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FULL PROTECTION AND SECURITY STANDARD IN TIMES OF ARMED CONFLICTS

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ABSTRACT

This article explores the "Full Protection and Security" (FPS) standard, commonly included in bilateral and multilateral investment treaties. The focus is on the impact of armed conflicts on the interpretation and application of this standard. Key issues include the limits of host state obligations, their transformation during armed conflicts, and the interaction between the FPS standard and other investment protection standards, such as "Fair and Equitable Treatment" (FET).

The author examines arbitral case law, including disputes related to conflicts in Libya, Crimea, Sri Lanka, and other regions, where issues of adherence to obligation of *due diligence* were raised as consequence of armed conflicts. The study concludes that armed conflicts alter the threshold for expected *due diligence* by host states but do not entirely exempt them from responsibility. The article emphasizes balancing investors' reasonable expectations with the host state's objective capacities in times of crisis.

This research contributes to the development of a more unified approach to the FPS standard, enhancing the predictability and stability of investment protection in unstable environments.

Keywords: Full protection and security, investments, armed conflicts, investment treaties, due diligence.

Introduction

The standards of protection of foreign investments, which are included in agreements on reciprocal protection of investments, are continuously modified whether by explicit reflection of such changes in the wording of the granted assurances or by implicit changes affected by the shadow of state practice, which is shaping the content of the obligations. Therefore, it is important to track these changes and delimit the shifts of the obligations to form a more unified approach and vision towards standards of investment protection.

One of the most important and widely accepted[1] [1] standards is "Full protection and security" (FPS) clause, which is regularly included in bilateral and multilateral investment treaties (ECT [2], EAEU [3], NAFTA [4], USMCA [5], etc.). The FPS is the most commonly invoked clause when we refer to instances where investors suffered injuries as a result of armed conflicts, civil strives, insurgencies or other severe political instability. Nevertheless, despite the wide acknowledgment of the FPS clause, there is a number of debates unfolding in scholarship and case practice on its definition, scope of application and even wording.

In this research the main emphasis is put on the issue of highlighting the effect of armed conflicts on FPS regime, as a circumstance transforming the boundaries of due diligence. This research concentrates on delimiting the line between cases of host-state's lawful adherence to its obligations in times of armed conflicts and unlawful denial of such defence.

The first part will focus on reflecting the general views on the standard of protection provided by the clause and the second will unpack the issue of transformation of expectations from host-state to meet the obligations encompassed in the clause.

The general view on FPS protection

The full protection and security clause has a substantial body of case law and history that allows for a thorough examination of its meaning, although it is often formulated in various ways. In some cases, it is referred to as "constant protection and security" [6] without the term "full", and in other cases, the terms "protection" and "security" are separated, with only one included in the text [7]. However, the specific wording of the clause arguably has a limited effect on the obligations it creates. As will be seen later, tribunals take different views when determining the origin of the standard and vary in their approaches to the importance of its wording [8].

Notwithstanding the different wordings, there is an almost universal consensus that the clause applies not only to negative obligation of the host-state to refrain from actions that will cause damage to the investments but also to positive obligation to guarantee such legal framework and factual protection that will be enough to ensure the security of the investments at question.

The main element that has a decisive role in defining the obligations arising from the FPS clause is the general interpretation adopted for the clause. There are two main views regarding its scope of application. The first view holds that it only applies to situations where there is a risk of physical harm to the investments, implying that the state's obligations are limited to physical protection [9]. The second

[1] According to UNCTAD, the FPS provision has been included in 2,181 of 2,592 mapped investment treaties.

view suggests that FPS extends beyond physical protection and includes "legal protection" as well [10]. This issue is complicated by the absence of a uniform approach by tribunals, leading to another question concerning the interrelation between FPS, fair and equitable treatment (FET), and other standards.

Nevertheless, without undermining the importance of the connection between these standards, for the purpose of the present research the more broadly accepted [11] idea of separation of those standards is followed. One example of this approach being followed by a tribunal is the *Frontier Petroleum v Czech Republic* case, where the Tribunal described the difference between the FPS and the FET standards as follows: *"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 host state's part to desist from behaviour that is unfair and inequitable."*[12]. Another example, in more recent *Krederi Ltd. v Ukraine* the Tribunal held that *"it is hard to believe that contracting parties of a BIT choose the separate wording of "full protection and security" in order to mean the same thing as "fair and equitable treatment"* [13].

This is further backed up by the opinions of some scholars such as Zrilic, who indicate that the interpretation of FPS and FET shall not be based on textual but rather contextual foundation. He emphasizes the logical correctness of separation of two different standards that are enshrined in two different provisions of the treaty by saying: *"A reading according to which there is a significant substantive overlap between two distinct standards included in the same provision betrays textual logic, renders the inclusion of both standards futile (in contradiction to effet utile interpretation), and […] tends to lead to resolution of relevant claims under only one of the standards (notably FET)"* [14]. This position prevents FPS from being submerged in FET and provides it the separate framework, which was originally given to that clause by states in treaties.

For this reason, the question of the extent to which FPS applies to "legal protection" in cases where such an extension is not explicitly included in the treaty text remains highly controversial. This is particularly relevant if we consider the legal protection framework – i.e., the legislation regulating the standards of protection afforded to FDIs – as being covered by FET. Alternatively, some scholars advocate the view that the FPS standard has evolved, expanding its scope to encompass legal protection issues within its regime. In this case the separation of two regimes, although somewhat complicated, will be still possible and necessary. Clear distinction between FET and FPS regimes will provide a uniformity and predictability of standards and foster the formation of a relatively unified approach towards both. For these reasons, a clear distinction must be drawn between the two, defining the nature of state actions that may fall under the denotation of "legal protection". Therefore, it seems reasonable to state that, in order to avoid merging the FPS

standard into the FET standard, the scope of protection under the FPS clause must remain connected to physical damages. This "connection" entails, among other things, the legal framework aimed at providing the corresponding protection or related to the ability to offer such protection, ensuring that it is available and effective, in accordance with the state's obligations.

As was emphasized by tribunals in number of cases, it is the very nature of the FPS clause to be invoked in cases of armed conflicts and political disturbances. Arbitral tribunals have addressed the application of the FPS clause in various instances where investors were harmed by physical violence. It has been most commonly invoked in cases involving low-intensity violence, such as the forceful seizure of property [15], expropriation with government help [16], social demonstrations [17], employee protests [18], and government harassment [19]. Less frequently, the FPS clause has been applied in large-scale violence, such as widespread riots, revolutions, and civil wars [20]. Notably, the AAPL v. Sri Lanka case dealt with FPS during civil war [21], with more cases arising from conflicts in Libya [22] and Crimea [23]. Therefore, it can be established that the FPS standard has been specifically tailored to address the issues of instability in the host-state and provide additional guarantees to the investors. In this context it is worthy of mentioning that the FPS standard has primarily been applied in three contexts [24]. In earlier cases of invocation, foreign investments were harmed by insurgents or rioters. A second category involves situations where government forces, such as police or military, were involved. More recent cases have focused on government regulatory actions that disrupt the legal environment of the investor's business. In theory, the question whether FPS clause may be applicable in other cases, such as cyber-attacks on investor's networks, may be raised.

As a result, the FPS clause is understood as an additional and widely accepted guarantee against investor losses that arise during periods of instability in a host state. The nature of such circumstances plays a pivotal role in defining the scope of necessary actions to prevent harm to investments and secure investors' rights. Often, these circumstances include armed conflicts, whether international or non-international in character. The FPS clause can be successfully invoked in cases where there is an armed conflict if host-state's negligence is proven despite the armed conflict. This is true when such conflict, while affecting the threshold of due diligence, has not restricted the ability of state to provide adequate protection in the extent that would satisfy the requirements established by general practice in international law.

While there is a general consensus that the duty of *due diligence* applies in cases where the harm has ben caused by non-state actors, a considerable number of scholars advocates that that duty must not be applied in cases when the harm is caused by a state organ [25]. The host-state is liable for protection of investments against infringements from actors that are out of its control as well as from actions

of state organs. However, the distinction between state and non-state actors plays an important role in assessing the scope of state's obligations. The character of the obligation might change as the host-state in these two situations may act either as a party that has failed to prevent the harm or as a party that has caused the harm. In the first case, the failure may potentially constitute a violation of the FPS standard, although the issue of compensation for the violation remains vague. In the second case, in addition to violating the FPS clause, it may also entail a stronger ground for obligation to compensate for delictual harm. Yet, as has been underlined in arbitral jurisprudence, states possess a discretion to choose certain actions that are aimed at protecting their public order and security interests, including interference [26]. Nonetheless, such interference must be reasonable and pursue a legitimate aim. Notwithstanding the similarities, such "reasonableness" of the interference must not be mistaken with the duty to exercise reasonable care (*due diligence*). Such interference must be proportionate to the aim pursued. Hence, state actions may be excused on this basis, even if the harm was caused by its officials. However, this does not prejudice the issue of compensation.

Alternatively, assessing whether the duty of *due diligence* under the FPS standard was fulfilled in such cases may appear irrelevant, as any intentional action by state officials causing harm to investments is sufficient to establish a failure of protection. Such wrongful failure may only be precluded due to an excuse or justification. However, it seems that in cases, where the harm by state organs was caused unintentionally it will be logical to apply the test of duty of *due diligence* to figure out whether the state has taken all reasonable and necessary measures to avoid this accidental harm.

The standard of due diligence for FPS clause

The FPS standard has never been considered as an absolute obligation in modern agreements. The FPS clause puts up a requirement to execute all necessary measures that are needed to grant due protection to the investors and prevent the harm, irrespective of the results of such conduct [27]. Such interpretation of FPS clause corresponds with the accepted rule, which has been confirmed by ICJ in *Elettronica Sicula SPA* case [28].

In order to assess the adherence to FPS standard it is necessary to establish the framework of what shall be qualified as fulfilment of due diligence duty. This question is resolved by dividing the duty to two aspects, first being the objective expectations and second, subjective circumstances. Such approach allows making a fair and equitable differentiation between expectations from states with highly developed economy and political stability and less developed states.

The objective element is often reflected in different formulations that show an expected line of reasonableness in state's actions under the obligations it undertakes, for instance as actions expected from "reasonably well-organized modern State." [29] This sets a minimum baseline for state behaviour, regardless of the

circumstances. The existence of such a minimal standard is only logical, as investors can never expect more than what can reasonably be offered by a "well-governed" or "reasonably well-organized modern" state. Nor is it acceptable, from the perspective of fairness and equity, to tolerate behaviour that does not align with the standards of such a state.

In modern understanding of the FPS this objective element is correlated with the subjective element which takes into account specific circumstances present in that case that could affect state's ability to provide due protection. The interplay between these two elements is the key factor for the evaluation of the potential breach of FPS clause. Although there is a common vision that these economic and social conditions must be thoroughly addressed, it remains undetermined to what extent they should be considered when evaluating a state's adherence to the full protection and security standard. [30] These conditions include but are not limited to the host state's level of economic development, availability of necessary resources, the presence of armed conflict, and other political or economic factors that can influence its capacity to ensure full protection and security. All of the above are able to originate troubles for the host state, often without its contribution and without its will.

In a recent award in a case against Libya, the tribunal noted the incoherence in complainant's position concerning the differences between "objective" and "modified objective" approaches by noting that throughout proceedings it was accepted by both parties, that the assessment of observance of *due diligence* obligation by the respondent, must be done by examining the availability of resources of the host state for preventing the alleged harm and concluded that "*[T]he applicable standard may require different responses depending on the circumstances of the State that is called upon to exercise due diligence*" [310]. Then, to establish the threshold of reasonable expectations, the tribunal examined the circumstances present at the relevant time. First, by assessing the stability of the specific region where the investments were located, it found that the area had become "highly unstable and lawless" and noted the absence of *"ample Libyan forces on hand who could easily have maintained or restored order"*. [32]. The tribunal then addressed the factual circumstances and development of the conflict in Libya. It assessed the amount of resources and military personnel that would have been necessary to carry out the evacuation and protect the investor's property, reviewing these estimations through the lens of the situation on the ground. Consequently, the tribunal concluded that *"it would have been entirely unreasonable to have expected [Respondent's military officer] to deploy approximately half (perhaps more) of his operation-ready troops to enable Claimants to gather up and relocate their machinery and equipment*." [33]. This meant that the tribunal found the Respondent virtually unable to provide more effective and immediate protection under the circumstances at the time, thereby concluding that it had not breached its due diligence obligation under the

FPS clause. This case vividly highlights the impact of armed conflicts on the reasonable expectations placed on the host state and how these expectations can change based on the situation on the ground, which, as a consequence of the harsh conditions caused by armed conflict, can drastically limit the state's ability to provide full protection and security.

This widely accepted "modified objective approach" recognizes that the host state must uphold an objective minimum standard of *due diligence*. However, the state's actions are evaluated based on what can reasonably be expected given its specific circumstances and available resources. This approach establishes fairer standards for developing states that frequently suffer the consequences of armed conflicts. From an economic perspective, it also introduces an additional consideration for investors before committing to investments in unstable states, thereby amplifying the negative impact of the "image of instability" for such states. This dynamic motivates states to project a stronger image and foster a more stable economy to attract additional investments.

This approach has received substantial recognition in arbitral jurisprudence. In cases of *Pantechniki v Albania* [34], *LESI v Algeria* [35], *Ampal-American v Egypt* [36] and others the tribunals relied on this approach and acknowledged the relative nature of due diligence. Although tribunals often find less developed states liable for not providing sufficient protection, this does not undermine the applicability of this approach. Such assessments are made precisely through the lens of the specific circumstances of each case and establish the failure to fulfil the obligation, even considering the lower threshold. Meanwhile, when applying this test, tribunals are also cautious of creating situations that would result in a vacuum of responsibility. These situations can arise when subjective circumstances are relied upon entirely, without establishing a minimum reasonable standard of protection by the state. For instance, in cases where a state's economy is in full collapse due to continuous conflicts and other circumstances, can the state justify a complete refusal of protection under its primary obligation? A positive answer would disregard the meaning and purpose of the investment treaty as a whole, and the FPS clause in particular. Therefore, the FPS is seen as a combination of both subjective and objective standards.

Among others, armed conflicts frequently serve as major factors that reshape the scope of *due diligence* obligations. These conflicts exert a profound impact on both the economic and political stability of the host state, and the adverse consequences for states already in a fragile condition can hardly be overstated. In such contexts, the primary obligation to ensure physical protection of investments and investors may undergo substantial modifications. The threshold for what constitutes negligence, as well as the level of effort expected from a state, often becomes more lenient, correlating directly with the state's diminished capacity to fulfil its obligations. This reduction in the expected standard of care reflects the practical limitations imposed on states by the destabilizing effects of armed conflict.

The conclusion of the tribunal in *Strabag v Libya* [37] is based on the logic highlighted above. In this case the tribunal emphasised the importance of circumstances present in Libya at the time: *"[T]he Tribunal believes that the duty of due diligence cannot be viewed in the abstract and in isolation from the conditions prevailing in Libya during 2011 and for much of the time since."* [38]. It took into consideration the harsh conditions imposed on Syrian government by the outbreak of armed conflict, political instability and economic crisis when assessing the threshold of expected due diligence. As a result, the tribunal has concluded that given the circumstances in Libya during and after the Revolution, it was not feasible for the Libyan authorities to implement consistent and effective measures to safeguard the Claimant's investment [39].

Nevertheless, judicial practice indicates that armed conflict is not regarded as a circumstance that entirely absolves states from their duty to provide due protection. Factors such as the character, scale, and duration of the conflict, *inter alia*, are taken into account to assess the host state's potential ability to adhere to its obligations. In other words, a host state does not gain *carte blanche* simply because an armed conflict exists. For instance in cases of *AAPL v Sri Lanka, AMT v Zaire and Ampal-American v Egypt*the tribunalsestablished the responsibility of the host-state notwithstanding the existence of an armed conflict.

In *AAPL v Sri Lanka* [40] the tribunal extensively elaborated on *due diligence* character of the FPS obligation and continued with assessing whether host state had met the standard of protection that was reasonably expected at that moment. It found that even in time of conflict the respondent had several options of actions that were available at the time, which would be considered enough to meet the standard of protection. Based on that the tribunal concluded that host state's responsibility is established under international law as it failed to provide sufficient guarantees [41].

In *AMT v Zaire*, the tribunal found Zaire liable for failing to provide the required protection under the FPS clause of the USA-Zaire BIT in response to damages caused by looting from fragments of Zaire's military. The tribunal concluded that Zaire made no efforts to prevent the damage, and it deemed the rejection of compensation based on national legislation by the respondent to be unlawful [42]. While the tribunal raised the question of what would constitute sufficient preventive measures in such cases, it did not provide a direct answer, as the respondent's complete inaction was deemed sufficient to establish liability in this case. Ultimately, the tribunal concluded that *"Zaire is responsible for its inability to prevent the disastrous consequences of these events…,"* [43] supporting the notion that, despite subjective factors such as the state's circumstances and available resources, a state must always make reasonable efforts to prevent harm in volatile situations.

In *Ampal-American v Egypt* the flexibility of the standard is more vivid. In the wake of Arab Spring Revolution armed militant groups used the instability and fragility of the situation to conduct a series of attacks on Trans-Sinai Pipeline. When assessing the alleged violation of FPS clause the tribunal took into consideration all thirteen attacks perpetrated. It has found that the failure to prevent harm from the first attack could not be considered as a violation of obligation to provide protection and security [44]. Here, the tribunal referred to Sole Arbitrator Paulsson, who underlined in *Pantechniki*: *"[…] it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecented magnitude in unprecedented places."* [45]. This position is coherent with the idea of "degree of vigilance", which must be present in the actions of the host-state. However, according to the tribunal after the fourth attack Egyptian forces should have reasonably expected new attacks on the pipeline and take measures to counter them. Therefore, when the court looked at the attacks in conjunction it has found that starting from the fifth attack it was apparent that the respondent was not putting reasonable efforts to protect the investments, thereby violating the obligation to provide "full protection and security."

After analyzing these conclusions, a discernible pattern emerges: tribunals generally agree that the contours of FPS obligations during armed conflicts are modified and adjusted to reflect the host state's capabilities. Nevertheless, tribunals place significant emphasis on the nature of each armed conflict and evaluate each harm within the context of the factual circumstances prevailing at the time. The core decision hinges on balancing the availability of resources and the ability to provide greater protection on one hand, against the sufficiency of the actions actually undertaken on the other. Arbitrators naturally bring individual perspectives to this question, influenced by their backgrounds and interpretations of the clause. However, considering the *raison d'être* of investment treaties, the wording of the FPS clause, and its historical application, there is a tendency to resist radical changes to its scope. In other words, while armed conflicts inevitably affect the host state's capabilities, investments should, to the extent reasonably equitable, continue to benefit from the FPS clause, which guarantees their protection even during times of crisis.

Conclusion

The FPS clause is widely regarded as the most pertinent tool for ensuring due protection to investors during periods of armed conflict and civil unrest. A uniform understanding of this clause would provide investors with a clearer vision of what they can reasonably expect from the host state during such unstable times. It is evident from both case law and academic doctrine that the FPS obligation is one of conduct, limited to the exercise of due diligence. However, the exact standard of

due diligence continues to be a matter of debate and must be assessed on case by case basis.

From the analysis conducted in this article, it can be concluded that various circumstances affecting the host state at the time when damage occurs to investments play a significant role in evaluating the state's ability to provide due protection. The reasonable efforts made by the host state are assessed through the lens of what actions the state would reasonably be able to undertake given the circumstances. Armed conflicts, as one of the most destructive and destabilizing situations, alter the threshold for what can be considered the exercise of due diligence. Such conflicts not only reduce the state's capacity to respond to threats against investors but also impair its technical ability to prevent harm. Additionally, armed conflicts place states in an economically vulnerable position, often hindering their ability to provide adequate legal, financial, or physical security. As a result, even when a state acts in good faith, its ability to provide the same level of protection as it could during peaceful times is significantly diminished. Therefore, the presence of armed conflict broadens the range of acceptable state actions and lowers the expected threshold of due diligence required under the FPS clause. Nevertheless, the assessment must consider the purpose of BITs, particularly the FPS clause as a guiding path, which underscores the idea that protection during armed conflicts is an essential tool for ensuring stability and predictability for investors while fostering mutual investments based on equitable standards of protection. For that reason, while acknowledging the impact of armed conflicts and the scarcity of resources during such challenging times, prioritizing the protection of investments under these circumstances remains in priority.

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39. *Idem* paras 236, 344-345.
40. *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Award, 27 June 1990.

41. *Idem* para 86.
42. *AMT v Zaire* para 6.05-6.08.
43. *Idem* para 6.08.
44. *Ampal-American v Egypt* para 285.
45. *Pantechniki v Albania* para 77.

СТАНДАРТ ПОЛНОЙ ЗАЩИТЫ И БЕЗОПАСНОСТИ ВО ВРЕМЯ ВООРУЖЁННЫХ КОНФЛИКТОВ

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АННОТАЦИЯ

В данной статье исследуется стандарт «полной защиты и безопасности» (“Full Protection and Security”, FPS), который широко используется в двусторонних и многосторонних инвестиционных договорах. Основное внимание уделяется влиянию вооруженных конфликтов на интерпретацию и применение этого стандарта. Анализируются ключевые вопросы, такие как пределы обязательств принимающего государства, их трансформация в условиях вооруженных конфликтов и взаимодействие между стандартом FPS и другими стандартами защиты инвесторов, включая «справедливое и равное отношение».

В статье исследуются прецедентная практика арбитражных трибуналов, включая дела, связанные с конфликтами в Ливии, Крыму, Шри-Ланке и других регионах, где из-за последствий вооружённых конфликтов вставал вопрос о соблюдении должной осмотрительности принимающего государства по защите инвестиций. Делается вывод, что вооруженные конфликты изменяют порог ожидаемой должной осмотрительности со стороны принимающих государств, но не освобождают их полностью от ответственности. Статья подчеркивает важность баланса между разумными ожиданиями инвесторов и объективными возможностями государства в условиях кризиса.

Данное исследование способствует формированию более унифицированного подхода к применению стандарта FPS, повышая предсказуемость и стабильность защиты инвестиций в условиях нестабильности.

Ключевые слова: полная защита и охрана, инвестиции, вооружённый конфликт, инвестиционные договоры, должная осмотрительность.