion, automatically means a breach of the FPS standard.<sup>144</sup> With this conclusion the Tribunal determined the infringement of the FPS standard without determining the existence of a single element of this standard; in the concrete case without having determined whether Ecuador made available to the investor an adequate legal system that would allow the investor the protection of his rights. Namely, the actions of the state must be observed as a whole; the possible unlawful conduct of one of the state bodies does not immediately constitute an infraction of the FPS standard if another state body can rectify the error.<sup>145</sup> Similarly, a very broad explanation was also given by the Arbitration Tribunal in the case *CME v. The Czech Republic* in which the Tribunal found that the Czech Republic infringed the FPS standard by changing its media legislation, since 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”.<sup>146</sup> Such a conclusion goes beyond the usual content of this standard, mainly because the investor must always expect reasonable amendments of the legal framework introduced in good faith and without discrimination.<sup>147</sup> In the case *National Grid v. Argentina*, the Arbitration Tribunal concluded that the expression “protection and constant security” does not imply that the protection relates only to the safety of physical property and that the radical changes in the regulatory framework and the insecurity arising from them are contrary to the standard of protection and constant security which, under the treaty, the state is obligated to offer to the investor.<sup>148</sup> The limitation of such a broad interpretation should consist in the right of the state to pass legislation and regulate a particular matter, as it was determined in the case *AES v. Hungary*, in which the Arbitration Tribunal stated that the FPS standard can extend beyond the mere physical protection, but that at any rate “it does not protect against a state’s right to legislate or regulate in a manner which may negatively affect a claimant’s investment, provided that the state acts reasonably in the circumstances and with a view to achieving objectively rational public policy goals”.<sup>149</sup>

<sup>143</sup> *Ibid.* para. 273.

<sup>144</sup> *Occidental v. Ecuador*, *op. cit.* in note 51, para. 187.

<sup>145</sup> For more details v.: Foster, *op. cit.* in note 34, pp. 1150–1151.

<sup>146</sup> *CME v. Czech*, *op. cit.* in note 135, para. 613.

<sup>147</sup> Foster, *op. cit.* in note 34, p. 1152.

<sup>148</sup> *National Grid plc v. the Argentine Republic*, UNCITRAL case, Award from 3 November 2008 para. 189, <https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf>. Accessed on 5 January 2018.

<sup>149</sup> *AES Summit Generation Limited and AES-Tisza Erőmű Kft v. The Republic of Hungary*, Award, para. 13.3.2, <https://www.italaw.com/sites/default/files/case-documents/ita0014-0.pdf>. Accessed on 21 November 2018.

## 6. CONCLUSION

As regards the distinguishing of the FPS standard from other standards of protection enjoyed by foreign investors and investments, it is particularly important to distinguish it from the Fair and Equitable Treatment (FET) standard. Although the analysis of the contents of these two standards may show that there are frequent overlaps between them, the arbitration practice has principally taken the position that they are two distinct standards. This position appears to be correct because it seems fully illogical for the contracting parties to stipulate these two standards separately and in various provisions of their investment treaties if they did not in fact have different content. It can be concluded that the FET standard refers to the host state's obligation to refrain from certain forms of action that could be detrimental for the investor or the investment, whereas the FPS standard represents the host state's obligation to work actively on the creation of an environment that guarantees the security of the investor and the investment. Although the FPS standard evolved from the minimum protection standard, in relation to the minimum protection standard, the FPS is an independent protection standard that represents the lower limit of the state's obligations in providing investors with protection and security, unless, of course, this was explicitly agreed otherwise in the relevant investment treaty. As for the liability standard, two situations are distinguished – first, those in which the damage to the investment or the investor is inflicted by the state itself or by the bodies for which the state is responsible and in which the state is always liable so that these cases exclude the implementation of the due diligence standard, and second, those in which the damage to the investment or the investor is inflicted by third persons, in which case the state must act with due diligence to prevent infringements and if infringements do take place, the state must with due diligence investigate the cases and penalize the perpetrators. It is also important to emphasize that this standard includes both physical protection and security not only regarding the actions of the state and of the subjects the state is responsible for, but also regarding the actions of third persons. If we accept the view that this standard guarantees both legal protection and security, then it should be interpreted in a way that it primarily covers the actions of third persons, while regarding the actions of the state (especially in relation to securing a stable investment regime) the fair and equitable treatment (FET) standard should be implemented. Therefore, since the FPS standard “covers” both physical and legal threats to the investment, following the interpretations of a number of arbitration tribunals, it also comprises the obligation of the state receiving the investment to secure legal protection for the investor by allowing a judicial procedure in which he would state his claim, and that this claim would then be processed under domestic and international law by an impartial and fair tribunal. However, it must be emphasized that the possible denial of justice would constitute an infringement of the FET standard, whereas in the case where the established system of legal protection proves inefficient, this may constitute an infringement of the standard of obligation to secure efficient legal protection.

Finally, it can be concluded that the greatest challenge in arbitration practice is to determine the scope of this standard, especially with respect to whether the protection and security the state is obligated to warrant includes only physical security or whether it also extends to legal security. The approach under which legal security and protection are included as well seems to be justified, particularly in the context of investment treaties in which all forms of

property are implied as investment, which means that nonmaterial property, such as intellectual property that cannot be protected physically but only legally, is included as well.

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## STANDARD PUNE ZAŠTITE I SIGURNOSTI U MEĐUNARODNOM INVESTICIJSKOM PRAVU

### Sažetak

Predmet istraživanja je analiza primjene standarda pune zaštite i sigurnosti stranih investicija u međunarodnoj arbitražnoj praksi. Riječ je o apsolutnom standardu koji sadrže gotovo svi međunarodni investicijski ugovori te koji se etablirao kroz arbitražnu praksu i to bez obzira na različitost jezičnih izričaja kojima se označava u investicijskim ugovorima. Objekti zaštite prema ovom standardu mogu biti i investitori i investicije, a njime se uspostavlja dvostruka obveza za države; s jedne strane to je obveza aktivnog djelovanja na sprečavanju i saniranju povrede ili kažnjavanju počinitelja, a s druge strane to je obveza suzdržavanja od poduzimanja bilo kakvih aktivnosti kojima bi se povrijedila strana investicija. Ovaj rad se posebice bavio trima pitanjima koja su odlučujuća za njegovu primjenu u praksi. Prvo je pitanje odnosa ovog standarda prema drugim standardima zaštite, posebice standardu pravičnog i poštenog tretmana kao i prema minimalnom standardu zaštite koju uživaju strani investitori i njihove investicije prema međunarodnom običajnom pravu. Drugo je pitanje sadržaja standarda: odnosi li se standard samo na fizičku zaštitu i sigurnost ili uključuje i širu, pravnu zaštitu i regulatornu zaštitu, sigurnost i stabilnost. Treće pitanje se odnosi na stupanj zaštite i sigurnosti, odnosno podrazumijeva li ovaj standard objektivnu odgovornost države domaćina ili ona mora postupati s dužnom pažnjom, dakle ovisno o okolnostima svakog slučaja. U radu se analiziraju sve javno dostupne odluke međunarodnih arbitražnih sudova kao i znanstvena literatura koja se bavi ovim standardom te se ukazuje na prevladavajuće stavove o ova tri ključna pitanja te na njihove implikacije na zaštitu stranih investicija.

*Ključne riječi:* standard pune zaštite i sigurnosti, međunarodno investicijsko pravo, međunarodna investicijska arbitraža, dužna pažnja, država primateljica investicija, fizička i pravna zaštita stranih investicija



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