Himachal Pradesh National Law University, Shimla (India)

Journal Articles | ISSN:2582-1903 | *Shimla Law Review*

Volume-II (2019)

FULL PROTECTION AND SECURITY STANDARD IN INTERNATIONAL INVESTMENT LAW AND PRACTICE: An Indian Perspective

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DOI: https://doi.org/10.70556/hpnlu-slr-v2-I1-2019-09

This article can be downloaded from: https://www.hpnlu.ac.in/journal-level-3.aspx?ref-id=11

Recommended Citation:
Santosh Kumar , FULL PROTECTION AND SECURITY STANDARD IN INTERNATIONAL INVESTMENT LAW AND PRACTICE: An Indian Perspective, HPNLU SHIMLA, II SML. L. REV. 177 (2019).
https://doi.org/10.70556/hpnlu-slr-v2-I1-2019-09

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Volume II | *ISSN: 2582-1903* | April 2019 - March 2020

FULL PROTECTION AND SECURITY STANDARD IN INTERNATIONAL INVESTMENT LAW AND PRACTICE: An Indian Perspective

Santosh Kumar [*]

[***Abstract***: *An investment treaty normally provides treatment provisions with respect to several matters. Various treatment standards in an investment treaty may be categorized as 'general' or 'specific', the former applies to all forms of investment activities in the host state while latter only concerns particular matter relating to an investment. General standards of treatments include host state's commitments to grant investors and their investments 'fair and equitable treatment', 'full protection and security', 'treatment in accordance with the international minimum standard', 'national treatment', and 'most-favored-nation treatment'. Specific treatment standards include 'monetary transfer provision', 'expropriation and investor rights in times of war, revolution, or civil disturbance. This paper examines the evolution of full protection and security standard in international investment law in general and its implication on third world countries such as India.*]

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

—Christian Wolff

I

Introduction

When investors decide to invest in a foreign jurisdiction, they have to consider different circumstances prevailing in that state. They are actually putting themselves and their investments into great political risk. In order to protect foreign investors and their investments against those political risks, investment treaties stipulate obligations

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[**] Christian Wolff, *Jus Gentium Methodo Scientifca Pertractum* in CLASSICS OF INTERNATIONAL LAW 536 (Joseph H. Drake trans., James Brown Scott ed., 1934).

regarding the treatment that the host state must provide to investors and their investments. Investment treaties usually do not define the term treatment in their texts. Treatment in its ordinary dictionary meaning includes the 'actions and behavior that one person takes towards another person'. In the *ICSID case of Suez*, *Sociedad General de Aguas de Barcelona SA*, and *Vivendi Universal SA* v. *The Argentine Republic*[1], the tribunal defined the term 'treatment' as follows:

> 'The word treatment is not defined in the treaty text. However, the ordinary meaning of that term within the context of investment includes the rights and privileges granted and the obligations and burdens imposed by a Contracting State on investments made by investors covered by the treaty.'

In other words, by concluding an investment treaty, a state takes obligation towards investors and investments of the treaty partner about its action and behavior it will take in future transactions[2]. The treaty provisions on standards of treatment of investors and investments are intended to restrain host state government behavior and impose discipline on governmental actions. In order to achieve these goals, investment treaties define a standard to which host state's actions and behavior towards investors and their investments must conform. State actions and behavior that fail to meet the defined standard constitute treaty violation. Such actions and behavior of the host state attract international responsibility and render it potentially liable to pay compensation for the injury it has caused.

An investment treaty normally provides treatment provisions with respect to several matters. Various treatment standards in an investment treaty may be categorized as 'general' or 'specific', the former applies to all forms of investment activities in the host state while latter only concerns particular matter relating to an investment. General standards of treatments include host state's commitments to grant investors and their investments 'fair and equitable treatment', 'full protection and security', 'treatment in accordance with the international minimum standard', 'national treatment', and 'most-favored-nation treatment'. Specific treatment standards include 'monetary transfer provision', 'expropriation and investor rights in times of war, revolution, or civil disturbance.[3] This paper will study the evolution of full protection and security standard in international investment law in general and its implication on third world countries like India in particular.

It is worth mentioning here that investment treaties provide standards for state behavior towards investors and their investments, but at the same time, they do not provide standards for investor's behavior towards the host state or its government. The reason

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[1] *Suez, Sociedad General de Aguas de Barcelona SA, and Vivendi Universal SA* v. *The Argentine Republic,* ICSID Case No ARB/03/19, Para 55 (3 Aug., 2006).

[2] J.W. Salacuse, THE LAW OF INVESTMENT TREATIES 228 (2015).

[3], *Bilateral investment treaties 1995-2006: Trends in Investment Rulemaking* UNCTAD 28 (2007), (Jan. 10, 2020), https://unctad.org/en/pages/PublicationArchive.aspx?publicationid=196

might be that host's state laws and legal institutions are considered sufficient to ensure appropriate investor behavior.

The full protection and security standard (hereinafter FPS standard) are an absolute treatment standard i.e., it is not contingent upon the treatment of other investors and investment by the host state. It is guaranteed in almost all investment treaties typically in the form of an FPS clause. Jonathan Bonnitcha, Lauge N. Skovgaard Poulsen, and Michael Waibel find that at least 70 per cent out of 1602 investment treaties include FPS standards[4]. Despite variation in the language of FPS standard in different treaty texts, its substance remains the same.[5] Traditionally the protection of these standard guarantees investors and their investment (qualifying) from physical harm only, but later on it also extends, by way of interpretation by investment tribunals, to cover legal and regulatory protection to the investor and their investments.[6] Physical protection essentially means a guarantee/obligation taken by the host state to protect physical investment of the investor from any damage. The host state must ensure the presence of the police force to protect the property from any damage by the protestors, employees, etc.[7] However, some scholar is of the view that the state is obliged to provide protection to the investors and their investments but only to the extent that the host state would be able to afford it. There is a difference between the two approaches, under the former the obligation to protect the investments does not look at the states means particularly while under the later approach states means is an important factor.[8] As far as legal protection is concerned, it is a bit controversial because sometimes you are of the view that legal protection is not really part of the full protection and security guarantees provided under investment treaties. This unusual extension of the protection standard to cover legal as well as regulatory protection leads to much controversy in the international investment legal regime. Some tribunals are of the view that the FPS standard only guarantees protection from the physical damage and the other holds the view that it also guarantees legal as well as regulatory protection[9]. Purpose of this paper is to find out the true meaning of FPS standard in investment treaties by perusal of the genesis of FPS standard in international law.

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4 *See* J. Bonnitcha & LNS Poulsen, *et. al*., THE POLITICAL ECONOMY OF THE INVESTMENT TREATY REGIME 94 (2017).

5 The NAFTA refers to 'full protection and security'. Other treaties, such as the ECT, refer to 'most constant protection and security'. The variations in language however do not seem to carry much significance.

6 *CME Czech Republic B.V.* v *Czech Republic, Partial Award* (9 ICSID Rep 121).

7 R. Dolzer & C. Schreuer, *Principles of International Investment Law* 160-166 (2012).

8 Blanco Sebastián Mantilla, Full Protection and Security in International Investment Law 326-329 (2019).

9 K.J. Vandevelde, Bilateral Investment Treaties: History, Policy, and Interpretation 245-48 (2010).

II

Evolution of FPS Standard

Foreignness is as old a concept as the statehood itself. National identities are exclusive of those not belonging to the national communities, who are accordingly designated as aliens, foreigners, or strangers. State interest to protect their nationals abroad remains the recurrent theme from time immemorial. That is the reason why it became difficult to determine the starting point of the roots of the FPS standard in history. Some international law scholars suggested that its roots are in antiquity.[10] Todd Weiler places the origins of FPS in the Bronze Age. In his words:

> 'The roots of the P&S standard lay in over two millennia of promises of examples and protection and security [...] The concept of hospitality, which encompasses the practice of according protection and security to aliens, appears to have been a recurring theme from the start of human civilization. While shared understandings of concepts such as sovereignty, territory, property rights, economy, and States may have all evolved over the millennia and between cultures, the concept of hospitality itself has remained largely immutable.'[11]

However, Sebastián Mantilla Blanco criticized hospitality approach of Todd Weiler. The hospitality approach is not entirely convincing. This view poses at least four concerns. The first concern refers to the contention that hospitality has been a consistent and largely immutable notion in utterly different historical and geographical contexts, as suggested by Weiler. The concept of hospitality is anything but straightforward. However, several theory propounded by the likes of Immanuel Kant, Emmanuel Levinas, Jacques Derrida and Pierre Klossowski suggest that people's understanding of hospitality considerably vary from one culture or religion to another.[12] A second concern arises from the assumption that the FPS standard is embedded within the notion of hospitality so that FPS can be properly styled as a 'hospitality obligation'. However, the link between the two notions is unsure. The reason being it is common ground that at least the FPS standard assures foreigners physical protection against private wrongs. The host state is thus pledged to protect aliens from its own citizens. It is dubious to say hospitality truly implies that guests shall be protected against a member of the host family. The third concern is that hospitality could be too broad a notion. The whole question of foreignness has been occasionally assessed as a question of hospitality. Without entering into the philosophical debate, one observes that, under some understandings of the term, hospitality could actually embody the whole substance of the law of aliens. From this standpoint, FPS would be a particular content

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[10] Mantilla, *Supra* note 9 at 39.

[11] Weiler Todd, The Interpretation of International Investment Law: Equality, Discrimination and Minimum Standards of Treatment in Historical Context 61 (2013).

[12] *See* Immanuel Kant, ZUM EWIGEN FRIEDEN. EIN PHILOSOPHISCHER ENTWURF 36-37 (1796); *See also* Jacques Derrida, OF HOSPITALITY 21-22 (2000); Jacques Derrida, ADIEU TO EMMANUEL LEVINAS 15 (1999).

within the broader notion of hospitality (as a general content). Lastly, a fourth concern pertains to the very idea of an international 'hospitality obligation'. In his celebrated essay *Zum ewigen Frieden,* Immanuel Kant conceived the idea of 'universal hospitality' as a condition for peace. Hospitality, said Kant, 'signifies solely the right every stranger has of not being treated as an enemy in the country in which he arrives'. Kant believed, however, that hospitality could be conditional and granted on merely temporary basis.[13]

He further criticizes Todd Weiler quoting Jacques Derrida's famous criticism of Kantian conception of international hospitality. Linking the FPS standard to hospitality entails paradox. According to Derrida if hospitality is pure, it cannot be conditional because conditions are inhospitable gestures. However unconditional hospitality puts an unbearable burden on the host. Impossible demands cannot be a binding international obligation. So, linking FPS standard with hospitality does not serve any purpose, rather it raises confusion for the notion of hospitality is entirely disputed. FPS standard has its own meaning.

Sebastian Mantilla Blanco traces the origin of the FPS standard to the practice of reprisals[14] in Western-European Middle Ages. Works of Emer deVattel and Hugo Grotius also reveals that law on the treatment of aliens was clearly linked to the notion of private reprisal, a European medieval institution. Albert Geuffre de Lapradelle and Nicolas Politis have suggested that the origin of the whole law of state responsibility for injuries to aliens can be linked to the institution of private reprisals. Later on, this practice of private reprisal was rationalized in the mid-to-late eighteenth century through the theory of the tacit agreement.[15]

However, as far as claims of Sebastian Mantilla Blanco are concerned, it remains far from reality. His claim that the origin of law on protection and security of aliens can be traced to the medieval practice of reprisals is not plausible on several accounts. Firstly, Plato in his longest dialogue *The Laws'* said, 'arbitrary offenses committed against strangers were liable to the vengeance of the gods . . . the foreigner having no kindred and friends are all the more an object of sympathy both of gods and men'. Inter-Greek treaties at that time contain provisions with respect to the protection of property and acquisition of real

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[13] Mantilla, *Supra* note 9 at 40-41.

[14] Kelsen defined reprisals as 'acts, which although normally illegal, are exceptionally permitted as reaction of one state against a violation of its right by another state'. Reprisals are measures of coercion, derogating from the ordinary rules of international law, decided and taken by a State (earlier by private individuals), in response to wrongful acts committed against it, by another State (earlier by foreigners), and intended to impose on it, by pressure exerted through injury, the return to legality.

[15] Aliens were thereby understood to 'tacitly' adhere to the social contract by the act of entering into a foreign sovereign's realms. The host sovereign was in turn presumed to agree to extend his protection to them, in return for obedience. Upon certain conditions, the breach of such protection obligation entitled the foreigner's home state to undertake or authorize reprisals.

estate in parties' city-state.[16] Even, the polity treaty in Greek times places foreigners on equal footings with the nationals. Arthur Nussbaum in his book *A Concise History of the Law of Nations* indicated that generally in the absence of treaty, the citizens of one Greek city-state receive protection and security from another Greek city-state on basis of kinship, but in some cases in absence of treaty, the Greek people could launch 'private reprisals' against the property of foreigners, who were accused of wrongdoing against their fellow citizens[17]. Secondly, in ancient Rome, the status of foreigners was more liberal than the Greeks. As Nussbaum notes, 'one may say that in contradistinction to the Greeks, the Roman did not live in a state of latent hostility with the rest of the world." Roman system of *jus gentium* provides protection to the person and the property of the foreigners. However, barbarians were not included in *jus gentium* and their properties were not protected and considered as res nullius[18]. Thirdly, ancient India displayed a far more liberal and rational outlook in the treatment of foreigners than the Greek legal system. In ancient India, aliens enjoyed significant privileges. Megasthenes, who came to the court of Mauryan emperor Chandragupta in 4th century B.C., wrote:

> 'Among the Indians officers are appointed even for foreigners, whose duty it is to see that no foreigner is wronged. Should any of them lose his health, they sent physicians to attend him and take care of him, and if he dies, they bury him and deliver over such property as he leaves to his relatives.'

Vincent Smith in his book, *Early History of India,* wrote 'many foreigners found India a great trading center and settled down in commercial towns. In Madura, the Pandyan capital, there was a colony of Roman merchants. The ancient legal system of India provided many safeguards to foreign traders. Kautilya in *Arthasastra* states that foreigners importing merchandise should be exempted from being sued for debts unless they form local associations or enter local associations. In another passage, he states that the superintendent of commerce could grant the remission of trade taxes.[19]

Therefore, we can safely conclude that the international law on protection and security existed even prior to the medieval practice of reprisals. Even the system of reprisals was itself of Greek origin. In ancient India, the international law on protection and security was fully developed as noted by Megasthenes in his book *Indica*.

Generally speaking, the law on state responsibility for the injuries to aliens in Middle Ages was slowly but steadily improved mainly through treaties, customs, and municipal laws. Studies of treaties and unilateral decisions of middle ages indicate that

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[16] Nartnirun Junngam, The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From? 7 AMERICAN UNIVERSITY BUSINESS LAW REVIEW (2018). (Feb. 3, 2020), https://ssrn.com/ abstract=3160032.

[17] Arthur Nussbaum, A Concise History of the Law of Nations 6 (1962).

[18] Junngam, *Supra* Note 17.

[19] M.K. Nawaz, The Law of Nations in Ancient India 172, 185 (1957). *See also* Coleman Phillipson, The International Law and Customs of Ancient Greece and Rome 40, 44, 45 (1911).

the nature and substance of protection and security standard were not consistent. Moreover, those who believe that the modern international law has Westphalian origin must consider the fact that in the absence of the law of nation in East Indies foundation of European fortified settlements in those regions would not be possible. It is quite obvious that without protection and security from the local sovereign the European merchants' community would not survive in the East Indies - which was dominated at that time by Islamic merchant communities.[20] Their protection was so much sure that even in wartime they were equally protected. As Hugo Grotius explains in his seminal work *Commentary on the Law of Prize and Booty*:

> 'When the situation at home grew unsettled, the States-General of the Low Countries provided documentary ratification of the arrangement on behalf of the Portuguese merchants, with the specific purpose of safeguarding the latter from the adverse treatment that might be accorded them under the pretext of war-time license. Thus the Portuguese, with their wives, their children, and the other members of their household, were taken under the guardianship of the state, as were their domestic furnishings, merchandise, other possessions, and all rights properly pertaining to them, regardless of whether or not they were present in person. For they were empowered to enter, depart from, or remain within the territory of the Low Countries, and to import or export their merchandise, by land or by sea. Orders were even given to all of the military commanders and soldiers, instructing them to safeguard the personal welfare and the goods of Portuguese dwelling in the said territory. Moreover, after the Lowlanders had repudiated the rule of Philip, and the Portuguese, on the other hand, had acknowledged his sovereignty, with the result that the two peoples became enemies, that same States-General (acting at the request of the Portuguese who were residing or doing business in the Low Countries, and moved by the consideration that it was to the interest of the natives that commerce should be cherished insecurity rather than impeded by war), nevertheless confirmed its earlier rescript and exempted the Portuguese from the laws of war to the extent indicated in the following provision: that all Portuguese who might wish to do so, should without danger to life or property enjoy safe passage to and from, residence, and the practice of commerce, among the people of the Low Countries.'[21]

Yes, it is equally true that only by the mid-eighteenth century the international obligation of protection and security owed by the state to the foreigners had coalesced into customary international law as evidenced in the writings of German professor Christian von Wolff and Swiss Scholar Emmer de Vattel.[22]

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[20] C.H. Alexandrowicz, An Introduction to the History of the Law of Nations in the East Indies *43*-45 (1967). *See also* R.P. Anand, Origin and Development of the Law of the Sea: History of International Law Revisited 67 (1983).

[21] Hugo Grotius, DE IURE PRAEDAE COMMENTARIUS: COMMENTARY ON THE LAW OF PRIZE AND BOOTY 173-74 (James Brown Scott ed., Gwladys L. Williams & Walter H. Zevdel trans., 1950).

[22] S.M. Blanco, *The Calm after the Storm: Full Protection and Security as an Element of the Minimum Standard of Treatment* in FULL PROTECTION AND SECURITY IN INTERNATIONAL INVESTMENT LAW EUROPEAN YEARBOOK OF INTERNATIONAL ECONOMIC LAW 117 (2019).

Christian von Wolff takes the law of nations in abstraction and propounded several ideas that are still relevant in the field of international law. He, in his magnum opus *jus gentium method scientifica pertractactu,* writes on tacit agreements that individuals by the very act of entering into a foreign territory tacitly bind themselves that they wish to subject their acts to the laws of the host state and the laws have the same force over them as over their citizens. In turn, the host sovereign presumed to agree to extend his protection to them, in return for their obedience. Individuals living abroad continue to be citizen of their home state. Along these lines of argument Wolff advances the proposition that tacit agreement is tripartite in nature, i.e., between the rulers of two states and its citizens living abroad[23]. In Wolff's system of law of nations, the right of security belongs to every man by nature[24]. In these terms, Christian Wolf seems naturalist or contractarian philosopher of the law of nations. The notion of protection envisages the duty to prevent harm as well as in the event of a breach, the duty to offer adequate means of redress:

> 'Foreigners, as long as they live in alien territory, ought to be safe from every injury, and the ruler of the state is bound to defend them against it, that is, security is to be assured to foreigners living in alien territory […] The ruler of a state ought not to allow any one of his subjects to cause a loss or do a wrong to the citizen of another nation, and if this has been done, he ought to compel him to repair the loss caused and to punish him; unless he does this, since he tacitly approves the act, the nation itself must be assumed to have done the wrong or inflicted the injury.'[25]

Scholars have suggested that Wolff's use of term like 'injury', 'loss', and 'wrong' made it very clear that duty to protect require physical as well as nonphysical protection. They heavily rely on Wolff to advance the proposition that the FPS standard requires both physical as well as legal protection of the investors and their investments.[26] However, this line of argument is misleading, for Wolff's system the protection is granted in exchange for obedience. He did not hold the view that aliens have right to enhance stability of the national legal system. The standard requires only the protection by the state against the private violence but not against the rules or regulations of the host state. Wolff himself explains protection obligation in these terms, 'the prince ought not to allow anyone of his subjects to cause a loss or do a wrong to the citizen of another nation'.[27] However, breach of rights and duties resulting from the tacit agreement could allow a state to resort to reprisals.

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[23] Christian Wolff, *Jus gentium methodo scientifica pertractactum* in CLASSICS OF INTERNATIONAL LAW 151-152 (James Brown Scott ed., Joseph Drake trans., 1934).

[24] *Id*. at 537.

[25] *Id*. at 536-537.

[26] George Foster, Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance, 45 (4) VAND. J. TRANSNAT. I. L. 1095, 1117 (2012).

[27] Wolff, *Supra* note 24 at 537.

Wolff's idea of the tacit agreement had influenced western international law scholarship. He had a remarkable influence on his Swiss colleague Emmer de Vattel. Emmer de Vattel in his seminal work *The Law of Nations or the Principles of Natural Laws* acknowledged that aliens are always entitled to the protection of the host state. The basis for the protection was strikingly similar to that of Wolff i.e. the idea of tacit agreement. He believes that the sovereign assures aliens security in exchange for an unconditional submission to domestic laws and regulations.[28] Moreover, Vattel's main concern seemed to be private violence and the possible attribution of individual conduct to the host state:

> 'As it is impossible for the best-regulated state, or for the most vigilant and absolute sovereign, to model at his pleasure all the actions of his subjects, and to confine them on every occasion to the most exact obedience, it would be unjust to impute to the nation or the sovereign every fault committed by the citizens. We ought not to say in general, that we have received an injury from a nation because we have received it from one of its subjects. But if a nation or its chief approves and ratifies the act of the individual, it then becomes a public concern; and the injured party is to consider the nation as the real author of the injury of which the citizen was perhaps only the instrument.'[29]

Vattel suggested that in case of injury to the foreigner, the home state can demand justice from the host state. And failure to do justice entails international responsibility.[30] Hence host state must accord protection and security to the aliens and in case of its breach, it must provide for its redresses. According to Vattel the reprisals are used between state and state to do justice when they cannot otherwise achieve it. It also requires the exhaustion of local remedies, so that the one resorting to reprisals must show that he has ineffectually demanded justice. He submitted that resort to reprisals is only admissible in case of denial of justice in international law.[31] Reprisals may be enforced on the person or the property of the offender or its co-nationals also. Later on, from the final decade of the eighteenth century, these notions of an international obligation of protection and security owed by the state to the foreigners have frequently incorporated in the commercial treaties concluded between a European power and the Americas. It did not remain a novel concept anymore. As Butler and Maccoby noted, several treaties of commerce and navigation of the eighteenth century 'protected more fully the person and property'.[32] After the Congress of Vienna (1814-15) the law on FPS standard further improved. The commercial treaties concluded between states in the nineteenth century usually contain a clause on the FPS standard. The United States started signing the Treaty of Friendship Commerce and Navigation from the late eighteenth century and

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[28] Emer de Vattel, THE LAW OF NATIONS 172 (G.G. & J. Robinson, 1758, 1797).

[29] *Id*. at 162.

[30] *Id*. at 287.

[31] Vattel suggests that reprisals are only legitimate in case of denial of justice by host state. Denial of justice may happen in several ways- First, by refusal to hear complaints of home state or its citizens, or by refusal to admit them to establish their right before the tribunals. Second, by making inordinate delay without cogent reasons denial of justice may happen, and thirdly, by making unjust and partial decision, *prima facie*; Emer de Vattel, *Id*. at 284.

[32] Geoffrey Butler & Simon Maccoby, THE DEVELOPMENT OF INTERNATIONAL LAW 211 (1928).

continued until the twentieth century. As we all know that the Treaty of Friendship Commerce and navigation is the precursor of the present Bilateral Investment Treaty. First Bilateral Investment treaty signed between Federal Republic of Germany and Pakistan contains provision on FPS standard in these words "investments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party'. After this treaty, the incorporation of FPS standard in investment treaty became the norm.

III

Arbitral Jurisprudence

The full protection and security standard maintain a very low profile in international investment law than their near sibling fair and equitable treatment standard, despite the fact that both standards of treatment enumerated side by side in almost every investment treaty. In 1990, Ibrahim Shihata, World Bank senior vice president and general counsel, and Antonio Parra, legal advisor with the International Centre for Settlement of Investment Disputes had observed no case law on FPS standard at hand. However, they warned that 'arbitrators in future cases will undoubtedly have the task of further elucidating this and other international law standards.[33] In view of a large number of cases coming out involving FPS standard violation and broad interpretation of FPS standard preferred by some tribunals proven Shihata and Parra right.

The full protection and security clause were interpreted in various ways by different tribunals in different time-space. As said earlier, some tribunals interpreted the FPS standard very narrowly while the other gave a very broad interpretation. Some tribunals have found that the FPS standard only includes physical protection of the covered investment while others found that it covers physical as well as legal and regulatory protection also. Two views are opposite to each other. Two opposite view is the result of scholarly view presented by two different sets of the ideologue.

Physical Protection

It is beyond doubt that the FPS standard in investment treaties guarantees at least the physical protection to the covered investment. In fact, the tribunals in many cases held that the FPS standard at least provides guarantees against the physical damage of the covered investment. In other words, the host state under FPS clause takes obligation to protect the investors and their covered investments from the actions of private as well as state officials. One of the early known cases on breach of FPS standard is *Sambiaggio case* between Italy and Venezuela. In this case Salvatore Sambiaggio, an Italian citizen residing in Venezuela alleged that some revolutionaries taken his property by force. His property right is violated by the revolutionaries. The tribunal while interpreting article

[33] *Available at*: https://oxia.ouplaw.com/view/10.1093/law:iic/bt117.regGroup.01/law-iic-bt117 (last visited Mar. 26, 2020).

4 of the 1861 treaty concluded between Italy and Venezuela held that the FPS standard contained in article 4 did not impose absolute liability on the host state to protect the foreigners from the party state in every situation. State could not be held responsible for the act which is not attributable to it. An act committed by persons out of their control could not be attributed to the host state. Tribunals further held:

> 'If it had been the contract between Italy and Venezuela, understood and consented by both, that the latter should be held liable for the acts of revolutionists -something in derogation of the general principles of international law - this agreement would naturally have found direct expression in the protocol itself would not have been left to doubtful interpretation.'[34]

Similarly, in *Neer* v. *United Mexican States*[35] the tribunal held:

> 'The treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.'

These two landmark cases on the international responsibility of state for the injuries to aliens laid down the jurisprudence on the subject. Tribunals in *Saluka* v. *Czech Republic* and *Rumeli* v. *Kazakhstan* interpreted FPS clause to include only physical damage. Thus tribunal in *Rumeli* v. *Kazakhstan* held:

> 'The Arbitral Tribunal agrees with Respondent that the full protection and security standard… obliges the State to provide a certain level of protection to foreign investment from physical damage.'[36]

Likewise, in *Saluka Investments* v. *Czech Republic* tribunal held:

> 'The full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence... the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.'[37]

In *BG Group* v. *Argentina*[38] tribunal also found that the protection and security was restricted to physical violence and damage only. Tribunal in *Eastern Sugar* v. *Czech Republic* stated that the FPS standard protects investors against violence from third parties, as follows:

> 'The criterion in Article 3(2) of the [Czech-Netherlands] BIT concerns the obligation of the host state to protect the investor from third parties in the cases cited by the Parties,

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[34] *Sambiaggio (Italy* v. *Venezuela),* 10 R.I.A.A., Paras 499, 524 (Mixed Claims Commission 1903).

[35] *L.F.H. Neer and Pauline Neer (U.S.A.)* v. *United Mexican States,* 4 R.I.A.A. Para 60 (2006) (15 Oct., 1926).

[36] *Rumeli Telekom A.S. and Telsim Mobil Telekomunikasyon Hizmetleri A.S.* v. *Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Para 91 (29 Jul., 2008).

[37] *Saluka Investments B.V.* v. *The Czech Republic*, UNCITRAL, Para 483 (17 Mar., 2006).

[38] *B.G. Group Plc.* v. *The Republic of Argentina,* UNCITRAL (24 Dec., 2007).

> mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent.'[39]

After perusal of a plethora of awards by different international courts and tribunals we find that FPS standard provides protection from (1) civil unrest, civil strife, civil disturbance, and physical violence;[40] (2) rioting and looting;[41] (3) threats and attacks on investment;[42] (4) attack and seizure of property;[43] (5) wrecking, looting, and dismantlement of equipment and property;[44] (6) forceful expropriation of investment;[45] (7) physical invasion of business premises or investment sites;[46] (8) impairment affecting the physical integrity of investment by forceful interference;[47] (9) occupation of a building and physical assault of the CEO;[48] and (10) killings and destruction of property.[49]

Beyond Physical Protection

Most difficult question before the tribunals is whether FPS standard includes legal protection within their ambit. Some of the tribunals are of the opinion that it includes legal protection of the investment also. But only to the extent that legal injury must have some nexus with the physical harm. While others hold the view that it includes every kind of legal as well as regulatory protection. Thus, it became very difficult to distinguish between the substance of FPS standard and FET standard in investment treaties.

In *Lauder* v. *Czech Republic* the tribunal while stating that host state inability to provide legal protection did not violate FPS standard also held for the first time in investment treaty arbitration that the state's duty to provide legal protection means state must

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[39] *Eastern Sugar B.V. (Netherlands)* v. *The Czech Republic*, SCC Case No. 088/2004, Para 203 (12 Apr., 2007).

[40] *OI European Group B.V.* v. *Bolivarian Republic of Venezuela*, ICSID Case No. ARB/11/25 (10 Mar., 2015); and *Pantechniki S.A. Contractors & Eng'rs* v. *Alb.*, ICSID Case No. ARB/07/21 (30 Jul., 2009).

[41] *Am. Mfg. & Trading, Inc.* v. *Zaire,* ICSID Case No. ARB/93/1 (21 Feb. 1997).

[42] *Saluka Invests. B.V.* v. *Czech*, UNCITRAL (17 Mar. 2006); and *Ampal-Am. Isr. Corp.* v. *Egypt*, ICSID Case No. ARB/12/11, Decision on Liability & Heads of Loss (21 Feb., 2017).

[43] *Wena Hotels Ltd.* v. *Egypt*, ICSID Case No. ARB/98/4 (8 Dec., 2000).

[44] *Al Tamimi* v. *Oman,* ICSID Case No. ARB/11/33 (3 Nov., 2015).

[45] *Siag* v. *Egypt*, ICSID Case No. ARB/05/15 (1 Jun., 2009).

[46] *Tulip Real Estate* v. *Turk.*, ICSID Case No. ARB/11/28 (10 Mar., 2014).

[47] *Binder* v. *Czech,* UNCITRAL (15 Jul., 2011); *Toto Costruzioni Generali S.p.A.* v. *Leb.,* ICSID Case No. ARB/07/12 (12 Jun. 2012); and *Spyridon Rosssalis* v. *Rom.,* ICSID Case No. ARB/06/1 (7 Dec., 2011).

[48] *MNSS B.V.* v. *Montenegro,* ICSID Case No. ARB(AF)/12/8 (4 May 2016); and *Von Pezold* v. *Zim.*, ICSID Case No. ARB/10/15 (28 Jul., 2015).

[49] *Asian Agric. Prods. Ltd.* v. *Sri Lanka*, ICSID Case No. ARB/87/3 (27 Jun., 1990).

ensure availability of judicial system all the time for the proper adjudication of any dispute. The tribunal further observed:

> 'The investment treaty created no duty of due diligence on the part of [the Respondent] to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law.'[50]

Shortly after Lauder case, the tribunal in CME extended the ambit of FPS standard to include legal as well as regulatory protection thus blurring the line between FPS standard and the FET standard. The tribunal held:

> '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.'[51]

Tribunal in CME laid down a new law through interpretation that host state's action, though it may not cause physical harm yet it may violate FPS standard. The tribunal brought those regulatory actions as well as administrative functions within the range of FPS standards, which violate the property rights. Even if, the host state in its day to day function indirectly causes any kind of damage to the investment, then it will be considered as the breach of FPS standard. Thus, every breach of investor's rights comes under the ambit of the FPS standard.

In *Siemens A.G.* v. *The Argentine Republic*, the ICSID tribunal observed:

> '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.'[52]

IV

Conclusion

The jurisprudence on the FPS standard in the Investment Treaty regime is not without controversy. Even the entire jurisprudence on treatment standards in the investment treaty is full of controversy. Scholarly view and arbitral jurisprudence on the FPS standard in investment treaty have been divided between two extremely divergent sides. According to one view, the FPS standard in investment treaty protects investment from physical harm only but according to another view, it protects the investment from

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[50] *Ronald S. Lauder* v. *The Czech Republic*, UNCITRAL, Final Award, Para 314 (3 Sep., 2001).

[51] *CME Czech B.V.* v. *Czech*, UNCITRAL, Partial Arbitration, Para 613 (16 Sept., 2001).

[52] *Siemens A.G.* v. *The Argentine Republic*, ICSID Case No. ARB/02/8, Para 303 (17 Jan., 2007).

physical harm as well as legal and regulatory harm. In that way, this research paper tries to strike out a balance between two divergent views.

A perusal of historical evolution of the FPS standard shows that it has roots in the medieval practice of private reprisal. The Scholastic writings of Christian wolf and Vattel suggest that law on the protection of foreigner's property abroad was based on tacit agreement. The duty of the host sovereign to protect foreigner's property is the same as that of its citizens. He suggested that the host sovereign's duty to protect foreigner's property is not limited only to physical damage. His duty extends to give protection from every kind of injury suffered by the foreigner. Wolf's view was later on misinterpreted by investment tribunals to accord every kind of protection to the foreigner's property. FPS standard has been treated by investment tribunals like insurance certificates given by the host sovereign to the investor. It is equally true that the FPS standard should not be confined in its doctrinaire limit. In modern times the ambit of property jurisprudence has been extended too wide, thus it has become a necessity to extend the ambit of FPS standard accordingly.