



**THE OBLIGATION OF HOST STATES TO ACCORD THE STANDARD OF “FULL
PROTECTION AND SECURITY” TO FOREIGN INVESTMENTS UNDER
INTERNATIONAL INVESTMENT LAW**

A thesis submitted for the Degree of Doctor of Philosophy

By

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Declaration

This is to attest that this work I have tendered for examination for the PhD Law Degree to Brunel University London is entirely my work except in the places where I have obviously marked that it is the work of some other people. I also affirm that any citation or rephrase from published or unpublished work of others have been acknowledged.

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Abstract

The analysis of this thesis is to examine whether foreign investors can fully rely on the standard of FPS in BITs for the protection of their investments in the territories of host States which has been mandated to States by international law. This question cannot be answered without giving insights into the content and structure of the origin of FPS standard and adopts a dynamic based-perspective of the interpretation of FPS under VCLT 1969, encompassing the relationship between FPS and CIL. It investigates the tribunals' interpretation of the clause using case laws and literatures to identify and explore the underlying explanatory process behind tribunals' case findings and outcomes. The study examines the critical realism that the obligation of FPS standard does not place absolute liability to a host State, rather the exercise of a reasonable degree of vigilance. It evaluates the controversy surrounding the relationships between FPS and FET, and illuminates on how the two standards may co-evolve which has led to various arbitral tribunals' divergence opinions interpretation of the two principles. The evaluation of the application of FPS to digital assets is dynamic in this research as it addresses the nature of threats investors face globally today over cyber attacks of digital investments. The thesis also emphasis on balancing up investors' rights and obligation, which explains the measures that States can apply to prevent foreign investors from engaging in illegitimate activities. Having look at all these issues, circumstances, and the controversies surrounding FPS standard, the result found is that there is a existence of a gap in this area of the law, that would mean that foreign investors cannot completely rely on the principle of FPS for the protection of their investments in the territories of the host unless this lacunae is properly filled by both the States and arbitral tribunals, especially the tribunals' interpretative meaning of the standard of FPS.

List of Abbreviations

APTs	Advanced persistent threats
AEEAN	Association of Southeast Asian Nations
AJIL	American Journal of International Law
APTs	Advanced Persistent Threats
BIT	Bilateral Investment Treaty
BYIL	British Year Book of International Law
CAFTA	Central American Free Trade Agreement
CAFTA-DR	Central American Free Trade Agreement (Dominican Republic)
CERTs	Computer Emergency Response Teams
CIL	Customary International Law
COMESA	Common Market for Eastern and Southern Africa Courses of The Hague Academy of International Law)
CERTs	Computer Emergency Response Teams
CPI	Consumer Price Index
CSD	Commission on Sustainable Development
DR Congo	Democratic Republic of the Congo
EA	Environmental Assessment
EC Treaty	European Community Treaty
ECHR	European Convention on Human Rights
ECJ	European Court of Justice
ECOWAS	Economic Community of West African States
ECT	Energy Charter Treaty
ECtHR	European Court of Human Rights

EHRR	European Human Rights Reports
EU	European Union
FCN	Friendship, commerce, and navigation
FCT	Free Trade Commission
FDI	Foreign Direct Investment
FET	Fair and Equitable Treatment
FIPA	Foreign Investment Protection and Promotion Agreement
FPS	Full Protection and Security
FTA	Free Trade Agreement
FTC	Free Trade Commission
GA	General Assembly
GPS	Global Positioning System
GATT	General Agreement on Tariffs and Trade 1994
ICAO	Chicago Convention: International Civil Aviation Organisation
ICC	Internal Chamber of Commerce
ICJ	International Court of Justice
ICJ Rep	International Court of Justice Reports
ICSID Disputes	International Centre for the Settlement of Investment Disputes
CSID Convention	Convention on the Settlement of Investment Disputes
ICSID Review-FILJ	ICSID Review Foreign Investment Law Journal
IAs	International Investment Agreements
IISD	International Agreement on the Investment for sustainable Development
ILC	International Law Commission

ILM	Internal Legal Materials
ILR	International Law Review
IMF	International Monetary Fund
IP	Intellectual Property
IPFSD Development	Investment Policy Framework for Sustainable
ISPs	Internet Service Providers
ITO	International Trade Organisation
J Int. Arb.	Journal of International Arbitration
LCIA	London Court of International Arbitration
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured-Nation
MIGA	Multilateral Investment Guarantee Agency
MITs	Multilateral Investment Treaties
NAFTA	North American Free Trade Agreement
NCP	National Contract Points
NGO	Non-Governmental Organisation
NIEO	New International Economic Order
NSA	National Aeronautics and Space Administration
OECD	Organisation for Economic Cooperation and Development
PCIJ	Permanent Court of International Justice
PCIJ Rep	Permanent Court of International Justice Reports
PPI	Producer Price Index
PTIAs	Preferential Trade and Investment Agreements

Receuil (Collected	Receuil des Cours de l'Academie de droit international
RIAA	Reports of International Arbitral Awards
SADC	Southern African Development Community
TFEU	Treaty on the Function of the European Union
TPP	Trans-Pacific Partnership
TRIMS	Trade Related Investment Measures
UK	United Kingdom
UN	United Nations
UNCAC	United Nations Convention against Corruption
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNTS	United Nations Treaty Series
US	United States of America
VAT	Valued Added Tax
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organisation

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Table of Contents

Contents

Abstract.....	iv
List of Abbreviations.....	v
Table of Treaties, Conventions, Resolutions, and Rules.....	ix
Table of Cases.....	xxi
Table of Contents.....	xxxii
CHAPTER ONE	Error! Bookmark not defined.
INTRODUCTION	Error! Bookmark not defined.
1.1 Aim and objective of the Thesis	Error! Bookmark not defined.
1.2 Research Question.....	5
1.3 The Background of the Thesis.....	7
1.4 Research Methodology.....	15
1.5 The Scope of the Thesis.....	16
CHAPTER TWO	Error! Bookmark not defined.
THE ORIGIN OF THE STANDARD OF FPS IN INTERNATIONAL INVESTMENT LAW.. Error! Bookmark not defined.	
2.1 Introduction.....	Error! Bookmark not defined.
2.2 What is Investment?.....	20
2.3 Overview of Bilateral Investment Treaties	22
2.4 The Use of BITs.....	26
2.5 International Investment Regime under Revolution	Error! Bookmark not defined.
2.6 International Investment Law Origins and its Content	30
2.2 The Origin of FPS under Traditional International Law	33
2.2.1 The Emergence of FPS in the Eighteenth Century	33
2.2.2 Christian Wolff’s “Law of Nations”	33
2.2.3 Emmerich de Vattel’s “Law of Nations or the Principles of Natural Law”.....	35
2.2.4 FPS and the Start of U.S. Commercial Treaties.....	36
2.3 The Concept of FPS from the beginning of 1800 to the First World War	39

2.3.1 Development of FPS in Customary International Law	Error! Bookmark not defined.
2.3.2 The FPS Provision in Early BITs	42
2.4 Full Protection and Security in BITs during the World Wars.....	42
2.4.1 Efforts to Codify FPS Standard with the Traditional International Law	43
2.5 The Protection of FPS Standard in the Cold War Era	47
25.1 FPS and the Havana Charter and the International Chamber of Commerce Code of Fair Treatment	47
2.6 The US FCN Treaty Programme in Relation to FPS after the Second World War	50
2.7 The Standard of FPS in the Present-day United State Investment Treaties	56
2.8 Conclusion	58
CHAPTER THREE	59
THE INTERPRETATION OF FPS PROVISIONS UNDER THE MECHANISM OF VCLT 1969 AND RELATIONSHIP BETWEEN FPS AND CUSTOMARY INTERNATIONAL LAW	59
3.1 Introduction.....	59
3.2 Terminology use for Full Protection and Security	61
3.3 Treaty Interpretation under VCLT OF 1969.....	61
3.4 The Common Interpretation of the Term “Protection and Security”	62
3.5 Investment TreatiesObjective and Purpose.....	64
3.6 Interpretation in Context to FPS provisions	67
3.7 Relevance Rules of Treaty Interpretation under International law	69
3.8 Additional Method of Interpretation	70
3.9 Other Methods of Treaty Interpretation	72
(a) Interpretative Statements by State Parties	72
(b) The Reliance of Past Decisions	73
3.2 Duty to Accord FPS under Customary International Law	74
3.2.1 Relationship of CIL for Investment Treaty Interpretation under the FPS.....	75
3.2.2 Modifications of U.S Protection and Security Provisions in Treaties.....	75
3.2.3 Equating Approach	76
3.2.4 Addictive Approach	79
3.2.5 FPS Interpretation under VCLT	81
3.2.6 Academic Commentaries/Literature.....	83

3.3. Conclusion	87
CHAPTER FOUR	89
ANALYTIC ARBITRAL TRIBUNAL DECISIONS ON STANDARD OF FPS	89
4.1 Introduction.....	89
4.2 State Accountability for the Conducts of its Entities.....	90
4.3 Components of States International Unlawful Conduct.....	91
4.4 The Conduct must be Ascribable under International Law to the State.	92
4.5 What Amounts to a Contravention of a State’s International Obligation	94
4.6 Collaboration.....	96
4.7 Liability for Country’s Omission to React.....	96
4.8 State’s Obligation to Accord Physical Security	97
4.9 State’s Obligation to Accord legal Security.....	98
4.2 Detail Analysis of Arbitral Awards on FPS Provisions	99
4.2.1 Decisions on Damage Attributed by the Country.....	99
4.2.2 Liability Dependent on Collaboration on Damage Attributed to Third Parties.....	105
4.2.3 Liability Dependent on Omission to Accord Physical Security.....	111
4.2.4 The Decisions of Arbitral Courts on Physical security	114
4.3 Legal Protection	118
4.3.1 Legal Principles and Political Similarity.....	119
4.3.2 The Decisions of Arbitral Courts on Legal Security.....	124
4.4 The Role of Domestic Judicial System and the Need to Resort to Domestic Court in Investor-State Dispute	141
4.5 The Fork in the Road Provision	142
4.6 Selection of Local Courts in Contracts	143
4.7 Review of Domestic Court Decisions by International Tribunals	143
4.8 Requirements of Environmental Law, Human Rights, and Child Labour.....	145
4.8.1 Host States Environmental Law Measures.....	146
4.8.2 Measure for the Protection of Human Rights and Child Labour.....	147
4.8.3 The United Nations Guiding Principles on Business and Human Rights 2011.....	148
4.9 Conclusion	152

CHAPTER FIVE	154
THE OBLIGATION OF FPS STANDARD AND IMPOSITION OF STRICT LIABILITY TO HOST STATES	154
5.1 Introduction.....	154
5.2 What is Strict Liability?	154
5.3 Obligation of Strict Liability on FPS	155
5.4 The Interpretation of Principle of Due Diligence	155
5.5 The History of Due Diligence in Relation to International Law.....	155
5.6 The Host State and Obligation of Due Diligence	164
5.7 The Host State Duty of Due diligence on the Standard of FPS	166
5.2.1 Strict or Relative Protective Standard.....	182
5.2.2 According Respect to Sovereignty of a State and Authority	185
5.2.3 The principles of Reasonableness, Necessity, and Proportionality.....	189
5.2.4 Awareness and Predictability.....	192
5.2.5 Causes and Effects	194
5.2.6. Disputing Investors’ Rights and Third Parties Rights	194
5.8 Conclusion	198
CHAPTER SIX	200
THE RELATIONSHIPS BETWEEN FPS AND CIL	200
6.1 Introduction.....	200
6.2 The Development of FET Standard	200
6.2.1 Transparency, consistency, Reliability and Security of the Investor’s legitimate Anticipations	206
6.2.2 Conformity to Contractual Agreements Duties.....	206
6.2.3 Procedural Due Process of Law	207
6.2.4 Honesty or Sincerity of Intention (Good Faith)	208
6.2.5 Emancipation from Persuasion and Molestation.....	210
6.3 The Link between FPS and FET	211
6.3.1 State’s Behaviours that can Breach both FPS and FET standard.....	212
6.3.2 Tribunals’ interrelated same meaning of Interpretation of FPS and FET	213
6.3.3 Tribunals’ Distinguishable Interpretation of FPS and FET	214
6.3.4 Tribunals’ Wider Interpretation of FPS	216
6.3.5 The Intertwining Interpretation of FPS and FET	217

6.4 The Need to Incorporate FPS Standard and FET in Two Different Articles in BITS	219
6.5 Implications for International Investment Law	222
6.5.1 Divergence of Tribunal Interpretations on FPS Standard	223
6.5.2 Tribunals’ too Expansive Interpretation of FPS.....	225
6.5.3 The Need for a more Substantial Consistency of FPS Interpretation	229
6.6 Conclusion	231
CHAPTER SEVEN	232
THE NEED TO APPLY FPS STANDARD TO CYBER SECURITY: DIGITAL ASSETS	232
7.1 Introduction.....	232
7.2 States and Computer Network.....	235
7.2.1 Tallinn Manual Rule 1: Sovereignty.....	235
7.2.2 Tallinn Manual Rule 2: Jurisdiction.....	237
7.2.3 Tallinn Manual Rule 5: State Control of Computer Network Infrastructure.....	241
7.2.4. Tallinn Manual Rule 6: Tallinn Manual Rule 6: Countries Legal Responsibility on Computer Network Threats.....	246
7.3 Are Digital Assets Classified as Investments?.....	253
7.4 Cyber Attacks on Corporate Entities	255
7.5 Applying Investment Treaty Adjudication to Reduce Cyber Attacks.....	262
7.6 Few Leading Arbitral Decisions that May be Applied to Digital Assets.....	265
7.7 Host States’ Duty to Prevent Cyber attacks on foreign Investor’s Digital Investments	269
7.7.1 Investors’ Due Diligence for the Protection of Cyber Attacks	273
7.7.2 Compensation for Cyber Attacks	274
7.7.3 Availability of Functional Legal System to Control Cyber Threats	275
7.8 Less-developed States and the Full Protection and Security Standard	278
7.9 Bilateral Investment Treaties and Polycentric Regime Mechanism	281
7.10 Cyber Security and Traditional International Law of Investment Disagreements	284
7.11 Advantages and Disadvantages of Employing International Investment law to making law of Cyber security protection.....	285
7.12 Conclusion	287
CHAPTER EIGHT	289
BALANCING UP INVESTORS’ RIGHTS AND OBLIGATIONS	289
8.1 Introduction.....	289
8.2 Foreign Investors	289

8.3 Nationality of Investors.....	290
8.4 Nationality of Corporations	291
8.6. Lawful Requirements and Restrictive Actions to Safeguard Environment, Promote Human Rights, Stimulate Anti-Corruption Practices, and Encourage Corporate Social Responsibility.....	293
8.6.1 The Right for Host States to Legislate.....	295
8.6.2 Environmental Restrictive Actions	296
5.2 The Importance of General Principles of Law of Human Rights to FPS' Due Diligence	297
8.6.3 Actions Providing Protection for Human Rights.....	299
8.6.4 Stimulus for Anti-Corruption Laws	299
8.6.5 Encouragement for Corporate Social Responsibility.....	301
8.7 Proposition for the States and Foreign Investors	302
8.7.1 New OECD Guidelines for Multinational Enterprises to Protect Human Rights and Social Development.....	304
8.7.2 Working towards the Binding of the new OECD Guidelines.....	305
8.7.3 The Inclusion of the Guidelines to BITs.....	308
8.8 General Option for the States and Recommendations on FPS.....	310
8.8.1The Inclusion of a No-Strict Liability Clause Interpretation into BITs.....	311
8.8.2 Host States' Due Diligence and Proportionality of Resources.....	312
8.8.3 Avoidance of FPS in Treaties Entirely	313
8.8.4 Inclusion of FPS Definition in BITs	314
8.8.5 The Ambit of FPS Provision in Treaties Compared with Traditional International Standards.....	315
8.8.6 Termination of Existing BITs	316
8.9 Conclusion	316
CHAPTER NINE	318
9.1 General Conclusion.....	318
Bibliography	333
Articles and online Journals.....	333
Text Books.....	342
Websites.....	347
Miscellaneous	353

CHAPTER ONE

INTRODUCTION

1.1 Aim and objective of the Thesis

The purpose of this thesis is to discuss the standard of ‘full protection and security’ provision under international investment law. This research does not only intend to discuss the obligation of this standard and the controversies surrounding it, but seeks to discuss and address how host states should fulfil their own part of the bargain in protecting foreign investment under the platform of this great protective investment standard in their territories, and the protective coverage that the standard accords to investors and investments within the territories of host States. Provision promising alien investors ‘full protection and security’ are incorporated in various multilateral and bilateral investment Treaties. They do not just necessitate the abstention from physical infringement or damaging against foreign investment by the host country, but as well pragmatic actions to be taken to provide protection for foreign investment, specifically against damage caused by the host State and its entities, as well as third parties or individual actors.

Therefore, the central argument of this thesis is to prove that host States in their territories have not provided full physical and legal security to foreign investments which has been reposed on them under the platform of the obligation of FPS in BITs by international law, and which the principle of FPS is reserved to preserve. There are four factors or controversies that the thesis tends to address that exist and which have led and contributed to the lack of provision of physical and legal security by host States to investors’ investments, and the dearth of addressing these issues have caused lacunae. And in this respect, it can substantially be argued that foreign investments are not fully protected by host States. This argument can even be more substantiated by these factors considering the numerous physical and legal harms that have continuously been perpetrated against investors and their investments by host States and by third parties in various host States which the States have failed to confront adequately and these have left huge gaps in the protection of foreign investments, and this gaps needs to be filled. These factors have also

created huge divergence of opinions by various arbitral tribunals in international investment law in the interpretation of the standard of FPS to the disadvantage of foreign investors. The failures by host States to remedy these shortcomings and to provide proper lasting solution are very visible and have appeared in many case laws of FPS in various BITs. It is very significant to confront these issues properly and head-on. This is because failure to address and tackle these problems head-on so as to ensure that host States accord foreign investments full protection and security to their investments will prompt foreign investors to continue to suffer more untold harms, hardship, and losses to their investments in foreign territories, encompassing dearth of recourse for physical and legal damages, most especially when host States had breached the obligation of the standard of FPS in BITs which have been reposed on them by international law. This thesis therefore intends to expose the inabilities of host States to adequately tackle these issues and tends to provide suggestions in solving them. Like the thesis mentioned earlier above, the gaps that exist have created divergence of opinions by various arbitral tribunals in the interpretation of the standard of FPS to the disadvantage of foreign investors. And this divergence of opinions by various tribunals in the interpretation of the standard of FPS has also contributed to expose foreign investors even to more vulnerability of harmful conducts against their investments by host States in the States' territories. Base on the aforesaid reasons, the thesis argument is that host States have failed to adequately provide full protection and security to foreign investments in their territories and the narrative of this argument will fully be buttressed and demonstrated mainly in chapters two, three, four, five and six of this thesis.

First off, host States are obligated under the provision of FPS in BITs to provide physical security to foreign investors and their investments in their territories. However, host States have always claimed that the obligation of FPS is restricted to physical protection. And also, many case laws have demonstrated that States have woefully failed in their obligations of FPS to accord physical and legal protection and security to foreign investors and their investments in their various host States. On this note, chapter 2 of this thesis will defeat the host States' argument that the standard of FPS is limited to physical security by looking at the origin of standard of FPS in international investment law from 17th century to the present day in order to prove this point which they have used as a defence to deny foreign investors protection and security for their investments.

The Second argument of the thesis to prove that foreign investments are not being accord full protection and security by host States is that, there is the issue of the relationships between the FPS and customary international law where some States have argued that the standard of FPS must not be lower or higher than minimum standard of treatment of international law (physical protection). The standard of FPS has been limited to minimum standard of treatment of international law and this argument has always been presented by some states any time they have breached this obligation. And that signifies that host States do not really provide full protection and security to investments under the protective umbrella of standard of FPS. It also demonstrates that host States have failed in their own side of the bargain in fulfilling this obligation thereby creating gap in the protection of foreign investors and their investments. The host States has the duty as required by the standard of FPS to make their local courts available for foreign investors to bring claims against the States where they (investors) feel it is necessary for them to do so, and to seek remedy for the breach of the standard where the court decide so. In many case laws the States have vehemently refused to extend the obligation of FPS to legal protection thereby depriving foreign investors of their rights under this standard as required by the law. This kind of conducts by host States create gap and this gap needs to be filled. On this note, chapter 3 of the thesis will be examining the interpretation of FPS provisions under the mechanism of VCLT of 1969, encompassing the relationship between FPS and customary international law so as to counter the arguments by some host States the Standard of FPS is limited to minimum standard of treatment of customary international law which in most cases have deprived foreign investors their rights of protection from host States.

Again, The third argument that will prove that foreign investments has not been afforded full protection and security that they deserve by host States that is due to them is that, the standard of FPS in BITs mandates States to provide not only physical protection to investments but as well as legal security. However, host States have frequently argued just as the thesis has make reference about chapter 2 of the thesis that is yet to be discussed in full detail that the obligation of FPS does not required them to provide legal security, but rather the standard of FPS is limited to physical security of investments. This limitation set by host States has created gab in the protection of investments because this is not what the standard of FPS stands for. And this gap has caused investments to suffer adverse effect which either emanates from the States, its organs,

or by third parties. To support the thesis argument that the limitation of FPS standard to only physical protection set by host States has created a gap in the protection to foreign investments and in the circumstances that comes with it, the thesis will prove that there are many case laws where the host States have denied foreign investors protection of their investment using the defence that the standard only provide for physical protection. Even the physical protection and security that most host States have accepted that the standard of FPS only mandated them to serve to investors and their investments host States in so many occasions in case laws have failed to adequately render it to them accordingly. Foreign investors investments have continued to suffer unnecessary physical attacks from host States and from third parties without the states according the necessary security. Looking at chapter 4 that deals with analytic arbitral tribunal decisions on standard of FPS will render support to these arguments in other to substantiate this fact that foreign investors and their investments are not fully protected under the standard of FPS based on States' conducts and ill-treatments meted against investors and their investments.

Fourthly, host States and various arbitral tribunals have unanimously accepted that the standard of FPS does not impose strict liability to the States. Rather States must exercise every step that is necessary in all circumstances to ensure that it prevent foreign investors and their investments against harms. But the thesis will prove that various case laws as well as arbitral tribunals' interpretation on due diligence will demonstrate that host States have not really taken that steps which are necessary to ensure the prevention of harms against investors' investments, or even make efforts to bring the perpetrators of those harms to justice. This issue has also created gaps in the protection of foreign investments and this is what this thesis is arguing about. For this reason, the evaluation on the obligation of FPS standard and the imposition of strict liability to host States is going to support and throw more light on this point in chapter 5 of the thesis.

Fifthly, chapter 6 will counter the reasoning by both the States and some arbitral tribunals that the standards of FPS and FET are overlapping. The notion by States and some tribunals that the two standards are the same has caused harm to foreign investors and their investments, and has undermined the weight and significance of the standard of FPS. The thesis will prove this argument by looking at the relationship between FPS and FET in this chapter 4.

I will prove my central argument by first, looking at the origin of standard of FPS in international investment law from 17th century to the present day, before examining the interpretation of FPS provisions under the mechanism of VCLT of 1969, encompassing the relationship between FPS and customary international law. Then the analyses of case law of FPS will follow in support of this argument in order to substantiate this fact that foreign investors and their investments are not fully protected under the standard of FPS. And this will be subsequent by the evaluation of the obligation of FPS standard and the imposition of strict liability to host States. Rather than imposition of strict liability, the duty of due diligence is expected by host States at all circumstance to protect investments. Furthermore, this argument will be proven by looking at the relationship between FPS and FET, before analysing the need to apply FPS standard to cyber security – digital assets. And the next in line to this argument is the analysis of balancing up investors’ rights and obligations, which is necessary in order for host States to curb the illegitimate activities and excesses of foreign investors while investing in the territories of the host States. And finally, the last but not the least in the sequence of the thesis will be the general conclusion of the thesis.

1.2 Research Question: Can Foreign Investors fully rely on the Standard of FPS for the Protection of their investments in the Territories of the Host States?

The research question is based on the doctrinal evaluation of, can foreign investors rely on the standard of full protection and security provision for the protection of its investment in the territory of the host States? The answer to this question is not far-fetched and will remain to be clearly a capital NO. This is because of the gaps that exist which have been created by host States and arbitral tribunals in the protection of investors’ investments that has led to their failure to provide investments adequate and full protection and security under the principle of FPS which has been stated above. Foreign investors will not be able to fully rely on the standard of FPS within the host States unless these gaps that have been mention are filled. If these gaps and controversies surrounding this protective clause are not properly filled foreign investor will continue to suffer intrusion and infringements to their investments from host countries.

Almost every present-day BIT incorporates some kind of provision that pledges protection and security for foreign investors’ investments under its scope, although with some minor differences

in wordings between the provisions.¹ Some BITs have used the term full protection and security and this has made some tribunals to regard the term ‘full’ to necessitate hundred per cent protection and security of foreign investors investment,² because ‘a special interpretation must be accorded to a phrase where it established that the members so proposed, which may possibly defend a restrictive opinion of the standard of FPS’.³

Despite the fact that the first investment treaty award by ICSID was on the ground of FPS,⁴ during the past decades this provision was constantly disregarded. But today things seem to have change for investors considering the number of awards rendered by arbitral tribunals in favour of the investors in the finding of a breach of FPS against the host States.⁵ This statistic might seems particularly crucial to investors wanting to invest in host foreign States assuming that their investments would be protected against any form of attack that emanate either from the State itself, its organs or from the third parties. There are a huge number of international bilateral investment treaties in place today relative to many States,⁶ and the number is rapidly increasing, and this demonstrates that there is an international persuasion for the host countries to offer protective measure to the investments of foreigners in their jurisdiction. Furthermore, some early treaties were seemed entirely to have been restricted in ambit as compared to the present-day BIT and did not incorporate FPS provision, for instance, the G-3 Treaty,⁷ amid Mexico, Colombia and Venezuela, but presently, there a lot of investment treaties that have incorporated this principle. There also have been a large number of ICSID claims and awards coming out of BITs⁸, and this could be misinterpreted to indicate that huge improvement has been made to protect investments, but really and truly, that does not necessarily mean that that foreign investors can fully rely on the standard of FPS for the security and protection of their

¹ Energy Charter Treaty, 2080 UNTS 95; 34 ILM 360 (1995)

² Article 31 (4) of Vienna Convention on the Law Treaties (23 May, 1969) 1155 UNTS 331

³ *id*

⁴ *Asian Agric. Prods. Ltd. V. Republic of Sri Lanka (AAPL)*, ICSID case No. ARB/87/3, Final Award, Para. 51 (June 27, 1990), 30 I.L.M.

⁵ See, Jeffrey Commission, ‘The Full Protection and Security Standard in Practice’ Kluwer Arbitration Blog (16 April, 2009) ,<http://kluwerarbitrationblog.com/blog/2009/04/16/the-full-protection-and-security-standard-in-practice/>>

⁶ Tom Cummis and Ben Giaretta, ‘Investment Treaty Arbitration’ in Ronnie King (ed.), *Dispute Resolution in the Energy Sector: A Practitioner’s Handbook* (Globe Law and Business 2012) 225, 226

⁷ G-2 Treaty. Colom-Mex, 13 June, 1994. This Agreement after was given a different name, the ‘G-2 Treaty, because of the treaty denunciation by Venezuela

⁸ *Id* at supra note 6, at 227

investments in the host States' territories. This is so right because of the failures by the host to properly apply measures to safeguarding and warranting for both physical and legal security to foreign investors and their investment in their domains. This failure by host States to provide protection to investors obviously has also been found between various arbitral tribunals in their divergence of opinions of the interpretation of FPS obligation while delivering judgements of claims on this principle thereby undermining the essence and significance of this obligation. Foreign investors who want to take the advantage of investment policies now do not have full confidence in the obligation of FPS for the protection of their investments knowing that the host States will aggravate their investment risk because of the growing numbers of claims and complaints against host States for breaches of the standard of FPS in BITs that have incessantly been brought by investors under international investment law. Foreign investors are now left with some kind of uncertainty of what protection and security that is available for their investments in the perilous atmosphere of host States. And the first avenue and place that foreign investor would now need to rely for the protection of his investment would without doubt be on the FPS provision under an applicable BIT due to this uncertainty. This is because by far and margin, the hopes that investors are supposed to rest upon for the protection of their investment has clearly seen being dashed by the aggressive conducts of host States toward the investors and their investments. It is even more glaringly so, especially by looking at divergence opinions of interpretation by arbitral tribunals that has worked to the disadvantages of foreign investors.

1.3 The Background of the Thesis

The standard of FPS under international law obliges the host States to provide physical, commercial and legal stability of secure environment to foreign investors' investments against interference which either comes from the State or its organs, or threats that emanate from the third party within the territories of the host States. Full protection and security standard in international law if it to be applied properly offers foreign investors immense benefits that cannot be imagined both in physical and legal protection of their investments. It is understood that investment agreements incorporate clauses in the treaties that grant investment guarantees, such as the full protection and security standard. The general objectives and aims of treaties of this sort are to promote greater economic cooperation between two parties in the territory of the other part; and also to grant investment and investors treatment that will motivate the flow of capital

and stimulate economical development of the Parties⁹. The same general objective and purpose of the treaty is referred to by tribunals when interpreting protection and security.¹⁰ Treaties do not only clarify the rights that investors are entitled to under international law, but also clarify the prerogatives and obligations that commit the host countries in providing investment protections to foreign investments. FPS standard encourages and protects investments in developed and developing countries by presenting certain clear “assurance and security which creates more steady and foreseeable legal mechanism for alien investors in each of the treaty parties”.¹¹

However, there are so many controversies surrounding this area of investment provision standard. The standard of FPS has unequivocally been overshadowed in international investment law by the standard of fair and equitable treatment (FET) clause in spite of the huge numbers of international agreements that insert the clause. The question is why it is that full protection and security standard has attracted less attention than other international investment law protective standards? Could the answer lie that the FPS provision has been merged together in almost all the BITs with FET standard clause instead of leaving it standing on its own and be recognised separately on its own merit as one of the standards of protection in international investment law? Or could the answer be that scholarly writers have given less attention to this standard by failing to write enough about it that has made this great provision less popular in international investment law?¹² I will take the latter as the more appropriate answer to this question. Even one scholar has emphatically narrated that the literature on the standard is “scarce”.¹³

Despite being overshadowed and hidden under FET, things would be much more different if more investment scholars should write more articles about full protection and security standard

⁹ Treaty Concerning the Reciprocal Encouragement and Protection of Investment, U.S.-Congo. PmbL., 12 February, 1990, S. TREATY DOC. NO. 102-1 (1991)

¹⁰ *Asian Agric. Prods. Ltd. V. Republic of Sri Lanka (AAPL)*, ICSID case No. ARB/87/3, Final Award, para. 51 (June 27, 1990), 30 I.L.M. 580 (1991)

¹¹ Letter of Submittal for Treaty Concerning the Treatment and Protection of Investments, U.S.-Pan., Oct. 27, 1982, S. TREATY DOC. NO. 99-2 [HEREINAFTER Panama Letter of Submittal] (emphasised added), available at http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAN_USA_1982_e.asp.

¹² See Christopher F. Dungan Et Al., *Investor-State Arbitration*. Oxford University Press, 18 September (2008) at p. 532 (he argues that the standard of FPS is “one greater respectable international obligation inserted in agreements in respect of the treatment accorded to aliens and their asset.”)

¹³ Giuditta Cordero Moss, ‘Full Protection and security’, in *Standards of Investment Protection* (August Reinisch ed., Oxford University Press, 2008), at p. 131

to promulgate the significance of this standard for the protection of investment. “Even up until 1990 there was difficult to find any established law by the outcome of former case on the standard of FPS for protection of foreign investment”,¹⁴ although things have slightly changed over time. “Beginning from 1990 to 2004, there were just six major awards concerning this particular principle, and there are much more than that number from 2004 up to date”.¹⁵ Gradually things have begun to change but the changes are not as one would expect them to be and there is a lot of controversy surrounding full protection and security standard.

First off, there is the controversy as to the meaning of this standard applied in nearly all investment agreements, and this has made the law in this area perplexing in so many ways. There are variations of phrases the parties use when drafting the notion. Some contain clauses such as “full protection and security”.¹⁶ Some use “constant protection and security”;¹⁷ some use the words like “most constant protection and security”¹⁸, some use “security” before “protection”, or “physical protection and security”. The difference in language usage does not carry much significance,¹⁹ and does not make the exact meaning and interpretation of the standard confusing or inconsistent.

Nevertheless, all these wordings or clauses used in the treaties mean that the host States are expected to take reasonable steps to protect investment from any harmful effects or interference, which can either be conducted by the host country and its entities,²⁰ such as the police or armed forces, or which stem from third parties.²¹

¹⁴ Mahnaz Malik, *The Full Protection and Security Standard Comes of Age: Yet another challenges for states in investment treaty arbitration*, 2011, available at http://www.iisd.org/sites/default/files/pdf/2011/ful_protection.pdf

¹⁵ *id*

¹⁶ See, A Newcomb and L. Paradell, *Law and Practice of Investment Treaties Standards of Treatment* (Kluwer Alphen an den Rijn 2009), at p. 307-8

¹⁷ The Abs-Shawcross Draft Convention text, in conjunction with a preface by the writers and their official report on the instrument, were printed in a specific publication of the *Journal of Public Law* in the year 1960. See also, Ignaz. Seidi-Hohenveldern, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J PUB. L. (1960), at p. 115-116

¹⁸ Article 10(1) of the Energy Charter Treaty (ECT) 1995

¹⁹ Giuditta Cordero Moss, ‘Full Protection and security’, in *Standards of Investment Protection* (August Reinisch ed., Oxford University Press, 2008), at p. 133-6; See also *Parkerings v Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September (2007), Para 354.

²⁰ See, the International Law Commission’s Article on State Responsibility at Article 4 on Conduct of entities of a country.

²¹ See, HE Zeitler, ‘The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harms Caused by Private Actors’ (2005) 3 Stockholm Intl Arbitration Rev 1.

Another controversy found in this standard is that many tribunals have considered the standard of FPS to be the same with FET standard.²² One will in a way agree that the standard of FPS does not qualify as a different title of responsibility for the reason that the anomalies clearly were all incorporated under the FET standard.²³ However, other tribunals have seen the two concepts as standards that should be treated separately and singularly,²⁴ because as we know, the content and the characteristics of both standards are identifiable.²⁵ It is also confusing and misleading to equate the both standard as one. The two are distinctive in the sense that the standard of FPS centres on the need to accord for an adequate legal system of framework that grants security of protection to investment from adverse conduct by both private individuals and also the country entities, whereas FET focuses on the obligation that host state is to refrain from acts that are inequitable and unjust to investors and their investments. If each of these standards is distinct in the way that they have been described, full protection and security standard should completely be separated out of the standard of FE. Tribunals make the both standards sound as if they are inextricably intertwined and interwoven whilst they are not. Notice has been drawn to the fact that the standard of FPS has cast obscurity or a shadow over the standard of FPS contemplating both the way the two standards has been drafted in bilateral treaties and also by the manners in which they are interpreted by tribunals. This has created a gap in investment protection.

Similarly, there is also this controversy whether the FPS standard merely provide protection against physical harm emanating from the host country and its corpuses, and also from individual parties without offering legal protection to investment. Without trying to undermine any of the controversies, this is the core controversy among all the controversies surrounding the whole of this FPS standard. A handful of tribunals have professed that the standard of FPS shields investors and their investments only from physical violence, also as against invasion of the investment premises,²⁶ while other tribunals have extended the standard beyond physical incursion and also as invasion against investment premises it protects from contraventions of

²² See, *National Grid v Argentina*, Award, 3 November 2008, Para 187, 189

²³ See, *PSEG v Turkey*, Award, 19 January 2007, at paras. 257-9

²⁴ *Azurix Corp. V The Argentine Republic*, Award, 14 July 2006

²⁵ *Jan de Nul v Egypt*, Award, 6 November 2008, Para 269. Footnote omitted. See also *Siemens v Argentina*, Award, 6 February 2007, Para 302

²⁶ ECT, art 10(1)

investor's rights by function of the enactments of laws propagated by the host country.²⁷ Some tribunals have agreed and have adjudicated that the standard is beyond physical security. One commentator stated that the standard goes further than physical security in a physical sense of protection, and he even advocated for the standard to include economic and political regulatory security.²⁸ Some tribunals in recent times have argued for the extension of the standard of FPS guarantee to physical, legal and commercial protection for the advancement and security of investments.²⁹ The extension of the standard beyond physical violence is plausible, yet it is not fully clear if the standard covers just physical protection, or whether it is inclusive of other security such as, legal, economic, commercial security or even financial security. Different and conflicting interpretations of this standard have been propounded by different tribunals³⁰. It appears that not only do tribunals make up the ways they interpret the doctrine of full protection and security standard, they also rigmarole about it and have not been consistent in their ways of interpretation of the case law regarding this particular standard.

Also, it's been understood from various tribunal rulings that the standard of FPS does not place the host country on the duty of absolute/strict liability.³¹ Strict liability in law is where the prosecution does not require proof that the defendant intended the consequences of their actions or even foresaw them before they can be found culpable for the offence. Rather, the standard of FPS under international law requires the host State to have the exercise reasonable of due diligence, meaning that the host States must employ a level of judgement, care, prudence, determination, and activity that a person would reasonably be expected to exercise under particular circumstances, and must undertake such steps in safeguarding alien investment that are fair and reasonable in all situations for the avoidance of being held culpable for any adverse effects that the investors incurred over their investments. The guarantee by a host State to accord

²⁷ R. Dolzer & C. Schreuer, *Principles of International Investment Law*, Oxford University Press, 1st edition 2009 pg 149

²⁸ TW Walde, 'Energy Charter Treaty-based Investment Arbitration' (2004) 5 J World Trade 390-1

²⁹ *CME v The Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Rep 121

³⁰ See, example of cases where the arbitrary decisions stated that standard of FPS is limited to physical protection, *Suez v Argentine Republic*, ICSID Case No. ARB/03/17, Decision on Liability (July 30, 2010), at p. 167-69; *BG Group Plc v Republic of Arg.*, Final Award, (UNCITRAL). Arb.Trib. 2007), at p.324-26. For decisions stating that FPS extends to both physical and legal protection, see, for instance *AES Generations Ltd. v Hungary.*, ICSID Case No. ARB/07/22, Award (23 September, 2010) at para. 13.3.2; *Azurix Corp. v Argentine Republic*, ICSID Case No. ARB/01/12, Annulment Proceeding, (14 July, 2006), at para. 310-11

³¹ R Dolzer and M Stevens, *Bilateral Investment Treaties*, Published by Martinus Nijhoff Publishers, 15 June, (1995) at p. 61; see, *AAPL v Sri Lanka*, Award, 27 June 1990, 30 ILM (1991) Para. 53

the standard of FPS to investors and their investments is not an absolute one and can not place absolute liability upon the country that offers it.³² Tribunals have interpreted the objectives of full protection and security clause clearly as the ‘promotion of investments by securing a suitable atmosphere of legal security for investors’ investments’,³³ and not the placement of duty of strict liability upon the host state.

Tribunals speak of the state’s duty to take all necessary steps to prevent damages, and have also highlighted on the issue that there is no need to prove negligence or bad faith or attribution for a state to be liable.³⁴ Whenever the country corpuses themselves exhibit a conduct in contravention of the FPS, or immensely contributed to that type of conduct they will then be held directly responsible. Dearth of funds to employ necessary step of action can not be used as a justification by the host country since this will be regarded as State responsibility for failure to protect. But States have failed to adequately provide due diligence to investments.

A state’s level of development or stability will not be considered in the determination of the level of care of due diligence to be expected of host States either for the fulfilment of this obligation. However, tribunals have distinguished between physical threats and circumstances akin to justice denial when taking into consideration the State’s resources. Lack of resources to take appropriate action is only to be considered as a defence in relation to a situation involving public violence, but will not be used in connection with denial of justice.³⁵ It is now a well-established fact from such arbitral ruling that a host State could be exonerated from the breach of this standard where it lacks the resources to take appropriate action to prevent or protect foreign investment from physical violence. Can this kind of arbitral ruling be construed as a deliberate attempt to deny investors and their investments protection rights under the concept of full protection and security standard? Should a lack of resources be accepted and be used as a yardstick or as a defence where the country, its entities or private persons have violated the FPS standard by significantly contributing to the investment’s adverse effects, be it physical, legal or commercial? We are yet to see whether the lack of resources dictum that has been used by the

³² *Tecnicas Medioambientales Tecmed v Mexico*, ICSID Case No. ARB/(AF)/00/2, Award, 29 May, (2003), p. 177

³³ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3.Final Award, 27 June, 1990), 51, I.L.M (1991) para. 601

³⁴ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3.Final Award, 27 June, 1990) Para 77

³⁵ *Pantechniki v Albania*, ICSID Case No. ARB/07/21, IIC Award, 30 July, (2009), at para. 383

tribunal in a Pantechniki case to dismiss the breach of the full protection and security application by a host State is an exceptional case, rather than the norm.³⁶ One can only assume that applying this reasoning as a norm in relation to the obligation of FPS would be parlous. We must monitor this ruling closely to see how much further it is going to unfold in future arbitral rulings.

Again, tribunals have been in loggerheads as to whether the provisions of FPS and FET create separate treaty standard, or if it just ordinary reference of minimum standard of treatment by traditional international law. Some tribunals see the standards as separate standards,³⁷ while other tribunals see them as a combination of the two standards into one.³⁸ Other tribunals see the standards as a bicycle with seats and pedals with two riders, one behind the other, without apparently explaining the relationship between the two riders and the bicycle.³⁹ In trying to resolve this issue, NAFTA refers to standard of FPS⁴⁰ as reflecting international minimum standard under international customary law. NAFTA clarified that the obligation of FPS standard did not provide protection beyond what was stated in customary international law⁴¹, and tribunals have accepted this interpretation in vast of case law.⁴² The acceptance of the interpretation of the standard of FPS partially as international law has only been deemed to be restricted to the North African Free Trade Agreements in Article 1105(1) and will not be transferred or exchanged to other treaties.

However, non-NAFTA tribunals reached the decision that the broad FPS principle is not limited to traditional international law but creates an autonomous treaty standard. Dolzer and Steven described this independent treaty standard as that of “due diligence” with a reasonable degree of

³⁶ *Id* Para 76

³⁷ *Enron Corp. v Argentine Republic*, ICSID Case No. ARB/01/3, Award, (22 May, 2007). 19 World Trade & Arb. Materials 109 (2007) , paras 251-68 & 284-86

³⁸ *Occidental Exploration v Republic of Ecuador I*, LCIA Case No. UN 3467, Award, (2004), at para 187

³⁹ *Sergei Paushock v Mongolia*, Award, UNCITRAL, Arb. Trib., Award on Jurisdiction and Liability 28 April, (2011), para 327 (upholding that the Standard of FPS provision or FET has been contravened).

⁴⁰ Article 1105 of the North America Free Trade Agreement 1992 (NAFTA) states that: (Every Party must afford to investors and their investments of the other Party treatment in compliance with the requirement under international law, encompassing FET and FPS.

⁴¹ Free Trade Agreements (FTA) Note of Interpretation of 31 July 2001, <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>>, access 4 June 2010.

⁴² *Pope & Talbot v Canada*, Award in Respect of Damages, 31 May 2002 (2002) 41 ILM 1347, paras. 17-69; *Mondev Intl Ltd v United States Of America*, Award, 11 October 2002, 6 ICSID Rep. 192, paras. 100ff; *United Parcel Service of America Inc v Canada*, Award, 22 November 2002, 7 ICSID Rep 288, Para 97

vigilance.⁴³ It has been viewed that the standard of FPS which depicts an independent treaty principle that is autonomous of minimum standard of treatment of traditional international law would be more desirable and advantageous. Some writers have contended in support of an independent notion of fair and equitable treatment that is autonomous of, or additionally to traditional international law.⁴⁴ This is because the minimum standard of international law does incorporate specific obligation to secure foreign investors from infringements or adverse effects.⁴⁵ Customary international law can be relied upon by an investor even in the absence of the security of clause of a treaty guaranteeing the obligation of FPS. One could see that the controversy on this point is huge and still remains because other treaties in force do not contain such definition as in NAFTA.

In addition to the above factors, full protection and security clauses have long been viewed as indicating a concept of traditional international law, that address a number of possible attacks to aliens, but not only physical harm.⁴⁶ Although physical harms in most times have constituted the greatest danger to foreign investors in alien States, there are other serious risk factors to foreign investment also, that comprises, among all things, the chance that foreign investors in any event can be swindled or be refused the reclamation of their arrears, which the host country may decide to use its regulations in bias and a prejudicially manner, or that alien's property or investment could face government takings (expropriation) without payment⁴⁷ or inadequate payment for the

⁴³ R Dolzer and M Stevens, *Bilateral Investment Treaties*, Published by Martinus Nijhoff Publishers, 15 June, (1995)

⁴⁴ F. A. Mann, 'British Treaties for the Promotion of Investment' (1981) 52 *British Year Book Int'l L* 241, 244; R Dolzer and M Stevens, *Bilateral Investment Treaties*, Published by Martinus Nijhoff Publishers, 15 June, (1995), at p. 60; PT Muchlinski, *Multinational Enterprises and the Law*, 2nd ed., Oxford University Press, (1999), at p. 626; UNCTAD chapters on cases under international investment treaties, FET 1999) 13, 17, 23, 37-40, 53, 61; S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 7 *British Year Book Int'l L* 104-5 139-44.

⁴⁵ *Amco Asian Corporation and Others v The Republic of Indonesia*, Award, ICSID Case No. ARB/81/1, 20 November, (1984) ICSID Rep 413

⁴⁶ Christian Wolf, *Jus Gentium Methodo Scientifica Pertractatum* (1749), *reprinted in* 2 *The Classics of International Law* 9 (James Brown Scott ed., Joseph H. Trans., 1934)

Emmerich De Vattel, *The Law of the Nations or the Principles of Natural Law* (1958), *reprinted in* 3 *The Classics of International Law* 145 (James Brown Scott ed., Charles G. Fenwick trans., 1916).

⁴⁷ George K. Foster, 'Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance', (2012) 45 *Vand. J. Transnat'l* 1095.

Available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>.

expropriation. Even a risk factor such as a cyber security attack that has deeply threatened foreign investments in today's times needs to be protected by BIT under the principle of FPS.

1.4 Research Methodology

The methodology of this research is predicated on doctrinal analysis or pure theoretical research method. That means the study is carried out based on legal initiatives by a method of assessing the existing statutory clauses and case law by the application of reasoning power and interpretation of the obligation of the standard of 'full protection and security' in BITs under international investment law. The measures are analysed to understand how the Standard fit and are adopted to regulate foreign investors' investment concerns in the territories of the host States and globally. The methodology in addition encompasses and reflects the analysis where the available steps for protecting foreign investments are pinpointed and general option for the host States and proposals on FPS are recommended. The application of comparative legal analysis is restricted in this study, as an effect.

The steps are categorised in 7 fronts; The VCLT provisions which governs the meaning of treaties for their aim and intention by tribunals, and traditional international law, that is, whether the standard is restricted to minimum standard of treatment under international law, or if it is an additional to it; the Articles on State Responsibility within environ of international law for the wrongful act of the States or its organs, or third parties for the breach of the standard through the assessment of analytical tribunal rulings in case law; the evaluation of strict liability which is predicated solely on the duty by host State to apply due diligence in all circumstances for the security of investments; the connection between FPS and FET; the furtherance of application of FPS to protect cyber security in the modern technological world; and the striking of a balance between foreign investors' rights and the obligation of the host States to accord FPS to investments. Assessing these available measures is necessary because of the number of issues confronting foreign investors and their investment in the host States. Hence, there are some factors and general challenges. Nevertheless, it should be kept in mind how tribunals' divergence interpretation influences and shapes the outcome of BIT awards regarding the controversy whether the standard covers legal protection, or whether it is only restricted to physical protection. This is specifically the case in FPS clauses and a major reason for assessing these steps and how better they confront concerns in the FPS obligation in BITs.

This thesis encompasses a literature review that confronts the problems raised and in addition explains legal initiatives. Legislations, established and proposed laws, treaties, books, reference materials, texts, newspapers articles, journal articles, reports, blog entries, case laws, archived, dictionaries or documented data and other materials have been employed to pinpoint, examine, assess the obligation of FPS and how they can be applied in tackling problems confronting foreign investors and their investments in the host States territories.

The result of the thesis methodology employed is aimed at the contribution of pinpointing difficulties which foreign investors confronts when engaging in commercial activities in the host State territories, pinpointing the available steps that should be taken in solving these problems; detailing how foreign investors globally can face investment insecurity from the host States because of inadequate measures by the host States to addressing such concerns; identifying approaches needed to tackling the obligation of the standard of FPS concerns in BITs under international investment law.

1.5 The Scope of the Thesis

In the light of the thesis' aim, research question, and research methodology as have been narrated above. The scope of the discussion will progress as follows. Chapter 2 gathers and employs proof that specifically uncovers the origin of the principle of FPS standard which began in the 1740's down to the emergence of investment treaty of the present day and discovers associated political missives, case law, and expression of opinions in form of commentary, in order to reach a more dependable interpretation of the standard. Chapter 3 summarises the 1969 VCLT analytic interpretation mechanism and elucidates, in advance, how it should be used for interpretation of the standard of FPS provisions, while emphasising the essential task allocated to that mechanism – to the general practice of international law, such as preparatory work, including the other proof fundamental to the agreement narratives. The chapter will also examine the relationship between FPS and customary international law. It analyses the challenges of applying in practice the treaty clauses of FPS protection. For example, the Declaration Note by NAFTA's Free Trade Commission to Article 1105 of NAFTA, that restricts the ambit of the provisions to police (physical) protection, which has the power of bringing some misnomer concerning what States parties might have in mind and what it is that has been abhorred by some international investment academic commentators and literature. Chapter 4 discusses analytic

arbitral tribunal decisions on the concept of full protection and security clauses. It takes a closer look at State responsibility for the actions of its organ and that of the third party on the obligation of full protection security that infringes the investor's right both on physical and legal security. Chapter 5 elucidates the host State's obligation to engage itself with reasonable measures of due diligence in looking after foreign investors' investments, and regarding the meaning of due diligence as something that not greater or lower than necessary measures of prevention that a good-governed State may be anticipated to apply under related situations, as opposed to strict liability to be placed on the host State in those circumstances. It further discusses the sources of due diligence in international law that appeared as a belief to arbitrate interstate relationships from the 17th century onwards in confirmation that the substance that is in due diligence is actually made reference of by international law, instead of national standards. The chapter also evaluates if the evolution of the Articles of State Responsibility is of importance to the principle of full protection and security based on due diligence. This encompasses the duty of international courts to accord respect to State's sovereignty in assessing due diligence, etc. Chapter 6 outlines the relationship between the standard of FPS and the principle of FET in international investment law. Also, the lack of consistency in the awards as to what degree of security the parties intended with different treaties beyond physical protection affirms the possibility of meandering practice. This includes the overlapping of the interpretation of the standards of FPS and FET by arbitral tribunals. Chapter 7 will look beyond the full protection and security standard that was customarily held to oversee the material and physical protection of tangible assets of foreign investors to the need of modifying the standard as to fit the sophisticated kind of cyber security threats that are being faced globally by investments and their owners in this 21st Century, especially the structural stability of digital ventures such as investments that involve a system of interconnected computers and websites against attacks that wage war either through or against the internet. To apply the full protection and security standard in this way might be challenging due to the sort of control that States keep in monitoring digital assets specifically, and supervising cyber security generally, and coupled with the dearth of uniformity of international law in this milieu. The chapter elucidates on the cyber threats that have engulfed and proliferated in number and severity in the world today by considering some of these so-called cyber-attacks that have taken place in recent times. The section will also look at the rules and commentary from Tallinn Manual on International law applicable to cyber warfare by groups of experts that

have interpreted the applicable standards in the cyber environment in the following characteristics: sovereignty; jurisdiction; States control of cyber facilities; and countries legal responsibility in relation to cyber threats. It explores the applicability of BITs, and also the topographical and multilateral agreements to reduce cyber-attacks. The chapter will be rounded up by analysing the employability of BITs and trade agreements to promote global cyber security via the lens of polycentrism of governance. Chapter 8 will be assessing the obligations of the investors for the reciprocation to the host State's obligation on FPS, as nothing or little has been said concerning the real obligation of the investors in the host States. Though, this is not the main focus of the thesis. This chapter will analyse the framework to solving these issues, with a concise analysis, particularly, in the sphere of environmental regulatory measures; measures providing protection for protection of human rights; promotion for anti-corruption laws; and the obligation for foreign investors to pay heed to the international recognised standards of corporate social responsibility. The chapter will also intend to proposition a master plan and specific provisions for future treaties intended to be signed by those States, so as to reduce the perils confronting investors or their investments when a security dispute flares up in their States. This section of the chapter will sum up the analysis and these options by showing how the deference and mindfulness for those views is the best method to avert disputes. And finally, chapter 9 gives elaborate conclusion of the whole chapters of this paper.

CHAPTER TWO

THE ORIGIN OF THE STANDARD OF FPS IN INTERNATIONAL INVESTMENT LAW

2.1 Introduction

The aim of this part of the thesis is specifically to investigate the evolution of the concept of FPS which began in 1740s down to the ascension of present-day BITs and pinpoints a connected political writings, court decisions, as well as opinions, in order to reach additional dependable definition of the standard. The investigation in regards to the aforementioned of the evolution of the principle of FPS as a matter of fact, is created along side in subsections, and would be considered as a wider analysis of the old time development of the standard of FPS in traditional international law as well as the United States treaty practice. The aforementioned proof effectively buttresses a definition that the standard does not only accords physical protection to investments which States have used an excuse to denied investors legal protection to their investments, but expands it above physical security, necessitating, inter alia, the reality of lawful mechanism which affords same hallmarks like entrance to the judiciary proceedings, following of court process, and recompense for government takings of investors' properties and the breach of other investment protection obligations. But before discussing the evolution of FPS from time immemorial, this chapter will firstly start by expressing what the characteristic of investment encompasses. It will follow by looking at the general overview of creation of Bilateral Investment Treaties in the mid-19th century to protect investors and their investment in developing countries. It also discusses the increasing use of BITs from mid-19th century to the present-day. Of course, the chapter will not leave out the international investment regime that is under revolution, i.e., the distrustfulness and displeasure that developing countries have towards the way the scheme is framed that has led to this revolution which also has led to BITs cancellations and suspensions by some third world countries. It also will look at the sources and the content of international investment law.

2.2 What is Investment?

The notion of an ‘investment’ is not very obviously established according to Christoph Schreuer.⁴⁸ Investment may include the use of capital, technical and managerial skills, patents, and other intellectual property also as a variety of other assets. Some of the activities that have been regarded as investments encompass; operation of mining, the building and operation of hotels, banking establishments, infrastructural projects, provisions of all sorts of services, civil engineering and construction projects, shareholding and also financial instruments which encompasses loans. International investment law does not generally speaking differentiate between portfolio investments and direct investments. All these factors that have been mentioned and been classified as characteristics of investments are under the protective umbrella of FPS by the host countries.

For establishment of the existence of an investment, tribunals have ruled that they had to begin from the general unity of an investment operative. This is because an investment is often a consistence of many different operations that are made of various interrelated enterprises - what is important is not a particular transaction but the all-inclusive operation.⁴⁹

Also, most BITS as stipulated in Article 1139 of NAFTA⁵⁰ or Article 1 section 6 of the ECT,⁵¹ include general definition of the phrase ‘investment’ which is exceedingly wide. They frequently make mention of ‘every kind of asset’ followed by another catalogue of examples which encompass; movable and immovable property, shares and other participation in corporations, making demands for money and many other operations that have a financial value, intellectual property rights, technical know-how and investment treaties. No particular qualms will crop up where the trade investment at issue has been protected using one of the interpretative classifications below. An instance of such position can be seen in Article 1(a) of Argentina/United States BIT 1991. It defines investment as follows:

⁴⁸ Christoph Schreuer, *Investments, International Protection*, (available at http://www.univie.ac.at/intlaw/wordpress/pdf/investments_int_protection.pdf)

⁴⁹ *Ceskoslovenska Obchodni Bankas, AS v Slovak Republic (Decision on Objections on Jurisdiction of 24 May 1999)* ICSID Case No ARB/97/4 (2002) 5 ICSID Rep 335

⁵⁰ Article 1139 NAFTA.

⁵¹ Article 1(6) of the Energy Charter Treaty (‘ECT’) 1998.

Investment means all kinds of investments in the jurisdiction of one Contracting Party possessed or managed either directly or indirectly by citizens or corporations of another Contracting Party, in the form of values, sum of money that is owed or due, and services and commercial agreements; and includes with no restriction...⁵²

By perusing the various international investment claims it is explicitly evident that arbitral tribunals have conclusively interpreted all these lists as “investment” under international investment law and they can fall under the obligation of host State FPS protection of investment.

Other treaties phrased it more in accordance with economic usage. Ukraine/Denmark 1992, for example, concentrates on the purpose of establishing long-term economic links. It states that, ‘by the reason of this agreement, “investment” must be classified as all types of property associated with commercial affairs obtained for an aim of setting up long-term commercial links [...]’.⁵³ Whereas, the other treaty reached by U.S.- Chile in 2003 based the definition of investment on the investment attributes’, mentioning differently to obligation of financial undertakings, anticipation of dividend or taking up financial risk:

“Investment” is also defined as all investments or assets that is owned and managed personally or by another person, which has the quality of an investment, encompassing other attributes such as the pledge of money and other wealth, the anticipation of earnings or income, or the taking up of risks”.⁵⁴

Article 25 (1) of the ICSID Convention) states that the existence of a ‘legal dispute arising directly from an investment’ as a territorial necessity but fails to provide an interpretation of the phrase ‘investment’.⁵⁵ Tribunals have come up with a record of yardsticks which they have acknowledged as characteristic or definitional components of investment. These yardsticks are: (a) particular duration; (b) the taking up of business risks; (c) a meaningful pledges or undertakings; and (d) importance to the development of the host country. These standards are popularly named as ‘*salini* Test’.⁵⁶ The name was derived from one of the first cases in which the standards were applied. The inclination of some tribunals to use these standards as a measure for

⁵² See, Argentina – United States: Treaty Concerning the Reciprocal Encouragement and Protection of Investment, Washington, 14 November, 1991, 31, I.L.M. 124 (1992), at Article 1 (a), for full definition of investment.

⁵³ See, Article 1 (1) of the Agreement between Denmark - Ukraine on 23 October 1992.

⁵⁴ See U.S. – Chile Free Trade Agreement Article 10.27, 6 June 2003.

Available at: http://www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html.

⁵⁵ See, Christopher Schreuer, *The ICSID Convention: A Commentary* (2001) 149 (Article 25).

⁵⁶ *Salini v Morocco*, Decision on Jurisdiction, 23 July 2001, 42 I.L.M. (2003) 609, p. 52

the objective reality of an investment and accordingly as jurisdictional requirements has been condemned by other tribunals and by observers. The usage of the jurisprudence of ICSID on Article 25 in this way is critically wrong. This is because this very Article solely deals with the definition of investment for the purpose of jurisdiction. While the BITs uses the phrase investment as to examine whether the foreign investor can benefit substantive and meaningful property rights on the State, including procedural rights, arbitral awards frequently confuse between the two. These two issues must be differentiated from each other and must not be mixed so as to prevent confusion and inconsistency by tribunals.

In a situation where a case comprises the use of a BIT incorporating a definition and also the ICSID Convention, arbitral tribunals have opted for the ‘double keyhole method’: an activity must correspond with the definition it has in the treaty and as well as the definitional standard established for aims of the ICSID Convention as was held in *Noble Energy v Ecuador*.⁵⁷

In *Mihaly v Sri Lanka*, it was held that discussions that are aimed for the intention of reaching an investment agreement which stay ineffective do not amount to an investment. And any amount of funds spent or sustained in the process of such discussion does not give sufficient reason to take legal action.⁵⁸ In other words, any such unfinished contract does not place any FPS obligation on the host State to perform.

2.3 Overview of Bilateral Investment Treaties

Western nations specifically created BITs after the upsurge of decolonisation from 1950s to 1960s to safeguard the investments of their citizens and their nationals in developing countries.⁵⁹ Due to the complexity and incomprehensible nature of principles of international law regulating

⁵⁷ *Noble Energy Inc v Ecuador (Decision on Jurisdiction 5 March 2008)* ICSID Case No ARB/05/12, para.125-42

⁵⁸ *Mihaly v Sri Lanka (Award of 15 March 2002)* ICSID Case No ARB/00/2 (2004) 6 ICSID Rep 310, para.60-1

⁵⁹ Kenneth J. Vandeveld, *A Brief History of International Investment Agreements*, in *The Effect of Treaty on Foreign Direct Investment, Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 3.13-35 (Karl P. Sauvant & Lisa E. Sachs eds., 2009); Patrick Juilliard, *Bilateral Investment Treaties in the Context of Investment Law, Investment Compact Regional Roundtable on Bilateral Investment Treaties for the Protection and Promotion of Foreign Investment*, at 1 (2001), available at <http://www.oecd.org/dataoecd/44/41/1894794.pdf>

the dealing of alien investment, capital-exporting states came to the realisation of the necessity to provide security for their nationals and companies using diverse kinds of investment treaties.⁶⁰

In relation to economic dealings, BITs were the mechanism used by developed nations to promote three wide principle objectives, namely: (1) encourage and secure investment; (2) ease investment access and performance; and (3) remove or loosen restrictions on the developing States economies.⁶¹ Bilateral Investment Treaties are as of today so well-known, starting from 1959 that the very first Bilateral Investment Treaty was ratified.⁶² Henceforth, Bilateral Investment Treaties have come to be the main channel by which FDI in the present-day is supervised. Capital-importing states try to ratify BITs with one thing in mind, which is the attraction of private foreign investments.⁶³ Many developing countries see private foreign investment as very vital to their economic growth. There are bountiful advantages of FDI for capital-importing states, which includes; accessibility to current scientific knowledge and possibility for transferring such scientific knowledge; expansion of tax base including related possibility for increasing revenue; curtailment of reliance on international aid and national debt; opportunity to new methods of funding for development; and lastly, succour for domestic commercial distributors via linkages.⁶⁴ Notwithstanding all the aforementioned benefits of FDI, every FDI varies and their effect in relation to economic advancement differs from State to State and from territory to territory.⁶⁵ One of the most credible ways to protect this investment is to

⁶⁰ See, Kenneth J. Vandavelde, id 50 at p. 15, (stipulating that Bilateral Investment Treaties “were a protective response to previous government takings (expropriations) of current operating investments with no recompense of their fair market worth”).

⁶¹ Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J. 67 (2006) at 75-79

⁶² Mahnaz Malik, Background paper: South-South Bilateral Investment Treaties: The Same Old Story? IV Annual Forum for Developing Countries and Investment Negotiators 1, New Delhi (27 -29 October, (2010) (acknowledging that the earliest Bilateral Investment Treaty was that finalised amongst Germany and Pakistan in 1959).

⁶³ Jennifer L. Tobin & March L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 WORLD POLITICS (2010) at p. 1, 4 (observing that basically, “the aspiration of Bilateral Investment Treaties means that, if they increase investors’ trust and self-assurance, they are possibly to bring an outcome of a larger FDI inflows.”).

⁶⁴ See U. N. LDC IV and OHRLLS, Background Paper” Harnessing the Positive Contribution of South-South Co-operation for Least Developed Countries’ Development, 20, New Delhi (18-19 Feb. 18-19, 2011) (analysing the advantages and importance of FDI to under-developed States of LDCs, (encompassing export increment, financial formations, creation of jobs, infrastructural development, and generally economic variation).

⁶⁵ *Id.* (acknowledging that alien investment “is mostly centred in some well endowed natural resource-States”, and that greater FDI inflow within LDCs is given to wealth-intensive schemes to have a restricted effect on job creation).

repose the obligation of FPS to host State in the territories where such investments are established or run which so many States have failed to do.

BITs were created in its importance to deal with the expiration of the Hull Rule, which stipulated that in circumstance where government takings occur, the host State was obligated to afford “immediate, appropriate, and successful” payment to the investor whose investment has been expropriated.⁶⁶ Starting from the beginning of 1960s to the middle of 1970s, criticism against the Rule of Hull which emanated from under-developed States was ferocious and continuous.⁶⁷ Those condemnations climaxed when the United Nations Declaration and Resolutions was adopted and that, when pieced together, seemed to have endangered the Capital-exporting countries’ investment interests⁶⁸ The Declarations that the UN had chosen at this point in time comprised of the 1962 Resolution on Permanent Sovereignty over Natural Resources (Resolution 1803),⁶⁹ the 1973 Resolution on Permanent Sovereignty over Natural Resources (Resolution 3171),⁷⁰ the 1974 General Assembly resolution declaring a New International Economic Order (Resolution 3201),⁷¹ and the 1974 Charter of Economic Rights and Duties of States (Resolution 3281).⁷²

Despite the fact that the campaign between 1960s to 1970s to develop a fresh intercontinental economic regulation crumbled and also, in spite of the fact that a lot of under-developed States have already embraced general economic practices,⁷³ BITs stay as a well-known mechanism by

⁶⁶ See, Green H. Hackworth, *Digest of International Law* 228, (Vol. 3, Washington DC: Department of State,(1942), at p. 655-59; Andrew Guzman, *Why LDCs Sign Treaties That Hurts Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. INT’L (1998), at p. 639, 641

⁶⁷ See, *id*, Andrew Guzman, *Why LDCs Sign Treaties That Hurts Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. INT’L 639, 641 (1998), at 641.

⁶⁸ The death of the Hull Principle caused a gap within international law also it resulted to legal unpredictability concerning the security that was accessible to alien investments. *Id.* (recognising that Bilateral Investment Treaties function soar in importance at the time that the international law of alien investment was the issue of great modification, unpredictability, and disagreement”).

⁶⁹ G. A. Res. 1803 (XVII), U.N. GAOR, 17th Sess., Supp. No. 17, at 15, U.N. Doc. A/ 5217, at 15, 14 December, 1962)

⁷⁰ G. A. Res. 3171 (XXVII), U.N. GAOR, 28th Sess., Supp. NO. 30, at 52, U.N. Doc. A/9030, at 52, 17 December , 1973

⁷¹ G. A. Res. 3201 (S-VI), U.N. GAOR, 6th Special Sess., Supp. No. 1, at 3, U.N. Doc. A/9559, at 3, 1 May, 1974

⁷² G. A. Res. 29/3281, pub., art. 1 U.N. Doc. A/Res/29/3281 12 December, 1974 (expressing the State equality of every country).

⁷³ In as much as the NIEO achievement is computed by the amount of the particular concepts and propositions found in the Declaration Programme of Action in 1974, which were endorsed by the global community and eventually applied, countless of commentators arrived at the judgement that NIEO was a fiasco. See, Adam Sneyd, *New*

which capital-exporting States applied to shield their economic and commercial interests, and assuring that their businesses overseas obtain just, impartial, fair and unprejudiced treatment, and to acquire exceptional security for investors,⁷⁴ especially on the standard of FPS. Developed States like United States of America usually apply BITs to safeguard, at the very least, six vital rights for investors in foreign jurisdictions: (1) prerogatives to just, impartial and fair and unprejudiced treatment; (2) entitlement to transferral of money from host State to another State without restriction; (3) security against government takings (expropriation) and conducts that amount to government takings and entitlement to immediate and sufficient recompense in the episode of government takings; (4) prerogative to international adjudication at a future time should disagreement arise; (5) restriction on operation requirements; and (6) foreign investors' right to choose foremost directorial staff.⁷⁵

Undoubtedly, BITs are unlikely to change for as far in the future as can be determined, considering the death of the MAI - Multilateral Agreement on Investment⁷⁶ and also, considering the reality that in the World Trade Organisation agreement investment issue is not appropriately confronted or tackled⁷⁷ and investment is not considered as part of the Doha Work Program.⁷⁸

International Economic Order (NIEO), Globalisation and Autonomy online Compendium, http://globalautonomy.ca/global1/glossary_pop.jsp?id=EV.0027 (commenting that the then President of the United States, Ronald Reagan in 1981 single-handedly pronounced the demise of the NIEO during the meeting of Cancun Summit on International Development Issues.); *See also*, Eric Allen Engle, *The failure of the Nation States and the New International Economic Order: Multiple Converging Crisis Present Opportunity to Elaborate a New Just Genium*, 16 *Sr. Thomas L. Rev.* (2003), at p. 187, 196

⁷⁴ Jennifer L. Tobin & March L. Busch, *A BIT is Better Than a Lot: Bilateral Investment Treaties and Preferential Trade Agreements*, 62 *WORLD POLITICS* (2010), at 7

⁷⁵ *See* Office of the United States Trade Representative, *Bilateral Investment Treaties*, available at <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (talking about the "six key advantages" BITs accords to foreign investors).

⁷⁶ *See* Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, in the *Effect of Treaty on Foreign Direct Investment, Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 3.13-35 (Karl P. Sauvart & Lisa E. Sachs eds., 2009), at 33

⁷⁷ *See*, the Agreement on Trade-Related Investment Measures, 15 April, 1994, 1868 U.N.T.S. 186 [hereinafter TRIMS Agreement], available at: < http://www.WTO.org/english/docs_e/legal_e/18-trims_e.htm > *see also* Sherry Stephenson & Uri Dadush, *The Current (Fragmented) Governance of FDI*, in *Foreign Direct Investment as a Key Driver for Trade, Growth and Prosperity: The Case for a Multilateral Agreement on Investment* 23, (2013), at p. 23 retrieved from:

http://www.3.weforum.org/docs/GAC13/WEF_GAC_GlobalTradeFDI_FDIKeyDriver_Report_2013.pdf

⁷⁸ In the Doha Ministerial Declaration investment is not included as one of the key parts covered. *See* World Trade Organisation (WTO), Ministerial Declaration of 14 November 2001, WT/MIN(01)/DEC (2001),

Available at: http://www.wto.org/English/tratop_e/dda_edda_e.htm \declaration; *see also*, WTO. *Subjects treated under the Doha Development Agenda*,

Available at: http://www.org/english/tratop_e/dda_e/dohasubjects_e.htm. (Showing that from the Doha Round "investment" issue was finally abandoned).

BITs without doubt are growing in popularity in respect to developing countries investment collaboration, and at the moment it seems there is no effort by many developing States globally to come up with a different effective normative mechanism for the supervision and attraction of FDI. But this popularity will mean nothing if investments are not fully protected under the standard of FPS in BITs as it seems the case presently.

2.4 The Use of BITs

As from 1959 to 1991, the number of BITs that were negotiated reached more than 400: the figure skyrocketed to nearly 2,500 at the last quarter of 2005.⁷⁹ Presently, the assumption is that almost all the countries in the world have signed at least one BIT.⁸⁰ As from 2005 onwards the number of globally concluded BITs has reached more than 3,000.⁸¹ Contrary to the FCN agreements that existed in the 1900 century, today BITs are wider in ambit, grant new prerogatives on alien investors, and has in its instruments legally binding investor-state disagreement settlement provisions.⁸² As for what they contain in them, very minute territorial topographical differences can be recognised or drawn out of the BITs. Instead, throughout the years “[a] substantive level of compliance has become apparent with regards to the key subject matters of BITs”.⁸³ Various BITs provide numerous standard of protections to alien investors, inter alia; FET standard, the standard of FPS, security from unnecessary or prejudicial practices, security against government takings, umbrella clause, nationality treatment and most-favoured

⁷⁹ U.N. Conference on Trade and Dev., *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, at 1 U.N. Doc UNCTAD/ITE/IIT/2006/5, U.N. Sales No. E.06.II.D16 (2007)
Available at: http://unctad.org/en/Docs/iteiia20065_en.pdf [hereinafter UNCTAD 2007].

⁸⁰ Vandavelde, See Kenneth J. Vandavelde, *A Brief History of International Investment Agreements*, in *The Effect of Treaty on Foreign Direct Investment, Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* 3.13-35 (Karl P. Sauvant & Lisa E. Sachs eds.2009, at 157 (discussing the explosion in the number of BITs since the 1990s and observing that over 2500 BITs exist, where most were concluded after 1990).

⁸¹ See Magalie Massmba (1) *Africa and Bilateral Investment Treaties: To “BIT” or not?* 16 July 2015 16-14
Available at: http://www.consultancyafrica.com/index.php?option=com_content&view=article&id=1697.africa-and-bilateral-investment-treaties-to-bit-or-not&catid=82:afric...

⁸² Friendship, commerce treaties and navigation (FCN) treaties are considered the first generation of investment treaties and precursors to BITs, which are considered second generation of investment treaties. See, Andrew Guzman, *Why LDCs Sign Treaties That Hurts Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 Va. J. INT’L 639, 641 (1998), at 653 (observing that contrary to BITs, FCNs “were not exclusively, or even primarily, vehicles to protect investments abroad,” but they nevertheless included some protection for investor).

⁸³ U.N. Conference on Trade and Dev., *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, at 1 U.N. Doc UNCTAD/ITE/IIT/2006/5, U.N. Sales No. E.06.II.D16 (2007),
Available at: http://unctad.org/en/Docs/iteiia20065_en.pdf [hereinafter UNCTAD 2007], at xi

nation, freely transferral of money, and investor-state disagreement reconciliation mechanisms.⁸⁴ Capital exporting countries like the U.S. and UK broker BITs based on the rationale of their different “Model BITs.”⁸⁵ For example, the UK Model BIT under Article 2 (2) stipulates that: “investments of citizens or corporations of every Contracting Party must always be afforded Fair and Equitable Treatment and must benefit Full Protection and Security in the jurisdictions of another Contracting Party”.⁸⁶ A few other underdeveloped States such as India have formed and are presently using a BIT Model too.⁸⁷

African countries are not left out in this trend of concluding BITs. A significant amount of BITs have been signed amongst States in the continent of Africa including other underdeveloped States. According to statistics, in general, African States have with Germany signed forty-seven BITs, with China, they have signed thirty-one BITs, they have concluded twenty-seven with the Netherlands, with the UK and France, they have signed 21 each, and with the United States, they have concluded 9 each.⁸⁸ However, African countries have with China entered into a greater number of BITs more than they have signed with their customary business associates, like France, the Netherlands, the United States, and United Kingdom.⁸⁹ One of the reasons why China’s economy is growing rapidly is arguably as a result of its increase of BIT signing with developing countries.

⁸⁴ See, Office of the United States Trade Representative, *Bilateral Investment Treaties*, available at: <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties>

⁸⁵ See, Office of the United States Trade Representative, *Bilateral Investment Treaties*, available at: <http://www.ustr.gov/trade-agreements/bilateral-investment-treaties> (talking about the United States Bilateral Investment Treaty programme and providing that “the United States brokers bilateral investment treaties on the ground of a text model”).

⁸⁶ See, the UK Model BIT (2005) at Art. 2 (2) (emphasis added)

⁸⁷ See State of India Department of Economic Affairs, *Indian Model Text of Bilateral Investment Promotion and Protection Agreement (BIPA)*, at http://finmin.nic/the_ministry/dept_eco_affairs/icsection/India%20Model%20Text%BIPA.asp?Pageid=1.>

⁸⁸ See, UNCTAD, *country-specific Lists of Bilateral Investment Treaties*, UNCTAD.org (1 June, 2013), <http://unctad.org/en/Pages/DIAE/International%20investment%20Agreements%2028IIA%29/Country-specific-Lists-of-BITs.aspx>.

⁸⁹ See, UNCTAD, *country-specific Lists of Bilateral Investment Treaties*, UNCTAD.org (1 June, 2013), <http://unctad.org/en/Pages/DIAE/International%20investment%20Agreements%2028IIA%29/Country-specific-Lists-of-BITs.aspx>.

2.5 International Investment Regime under Revolution

Despite the multiplication of BITs, developing countries never trusted the international investment law regime very much and as a result of this mistrust in the 1990s opposed to the concept of a multilateral investment that was under the protection and support of the WTO- (World Trade Organisation) and the notion of a MAI - (Multilateral Agreement of Investment) that was debated under the mechanisms of the OECD - (Organisation for Cooperation and Development) in Europe. In spite of the aforesaid opposition, from middle of 2000s, underdeveloped States started to vigorously voice out their dissatisfactions with the BITs that they entered into at that time. Plurinational State, i.e., the coexistence national State of Bolivia in 2007 quitted from the ICSID Convention- International Centre for Settlement of Investment Disputes Convention, Ecuador speedily went along the same route in 2009.⁹⁰ Nine of the State of Ecuador's BITs that it entered into were cancelled by the State in 2008.⁹¹ South Africa in 2009 commenced a thorough evaluation of its BIT program that was in progress, reaching in its statement of a proposal to allow some remaining BITs to lapse and a suspension on the brokering of all other future BITs.⁹²

All other civil society groups in developing countries and some developed countries have expressed displeasure on how the international investment scheme has been framed at the moment. Consequentially, the international investment scheme is passing through a catastrophe

⁹⁰ On 2 May, 2007, the ICSID accepted the State of Bolivia's declaration of its departure out of ICSID Convention and the withdrawal took place on [3 November, 2007.]. Ecuador's denunciation warning was accepted by the ICSID Convention on 6July, 2009 and the withdrawal happened on 7January, 2010. *See*, United Nations Conference on Trade and Development, Denunciation on the ICSID Convention and BITS: Impact on Investment-State Claims. IIA Issue Note, at 1 No. 2 (December 2010) [hereinafter UNCTAD 2010).

⁹¹ *See id*, UNCTA, IIA Issue Note at 1 n. 3 (December 2010), the nine States that the State of Ecuador terminated their BITS with. (They were Cuba, the Dominical Republic, EI Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay).

⁹² *See*, the Speech made by Dr. Rob Davies during the South African Launch of the U.N. Conference on Trade and Development Investment Policy Framework for Sustainable Development, University of The Witwatersrand, (26 July, 2012) *available at*:< http://www.info.gov.za/speech/Dynamic_Action?pageid=461&sid=29391&tid=77861> *See*, e.g. Withdrawal of BIT with the Belgio-Luxemburg Economic Union, Leon (quoting Missive by Maite Nkoana-Mashabane, the Minister for Internal Relations and Co-operation for South, to Emissary of Belgium to South Africa, John Maricou (7 September, 2012). *See also* Peter Leon, Jonathan Veeran & Erinn Warmington, *South Africa: South Africa Declines to Renew Bilateral Investment Treaties with European Union Member States*. MONDAQ (Oct. 5, 2012), *Available at*:< [Http://www.mondaq.com/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States.>](http://www.mondaq.com/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States.>)

of legitimacy, but not in objection with the whole concept of BITs itself. Testament of this displeasure within the scheme exists as follows:

- State of Bolivia renounced the ICSID Convention on 2 May 2007;⁹³
- The World Bank was sent a written communiqué of withdrawal out of ICSID Convention by Ecuador on 6 July, 2009;⁹⁴
- Venezuela officially terminated its Membership from the ICSID Convention on 24 January, 2012;⁹⁵
- Australia made a declaration that it was no more interested to incorporate investor-State adjudication into its subsequent BITs on April 2011;⁹⁶
- South Africa made the decision in 2012 that some of the State's BITs were not going to be renewed after their expiration;⁹⁷
- Also, South Africa took the decision in 2012, to refrain from ratifying any prospective BITs, except in the event of a particular convincing commercial and political situations;⁹⁸ and lastly
- There is a rumour that Republic of Argentina is contemplating to secede from the membership of ICSID.⁹⁹

⁹³ On 2 May 2007, the State of Bolivia presented a Notification under Article 71 of the Washington Convention, The State of Bolivia came before all other States in time to withdraw from the Convention of ICSID. *See* Sebastien Manciaux, *Bolivia's Withdrawal from ICSID*, 5 TRANSN'T'L DISPUTE MGMT. (2007).

Available at: < <http://www.transnational-dispute-management.com/article.asp?key=1076>.>

⁹⁴ On 9 July, 2009, Ecuador presented a Notification as required by Article 71 of the Convention of ICSID for its membership withdrawal from the organisation. Available at:

<<https://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=OpenPage&PageType=AnnouncementsFrame&FromPage=NewsReleases&PageName=Announcement20>>

⁹⁵ Ernesto J. Tovar, *Venezuela Officially Withdraws from ICSID*, EL UNIVERSAL (25 January, 2012, 12:52 PM), <<http://www.eluniversal.com/economia/120125/venezuela-oficialmente-withdrawals-from-icsid>>

⁹⁶ Dep't of Foreign Affairs & Trade, Gillard Gov't Trade Policy Statement: Trading our Way to More Jobs & Prosperity (2011) (Austl.).

⁹⁷ *See*, Peter Leon, Jonathan Veeran & Erinn Warmington, *South Africa: South Africa Declines to Renew Bilateral Investment Treaties with European Union Member States*. MONDAQ (Oct. 5, 2012), Available at:

<<http://www.mondaq.com/x/199586/international+trade+investment/South+Africa+Declines+To+Renew+Bilateral+Investment+Treaties+With+European+Union+Member+States>>

⁹⁸ *See*, the Speech made by Dr. Rob Davies during the South African Launch of the U.N. Conference on Trade and Development Investment Policy Framework for Sustainable Development, University of The Witwatersrand, (26 July, 2012) available at: < <http://www.info.gov.za/speech/DynamicAction?pageid=461&sid=29391&tid=77861>>

⁹⁹ *Argentina to Withdraw from ICSID*, PRESS TV (24 January, 2013, 12:17 PM).

Available at: <<http://www.present.com/details/2013/01/24/285299/argentina-to-withdraw-from-icsid/>>

Despite the resistance of a few dissatisfied countries and groups, BITs are still waxing strong amongst numerous countries as a way of protecting foreign investors and their investments from suffering adverse effects in territory of host States. Particularly, under the protective umbrella of FPS which international law mandates states to observe, it is very likely that it has perpetually come to stay. But if it has really come to stay, it must be applied properly to fully protect investors' investments against harms from the States under FPS clauses in BITs.

2.6 International Investment Law Origins and its Content

Not any one whole unified multilateral agreement that rules bilateral investment schemes among States, also not one particular international organisation, which is similar to the World Trade Organisation, accountable for regulating of BITs. In the case of (*Belgium v. Spain*), the ICJ expressed discontent over the lackadaisical evolution in the law of international investment. In its lamentation the ICJ stipulated as follows:

Contemplating the significant events over the past fifty years regarding the progression of alien investments including the furtherance in the inter-States affairs of companies False and contemplating the manner by which the commercial interests of countries have increase rapidly in numbers, it might first of all seem astonishing that the development of law never has been advanced and also that there is no commonly acknowledged practices in the issue that have formed and solidified on the inter-continental level.¹⁰⁰

However, the circumstances have changed in the present-day. International investment law has continued to evolve. Although there is no one unified or single international multilateral investment agreements, either BITs or any other global investment promises, for example, investment chapters like liberal business treaties and territorial business treaties such as specific intent treaties like the ECT,¹⁰¹ are accepted as the main international investment law origins. Salacuse and Sullivan recognised in their journal that “[f]or every pragmatic intention, treaties have come to be the international investment law rudimentary origins in the department of alien investment”.¹⁰² Omar Garcia-Bolivar observed that in the beginning, international investment law was “an extension of the principle of law on States Responsibility covering the Damage to

¹⁰⁰ *Barcelona Traction. Light and Power Company, Ltd (Belg. v Spain)*, I.C.J. 3, 5 February, (1970) at p. 46-47

¹⁰¹ The Energy Charter Treaty, *Opened for signature 1* February, 1995, 34 I.L.M. 360: North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289.

¹⁰² See, Jeswald W. Salacuse & Nicholas P. Sullivan, *Do BITs Really Work? An Evaluation of Bilateral Treaties and Their Grand Bargain*, 46 HARV. INT’L L. J.67, (2006), at p. 70

Foreigners,” but that this belief today “has developed to a constant change and progressive collection of principles and maxims incorporated in investment agreements and used by established institutions and ad-hoc adjudication tribunals.”¹⁰³ Emphasising the lack of consistency within the corpus of international investment law, Garcia-Bolivar records that this body of law:

is included in various (BITs), entered among wealth importing and exporting States under the chapters of Free Trade Agreements in investment, in treaties like the one which creates an established adjudication body to resolve disagreements among the States and the investor under the ICSID in an agreement that establishes a corpus like a multilateral Body for risk protection, for instance the MIGA - (Multilateral Investment Guarantee Agency) in concepts of traditional rules that are legally binding on States in their interactions with other States, individuals, organisations and other entities –(public international law), in laws that are soft such as, guidelines, policy declarations or codes of conducts which set standards of conducts and other countless of rulings by established tribunals like the ICJ, the United States-Republic of Iran tribunals, ad-hoc adjudication tribunals, and ICSID adjudication tribunals.¹⁰⁴

BITs, MITs plus other International Investment Agreements (IIAs) in this present-day can be said to contain the corpus of law that is called international investment law. The number of these consensuses is not only increasing, equally their ambit is widening to cover current matters. Bilateral Investment Treaties with “additional advance and modern investment guarantee clauses and also with liberalisation obligation”¹⁰⁵ are growing increasingly widespread, which the doctrine of full protection and security is part of.

The UNCTAD states as following:

[C]urrent treaties incline to comprise a wider scope of matters that within the majority of all-inclusive treaties may encompass not just investment security and liberalisation, but as well as good and services in

¹⁰³ Omar Garcia-Bolivar, *International law of Foreign Investments at a Crossroads: The Need for Reform*, Presented at Second Biennial General Conference of International Law. University of Tokyo 1 (2009)

¹⁰⁴ Mahnaz Malik, *Recent Developments in Regional and Bilateral investment Treaties* 4-5, Second Annual Forum of Developing Country Investment Negotiators (3-4 November, 2008), available at: http://www.icsid.org/pdf/2008/dci_recent_dev_bits.pdf (commenting that, originally, Bilateral Investment Treaties were concluded amid developed States and underdeveloped States and that various number of Bilateral Investment Treaties among western States has expanded across the past several years). To evaluate a sequential catalogue of Bilateral Investment Treaties concluded before September 1994, see Rudolf Dolzer & Margrette Stevens, *Bilateral Investment Treaties* Martinus Nijhoff Publisher, 15 June, (1995), at p. 267-85

¹⁰⁵ U.N. Conference on Trade and Dev., *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, art. 4 U.N. Doc. UNCTAD/ITE/IIA/2007/3 U.N. Sales No. E.07.II.D10 (2005)

business, the rights of intellectual property, government policy to reduce abuse of monopoly power, administrative acquirement, interim admittance for business people, accountability, the environment, and including labour rights.¹⁰⁶

To conclude this section, it is worthy to note that the regional reach of International Investment Treaties is excellent. The wide topographic reach of BITs emphasises their significance as origins of international investment law. MITs are not left out in this context as they are also imperative to investors' protection framework. Just like the tribunal in the case of *Mondev v. United States* has stated in 2002: "investment agreements run from North to South, and from East to West, and among countries in those territories between themselves."¹⁰⁷ Moreover, BITs under FPS provision encourages and gives stimulus to foreign investors with the assurance that their investments would be protected through States Responsibility for international wrongful acts or omission. It has been accepted by many observers that International Investment Agreements "are indeed widespread within their jurisdiction and vital clauses."¹⁰⁸ The good results of the law of international investment "treatification" are factual and significant.¹⁰⁹ Even countries that have deliberately and carefully kept away from signing multitudinous Bilateral Investment Treaties now have cause to be fascinated in the law of international investment advancement, considering their possible reach and result in the context that they may be regarded as a proof of traditional international law presently or by the very short distance away later.¹¹⁰ But these countries must keep their own sides of the bargain.

On this note, the thesis will in the next section take account into the origin and emergence of the standard of FPS through customary international law and from treaty practices starting from as early as the middle of seventeenth century

¹⁰⁶ U.N. Conference on Trade and Dev., Investor-State Dispute Settlement and Impact on Investment Rulemaking, art. 4 U.N. Doc. UNCTAD/ITE/IIA/2007/3 U.N. Sales No. E.07.II.D10 (2005).

¹⁰⁷ *Mondev v United States*, ICSID Case No. ARB(AF) 199/2 Award, 117 (11 October, (2002), 6 ICSID Rep. 181 (2005) at p. 117

¹⁰⁸ *CME v Czech Republic*, Final Award, 14 March, 2003, UNCITRAL Arbitration Tribunal, *published in* (2003/08) 15 World Trade and Arbitration Materials No. 4.

¹⁰⁹ Jeswald W. Salacuse, *The Treatification of International Investment Law*, 13 L. & BUS. REV. AM. 155, 158 (2007).

¹¹⁰ *Mondev v United States*, ICSID Case No. ARB(AF) 199/2 Award, 117 (11 October, (2002), 6 ICSID Rep. 181 (2005), at Para 177

2.2 The Origin of FPS under Traditional International Law

The aim of this part of the thesis is specifically to investigate the evolution of the concept of the standard of FPS that started in 1740s and has continued to be applied in the present-day investment BITs and pinpoints connected political writings, judicial rulings, and opinions, in order to reach additional dependable definition of the standard of FPS. Proof in relation to all of the aforementioned is as a matter of fact investigated in the subsections that follow, and would be considered as a wider analysis of the old time development of the FPS standard in traditional international customary law as well as the United States treaty rule. The aforementioned proof effectively assists an interpretation of the standard of FPS which does not only accord physical protection to investments, but expands such protection to more than physical security, necessitating, inter alia, the persistence of legal mechanism which affords some hallmarks like access to the judiciary proceedings, following of court process, and recompense for government takings of investors' properties and the breach of other investment protection obligations against the argument of some States.

2.2.1 The Emergence of FPS in the Eighteenth Century

A recognisable duty of security and protection that a country is obligated to offer to aliens in its jurisdiction had been found to have been merged or consolidated in traditional international law in somewhat, since about the middle of 1800s according to the texts written by **Christian Wolff** and **Emmerich de Vattel**. This security and protection concept was at that time cited in the United States business commercial Agreements that were brokered in the last years of the same century. The very first security and protection provisions were those of Wolff of Germany and Vattel of Switzerland.

2.2.2 Christian Wolff's "Law of Nations"

A German professor, Wolff, in 1749, wrote a book which was titled "*The Law of Nations Treated According to a Scientific Method*".¹¹¹ In that text he narrated to a large extent a duty of "security" and "protection" that a host country is obligated to provide to aliens under

¹¹¹ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), *reprinted in 2 The Classics of International Law* 9 (James Brown Scott ed., Joseph H. Drake trans., 1934).

international law. Especially, looking at the segment that was titled “Of the assurance of security to foreigners in one’s territory”,¹¹² Wolff acknowledged that “aliens, so far they abode in a foreign jurisdiction, they must be protected against all injuries, also the leader or the head of that State must be obligated to protect them from any form of it, i.e., security must be guaranteed to aliens that abode in a foreign jurisdiction.”¹¹³

In addition, Wolff stated that “the heads of those countries must never permit his citizenries or subordinates to cause to the foreign nationals a loss, or allow them to conduct any wrong against foreign nationals of another country, peradventure, if such conducts had taken place, the ruler must force the perpetrator to amend or restore the losses that were sustained by those foreigners which were perpetrated by his citizens and he should penalise the offender”.¹¹⁴

For him to use a common phrase like, injuries, loss, and wrong, Wolff stated obviously that such obligation necessitated for protection from non physical security and also against physical damages.

He further emphasised that this FPS obligation is dependable on an implied agreement among the foreign nationals at issue and the head of State of that country:

Between the head of the jurisdiction and the alien dwelling in that country there is an existence of an implied agreement, through which the last promises non-permanent compliance, the first *protection*. Accordingly, because an implied agreement of that type are meant to be obeyed, the head of the jurisdiction is obligated to protect aliens, accordingly not to permit them to be harmed against the entitlement common to every man by creation. But when he refused to permit aliens dwelling in his jurisdiction to be harmed by others, he guarantees them a security. Accordingly, the head of a country is obliged to guarantee security to aliens dwelling in his jurisdiction.¹¹⁵

¹¹² id

¹¹³ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), *reprinted in* 2 *The Classics of International Law* 9 (James Brown Scott ed., Joseph H. Drake trans., 1934), at 536 (emphasis added)

¹¹⁴ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), *reprinted in* 2 *The Classics of International Law* 9 (James Brown Scott ed., Joseph H. Drake trans., 1934), (emphasis added)

¹¹⁵ Christian Wolff, *Jus Gentium Methodo Scientifica Pertractatum* (1749), *reprinted in* 2 *The Classics of International Law* 9 (James Brown Scott ed., Joseph H. Drake trans., 1934), at 537 (emphasis added)

The reason he wrote “The Law of Nations Treated According to a Scientific Method”, was that the heralds to declare war to an enemy state appeared to have occurred in 1657, when Sweden went to war against Denmark.¹¹⁶ The more modern method at that time by states was also to declare war by way of public proclamation directed to the opposing side.¹¹⁷ As to be appropriate for a polite and formal age, it was urged that this be phrased in suitably dignified terms, with a careful avoidance of invective, defamation or similarly undignified language. Christian Wolff felt the urge to offer some advice on this subject to rulers of his days, and he solemnly abjured or renounced that:

‘In declaration of war, the facts are to be reviewed and to them are to be applied the principles of the law of nature and nations, a thing which can be done without any harshness of words and without argument prompted by ill will . . . [F]ar be it from you to call your enemy a breaker of treaties and traitors, for whom there is nothing so sacred that he does declare it . . . [I]t is sufficient that the acts and the principles of the law of nature and nations applicable to them are to be understood by others and it is not required that you should set forth your opinion of the vices of your enemy. If then you do this, it is not done with the intention of instructing others, but of harming your enemy, or detracting from nothing else than from hatred towards the enemy and from desire for vengeance and other perverse impulses akin thereto’.¹¹⁸

2.2.3 Emmerich de Vattel’s “Law of Nations or the Principles of Natural Law”

The next author shortly after Wolff on this international duty of protection and security is Vattel, a Swiss philosopher, diplomat, and legal expert whose theory laid the foundation of modern international law and political philosophy. In 1758, in his creative piece of work entitled: *The Law of Nations or the Principles of Natural Law*: Vattel stated that:

A State may not permit the prerogative of admission or freedom of movement into his jurisdiction offers to aliens to be seen as inimical to them; in welcoming them he accepts to provide them with security like his own citizens and assures that they benefit from it, to the extent they depend on the sovereign for a perfect security. Therefore, must assure that each State that give asylum to an alien contemplates that it is not less

¹¹⁶ NYS, *Droit de la guerre*, at 111-12

¹¹⁷ See, for example, Wolff *Law of Nations*, at 364-6, and Vattel, *Law of Nations*, at 255

¹¹⁸ Wolff, *Law Nations*, at 382

hurt by the harms that could be done to the alien than if those harms were perpetrated against his own citizens.’¹¹⁹

In addition, he expressed clearly that the harms that are ought to be protected against aliens suppose not to be restricted to infliction of physical injuries or damages, by observing that host countries ought to protect foreigners from conducts which cannot be justified.¹²⁰ Any act that cannot be justified can be construed to be anything that causes an adverse or negative impact to the foreigners and their investments. He explained further that the host States ought not to shield just aliens, but that their investments should as well be protected,¹²¹ and the States should afford recompense for any government takings otherwise known as expropriation.¹²²

Vattel’s monograph on his law of nations successfully brought broad dissemination throughout some part of the 18th century and it was regarded by the people living at that time and the age after, especially within the English-speaking nations as the only great functional and reliable authority of international law.¹²³ These Statements by both writers have countered the present-day States’ arguments that the protection of investors’ investments should be limited to only physical security.

2.2.4 FPS and the Start of U.S. Commercial Treaties

Taking into account of the influence and significance that was afforded to this book written by Vattel at that time, it is only normal that at the period the rising developing State like the United States started incorporating investment treaties that would benefit its nationals that participated in overseas trading and investments, those Treaties clearly incorporated the obligations to provide FPS for the protection of investments in which Wolff and Vattel outlined.

¹¹⁹ Emmerich De Vattel, *The Law of Nations or The Principles of Natural Law* (1958), *reprinted in 3 The Classics of International Law* 145 (James Brown Scott ed., Charles G. Fenwick trans., 1916).

¹²⁰ *Id.* At 136

¹²¹ *Id.* At 146

¹²² *Id.* at 96

¹²³ Albert de Lapradelle, *Introduction to 3 The classics of international law* xxxiv-xxxv (James Brown Scott ed., Charles G. Fenwick trans., (1916)

The foremost Treaty ratified by United States and Prussia as far back as 1785 comprises just short and obscuring reference of the protection right to alien trader.¹²⁴ However, an Agreement signed with the UK in 1794, just couple of years later, has in it better references to security and protection of investment.¹²⁵

The withdrawal of Britain's military posts from the United States' jurisdiction was provided in Article II of the Agreement signed between United States and Prussia, stating that:

every habitant and merchant, living in the neighbourhood or territory of the aforesaid places, must persist to enjoy, not to be harassed, all their entire property of all kinds, must be *protected* in those places. They must have a complete freedom to stay in those places, or to take with them all or some of their personal belongings, and they must as well not be restricted to give their landed properties, homes, or personal belongings in exchange for money, or to keep their belongings aforementioned, according to their wishes.¹²⁶

This phrase "protected" that was used by Vattel in his writing which have been mentioned in the passage above did not suggest that the term was meant to provide protection for just physical harm which some States argue for today, but it also provide position of acquiring property rights within the law.

Article XIV lay out a common warranty mutual and an ideal freedom of trade and seamanship, and stated in particular then that, the nationals and settlers comprising of both State individually, must have freedom willingly and protectively... to rent and own homes and storehouses for the intentions of their trade, and mainly the sellers and merchants on both sides, must benefit, '*the most complete protection and security for their commerce*'.¹²⁷ The terminology of security and protection used in this context appears to suggest to a certain extent a lack of improper or discriminatory legal limitations upon alien traders' business ventures.

Article XIX is demanding protection that shields all the nationals and ships of all parties from fighter of war and pirates. The use of this phraseology suggests protection from physical harm.

¹²⁴ See e.g., Treaty of Amity and Commerce between the United States and Kingdom of Prussia, art. XVIII, 10 September, 1785, 8 Stat. 84

¹²⁵ See Treaty of Amity, Commerce and Navigation between His Britannic Majesty and the United States of America (U.S.- Gr. Brit.), 19 November, 1794, 8 Stat. 116, 117.

¹²⁶ *Id.* art. II, at 117 (emphasis added).

¹²⁷ *Id.* art. XIV, at 124 (emphasis added).

Lastly, in spite of the fact that Art. X in this agreement leaves off a phraseology like protection or security, **Alexander Hamilton**, who is protector of this agreement simultaneously characterise it as contemplating a traditional obligation of offering protection and security to trade. This clause at issue stipulates that, ‘Neither the arrears unpaid from citizens of one State to citizens of another States, nor dividends, nor money, which they deposited in with the State’s government funds, or in the individual banks, must never in any episode of battle or ethnic quarrels be expropriated or impounded’.¹²⁸

Later, when the report about this Treaty was publicised, Article X was criticised by few people, including many more clauses, saying that they are too liberal to the British.¹²⁹ Hamilton protected the treaty in a succession of missives promulgated under the incognito or nickname “Camillus”.¹³⁰ Hamilton expressed that Article X was a basic quality that is often seen in treaties and claimed that those clauses obviously signify as follows, “that when there is an outbreak of a battle fighting between the sovereigns who have entered into a treaty in a specific matter, there must be for a duration of between six and nine months of full protection and security to be granted to the individuals and assets of the citizens of anyone that lives at that particular time in the jurisdictions of the other State”. In addition, he stated according that the permission of that kind of security to foreign traders and their possessions is comparatively as the law of Nations.¹³¹ Hamilton came up with the argument that the parties did nothing unusual by the inserting of Article X; rather they had merely included an already existing commitment under the law of nations. More importantly, he quoted Vattel’s notion to back up the reality of that type of traditional standard of protection and security.¹³² Within his other missive, he expatiated on this standard in this way:

The prerogative of obtaining or possessing belongings or assets in a State consistently requires an obligation on the side of its Regime to *protect* those assets as well as to make sure it *secure* to the possessor or to the holder the *full* benefit of it. Every time, consequently that a Regime gives authorisation to aliens to

¹²⁸ *Id.* art. X. At 122

¹²⁹ See Harold C. Syrett, *An Introductory Note* to 18 The Papers of Alexander Hamilton 475, 475 (Harold C. Syrett., 1973).

¹³⁰ *Id.*

¹³¹ *Id.* at 387.

¹³² Alexander Hamilton, The Defence No. xxi (Oct. 30, 1795), *reprinted in* 19 The Papers of Alexander Hamilton 365, 365 (Harold C. Syrett ed., 1973).

buy assets or obtain belongings in its jurisdiction or to carry and leave it in that country, it indirectly assures protection plus security.¹³³

He went further to explain that this obligation necessitated that ‘the alien owners... must benefit from the entitlements, advantages and exemptions of an indigenous owner with no other peculiarities apart from those that the substantial regulations may have already openly announced’.¹³⁴ That is to say, inter alia, the traditional obligation of security and protection demanded uniform security at the point of law.

The aforementioned proof clears it up that the concept of FPS in the United State earliest trade treaties considered protection against various numbers of harms, ranging from aggressive military actions by fighters of war to States expropriations, even to contraventions of legitimate prerogatives. This as well connotes that all of these treaties employed the phraseology in principally the same manner as Wolff and Vattel had applied it.

2.3 The Concept of FPS from the beginning of 1800 to the First World War

Between the period of the 19th century and the middle of the 20th century, the traditional concept of FPS experienced more improvement and clarification, and United States FCN treaties progressed in proportionate manner. The proof is clear-cut, but nevertheless, the practice was comprehended in every part during this era as providing protection beyond just police protection. Truly, to the scope that the principle developed, it pointed to the route of the prerequisite of more expansive protection within the regulation for foreigner’s asset rights.

2.3.1 Development of FPS in Customary International Law

There were claims by many commentators throughout this era that the traditional obligation of protection required not merely physical protection, but inclusively making the courts available to investors, the allowance of impartial protection by the law, as well as fair treatment by State government officialdom.

¹³³ *Id* Para at 318, 319.

¹³⁴ *Id*

One of the commentators that made such an assertion was **James Kent**. In his report on the *commentary on International Law*, in 1878, he observed that: “when aliens are permitted into a country on unrestricted and open-minded conditions, the citizenry ideology becomes promised for the aliens’ *protection*. The judiciary must be liberally open-minded to them so as to adopt and turn to the remedy of their injustices and complaints.”¹³⁵ In the same vein, **Lassa Oppenheim** made a commentary in 1905 in the following terms regarding this issue:

An alien ... ought to be accorded same protection both of him the person and his asset as is benefited by a national... In result of the aforementioned each country is by according to the Laws of Nations forced or obligated to afford to aliens *equality in the eyes of the law* with its nationals inasmuch as the protection of the individual and his asset is concerned. An alien must not in particular be injured either in physical body or his asset by the representatives and the judiciary of the country. Therefore, the police should not apprehend him without a good reason. *The custom authorities ought to treat him courteously and in accordance with the law, and the judiciary ought to treat him rightly and civilly.*¹³⁶

The above commentaries did not suffice on this matter and other scholars and diplomats from capital-export countries followed suit and started spotlighting at this period of time that protection accorded to foreigners ought to be in agreement with *international* standards, not just national laws. This response was as a result of an opinion first expressed by the Argentine jurist and diplomat **Carlos Calvo**, in his famous study first published in 1868 which afterwards was absorbed in a lot of Latin American States. Calvos opined that, a native country does not have the rationale to grumble for international law except in the circumstances where the treatment meted out to its citizens by the other contracting party is less favourable than that encountered by its own host-State citizens.¹³⁷ He also argued that international law must in practice be comprehended as permitting the host country to lower the security of the foreigner’s assets when

¹³⁵ James Kent, *Commentary on International Law* 113 (J.T. Abdy ed., 2d ed. (1878))

¹³⁶ L. Oppenheim, *1 International Law* 376 (1st ed. 1905) (emphasis added).

¹³⁷ After the end of colonial rule of Latin American experts and writers on law drew on the ideology of Calvo, who was an Argentine emissary of the later part of 19th century, to dismiss the advanced countries’ assertions about the ‘minimum level of treatment of international law’ for foreigners. Rather, their stand was that foreigners were qualified just to the selfsame standard of treatment which native citizens get under the national regulation legal framework. Nicholas DiMascio & Joost Pauwelyn, ‘*Non discrimination in Trade and Investment Treaties: Words Apart or Two Sides of the same Coin?*’ 102 *AM. J. INT’L L.* (2008), at p. 48, 52

as well as lowering the protections for assets held by its own citizens.¹³⁸ Calvo's viewpoint had it been adhered to would have created more allowance for a complete lack of protection for foreign investment than some States argue today. A typical example of where the developed country was of the viewpoint that host States ought to satisfy the traditional international law minimum standard of treatment in the security guaranteed to aliens is found in the statements by previous Secretary of State of the United States in 1910, **Elihu Root** in the following:

Every State is obligated to the citizens of the other State in its region the enjoyment of the selfsame regulations, the selfsame management, the selfsame protection, and the selfsame compensation for damages which it provides to its own indigenous citizens, and no more no less: as far as the protection that the State provides to its native citizens is *in compliance with the instituted level of advancement and civilisation*.¹³⁹

Elihu Root further emphatically stipulated the widespread stand as the following:

There exists a standard of treatment that is very straightforward, very basic, and which is generally accepted by all advanced States as to make a part of the globally international law. The circumstances by which any State has the right to assess the treatment required of it to a foreigner by the treatment which it affords to its indigenous nationals must be that, its mechanism of law, including its management must comply with this general standard of treatment. If any State's framework of law and management fails to comply with that standard, in spite of the fact that the citizenry of the State may be pleased or forced to exist under it, there will be no other States that can be forced to acknowledge it as bestowing an adequate standard of justice to its nationals.¹⁴⁰

It was just a matter of time before this concept which stipulated that all the host country ought to reach "the traditional level of civilisation" in respect to aliens came to materialisation and be famously called the "international minimum standard treatment".¹⁴¹

¹³⁸ See, Carlos Calvo, *Derrrecho Internacional Teorico y Practico de Europa y America* (1868); Charles Calvo, *Le droit International, : theorie et pratique* (1896) 3:138.

¹³⁹ Elihu Root, *the Basis of Protection to citizens Residing abroad*, 4 *AM. J. INT'L L.* 517, 521 (1910).

¹⁴⁰ E Root, *'The basis of Protection to Citizens Residing Abroad'* (1910) 4 *AJIL* 517, 528

¹⁴¹ See Jeswald W. Salacuse, *The Law of Investment Treaties* 1st ed., published by OUP (2010) at p. 48; see also Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens*, published by Leiden A.W. Sijhoff (1949) at p. 112-13

2.3.2 The FPS Provision in Early BITs

The FPS clauses in the United States treaties started as far back as early 1796 and similarly indicated a need that the host States should involve definite basic characteristics for the security of aliens trade in another territories. For instance, **John Adams**, subsequently having brokered an investment agreement alongside with others for the United States their first FCN Treaty with France,¹⁴² without doubt stressed the security of foreign assets or belongings by the principles under international law. He emphasised that:

There is no existing doctrine in the law of nations that is more strongly formed than the one that gives foreigners the rights to assets in the territories of the other States in relationship with their own for the protection of its State by all endeavours within his power.¹⁴³

This statement propagates the idea that it has been a long standing establishment by international law that the properties of foreign investors including the investors has been accorded protection and security as far back as this era and counters the argument for such protection by some States in the present-day.

2.4 Full Protection and Security in BITs during the World Wars

Neither State practice nor scholars of international law before 1917 had reason to focus any particular attention to rules that protect foreign investment. In this period of time the treaty practice only protected alien property on the ground of domestic laws enacted by the host country, and not on the basis of an independent standard. An illustration of this fact can be found in the Agreement that was entered by the United States of America with Switzerland in 1850 under its Article 2 (3) of the treaty, it stipulates that:

In the event of (. . .) government takings (expropriation) for the intention of State usage, the nationals of any of the contracting parties, living or operating business in the jurisdiction of the other State, must be given the same treatment with the nationals of the State upon which they live to compensations for injuries they possibly have suffered.¹⁴⁴

¹⁴²See, KJ Vandeveld, 'The BIT Programme: A Fifteen-Year Appraisal' American Society of International Law, *Proceedings of the 86th Annual Meeting (1992)* 532

¹⁴³ Cited in JB Moore, *A Digest of International Law (1906)* 4:5.

¹⁴⁴ Cited in R. Wilson, *United States Commercial Treaties and International Law (1960)* p. 111

The First World War and its consequences ushered in a rise in antagonism to foreigners in many countries of the world.¹⁴⁵, also it brought change of government that led to government takings (expropriations) of alien-owned individual assets in the State of Russia and other places in Eastern Block of Europe.¹⁴⁶ In respect to this development, the U.S. amended the language of its FPS provisions in order to give detailed definition of the features of the host country's legal mechanism which were considered by the principle. Simultaneously, intercontinental tribunals confirm again the customary concepts of FPS, and also the efforts to codify the concept by the League of Nations proved abortive.

2.4.1 Efforts to Codify FPS Standard with the Traditional International Law

There have also been attempts at collecting and restating the standard of FPS of foreign investments under traditional international law. For Example, the League of Nations established the Covenant that included a clause in Article 23(e), which obliged every member country to “make requirement to obtain and keep right of reporting in form of communication and of movement and *equitable treatment* so as to protect the investment of all the League of Nations’ Members, was the treaty which the League of Nations created in 1919.¹⁴⁷ This seemingly was the very first time that an international body has in their usage of word used the phraseology *equitable treatment* in connection with foreign investments, a principle that has from that time grown to be universal with the plentiful of FET provisions in investment Agreements.

The use of the term *equitable treatment* could not have been a mere general statement that the writers opted for the phrase *treatment* in Article 23(e). This term was at that time being applied commonly in conjunction with the words such as *security and protection* to make references to host countries’ international duties to aliens. This kind of word that was used was found in Elihu Root’s commentary that the traditional obligation of security intends minimum standard under international.¹⁴⁸ It may as well be found in the argument made in the United

¹⁴⁵ See Pitman B. Potter, *International Legislation on the Treatment of Foreigners*, AM. J. INT’L L. 748, 749 (1930)

¹⁴⁶ See, K Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010) at p. 34-35.

¹⁴⁷ League of Nations Covenant art. 23(e), *reprinted in* 1 *International Legislation* 16 (Manley O. Hudson ed., 1931) (emphasis added)

¹⁴⁸ See, Elihu Root, *The Basis of Protection of Citizens Residing Abroad*, 4 AM. J. INT’L, (1910) ,at 521-22

States and Mexico case, *Robert (U.S. v Mexico)*,¹⁴⁹ that in international law, foreigners should be accorded the *treatment* in conformity with general levels of civilisation.”¹⁵⁰

Truly, the fact that the writers of Leagues of Nations in Article 23(e) comprehended a necessity of FET as a principle that exists under traditional international law is a proof from that reality. As soon after the treaty was approved, the League of Nations’ Economic Committee began attempts to arrange into a systematic code the States’ duties towards foreigners “in pursuance of” this clause.¹⁵¹ This does not mean that the writers of the Agreement were convinced that international law was in this department flawlessly established and loyally observed by all countries. If that was to be the case, the need would not have been there to require such treatment in the Agreement and no advantage to arranging into a systematic code of international law on the issue. However, taking into account the aforementioned, it cannot be feasibly questioned that they comprehended international law in tackling the treatment entitled to a foreigner, and as necessitating, in a general speaking, that it should be equitable.¹⁵²

The writers of the aforesaid have made mention to a duty to afford FPS to aliens. The FET concept, in one part, and the standard of FPS, on the next part, and both were seen by many during that era as similar, or by a degree overlapping to each other. But that does not mean that the two are the same. In 1924, this is a proof by the Solicitor’s allegation that the Agreement duty of FPS prohibited “tyrannical and unjust *treatment*” of the citizens of the United States.¹⁵³ It is as well obvious from the evidence that the blueprint agreement was produced in accordance with the League of Nations of Article 23(e) started as a “strings of rules for counselling of countries concerning the *protection* of alien citizens and businesses from arbitrary financial

¹⁴⁹ *Roberts (U.S. v Mex.)*, 4 R.I.A.A. (U.S.-Mex. Gen. Claims comm’n 1926

¹⁵⁰ *Id* at 77, 80

¹⁵¹ The League of Nations Protocol promises all members to “make requirement to obtain and sustain the right of transmission, movement and equitable treatment in order to protect the investment of all the League of Nations’ Members. It was to the achievement of this aim that sprung up the Economic Committee of the League and prompted the outlining of the Draft Convention that deals with treatment of aliens, specifically with business issues. John Ward Cutler, *The Treatment of Foreigners in Relation to the Trade Convention and Conference of 1929*, 27 AM. J. INT’L L. 225 (emphasis added); Arthur K. Kuhn, *International Conference on the Treatment of Foreigners*, 24 AM. J. INT’L L. 570, 573 (1930) emphasis added).

¹⁵² See, Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010) at 226-32

¹⁵³ See e.g., Solicitor Memorandum, THE Energy Charter Treaty, *Opened for signature* Feb. 1, 1995, 34 I.L.M. 360; North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 8, 1993, 32 I.L.M. 289

treatment and unjust prejudice.”¹⁵⁴ In point of fact, despite that the blueprint agreement was titled a “Draft Convention on the *Treatment of Foreigners*,” one scholar reported it at that period as “partially an international law codification in relationship to the protection of foreigners”¹⁵⁵ And actually, the Draft Agreement had mentioned frequently to a duty of “protection.”¹⁵⁶

The other example was that Article 9 of the same Protocol stipulated that “citizens of all of the Contracting State must benefit in the jurisdiction of another Contracting State the selfsame treatment as citizens with reference to the *juridical and courts security of their individuals, assets, entitlements and concerns*”.¹⁵⁷ This same Article further catalogued certain legal protections that need to be afforded, encompassing the entitlement to bring proceedings and to engage in application of the law without impartiality.¹⁵⁸

In the same vein, Article 12 stated that protected nationals are to enjoy with respect to financial payments, “the selfsame treatment and selfsame *protection* by the financial bodies and tribunals of the courts as citizens of the State.”¹⁵⁹ One more time, the phrase *protection* has been used in alongside with the term *treatment* and suggests protection against nonphysical threats or against legal protection.

Also, within this particular period, Harvard Law School researchers produced their own blueprint arrangement of systematic code of countries’ duties to aliens. The codification was accomplished in 1929 and was titled Draft Convention on Responsibility of States for Damage Done in Their Territory to the Person or Property of Foreigners, and the document also outlined some of the rules that were linked to the traditional ideas of the standard of FPS.¹⁶⁰ In article 5 of the Draft Convention, for instance, it stated that “(a) country has an obligation to accord to a foreigner methods of remedy for harms that are no lower favourable than the methods of remedy accorded to its citizens.”¹⁶¹ Additionally, under Article 9 of the same Convention, which is

¹⁵⁴ Arthur K. Kuhn, *International Conference on the Treatment of Foreigners*, 24 AM. J. INT’L L. (1930) p. 571 (emphasis added).

¹⁵⁵ *Id.* at 573 (emphasis added).

¹⁵⁶ *Draft Convention on the Treatment of Foreigners*, League of Nations Doc. C.36.M.21.II, passim (1929).

¹⁵⁷ *Id.* art. 9 (emphasis added).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.* art. 12 (emphasis added).

¹⁶⁰ Edwin M. Borchard, *Part II: Responsibility of States for Damages Done in Their Territory to the Person or Property of Foreigners*, 23 AM. J. INT’L L. 133, 133 (Spec. Supp. 1929)

¹⁶¹ *Id.*

responsible for the “denial of justice”, it stipulates that it is the obligation of the states for the harm that is resulting as consequences of “refusal, unjustifiable procrastination or impediment of availability to judiciary, conspicuous inadequacy in the application of juridical or rectification procedure, omission to accord those promises which are ordinarily contemplated absolutely necessary to the required application of law, or a blatantly biased verdict.”¹⁶² All of these clauses are a reminder of the claims by the commentators in the likes of Kent, Vattel, and Wolff, that the traditional obligation of FPS necessitates rectification frameworks for damages sustained by an alien which is different from what host States believe today. The clauses as well bring to a conscious mind the protections of due process in lawsuits which has been outlined in the standard of FPS clauses of the United States Agreement that were ratified in the 19th century and in the beginning of the 20th century.

And finally, this Draft Convention stipulated even more in Article 10 that “(a) country is liable if any harm to a foreigner is as a consequence of its omission to employ a reasonable measures of due diligence to thwart the damages, if domestic solutions have been depleted without proper correction for such omission.”¹⁶³ This Article additionally expresses another area of the traditional standard of FPS, as was emphasised in the *Sambiaggio* case, that the obligation requires the use of due diligence to thwart harms to the foreigner including that of heir investments.

All these efforts mentioned at codification eventually collapsed as a consequence of disaccords among the growingly various international community in respect to the type of obligations that should be given to foreigners.¹⁶⁴ However, these attempts provide an understanding on how the writers comprehended international law in that era on this subject matter and in this area of the law.

¹⁶² *Id.* art. 9, at 134.

¹⁶³ *Id.* art. 10, at 134.

¹⁶⁴ See, Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*. Published by Kluwer Law International, (2009) at p.15-17; see also Manley o. Hudson. *The First Conference for the Codification of International Law*, 24 AM. J.INT’L. L. (1930) p. 447, 459

2.5 The Protection of FPS Standard in the Cold War Era

The World War 2 with its consequences simply brought segregations of dogmatism among the international community. This was due to a widespread of communism that consequentially resulted to a new wave of government takings of individuals' assets (expropriation), and bitterness and rancour that was meted towards alien investments within underdeveloped States which obviously became growingly prevalent.¹⁶⁵

Confronted with all these ugly events, the United States administration and the commercial interest in capital-exporting States came to the conclusion that investor protections at the international arena were more significant than it was before. With this notion, the United States increased its FCN treaty scheme and engaged in several discussions with the objective of brokering multilateral agreement on investment, while commercial benefits worked autonomously to encourage equivalent agreement. The treaties and the blueprint documents all embodied protection and security provisions and were the recent predecessor to those in the present-day treaties. As can be seen, so many things, such as their wording, writing background, and related analysis, they all symbolise that the principle of FPS as was used in the document proposed a legal mechanism faceting specific independent methodology guarantees, also that the principle was found as conveying traditional international law.

2.5.1 FPS and the Havana Charter and the International Chamber of Commerce Code of Fair Treatment

The standard of FPS can also be linked to Havana Charter where fifty three States in the city of Havana in Cuba on 24 March, 1948, concluded and ratified an instrument that has been named the Havana Charter.¹⁶⁶ The document asked for the establishment of an International Trade Organisation (ITO) for the assistance of negotiation and execution of global treaties on business,

¹⁶⁵ Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), p. 41-43; *see also*, Louis Henkin, *International Law: Politics, Value and Functions*, in 216 RECUEIL DES COURS, (1989), at p. 195-96

¹⁶⁶ United Nations Conference on Traded and Employment, Havana. Cuba, Nov. 21, 1947-Mar. 24. 1948, *Havana Charter for an International Trade Organisation, Final Act and Related Documents*, U.N. Doc. E/CONF.2/78 (Mar. 24, 1948) [hereinafter *Havana Charter*].

investment and commercial, and includes remarkable references to the requirement for the equitable treatment and security of investments.¹⁶⁷

Specifically, the Article asked the ITO for proposals for global treaties aimed “to ensure *fair and equal treatment* towards businesses, expertise, monies, crafts and scientific knowledge taken from one Contracting State to the other.”¹⁶⁸ The Article in addition stipulated that contracting State parties were to “render fair and equitable possibilities or chances for investments agreeable to aliens and reasonable *protection* for current and subsequent investments.”¹⁶⁹

The Havana Charter drafting background provides some perception on how its composers comprehended the phrase *security* considering on how it was used in Article 12. Particularly, in one symposium some representatives from Czechoslovakia where communist revolution was predominant then or was reigning supreme, recently came up with a proposal of adding the word “legal” before “security.”¹⁷⁰ One of the representatives alleged that this correction would be suitable as, in the absence of it, a foreign investor could claim that the phrase “*security*” proposed *political security*, especially, security from a revolution.¹⁷¹ The Representative of the United States to the conclave reciprocated by saying that he raised “no compelling opposition” to this proposition, rather, that such an argument was unwarranted since “no Follower to the instrument would be that irrationally daft as to make an insistent request for security while a State was going through a revolution, in clearer words, a regime change.”¹⁷² But the UK representative in his reciprocation to that recommendation, stated that, he disagreed to the proposition since “[i]t connotes a much narrowly legalistic definition of security, “I am certain the purpose was that it ought to be broader”,¹⁷³ he said. Those expressions by the UK representative show that the representatives were not in opposition to the requirement of legal security, but rather to the opposite, and think that the prevalent reference to security included

¹⁶⁷ Hugh M. Hollman & William E. Kovacic, *The International Competition Network: It's Past, Current and Future Role*, 20 MINN. J. INT'L L. (2011) 274, 316-17; Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at p. 41

¹⁶⁸ *Havana Charter*, art. 11(2) (emphasis added).

¹⁶⁹ *Id.* art. 12(2)(a)(i) (emphasis added).

¹⁷⁰ See U.N. ESCOR, 2d Sess., 39tn, at 21, U.N. Doc. E/PC/T/A/PV/39 (Aug. 14, 1947) (comments of Mr Augenthaler).

¹⁷¹ *Id.* (emphasis added).

¹⁷² *Id.* at 24.

¹⁷³ *Id.* (emphasis added).

legal security already. The only issue that was in contention was whether the wording should be eligible to make obvious that the document did not include *political* additionally to physical and *legal security*.

Regardless of the circumstances, the Havana Charter never came into commencement, neither was it concluded or signed by countries. Indeed, this was partly as a result that commercial concerns and investors in capital-exporting States believed that the terminology in respect to investment was diluted or adulterated overly at the demand of developing States.¹⁷⁴ Therefore, in 1949, a blueprint was propagated by the International Chambers of Commerce that implemented exactly similar rudimentary concepts of treatment and security, but expressed them to a greater extent vigorously. While it was never accepted, this document officially labelled the International Code of Fair Treatment for Foreign Investments (the ICC Code)¹⁷⁵ has noticeable sameness to current investment treaties.

Remarkably, Article 2 ascribed an obligation by the members “to employ *fair treatment*... to businesses of any type produced in their jurisdiction by the citizens of another High Contracting States”.¹⁷⁶ This is in parallel to the present-day FET standard provision.

The ICC Code in its Article 5 was like a type of security and protection provision to foreign investment, it stipulated that:

(t) he treatment expanded to the citizens of another High Contracting State must be no less adequate than that given to its own citizens, in accordance to the *lawful and juridical protection of its citizen, asset, rights and concerns*, and in regards to the acquiring property or object, buying, disposal of commodity for money, and allotment of moveable asset and immoveable asset of any sort.¹⁷⁷

One more time, the phrase *protection* was used in the Article above to indicate protection of investment to more than physical security.

¹⁷⁴ See, Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 41;

Gudrun Monika Zagel, *Protection of Foreign Investment under International Law*, in *International Protection of Foreign Investment* 6 (Dennis Campbell ed., 2d ed. 2010).

¹⁷⁵ Int'l Chamber of Commerce [ICC]. *International Code of Fair Treatment for Foreign Investments*. Brochure 129 (June 1949) [hereinafter *ICC Code*].

¹⁷⁶ *Id.* art. 2 (emphasis added).

¹⁷⁷ *Id.* art. 5 (emphasis added).

2.6 The US FCN Treaty Programme in Relation to FPS after the Second World War

While these attempts to reach a multilateral investment agreement were proving abortive or depleting, the United States was at that time occupied itself finalising bilateral FCN treaties.¹⁷⁸ These steadily encompassed protection and security clauses, and their phraseology, also as concurrent report by State Department representatives made it obvious that they also, proposed a legal mechanism proffering definite substantive and systematic protections for protected aliens.

The most convincing proof in this respect probably, is a formal State Department report from the late 1950s in a description of the FCN treaty scheme.¹⁷⁹ Out of the remarks found in that instrument that were significant were stated as following:

- United States FCN agreements encompass “guarantees of *security and protection* for the person in his ability as an asset owner. These comprise liberty from illegitimate visitation and ransacking of his house or his business premise, *the entitlement to fair recompense for expropriation of his belongings by the country, and particular prerogatives in accordance with acquisition, possession, and sale of physical and individual belongings*”.¹⁸⁰
- “Assurances to proffer *security of prerogatives in asset*, certainly, are of particular significance to an American investor that does business in foreign jurisdiction. In the absence of such warranties the commercial special rights that the treaty proffer to him would be deprived much out of their actual meaning”.¹⁸¹
- “Particular awareness had been rendered to according American businessmen an adequate step of *security* from unwarranted possibility of threats predictably to afflict their overseas activities. The aim has never been to protect investors from the commercial dangers to which capital invested is the issue but to lower the particular risks to which foreign investment could be unprotected as a result of unfavourable *legislations and judicial conditions*”.¹⁸²

In view of all these aforementioned comments, it is unequivocally certain that these are provisions of strong proof that the duty of protection and security as it has been use in U.S. FCN

¹⁷⁸ Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 56 (reporting about the twenty-one FCN Agreements that the United States ratified from the year 1946 to 1966)

¹⁷⁹ See, U.S. Dep’t of State, Pub. No. 6565, Commercial Treaty Programme of the United State (1958).

¹⁸⁰ *Id.* at 1 (emphasis added)

¹⁸¹ *Id.* (emphasis added).

¹⁸² *Id.* at 4 (emphasis added).

treaty at this period of time was aimed to shelter investors not merely from physical threats, but inclusively from unjustified ransacking, inadequate compensation of government takings of private owned properties, and disadvantageous judicial conditions. These are completely in opposite to the phraseology that has been used in the present-day United States investment treaties alleging that the obligation of standard of FPS is restricted to physical security thereby depriving investors their legal rights and security to their investments.

Again, the confirmation that the FPS clauses during the beginning of the Cold War period were of a proposal that it was meant for more than police/physical protection can also be found in the simultaneous report by an intellectual like **Michael Brandon**. Brandon alleged that the clauses of FPS found in treaties were aimed to guarantee that “persons and foreign companies have the *same prerogatives of protection in the eye of the law* like it is benefited by nationals, presuming this satisfies the international minimum standard”.¹⁸³

Brandon’s inferences gained approval by the phraseology of protection and security clauses during that era, and from the surroundings of the applicable treaties. Notwithstanding the fact that these clauses were more complex in some regards than their forerunners, (because they added for instance, particular formulas for quantifying the compensation for the expropriated investment), the terminology makes it obvious that the indicated current characteristics were just components of the overall notion of the standard of FPS.

The above detail that has just been emphasises is explained in the FCN treaty between the United States and China which was finalised in 1946;¹⁸⁴ (this was not long prior to the Communist capturing of the State of Italy in the year 1948.¹⁸⁵ The FPS clauses of these treaties started with a wide necessity that every party afford citizens of another with “the full protection and security necessitated under international law”.¹⁸⁶ They then enumerated clearly several other warrantees and enjoyments to be afforded to protected citizens in that respect, encompassing precise components of fair treatment through the normal judicial system - due process and

¹⁸³ Michael Brandon, *Legal Aspects of Private Foreign Investments*, 18 Federal Bar Journal (1958), at p. 298, 323

¹⁸⁴ See, Treaty of Friendship, Commerce, and Navigation, U.S.-China, Nov. 11, 1946, 6 Bevans 761 [hereinafter U.S.-China FCN Treaty].

¹⁸⁵ See, Treaty of Friendship, Commerce, and Navigation, U.S.-It., Feb. 2, 1948, 12 U.S.T. 131 [hereinafter U.S.-Italy FCN Treaty].

¹⁸⁶ U.S.-China FCN Treaty, art. VI; U.S.-Italy FCN Treaty, art. V

payment for government takings - expropriation.¹⁸⁷ In continuation to this point, paragraph three of this treaty stipulated as the following:

The citizens, companies and members of the Contracting State must in every part of the jurisdiction of another Contracting State *be given security and protection in connection with the issues specified under this Article in paragraphs 1 and 2*, on the conformity of the statutes, if there are any, that are or could subsequently be implemented by the obligation established authorities....¹⁸⁸

This means protected citizens and corporations were supposed to benefit from security and protection *in connection with* due process with legal proceedings and payment for government takings. This is reasonable only if the standard of FPS is expanded further than physical security, since the elements that were made reference to are legal protections, and not physical components.

The other outstanding U.S. FCN treaty that is vital on this point is the very one that it finalised with Belgium in 1961.¹⁸⁹ It is stipulated in Article 1 of that treaty that: “every Contracting Party must always afford fair and equitable treatment and *functional security* to the individuals, assets, businesses, *prerogatives and concerns* belonging to citizens and corporation of another Party”.¹⁹⁰ It added in Article 3 that: “Citizens of one Contracting State in the jurisdictions of another State must be afforded *full legal and juridical security for their individuals, entitlements and concerns*. Such citizens must have freedom from harassment and must be given consistent security under no circumstances lower than that necessitated under international law”.¹⁹¹ Lastly, it was stated in Article 4.1 of the same treaty that: “Assets that citizens and corporations of each of the two Contracting State possess or have inside the jurisdiction of another Contracting State must enjoy *stable security in these territories by full legal and judicial protection*.”¹⁹² This demonstrates to the greatest extent uttermost acknowledgement within the body of the United States FCN agreements that the obligation of the standard of FPS is not only meant for physical protection, but typifies the uttermost

¹⁸⁷ U.S.-China FCN Treaty, art. VI; U.S.-Italy FCN Treaty, art. V.

¹⁸⁸ U.S.-China FCN Treaty, art. VI (emphasis added); accord U.S.-Italy FCN Treaty, art V.

¹⁸⁹ Treaty of Friendship, Establishment, and Navigation, U.S.-Belg., Feb. 21, 1961, 14.2 U.S.T. 1284 [hereinafter U.S.-Belgium FCN Treaty] (emphasis added).

¹⁹⁰ *Id.* art. 1 (emphasis added).

¹⁹¹ *Id.* art. 3.1 (emphasis added).

¹⁹² *Id.* art. 4.1 (emphasis added).

maximum acceptance in the entity of the treaty that the duty proposed expansion beyond physical protection. But today, many host States contend to this fact.

This treaty could be seen as one that its notion of protection and security was distinguishable from the usual norms, apart from the fact that when it was submitted to the Senate for their consent, the State Department gave its guarantees that the treaty did not significantly distinguish itself from the rest of the other previous US FCN treaties. Particularly, a functionary of State Department confirmed notwithstanding that, “substantial transfiguration of the usual phraseology employed in United States agreements was found obligatory” to deal with the issues prompted by brokering opposition parties, these recasting were “of comparatively slightly of importance.”¹⁹³ Not only that this treaty is not abnormal from the others, it also followed very nearly the phraseology of previous blueprint multilateral documents, in conjunction with the Draft Convention of 1929 on the Treatment of Foreigners, also and that of the ICC Code 1949. These all connote that the placing of the terms ‘*legal*’ with ‘*and*’, and ‘*judicial*’ in front of ‘*protection*,’ with ‘*and*’, and ‘*security*’ merely made a clear-cut point that, in other words, could not have been expressed.

Other FCN agreements that the United States entered into at this era also observed the introduction of some particular clause that would later be taken as attachments of the present-day U.S. investment treaties, though in amended format. These encompassed, among other things, clauses preventing unreasonable and discriminatory impairment or damages of acquired rights¹⁹⁴ and provision necessitating fair and equitable treatment.¹⁹⁵ Concurrent report on these clauses shows that the both provisions were seen as connected to the standard of FPS, and as stating the features of traditional international law.¹⁹⁶

¹⁹³ , S. EXEX. DOC. NO. 87-89 (1961). (pronouncement that was made by Peyton Kerr who was Secretary of State Deputy Assistant in charge of Economic Affairs, Department of State)

¹⁹⁴ See e.g., Treaty of Friendship, Commerce and Navigation, U.S.-Greece, art. VIII, 3 August, 1951, 5.2 U.S.T. (1829)

¹⁹⁵ *id.* Art. XIV(4)

¹⁹⁶ Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 Political Science Quarterly, March, (1958), p. 57, 69

In regards to the current “unreasonable as well as discriminatory impairment” clauses, it was explained by a U.S. State Department treaty negotiator, **Herman Walker Jr.**,¹⁹⁷ as being drawn to “confirm and strengthen customary international law concerning the *protection* that a State administration is under an obligation to accord to the asset of the foreigner” and to focus especially inappropriate governmental action failing to reach the standard of completely and instantaneously government takings (expropriation).¹⁹⁸ In a clearer word, these current clauses were only expressing a characteristic of the existing of the early time traditional obligation of security. Walker in addition stated that U.S. negotiators were of the thought that it was wise to start clarifying and defining this area of traditional obligation of protection, in respect to unresolved condition within international law and the growing persistency by which the government were disrupting or intervening with personal property in manners short of government takings (expropriation).¹⁹⁹

Concerning the current FET provisions, these provisions contained conspicuous sameness as in the Havana Charter that was adopted in 1948 to the reference of “fair and equitable treatment” and in the ICC Code that was enacted in 1949 to the reference of “fair treatment”,²⁰⁰ as mentioned above. Furthermore, the both documents received their motivation in the 1923 League of Nations Covenants by the previous references to equitable treatment and the Draft Convention on the Treatment of Foreigners of 1929, and those blueprint documents attempted to contemplate traditional international law.

In this vein, it can not be unusual that when the standard of FET provision found its way in the United States FCN agreements many intellectuals acknowledged that the principle was born

¹⁹⁷ *Sumitomo Shoji Am., Inc. V. Avagliano*, 457 U.S. 176, 182 n.6 (1982) (explaining that Walker “served as Adviser on Commercial Treaties at the State Department” during the 1950s, and “was responsible for formulation of the post-war form of the Friendship, Commerce and Navigation Treaty and negotiated several of the treaties for the United States”).

¹⁹⁸ Herman Walker, Jr., *The Post-War Commercial Treaty Program of the United States*, 73 POL. SCI. Q. (1958), at 57, 69

¹⁹⁹ Herman Walker, Jr., *Treaties for the Encouragement and Protection of Foreign Investment: United States Practice*, 5 AM. J. COMP. L. (1956) at p. 229, 235-36; *see also walker*, on the Post-War Commercial Treaty Program of the United States, 73 POL. SCI. Q. 57, 69 9958) at p. 57, 69 (arguing on how the agreements accord for property security).

²⁰⁰ See, Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 195-97 (claiming that the FET clauses that first emerged in the United States FCN Agreements were encouraged by Havana Charter and a draft agreement arranged by the Organisation of American States in the same year, that had a equivalent reference to “just and equitable treatment”).

out of traditional international law. Also in this regard, Michael Brandon had alleged that these provisions were meant to convey a commitment of “good faith” within traditional international law.²⁰¹ In addition to Brandon’s observation, **George Schwarzenberger** has written that the principle place an obligation on the host country to treat aliens “in conformity to the necessity of *jus aequum*²⁰² (equity and justice), which he interpreted as a “lawful mechanism in which prerogatives are similar and should be applied appropriately as well as in good faith.”²⁰³ **F. A. Mann** conveyed the same belief in his writing on “*The legal Aspect of Money*”. He was of the assertion that traditional international law prevents “indefensible partiality, intentional harm, tyrannical, [and] denying people justice *lato sensu* or abuse of rights” within the concept of “FET, or the way it has been put sometimes, good faith which every country is globally necessitated to show in its behaviour towards foreigners”.²⁰⁴ All these opinions that have been expressed by Brandon, Schwarzenberger, and Mann are all in line with the previous accounts of one particular feature of the traditional standard of security, that is, the duty to abstain from unjust or tyrannical employment of the legislation.²⁰⁵

With all of these, it may not be possible to dismiss the fact that the standard of FET and the principle of FPS cover part of each other. And this overarching between the two standards can be explained by their familiar extraction from similar traditional standard. It seems that the two standards were used in different ways in the post Second World War in the United States FCN agreements. Depending on the aforementioned proof, the standard of FPS appears to have

²⁰¹ Michael Brandon, *Legal Aspects of Private Foreign Investments*, 18 Federal Bar Journal (1958) p. 336

²⁰² George Schwarzenberger, *Foreign Investments and International Law*, (George W. Keeton & George Schwarzenberger eds., 1969). at 114

²⁰³ George Schwarzenberger, *The Dynamic of International Law* 3, Published by Professional Books (1976). See as well Schwarzenberger’s full analysis of the traditional rule of “equity”-of that he asserted, “good faith” to be the key element. *Id.* at 56-76

²⁰⁴ F.A. MANN, *the Legal Aspect of Money*, 5th ed., Clarendon Press (1992) at p. 472. These accounts by Florian Alexander Mann concerning the standard of FET may appear shocking for the fact that he had as well argued in a different article in the year 1983 that the doctrine of fair and equitable treatment provision in a specific UK Bilateral Investment Treaty must be seen as indicating an independent norm, instead of a doctrine of traditional international law. See F.A. Mann, *British Treaties for the Promotion and Protection of Investments*, 1981 BRIT. Y.B INT’L L. 241, reprinted in F.A. MANN, *Further Studies in International Law* (1990), at 234, 237-38. For further analysis about the friction between Mann’s several reports on the principle see J.C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REV.-For. INVEST. L.J. 21, 51-58 (2002).

²⁰⁵ Robert R. Wilson, ‘*Property – Protection Provisions in the United States Commercial Treaties*, 45 AM. J. INT’L L. (1951), at p. 83, 97 (making references to an 1866 United States diplomatic instruction); Solicitor Memorandum, treaty between Germany and the United States, 8 December 1923.

necessitate the host country to apply with care and due diligence, in a manner that is appropriately required to secure aliens’ citizens and their assets, and also, to have and make accessible a reasonable *legal mechanism*, that characterises such security as proper correctional frameworks, due process, as well as an entitlement to full or adequate recompense for government takings. By the opposite, the standard of FET seemingly is about the way by which countries treat protected citizens when relating with them, mandating them to conduct themselves appropriately and in honest intentions (good faith). The relationship between FPS and FET standards will be discussed fully later in chapter 6 of this paper to demonstrate that the two standards are entirely different from each other.

2.7 The Standard of FPS in the Present-day United State Investment Treaties

The last FCN treaties that were ratified by United States were with Thailand and Togo in 1966.²⁰⁶ Subsequent to those treaties, the United States investment treaty plan was slowed down or suspended for so many years, at least not until 1977 when it was reinvigorated. It was then that the Administration of Jimmy Carter made up its mind to follow a divergent kind of treaty: the BIT.²⁰⁷

In so many ways, BITs are very dissimilar from its FCN forerunners, in the sense that, first and foremost, FCN treaties particularly concern themselves with a number of matters, encompassing commercial, navigation and investment. On the other hand, BITs is only concerned with investment issues.²⁰⁸ Again, in some respects, FCN treaties deal with investment matters, that is, they are meant to accord protection to individuals, rights, and concerns of the protected citizens and corporations that partake in investment. In the opposite, BITs safeguard investments in themselves²⁰⁹ and in addition, the citizens and companies who create those investments.²¹⁰ Furthermore, BITs normally create a framework that enables protected investors

²⁰⁶ Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 56.

²⁰⁷ *Id.* at 57

²⁰⁸ *Id.*

²⁰⁹ Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT’L. L. (1985) at p. 373, 373-74

²¹⁰ At a minimal, numerous investment treaties offer protected investors the *systematic* protection of entrance to arbitration in order to implement the important protections afforded to their businesses under the agreement, see Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 58.

to exercise their legal rights in which they may initiate arbitrary proceedings directly against the host countries for the contraventions of the agreement's meaningful clauses, a chance that was never rendered by FCN agreements. In spite of all the dissimilarities, a lot of the meaningful clauses of BITs are evolved from the United States FCN agreements that encompassed the standard of FPS provisions.²¹¹ But unfortunately, these benefits have not been fully provided by some host States to foreign investors and their investments under the standard of the FPS.

The decision by the U.S. to make a shift to BITs was as a result of their European counterpart's States that had been brokering BITs deals with the underdeveloped countries for quite some time and the U.S. wanted to take their footsteps by following suit.²¹² The new U.S. BIT plan did not yield fruit within a twinkling of an eye. It indeed took quite a while. The US only succeeded in brokering BITs with a few of developing States by the middle of 1980s after so many years.²¹³

Different kinds of United States history and case-law render an accurate and a deep understanding of the interpretation of the standard of FPS provisions in these treaties. Though the U.S. is just one of the contracting parties to the other party to any agreed BIT, the United States stance and their bargaining power disparity is to them of crucial importance in taking into consideration of how these treaties are brokered. To be specific, almost all BITs that are finalised with an under-developed State and the United States, the U.S. brokering version is shown as perfect in everything, which left the underdogs with little or no chance for any effective negotiation or haggling to the advantage of the other party occurring. This is seen as a one-way traffic brokering of a deal which does not render much benefits to the developing countries neither to investors. This method was expressed by **Jose Alvarez** a previous BIT negotiator, as follows:

Yet various treaties as well grant particular *meaningful* protections on investors. *See e.g.*, North American Free Trade Agreement, U.S.-Can.-Mex., Dec. 17, 1992, Art. 1102(1), 32 I.L.M. (1993)605, 639, stating that: ("Every Party must afford to *investors* of the other Contracting Party treatment not favourable lower than the one that it afford, in the same situation, to its national investors in respect of the institution, purchasing, extension, administration, action, performance, and transaction or other sales of investments"). (emphasis added)).

²¹¹ *Id.*

²¹² *See id.*, at 55

²¹³ Kenneth J. Vandeveld, *U.S. International Investment Agreements*, 1st ed., Oxford University Press, 30 April, (2009) at p. 91-94

The United States “cookie-cutter” attitude to BIT arrangement leads to a one-way discussion of forced and exploited terms. A Bilateral Investment Treaty brokering is not a conversation among State equals. It is to a greater extent like an intensive training seminar exercise run by the U.S, on the United States’ terms and conditions, on what it must take to obey the United States draft.²¹⁴

2.8 Conclusion

Having discussed in detail the background and the origin of the standard of FPS, it is not to be doubted that from the discussion that starts from a German professor, **Wolff**, in 1749, when he published “*The Law of Nations Treated According to a Scientific Method*, and from the writing of **Emmerich de Vattel**, a Swiss philosopher, diplomat, and legal expert whose theory laid the foundation of modern International law and political philosophy, in 1758 in his creative piece of work entitled: *The Law of Nations or the Principles of Natural Law* to the standard of FPS in the modern investment agreements, that the FPS standard has long been accorded protective protection to investment both physically and legally. Despite the affirmation by the ancient interpretation, the tribunals, States and some scholars are still doubtful whether the standard is extended to physical security or not and this mentality has deprived investors the much needed security to their investments against from the states or third parties. It is better for States, commentators, and various arbitral tribunals to come to terms with the fact that this standard of FPS needs to be extended beyond physical to legal security as it has always been, taking into account of all the facts that has been expressed in this whole chapter. This understanding will assist to fill the lacuna in the protection of investments for both physical and legal security that the standard of FPS offered to them under international law. The next chapter will focus on the modern day interpretation of FPS under the VCLT followed by the relationship between FPS and customary international law.

²¹⁴ Jose E. Alvarez, *Remarks*, 86 AM. SOC’Y INT’L.L. PROC. (1992) at p. 532, 553

CHAPTER THREE

THE INTERPRETATION OF FPS PROVISIONS UNDER THE MECHANISM OF VCLT 1969 AND RELATIONSHIP BETWEEN FPS AND CUSTOMARY INTERNATIONAL LAW

3.1 Introduction

The discussion in this chapter gives a general description of the VCLT interpretative mechanism and describes, as an introduction, the way it ought to be employed to FPS provisions. At the same time it emphasises on the interpretative role which has been set out through that mechanism to common principles in international law, the *travaux* (preparatory work), including other proofs that are naturally essential to the treaty wording. It is generally acknowledged that the system employed by the VCLT layout the adequate framework for interpretation of any treaty signed among State parties. It brings together a number of rules of traditional international law which is frequently and regularly followed and depended upon by the judiciary, tribunals, including the academics, as the reliable precedent to reading treaties.²¹⁵ But the question to be asked is that, have all various tribunals followed this authoritative guideline of VCLT interpretation for the protection of full protection and security standard? This question can be answered in disagreement, and as the thesis progresses the answer to this question will definitely fully come to light. The thesis will examine the VCLT interpretative mechanism and relate it to tribunals' interpretation in case laws. The chapter will first and foremost outline the various terminologies used by parties for the standard of full protection and security and which differences of these terminologies in respective of BITs do not have any bearings towards the meaning of the standard. This will be followed by discussion of the VCLT 1969 and with particular focus on Article 31 and 32 of VCLT 1969 where it gives a general instruction that a treaty should be interpreted taking into consideration of its aim and intention. The chapter will also be looking at the guidelines of the VCLT that governs treaty interpretation which demands

²¹⁵ See, *Chubb & Son. Inc. v Asian Airlines*, 214 F. 3d 301 (2d Circuit. 2000) (giving a detail account that the VCLT is a reliable precedent to the traditional international law concerning the interpretation of treaties.); Jan Peter Sasse, *An Economic Analysis of Bilateral Investment Treaties*, ed., illustrated, Published by Spring Science & Business Media (2011) at p. 60.

for the need to find out for sure how the relevant rules of international law should be applied with special reference to FPS in this context. The chapter will achieve this goal by looking at the following subheadings, such as: supplementary means of interpretation or what this thesis tags as an additional method of interpretation. The section will also be looking at other methods of treaty interpretation employed by a corpus like NAFTA to interpret the meaning of treaties under the subheading of interpretative statements. And lastly, the section will be looking at the past rulings and whether tribunals are dependent on the past decisions of the other tribunals whenever they what to make judgements, or whether they can use them as a reference in relation to the interpretation of BIT treaties. This chapter will as well be outlining the relationships between the principle of FPS standard and traditional international law. It will examine the controversy as to whether the FPS standard is equated with the traditional international law of minimum standard - “equating” approach, or whether the two obligations are intended as autonomous standards that go beyond international law,²¹⁶ - “addictive” approach.

The approach will draw the attention of the relationship between FPS and customary international law to the connection with disputes in investment treaties which aims to argue whether the FPS and FET concepts illustrate customary international law, or are supposed to be stand-alone standards that go beyond physical protection and security in international law. The chapter will proceed by looking at the some of the awards on the standard of FPS as they were interpreted under VCLT in relation to whether the standards draw a link to customary international law between parties. This controversy has led to gap in the protection of foreign investments by various host States in their territories and this gap needs to be filled by thesis.

²¹⁶ Authorities interpreting FET, FPS, or both as principles of traditional international law include, for example, *Genin v Republic of Estonia*, ICSID Case No. ARB/99/2, Award, 367 (25 June 2001) 17 ICSID REV.-FOR. INVEST. L. J. 395 (2002); see, J. C. Thomas, ‘Reflections on Article 1105 of NAFTA: ‘History, State Practice and the Influence of Commentators’, 17 ICSID REV-FOR. INVEST. L.J. at 51-100 (2002); see also Gus Van Harten, ‘Investment Treaty Arbitration and Public Law’ 87 (2007) (describing the standards as expressions of the treatment of minimum standard under international law. Authorities treating FET, protection FPS, or both as autonomous standards include, for instance, *Azurix Corp. v Republic of Argentina*, ICSID Case No. ARB/o1/12, Annulment Proceeding, 36 (14 July, 2006); *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Ruling on Jurisdiction and Culpability, 244-54, 284 (14 January 2010); Christoph Schreuer, ‘Full Protection and Security’, I. J. INT’L. DISP. SETTLEMENT 353, 364 (2010)

It will follow with academic commentators and literatures which explain and support, primarily, that the FPS and FET should stand as an independent standard which is autonomous of the minimum standard of international law.

3.2 Terminology use for Full Protection and Security

Almost all the modern day BITs have some kind of clause that guarantees protection and security in their treaties. The terminology that is used for the purposes of protecting and safeguarding investment varies, but these differences in wording do not cause any variation in the ways of interpretation.²¹⁷ For example, wordings like ‘protection and security’, ‘full protection and security’, and some use ‘most constant protection and security’, ‘constant security and protection’ or rarely ‘protection and legal security’ in various BITs.²¹⁸ These phraseologies mean that foreign investments must be fully and adequately be protected physically and legally by States. The United States BIT, for example, used the phrase such as, ‘...shall enjoy full protection and security...’ to guarantee the protection of its nationals’ investment with other contracting States.²¹⁹

Additionally, some non-US provisions do not include or make reference to FET, neither do they make reference to international law,²²⁰ and just a small number appear to include the standard of FPS together with the doctrine of FET under the same Article in a BIT.²²¹

3.3 Treaty Interpretation under VCLT OF 1969

The VCLT provisions that govern the interpretation of treaties can be uncovered under Articles 31 and 32 of the VCLT 1969. And under Article 31, it sets out the general instruction which stipulates that ‘a treaty must be read in honesty and sincerity of intention (good faith) in a

²¹⁷ Cordero Moss, ‘Full Protection and Security’ in A Reinisch (ed.) *Standards of Investment Protection* (OUP, Oxford 2008) p. 133-6; See also, *Parkerings v Lithuania*, Award, 11 September 2007, Para. 354.

²¹⁸ Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*. Published by Kluwer Law International, (2009) at p. 308; Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), p.244

²¹⁹ For example, see art. II (2) (a) of the treaty between the United States and Argentina, (1991) Available at: <http://2001-2009.state.gov/documents/organisation/43475.pdf>.

²²⁰ *Id*, Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*. Published by Kluwer Law International, (2009) at p. 308; Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), p.244

²²¹ *id*, at p. 313, (debating on an agreement involving Republic of Argentina and Republic of France that necessitates “FPS that is in conformity with the doctrine of FET”).

way that agrees generally with what is meant to the words of such an agreement in their frame of reference and taking into consideration its aim and intention’.²²²

Article 31 (3) provides that one must as well when interpreting a treaty take into consideration any future treaty that the parties may decide to enter in finding the treaty definition, their procedure when making use of the treaty, also “any appropriate principles under the international legislation that is applicable in connections between the contracting parties”²²³ Article 31 (4) went further to say that ‘an exceptional meaning must be afforded to a phrase providing that it is proven that those that entered into the agreement planned to do so’, which can conceivably justify a restrictive view of ‘full protection and security’.²²⁴ All the different terminologies of these provisions indicate that the host country is obligated to take actionable steps to safeguard the investment against interference that either emanates from the host State and its organ or from private parties.

The next sections that follow employ the aforementioned interpretative mechanism to FPS clauses in some investment treaties.

3.4 The Common Interpretation of the Term “Protection and Security”

There is controversy surrounding the definition of the term “security and protection” under international law. The most appropriate and generally accepted methods for explaining the meaning of any treaty between States has been outlined in VCLT as explained earlier. The VCLT compiles a set of principles of traditional international law that is procedurally depended on by the judiciary, arbitral tribunals, and intellectuals as the trustworthy blueprint for the interpretation of treaties,²²⁵ as also has been mentioned in the introductory part of this chapter. The guidelines of the VCLT that governs treaty interpretation are uncovered under VCLT Articles 31 and 32. And accordingly, under Article 31 there is a demand for the need to find out for sure the ordinary meaning of the treaty terms in the matter concerned. This is also in line with arbitral tribunal ruling in *Siemens v Argentina* case, where the arbitral tribunal said that the “the

²²² See article 31 (1) of Vienna Convention on the Law of Treaties (1969)

²²³ *Id.* art. 31 (4)

²²⁴ *Id.*

²²⁵ *See id.* VCLT 1969, (reporting that the VCLT is like “a dependable model to the traditional international law for the interpretation of treaties)

two parties in this claim have relied their assertion on the definition of the treaty that they have signed between them in compliance to VCLT Article 31”. According to the tribunal, “this Article stipulates that such a treaty should be ‘defined in honesty and sincerity of intention (good faith) in agreement with the common definition to be applied to the wordings of such agreement in their frame of reference and taking into account of its intention and objective.”²²⁶The tribunal therefore concluded that it “will follow to those rules of reading in examining the disagreed clauses in the Treaty”²²⁷

In order to ascertain the meaning, in most cases anyone seeking to interpret the treaty term makes reference to the definitions in dictionary.²²⁸ Though the meaning of the word protection including the term security is variable depending on the dictionary used, but *Oxford English Dictionary* reads the word protection as “the fact or condition of being protected; shelter, defence, preservation from harm, danger, damage, etc.; guardianship, care.”²²⁹ It defines protect, in turns, as “[t]o defend or guard from danger or injury; to support or assist against hostile or inimical action; preserve from attack, persecution, harassment, etc., to keep safe, take care of,” and so on and so forth.²³⁰ The same dictionary defines security to include “(t)he state or condition of being protected from or not exposed to danger; safety,” and “the state or condition of being ...secure” as in “(f)reedom from danger”, “freedom from care, anxiety, or apprehension,” “freedom from uncertainty or doubt,” “stability,” and “freedom from material or financial want.”²³¹

Considering the dictionary definition of the term “protection” and “security”, one would agree that the two terms have the same meaning, and that the two terms generally indicate that what is being shielded from attack or danger, can be of physical, legal, financial, intangible or even emotional nature based on how the word is used in the treaty.

²²⁶ article 31 (1) of Vienna Convention on the Law of Treaties (1969)

²²⁷ *Siemens v Argentina*, ICSID Case No. ARB/02/8, IIC 227 (February 6, 2007), at Para. 80

²²⁸ See e.g., *MTD Equity Sdn. Bhd v Republic of Chile*, ICSID Case No. ARB/01/7, Award, (25 May, (2004) at 113, available at: http://www.Oxfordlawreports.com/subscriber_article?script=yes&id=/ic/Awards/law-iic-174-2004&recno=12&module=iic&category=Chile

²²⁹ Oxford English Dictionary (3rd ed., 2007); see also Webster’s Dictionary third New International Dictionary of the English Language Unabridged 1822 (2002)

²³⁰ See *id* Oxford English Dictionary (3rd ed., 2007); see also Webster’s, at *Id*.

²³¹ Oxford English Dictionary (3rd Ed., 2007); see also Webster’s, at *Id.*, at 2053

3.5 Investment Treaties Objective and Purpose

There is a call under the Article 31 of the VCLT 1969 for a phrase to be read by looking at the aim and intention of the treaty wherever it is being used.²³² This is making reference to the rationale as to why the agreement is in existence”, and it is occasionally called *ratio legis* or the agreement’s *raison d’être* according to the treaty parties’ point of view.²³³ The agreement’s *title* and *preamble* in most cases is to find out for certain the aim and intention of entering into the agreement.²³⁴

The title of most investment treaties indicates to us that their purpose is aimed to accord protection for investments in order to promote investment by citizens of one State party to the jurisdiction of another State. A case in hand is the United States/Argentina BITs which at all times encourages the promotion and protection of foreign investment for benefit of both parties.²³⁵

The *Preamble* also notes down the purpose of the treaty. An example of where the aim of preamble is noted down in a treaty is in the United States/Zaire BITs, which records that the State parties negotiated the agreement “to encourage more extensive trade collaboration among the two States in connection with investment by citizens and corporations of all parties in the jurisdiction of another party’ depended on their anticipation that ‘the treatment required to be offered to their investment will encourage the stream of individual wealth and the business-related advancement among the parties.”²³⁶ A great numbers of preambles found in BITs are inserted related wording, and it has been generally accepted that this precisely indicates the aim of investment agreements.²³⁷

²³² Vienna Convention on the Law of Treaties, art. 31(1).

²³³ Ulf Linderfalk, *on the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer Science Business Media, 11, 204-05 (2007)

²³⁴ See Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Published by Kluwer Law International (2009) at 113.

²³⁵ See e.g., Article II (2) (a) of the agreement between the United States and Argentina, 1991.

²³⁶ See the United States and Congo, Republic of (Brazzaville) BIT, 12 February, (1990), Senate Treaty Doc. 102-1 (1991).

²³⁷ See e.g., Rudolf Dolzer & Christoph Schreuer, *Principles of International Investment Law, 1st ed.*, OUP (2008) at p. 21-22; also see Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at p. 57

The aim of the treaty can also be found in a letter that follows a treaty which will be handed to the Head of State. For instance, in the case of the U.S. BITs, the missive of submittal linked to the very first BIT the United States ever endorsed in 1982 with Panama, and it acknowledged that the aim of that agreement was ‘to promotes and safeguard the investment of the United States within the underdeveloped States. By offering specific reciprocal warranties and security, a bilateral investment treaty generates a greater stable and foreseeable legal mechanism for alien investors for all the parties that have entered into the treaty’.²³⁸ The letter further stated that this particular BIT with others that were under contemplation as at then were:

stable in objective with the mechanism of the agreements of Friendship, Commerce, and Navigation that the United States has brokered starting from the periods after it became a Republic until the completion and accomplishment of its treaty arrangements with Republic of Thailand and Togo at the end of 1990s; they pursue the United States principle of acquiring by treaty standards of equitable treatment and security of the citizens of the United States performing their business overseas, and establishing procedures for the resolution of disagreement among foreign investors and the host States, and among governments’.²³⁹

Up until the present-day, the tribunals and intellectuals interpreting the meaning of the FPS provisions have recognised some numbers of enlightenment to be drawn from such proof of the aim and intention of investment agreements. While it is normal for arbitral tribunals to contemplate proof of this kind when giving the interpretation of FET, and to uphold that one out of the other components of that concept is to necessitate a steady and foreseeable legal milieu,²⁴⁰ they seldom draw related judgements about the standard of FPS. They have failed to apply it adequately in order to accord foreign investment full security and this can be found in the interpretation of various case laws of FPS.

An example of the occasion when an arbitral Tribunal have made reference to aim and intention of the agreement when reading the meaning of the standard of FPS provision was in the very first popular investment agreement judgement in *AAPL v. Sri Lanka case* in 1990.²⁴¹ This case was

²³⁸ Missive that was submitted to the President with the BIT between the United States and Panama on 27 October, 1982, SENATE TREATY DOC. NO. 99-2

Available at: <http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAN_USA_1982e.asp>

²³⁹ *Id*

²⁴⁰ *CMS Gas Transmission Co. V Argentina*, ICSID Case No. ARB/01/8, 12 May, (2005) 44 I.L.M. 1205 (2005) at 274

²⁴¹ *Asian Agricultural Products v Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award 51 (27 June, 1990), 30 I.L.M. 580 (1991) at p. 51

brought by an investor on the bilateral investment treat between the United Kingdom and Sri Lanka. The applicant argued that the State of Sri Lanka breached a clause of the agreement that guarantees the FPS by neglecting to thwart the damaging of the applicant's shrimp farm, including the killings of many of the applicant's workers when the Sri Lankan military armed forces clashed with the insurgent group known as Tamil Tiger.²⁴² Additionally, the applicant asserted that the FPS standard placed upon the host State of Sri Lanka an obligation of absolute liability to prevent harm to protected investments.²⁴³

The Tribunal while assessing this application acknowledged that the proper meaning of the FPS provision is to put into consideration the awareness of the treaty's general objective and aim, which is certainly obvious in this current case, 'the promotion of investments by making available an adequate environment of legal security'.²⁴⁴ The tribunals however disagreed with the claimant's assertion that the standard imposes a strict liability because interpreting the treaty in such a way will be improper.²⁴⁵ The Tribunal said that the obligation of the standard of FPS only necessitates due diligence for the protection of the investment, it does not impose a complete safeguard that no harm would occur.²⁴⁶ Although the tribunal in this case refused to vividly say that the standard of FPS expands to more than physical security, it obviously recognised in aforementioned wordings cited above that the intention of the agreement was to 'provide an adequate atmosphere of legal security,' and the tribunal had the feeling that this was reasonable for the interpretation of the standard.²⁴⁷ But the State of Sri Lanka failed to provide this security to the claimant neither did the tribunal held the state culpable for it

It can be said that the tribunal in this case was right in this respect of absolute liability, but more other things can be added on the subject matter. Firstly, frequent reference of treatment and protection in the BITs' preamble section demonstrate that the FPS and FET standards shown in the structure of the agreement are both precisely connected to the agreement's intention. Basically, a normal treaty agreement starts with insertion of a statement stipulating that the parties are signing the treaty so as to obtain intensified treatment and security for investment,

²⁴² *Id.* at 581-82

²⁴³ *Id.* at 583-84, 588

²⁴⁴ *Id.* at 601

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 602, 612

²⁴⁷ *Id.* at 601

comprising a heightened legal mechanism, accompanied by provisions by which the parties promise to accord FPS and FET, in a situation where the two standards are incorporated in the same clause as it is often the case. This would indicate that the parties proposed these two standards to provide legal structure to the ambition highlighted within the preamble, that is, to change the aims of the agreement into duties. Again, the claim in missives of submittal which stipulates that “by offering specific reciprocal warranties and security, a BIT generates an extensive steady and foreseeable legal mechanism for alien investors” appears to affirm that the concept of protection within the FPS provision considers some kind of legal security and protection.²⁴⁸

3.6 Interpretation in Context to FPS provisions

The VCLT 1969 under its Article 31 shows that a phrase should be interpreted in its context to the treaty, encompassing any interconnected annexes and treaties associated with it.²⁴⁹ The meaning of term context in this regard comprises the grammatical expression of the clause in which the phrase emerges, and also the position of the phrase within the formation of the treaty in general.²⁵⁰ Great numbers of the United States BITs that have been ratified had started in sequence with, a preamble in the beginning, accompanied by the definition segment, accompanied by a substantive part, accompanied by phraseology on disagreement settlement, agreement cancellation, including other no substantive issues.²⁵¹

The substantive section in Article II of the VCLT is the first Article and normally will set out several wide promises in the treaty concerning the treatment and protection to be afforded to investment. Particularly, it makes reference to a duty to treat businesses of corporations or citizens of other State parties with no lower favourable treatment than the treatment that it offers to the investments of its own citizens or the investments belonging third party State citizens.²⁵² This sort of treatment if it occurs is often referred to, or known as ‘national treatment and “most-

²⁴⁸ Missive that was submitted to the President with the BIT between the United States and Panama on 27 October, 1982, SENATE TREATY DOC. NO. 99-2

Available at: <http://www.sice.oas.org/Investment/BITSbyCountry/BITS/PAN_USA_1982e.asp>

(Emphasis added).

²⁴⁹ Vienna Convention, art. 31(1)-(2)

²⁵⁰ Richard H. Gardener, *Treaty Interpretation*, Reprinted edition, Oxford University Press (2008), 178, 182

²⁵¹ See, the treaty between United States and Argentina 1991 at Para art. II (2) (a).

²⁵² See, e.g., *id.* Art. II(2)(b)

favoured nation (MFN) treatment,” separately in the order mentioned.²⁵³ Other obligations that follow are the duties to afford FET and the standard of FPS.²⁵⁴ These obligations are subsequent to the promises to abstain from unreasonable or prejudicial damage of investments of the investors²⁵⁵ and to respect commitments that have been ratified in respect to investments.²⁵⁶

Next in succession after language are the listings of more particular substantive clauses that deal with matters like;

- a duty to offer successful methods of submitting claims and implementing entitlements;²⁵⁷
- a duty to bring to the knowledge of the public all statutes, rules, governmental procedures, and judiciary findings concerning investments;²⁵⁸
- recompense for government takings known as expropriation;²⁵⁹ and
- Recompense for losses sustained in relation to “fighting a battle or military operation, settlement of various disputes, state of domestic crisis, insurgency, public disobedience or other related occurrences.”²⁶⁰

The placement of these standards at the start of the substantive section with many other languages that are used concerning the treatment of investment show that they could be aimed as general comprehensive commitments that commit all parties to accord the kind of security and treatment required to encourage more investments. These commitments are then apparently explained in more detail by the further specific clauses in successive. Accordingly, for instance, the successful method, transparency, government taking of investments known as expropriation, and armed conflict and civil disorder provisions could all be aimed to explain characteristics of the standard of FPS and FET to be offered. If on the opposite, the standard of FPS was designed to serve as a restricted standard which does not require anything that goes beyond physical security, then people would anticipate it to feature subsequently in the agreement between other

²⁵³ See, e.g., Rudolf Dolzer & Christoph Schueuer, *Principles of International Law* 21-22 (2008) at 178-79, 186-87

²⁵⁴ See, e.g., U.S.-Argentina BIT, *supra* note 236, art. II(2)(a)

²⁵⁵ See e.g., *id.* Art. II (2) (b).

²⁵⁶ See e.g., *id.* Art. II (2) (c).

²⁵⁷ See e.g., *id.* Art. II (6).

²⁵⁸ See e.g., *id.* Art. II (7).

²⁵⁹ See e.g., *id.* Art. IV (1).

²⁶⁰ See, e.g., *id.* Art. IV (3).

subsidiary duties. One could anticipate it to feature specifically in the selfsame article like the civil disorders and military operation provision that tackles the outcomes of physical damages. For it not to have featured in the selfsame article means that it is definitely not in conformity with them. Unfortunately, various tribunals have interpreted the meaning of FPS clauses in BITs properly without fully explaining why.

3.7 Relevant rules of Treaty Interpretation under International law

In establishing the definite meaning of any phrase incorporated in an agreement, the VCLT demands for consultation on any applicable guidelines provided under international law relevant to the parties in this regard.²⁶¹ For instance, where there are any traditional guidelines that rule country's duties towards aliens in any matters, this will be the most appropriate place to look for it in order to find out the nature of those duties.

There are surely these types of common guidelines found within international law, and this includes the international law of minimum standard that was mentioned in the current United States investment agreements. But it will not be prudent to swiftly link the general guideline of international law with a treaty agreement standard, especially in circumstances where the minimum standard is not clearly and directly mentioned. Like Christopher Schreuer stated, 'the parties that entered into the treaty could have decided to impose to themselves a different standard, that is, a standard which is autonomous regardless the guideline that is existing within international law'.²⁶² Schreuer warned specifically towards linking the standard of FPS with the minimum standard of international law, saying that 'it is difficult to comprehend the reason why the writers of an agreement will use the terminology 'full protection and security' where their intention signify minimum standard of traditional international law'.²⁶³ To put it in a different perspective, he said if the parties wanted to follow the usual practise of customary practise, it would be reasonable for them to specifically mention it by name. Exactly how majority of tribunals have applied it under FPS thereby depriving foreign investors and investments full security. However, Foster said that Schreuer's argument seems to be a very smart one. But

²⁶¹ Vienna Convention, art. 31(3).

²⁶² Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L, DISP. SETTLEMENT 353, 364 (2010).

²⁶³ *Id.* Schreuer, at 364.

argued that such ‘reasoning would not hold water particularly where it can be indicated that the phrase security and protection holds its own specific constructed interpretation under the traditional international law as a component of, or different description, or name for minimum standard of international law’, and ‘if that is the case, in obligating for security and protection the parties to the treaty would have mentioned a general guideline by name’.²⁶⁴ One can see that there is also controversy over even academic scholars. This issue will be broadly dealt with below under the section that discusses the relation between full protection and security and customary international law.

It is very true that some investment agreement tribunals have observed that traditional international law comprises a duty of protection against aliens and have drawn a connection between both the traditional international law obligation and the duty of FPS standard. For example, in the *AAPL v Sri Lanka* case, the arbitral tribunal assessing the claimant’s protection and security application spotted several past authorities that made mention to a traditional obligation to ‘protect’ foreigners in respect to applying the standard of “due diligence” and have drawn a link between customary international law obligation and the agreement standard.²⁶⁵ However, it would be right to say that the *AAPL* case only focused on authority which gave the opinion that the traditional obligation of security is restricted to physical protection of foreign investments.

3.8 Additional Method of Interpretation

Sometimes arbitral tribunals can as well make references to the additional method of interpretation incorporated under the VCLT at Article 32. Article 32 of the VCLT stipulates that, ‘there can be a possible option for an additional method of interpretation, encompassing the “preparatory work’ and the condition by which the agreement was ratified.’²⁶⁶ There is an

²⁶⁴ See, George K Foster, *Recovering “Protection and Security”: The Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 1113, available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>.

²⁶⁵ *Asian Agric. Products v Sri Lanka (AAPL)*, ICSID Case No. ARB/87/3. Final Award, 69-77 (June 27, 1990), 30 I.L.M. 580 (1991).

²⁶⁶ Vienna Convention, art. 32.

argument concerning exactly at what stage to turn to additional method,²⁶⁷ but it can not be disputed that it is possible to seek for additional method interpretation when the principal means have some level of vagueness and complexity, as is always the case.²⁶⁸

Additionally, it is commonly acknowledged that no matter the role officially allocated by the VCLT to this additional method of interpretation, the judiciary and arbitral tribunals as part of a regular procedure consider them in principle to the degree that they are obtainable. It has been stated by one scholar that, “the parties that involve in a disagreement will frequently direct the attention of the tribunal to the *travaux* (preparatory work) and the arbitral tribunal will unavoidably evaluate them together with every other evidence placed before it.”²⁶⁹

The preparatory work concept does not just cover the blueprints of the agreement in question, but as well it covers other written communication among the parties when negotiating the terms of the treaty,²⁷⁰ ‘and reports, explanatory accounts, and comparable documentation drafted simultaneously when an agreement is being prepared’.²⁷¹ The terminology ‘circumstances of the treaty’s conclusion’ makes reference to the exact and legal context from which the agreement was finalised, or to be more particular, components that affected the finalisation of the agreement.²⁷² Such conditions can comprise other agreements which have equivalent topic, or apply equivalent phraseology.²⁷³ In the current circumstances, this would comprise other treaties that deal with investment, like the one found in the FCN agreements.

Furthermore, Article 32 of VCLT can not restrict the admissible additional method of interpretation to the *travaux* and the context of the agreement’s finalisation.²⁷⁴ The other

²⁶⁷ Ulf Linderfalk, *on the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer Science Business Media, 11 (2007), at 236-37.

²⁶⁸ See, Richard H. Gardener, *Treaty Interpretation*, Reprinted edition, Oxford University Press (2008), at p. 328

²⁶⁹ Anthony Aust, *Modern Treaty Law and Practice*, 2nd ed., Cambridge University Press (2007) p. 245; *see also*, id Richard K. Gardener, *Treaty Interpretation* (2008) at 326

²⁷⁰ Ulf Linderfalk, *on the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer Science Business Media, 11 (2007), at 240

²⁷¹ Richard K. Gardener, *Treaty Interpretation* (2008), at 346

²⁷² See, Ulf Linderfalk, *on the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer Science Business Media, 11 (2007), at 246.

²⁷³ Richard H. Gardener, *Treaty Interpretation*, Reprinted edition, Oxford University Press (2008), at 345

²⁷⁴ *See id.* At 343 (observing that admissible additional methods of interpretation are not restricted to the instances accorded under the VCLT narrative).

allowable proofs would comprise, for instance, a party's declarations in accordance with the signing of the agreement, like the missives of submittal.²⁷⁵

It is accordingly proper to examine any and most of all, the above-stated lists of proofs to the length they can be found, with a perspective to the comprehension of the concept of FPS highlighted in the present-day investment agreements.

3.9 Other Methods of Treaty Interpretation

(a) Interpretative Statements by State Parties

Sometimes, the State parties that have ratified an agreement can give an expressed viewpoint regarding its real meaning at the duration of arbitral trials. The State parties that have signed a BIT can sometimes make a collective, non-obligatory or non-enforceable pronouncement if an issue of definition is awaiting decision or settlement before a tribunal.²⁷⁶

Also, NAFTA has a system in place in which the Free Trade Commission (FTC), an entity comprised of delegates that represent parties of the three States, can endorse obligatory or enforceable interpretations of the agreement.²⁷⁷ This mechanism has been used in 2001 by FCT while defining the meanings of the FET principle and the FPS standard under NAFTA in Article 1105.²⁷⁸ NAFTA tribunals have agreed that this interpretation is legally enforceable.²⁷⁹ The acceptance of this FCT by some tribunals has caused investments to incur harms either from the States or from third parties thereby leaving a gap in the investment protection.

Although, BITs do not usually have institutional framework to acquire the original explanations of their definition, Article 30 (3) of the 2004 Model BIT of the United States allows for a system that is almost the same as that of the NAFTA, and stipulates that, 'a collective choice of all the Parties, all functioning via its agents appointed for the intentions of this provision, announcing

²⁷⁵ Ulf Linderfalk, *on the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Springer Science Business Media, 11 (2007), at 249.

²⁷⁶ See e.g., *CME v The Czech Republic*, 9 ICSID Rep. 121 (September 13, 2001). In its Final Award, 14 March 2003, 9 ICSID Reports 264, at paras 87-93, 437, and 504

²⁷⁷ See, NAFTA Article 2001 (1): where the Parties accordingly established a Commission made up of the Parties' Advisory delegates or their nominees; see also, NAFTA Article 1113(2) regarding this same issue.

²⁷⁸ FTC Note of Interpretation of 31 July 2001, 6 ICSID Reports 567.

²⁷⁹ See, for an example, *Mondev International Ltd. v United States of America*, Award, 11 October 2002, 6 ICSID Reports 192, paras 100 *et seq*

the definition of a clause of this agreement must be obligatory on an arbitral tribunal, and also, any ruling or Claim Order awarded by tribunal should be compatible with their collective choice'.²⁸⁰

This mechanism arguably can be adequate, but can also amount to a grave disadvantage. It can have a serious drawback in the sense that, States may try to give formal readings to sway lawsuits where they are members or belong.

A system, in which a participant to court proceedings is capable of controlling the end result of lawsuits, by the use of official interpretations to the loss of the other party, is not in conformity with the concept of fair procedure and is thus implausible and unacceptable.

(b) The Reliance of Past Decisions

Relying on previous judgements has always been a classical characteristic of any well-ordered decision procedure. Employing the practical knowledge of past decision makers is vital in acquiring the necessary consistency and conformity of the law. Consistency of case law solidifies and stiffens the foreseeability of decisions and magnifies their authority. Tribunals are dependent on past decisions of the other tribunals whenever they can in making judgements. Consideration of past cases and how those cases were interpreted by tribunals is a frequent characteristic in virtually all decisions. For this reason, the tribunal in *AES Corp v Argentina*²⁸¹ has pointed out to relevance and usefulness of past rulings by stating that, 'every tribunal stays independent and can keep, as the ICSID principle has affirmed, a different formula for solving similar matter; however the determinations on jurisdiction dealing with identical or related matters can if nothing else show some logical argument of factual interest, the tribunal may examine them to have a viewpoint of its own situation with those previously endorsed by its forerunners, if it is in agreement with the opinions that were previously put through by some tribunals on a particular law, it can freely endorsed the same formula'.²⁸²

Although the above statements were general statements, and after making the general declarations, the tribunal went further on to assess and rest on the past judgements by separate

²⁸⁰ See, Article 30 (3) of the United States Model BIT, 2004

²⁸¹ *AES Corp. V Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICSID Reports 312, at paras. 17-33

²⁸² At para.30

tribunals.²⁸³ In *Saipem v Bangladesh*,²⁸⁴ the tribunal regarded it its obligation to lend to an agreeable expansion of the legislation. It stated that, ‘the tribunal contemplates that they are not restricted by the past ruling. Simultaneously, the tribunal is of the viewpoint that it ought to give proper contemplation to past findings reached by international tribunals....’²⁸⁵

Despite the dependence on the past rulings, the tribunals have stated frequently that it is not confined by past rulings.²⁸⁶ The tribunal engaged into a thorough deliberation of the utility of past rulings as precedents, and it stated that ‘...every ruling of award rendered by the tribunal of ICSID is just enforceable between the contracting parties to the disagreement resolved by this finding or settlement. There is until now no standard of previous case or legal decision that may be or must be followed in subsequent similar case within the general international law, neither is there one in the specific framework of ICSID...’²⁸⁷ No wonder NAFTA tribunals have got the temerity to endorse obligatory or enforceable interpretations of the treaty.

This conclusion brings to mind the decision in the *Vivendi* case that says that “the ambit of the standard of FPS can be interpreted by arbitral tribunal to pertain to extend to any action or steps which take away the investment of the investor especially in the absence of word limitations”.²⁸⁸ One will wonder whether this type of conclusion if followed will not attract divergence amongst various tribunals to the interpretation of FPS and deprivation of investments protective rights.

3.2 Duty to Accord FPS under Customary International Law

Customary international law is of importance for the understanding and interpretation of investment treaties. Accordingly, the following analysis evaluates how customary international law deals with group or similar things that are often connected to disputes in relation to FPS clauses in investment treaties, which are protection against harm, caused by State or third party participants.

²⁸³ *Id* at paras 51-59, 70, 73, 86, 89, 95-97; *See also, Bayindir v Pakistan*, Decision on Jurisdiction, 14 November 2005, at Para 76

²⁸⁴ *Saipem v Bangladesh*, Decision on Jurisdiction, 21 March, 2007.

²⁸⁵ Para 67. Footnotes omitted

²⁸⁶ *See, for example Amco v Indonesia*, Decision on Annulment, 16 May 1986, 1 ICSID Reports 521, at Para 44

²⁸⁷ *EAS Corp. v Argentina*, Decision on Jurisdiction, 26 April 2005, 12 ICDID Reports 312, at 23

²⁸⁸ *Vivendi v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August, 2007 at Para 7.4.15

3.2.1 Relationship of CIL for Investment Treaty Interpretation under the FPS

An argument has continued to arise on whether the concept of FPS standards, is aimed to illustrate the principles of traditional international law, or are aimed as an autonomous principle that extends beyond international law,²⁸⁹ despite the fact that it has been made clear from the 17th centuries that the standard of FPS is never restricted to physical security alone, extended to legal and other commercial security. One can refer to the previous view as the “equating” approach, since it equalises the both standards with the international minimum standard of treatment, and the last-mentioned as the “additive” approach, since it regards the treaty standards as additive to customary international law. The *Iran v United States* case described the connection amid treaty and traditional international law like the following:

As a law governing a specific subject matters (*les specialis*), in connections among the two States, the treaty replaces the doctrine that relates to the interpretation of laws which can be applied in both domestic and international law contexts (*lex generalis*), known as traditional international law...nevertheless...the principles of traditional international law may be essential as a means to fill in any likely gap of the legislation of the Agreement, as to discover the definition of unexplained phrases in its wording , or altogether, to assist the definition and application of it clauses.²⁹⁰

3.2.2 Modifications of U.S Protection and Security Provisions in Treaties

Subsequent to World War 1, the standard of FPS clauses in the recently ratified United States FCN treaties experienced a remarkable transformation. They started to express diverse civil rights, liberties of citizens to political and social freedom and equality to be benefitted by protected citizens. The United States made it abundantly clear that this principle was to be embedded in traditional international law, also that the protected aliens should have the right for compensation for any governmental takings (expropriations). There was no example where it mentioned or indicated that the principle was by some means restricted to physical security.

²⁸⁹ *Id.*

²⁹⁰ *Texaco Overseas Petroleum Co/California Asiatic Oil Co v Libya* Award, 19 January 1977, 17 ILM 3, (1978), Para 82.

An illustrated example is the United States and Germany treaty that was ratified in 1923. Article 1 of the treaty started by quoting several civil rights that should be afforded to protected citizens, which comprised availability to judiciary to investors. It stated that:

The citizens of every High Contracting State must be given in the jurisdiction of one State, on accepting to terms placed on its citizens, the most constant protection and security for their citizens and assets, and shall benefit in this regard that level of protection which is necessitated in international law. Any asset that they owe must not be confiscated without following the normal due process in law, and without settlement of fair recompense.²⁹¹

The United States representatives that saw the principle as an expansion that goes further than physical protection is furthermore shown by the office of State Department Solicitor Memorandum in 31 December, 1924, in respect to this Agreement with Germany.²⁹² The Memorandum stipulated as follows:

In the concluding section under Article 1 it is prescribed that the treatment afforded to the Permanent Residents foreigners is that which is provided in international law. This condition will function as to guarantee protection contrary to arbitrary and unfair justice in any specific by which the Authority of a State fails to afford its own citizens a favourable treatment like the one that is acknowledged under international law.²⁹³

To put this differently, the Article 1's instruction to afford FPS to investors as "necessitated under international law" intended not just physical security, but protection from tyrannical and unfair treatment too.

3.2.3 Equating Approach

In numerous investment treaties, traditional international law, including customary minimum standard of treatment required to be accorded by the host country to foreigners, is even clearly addressed. Classic principles that are used, for instance, in FCN agreements,²⁹⁴ and in the OECD

²⁹¹ Treaty of Friendship, Commerce, and Consular Rights, U.S.-Ger., art. 1, Dec.8, 1923, 8 Bevans 153 (emphasis added).

²⁹² Memorandum, Office of the Solicitor, Dep't of State, Treaty of Friendship, Commerce and Consular Rights Between the United States and Germany Concluded December 8, 1923: Legal Reasons Why Such a Treaty is Desirable, filed 711.622/60 (Dec. 31. 1924) (on file with author) [hereinafter Solicitor Memorandum].

²⁹³ *Id.* (emphasis added)

²⁹⁴ See US/Italy FCN Agreement evaluated by the International Court of Justice in *Case Concerning Elettronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15

proposal of 1995 for a MAI, provide appropriately that every party must be accorded the ‘most constant protection and security, that which would not in any way be lowered than that necessitated under international law’.²⁹⁵

Also, Full protection and security clauses in U.S. BITs that were ratified prior to 2004 stipulated that FPS standard comes after fair and equitable treatment clause and followed by a firm warning that the treatment and protection to be afforded must not be lower than that necessitated under international law²⁹⁶.

The equating approach has been favoured by the fact that the U.S. drafters of these clauses explicitly regarded the standards as representing the international law of minimum standard of treatment. For instance, the previous BIT negotiator Pamela Gann alleged that the standard of FET “provides, in effect, a ‘minimum standard’ which creates part of customary international law.”²⁹⁷ Also, Kenneth Vandeveld, another former U.S. BIT negotiator, gave the description of the full protection and security standard as “an establishment standard of customary international law”, and has claimed that when BITs includes this standard, they “make it clear that the standard applies to cover investment, although it would apply through customary law even if it were not included in the treaty.”²⁹⁸ Additionally, the missive of submittal that links up with pre-U.S. BITs constantly describe both FET and FPS as expressing standards of customary international law, including the minimum standard of treatment in particular.²⁹⁹

²⁹⁵ The 2004 US Model BIT can be found at: <http://www.osec.doc/ogc/occcic/modelbit.hmt>. It is currently under review, see <http://www.investmenttreatynews.org/cms/news/archive/2009/06/05united-states-reviews-its-model-bilatera-investment-treaty-asp>. See also R. Wilson, *The international Law Standards in Treaties of the United States*’ Harvard University Press (1953) 92-3

²⁹⁶ For example, the US-Bangladesh BIT States: Investment of nationals and firms of both Parties must always be afforded FET and must benefit from FPS in the region of both Parties. The treatment of Investment, security and protection must be in compliance to applicable domestic laws, and must not in any way be lower than the one needed under international law. U.S.-Bangl. Art. II, 3, March 12, 1986, S. TREATY DOC. 99-23 (1986).

²⁹⁷ Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN. J. INT’L. (1985) 373,373-74

²⁹⁸ ²⁹⁸ See, Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at p. 243

²⁹⁹ See, J. C. Thomas, ‘Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators’, 17 ICSID REV-FOR. INVEST. L.J. (2002), at p. 49-50 (identifying a multitude of letters of submittal from the late 1980s and 1990s that describe the provisions referring to FET and FPS as incorporating standards of traditional international law, also in particular, the international standard of minimum treatment).); see also Christoph Schreuer, *Full Protection and Security*, I. J. INT’L. DISP. SETTLEMENT (2010) 353, 364

NAFTA in the other hands requires its members to provide for FPS. Article 1105 of the NAFTA made mentioned of both the standard of FET and FPS standard,³⁰⁰ and is broadly regarded as expressing the traditional minimum standard treatment of international law. Article 1105 of NAFTA is captioned “minimum standard of treatment”³⁰¹ and states that: ‘Every Party must afford to investors’ investments of the other Party Member treatment in conformity to international law, *encompassing* FET and FPS.’³⁰² It has pointed out that this formulation and the use of the terms *including*, in particular - appears to treat the concepts of both the standard of FET and the standard of FPS as international law components.³⁰³

But Article 1105 of the NAFTA provision has a peculiarity that cannot be found in other treaty provisions that deal with FPS. It makes reference to the minimum standard of treatment within its headline as earlier stated, and this is a testament that it refers to general international law. Additionally, the provision makes reference to FET and also FPS as part of international law. One can conclude at this juncture that both the standard of FET and the standard of FPS are part of, and are under international law.

Also, the Free Trade Commission of NAFTA has interpreted Article 1105(1) of this chapter to be reflecting the minimum standard of treatment of traditional international law, and for that reason it stated that, the notions of FET and FPS do not necessitate for a treatment additionally to, or treatment above that necessitated by the minimum standard of treatment of aliens under traditional international law.³⁰⁴ It states the following:

1. NAFTA, article 1105 (1) stipulates minimum standard of treatment of traditional international law to foreigners at a minimum standard of treatment to be accorded to investors and their investments of the other party.

³⁰⁰ Article 1105 (1) of the North American Free Trade Agreement (NAFTA) 1992, provides for foreign investors to be given minimum treatment under traditional international law. It stipulates that Every Party Member shall afford to investments of investors of the other Party Member treatment in compliance to international law, encompassing FET and FPS.

³⁰¹ *id*

³⁰² *Id.* (emphasis added)

³⁰³ J. C. Thomas, ‘Reflections on Article 1105 of NAFTA: ‘History, State Practice and the Influence of Commentators,’ 17 ICSID REV-FOR. INVEST. L.J. (2002), at p. 55-56

³⁰⁴ NAFTA Free Trade Commission, *Notes of Interpretation of certain Chapter II Provisions*, pt. 2 (July 31, 2001). Available at: <http://www.international.gc.ca/trade-agreements.accords-commerciaux/disp-diff/NAFTA-Interpr.aspx>; see also, Article 1105 (1) of the North American Free Trade Agreement (NAFTA) 1992.

2. The standards of FET and FPS require not treatment additionally to or above that necessitated by the traditional international law.³⁰⁵

NAFTA Tribunals have accepted the explanatory declaration of 2001 (NAFTA Free Trade Commission 2001)³⁰⁶ and the later United States BIT policy³⁰⁷, and Canada³⁰⁸ as well has accepted this explanatory declaration. Nonetheless, the relationship of this definition is only restricted to NAFTA under Article 1105 and is not permitted to be transferred to another treaty. The US has already begun incorporating more carefully phrased provisions in many of its present-day BITs. For instance, the treaty between US and Chile in Article 10.4 provides that:

Every Party must afford to protected investments treatment in conformity with traditional international law, encompassing FET and FPS. For bigger assurance, this stipulates minimum standard of treatment of traditional international law to aliens at a minimum standard of treatment to be accorded to investors and their investments of the other party. The standards of FET and FPS require not treatment additionally to or above that necessitated by that principle, and create no additional substantive prerogatives. The duty of paragraph 1 to accord the obligation of FPS necessitates all Parties to afford the standard of police/physical security necessitated under traditional international law.³⁰⁹

3.2.4 Addictive Approach

But despite the fact that NAFTA Tribunals have maintained that the standard is limited to physical protection, other non-NAFTA Tribunals have held that the standard has a wider interpretation, which means, it cannot be restricted to the customary international law, but creates an autonomous stand.

³⁰⁵ *Id.*

³⁰⁶ *Pope & Talbot v Canada*, Award in Respect of Damages, 31 May 2002 (200) 41 ILM 1347, paras. 17-69; *Mondev It'll Ltd v United States of America*, Award, 11 October 2002, 6 ICSID Rep 193, paras. 100ff; *United Parcel Service of America Inc v Canada*, Award, 22 November 2002, 7 ICSID Rep 288, Para 97.

³⁰⁷ See Chile-United States FTA of 2003, Article 10.4; United States-Uruguay BIT of 2004, Article 5; US Model BIT of 2004, Art. 5(2)

³⁰⁸ Canada Model BIT, Art. 5

³⁰⁹ See the Free Trade Agreement (FTAs) with Singapore, Morocco, Australia, and Peru, and the BIT with Uruguay. The first draft of the US-Chile FTA still had contained the option in brackets to refer to 'Jurisdictional protection and security'. All FTAs in question are available < <http://www.ustr.gov> > See DA Gatz, 'The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement' (2004) 19 AU ILR 679, article 10.4

Some writers of this additive approach have argued that while U.S. BITs treat international law as a floor on the standard of protection to be accorded to investment, it does not operate on a ceiling either, in the sense of restricting the FET and FPS standards.³¹⁰ Considering the origins of both principles and their description by U.S. representatives, it seems likely that they were planned to place responsibilities similar to the international minimum standard, as that standard is comprehended by capital-exporting countries.

However, in the *ELSI* case, the FCN treaty added the ‘most constant protection and security’³¹¹ standard. It went further and added, ‘and shall enjoy’ in connection with this point the standard of full protection and security necessitated under international law’.³¹² This was regarded by the ICJ to be that, although the FPS complies with international minimum standard, this treaty clause laid down rules which may expand in their protection beyond customary international law that is required.³¹³ However, “the Chamber did not construe the mentioning of international law in this circumstances as a restriction to limit the principle to the minimum standard of international law (physical security), but have contemplated that traditional international law afford a residual principle less than that which the treaty principle could not fall”.³¹⁴ But tribunals have failed in so many occasions to apply this analogy to the interpretation of FPS clauses.

The wider customary phrase of provision assuring security and protection that ‘would never be in any circumstances lower than that necessitated by international law’³¹⁵ is instead been surprising, taking into consideration that the principal purposes for swift extension of multilateral and bilateral investment agreements was that the unpredictability of traditional international law must be prevented.³¹⁶ A Quite number of FCN treaties slightly for the similar purpose, did not

³¹⁰ For an instance of such finding, see, *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, 14 January, (2010), at Para 253, 284

³¹¹ See *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July, 1989, ICJ Reports 1989, 15 at Para. 111

³¹² Id at Para 111

³¹³ Id at Para 111

³¹⁴ Christoph Schreuer, *Full Protection and Security*, I. J. INT’L. DISP. SETTLEMENT 353, 364 (2010), PP. 1-17 doi:10.1093/jnlids/idq002, available at <http://www.univie.ac.at/intlaw/wordpress/pdf/fullprotection.pdf>.

³¹⁵ See the 2004 US Model BIT can be found at < <http://www.osec.doc/ogc/occcic/modelbit.hmt> >. It is currently under review, see <http://www.investmenttreatynews.org/cms/news/archive/2009/06/05united-states-reviews-its-model-bilatera-investment-treaty-asp>

³¹⁶ JW Salacuse and NP Sullivan, ‘Do BITs Really Works’ (2005) 46 Harv ILJ 67, 76.

incorporate any references whatsoever to international law.³¹⁷ On the opposite, new BITs have largely incorporated reference to international law on the ground for the presumption that this might assist to reach a greater unchanging definition and ease their application.³¹⁸ Moreover, it was recommended that the references to the principles assumedly already assured within customary international law could be carried out by countries out of an inkling of duty, of *opinio juris*.³¹⁹ In customary international law, **opinion juris** is the second element (along with State practice) that is needed to establish a legally obligatory custom.

3.2.5 FPS Interpretation under VCLT

Claims and awards have acknowledged the notions of treaty definition in the VCLT, which necessitated considering ‘any appropriate principles under international law pertinent in the relationships among the parties’.³²⁰ For instance, in the case of *AAPL v Sri Lanka*, the investment tribunal observed that the traditional international law comprises a duty of FPS towards aliens and think that there is a link between traditional international law with the treaty principle of FPS. The tribunal while assessing the Claimant’s protection and security application spotted several past authorities that made reference to a traditional obligation to safeguard foreigners in respect to providing due diligence principle and it drew a connection amid customary international law obligation and the duty of treaty standard³²¹ The tribunal held that the bilateral investment treaty did not have a ‘self-contained connected legal system’, but needed to be ‘envisioned in a broader judicial milieu by which principles from other authorities are consolidated through suggested insertion mechanisms, or by explicit reference to specific supplementary principles, be it of intercontinental law position, or national law essence’.³²² On the ground of this perception and the consent of the members concerning accepting

³¹⁷ KS Gudgeon, ‘United states Bilateral Investment Treaties: Comments On their Origin, Purposes and General Treatment Standards’ (1986) 4 International Tax & Business Law 105, at pp. 111-12

³¹⁸ *Id* 124

³¹⁹ S Vasciannie, ‘Bilateral Investment Treaties and Civil Strife: The AAPL v Sri Lanka Arbitration’ (1992) 39 Neth ILR , p. 332, 343

³²⁰ See Art. 31.3(c) of the VCLT Convention 1969. See also, ‘Applicable Substantive Law in ICSID Arbitrations Initiated under Investment Treaties’ (2000) 17(2) ICSID News 8, available at <http://www.idlo.int/texts/%5C%5CIDDLI%5C%5Cm5850.pdf>

³²¹ *Asian Agricultural Products (AAPL) v Sri Lanka* ICSID Case No. ARB/87/3, Final Award, June, (1990), Para 69, 77, 30 ILM 580 (1991)

³²² *Ibid* Para 21; see also, Martin Koskenniemi as a chairman of a Group Study on the Comments of the International Law Commission on the Fragmentation of International Law (, UN.4/L682, 13 April 2006, Para 414.

supplementary remedy to common traditional international law, arbitral tribunal mentioned to traditional international law while it is defining the realty.³²³

The case to which *AAPL* made reference to, involved physical harms impacted on the aliens, which was merely understandable taking into consideration that the case in particular was associated with a physical harm on the Applicant's investment and workers. However, the case centred on that reference which assisted in giving rise to the feeling that the traditional obligation of security is restricted to physical security. But finally, the Tribunal rejected the State's argument that this obligation should be limited to such a standard.³²⁴ However, the State of Sri Lanka was never held culpable for the destruction of the claimant's farm despite the fact its arm forces and the rebels that were responsible for the destruction of the farm.

Also, it was decided in the case of *ADF v United States* by tribunal that:

We have the comprehension of what the *Mondev* Tribunal is saying and we deferentially accept it that whatever universal to be afforded to "fair and equitable treatment" and "full protection and security" should be independent of National policies and judicial or arbitral rulings or other authorities of traditional international law.³²⁵

In contrast to the reasoning of the above difference awards, the Tribunal in the case of *Noble Venture v Romania*³²⁶ stated that it appears uncertain whether an FPS provision in the United States-Romanian bilateral investment treaty may 'be seen as being broader in ambit more than the traditional obligation to afford for FPS of alien citizens seen in the traditional law of foreigners'.³²⁷ In other words, the tribunal in this case has maintained that the standard of FPS should be restricted to the physical security for aliens under traditional international law. It stated as follows:

In respect to the applicant's contention that the defendant contravened the BIT, Article II (1) (a), that prescribes that 'investment shall --- enjoy full protection and security', the arbitrary adjudicators stated: that

³²³ Arbitrator Samuel Asante dissented, considering the BIT to be a special agreement that sought to derogate from general international law, see *AAPL v Sri Lanka* at paras 628, 641.

³²⁴ *Agricultural Products (AAPL) v Sri Lanka* ICSID Case No. ARB/87/3, Final Award, June, (1990), Para 69, 77, 30 ILM 580 (1991), Para 9

³²⁵ *ADF Group Inc v US* ICSID Case No. ARB (AF)/00/1 (NAFTA), Award, 9 January 2003, Para 184.

³²⁶ *Noble Venture Inc v Romania* ICSID Case No ARB/01/11, Award, 12 October 2005.

³²⁷ *Id.*

it appears doubtful if that clause may be considered as being broader in ambit than the traditional obligation to accord for security and protection of alien citizens in the traditional international law of foreigners.³²⁸

3.2.6 Academic Commentaries/Literature

Some commentators such as Schreuer have argued that the opinion that supports the FPS, just like fair and equitable treatment principle, should stand as an independent agreement principle that is autonomous from the minimum standard of treatment in international law should be a better one and more desirable. He added that, ‘in respect to the common definition of the phrase, it is difficult to figure out why the writers of such an agreement would use the term ‘full protection and security’ in the circumstance where they signify the ‘minimum standard under customary international law’.³²⁹ He said that, ‘this idea will be perfect, especially if the agreement at issue as it often does, includes different wording to that of traditional international law’.³³⁰ One does not seem to be in denial that the concept of fair and equitable treatment and the standard of FPS are section of customary law considering the numerous investment treaties, traditional international law, and minimum standard of treatment accorded by host States to aliens as it has been clearly addressed, rather that, its protective length to investments should be extended to legal security and should not be limited to physical security only. If the protective length is not extended to legal security, foreign investors and their investments will continue to suffer harms from the host States in this area of protection.

In confirmation of Schreuer’s reasoning, the tribunal while interpreting Article 1105 of the NAFTA, in *ADF v United States* accepted:

that the traditional international law that was made mention under Article 1105 (1) is not stagnant or fixed just for a particular period of time and that the minimum standard of treatment can change... what traditional international law forecast can not be an unchanged picture of the minimum standard of treatment of foreigners just as it was in 1927 during the ruling of the Neer Award.³³¹For both traditional international

³²⁸ *Noble Venture Inc v Romania* ICSID Case No ARB/01/11, Award, 12 October 2005 at Para 164

³²⁹ Christoph Schreuer, *Full Protection and Security*, I. J. INT’L. DISP. SETTLEMENT 353, 364 (2010), PP. 1-17 <doi:10.1093/jnlids/idq002, available at: <http://www.univie.ac.at/intlaw/wordpress/pdf/fullprotection.pdf>>

³³⁰ *Id*

³³¹ *LFH Neer and Pauline Neer v United Mexican States* US-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60. *ADF Group Inc v US* ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179

law and foreigners' minimum level of treatment that it inserted, are steadily under a mechanism of evolution.³³²

This argument seems to be commendable since the world has moved on in so many ways, especially to a technological advancement. Restricting the obligation of FPS has made investments to suffer harms from the States and from third parties and tribunals are helping matters either. Therefore, this article is on the side of the argument that supports that FPS standard should stand as an independent treaty principle that is autonomous of the international minimum standard of treatment of international law. There are so many avenues today that foreign investments have been threatened and continued to be harmed. One example of such threats come from global cyber-attacks that was thought unimaginable when this protection and security was supposedly pegged to customary international law of physical protection alone. There is every need now to expand full protection and security beyond physical protection. This move will assist in addressing the challenge that confront foreign investor and their investments, for instance, like unnecessary enactment of new legislations by the host States that has lead to cancellation of contracts without the accessibility of judiciary to seek redress for foreign investors.

Also, G. Foster stated that he also supports the opinion that views full protection and security standards as separate from depending upon the existence of an international minimum standard.³³³ But still, viewing the standard as having a different meaning other than from those suggested by treaties, scholars, jurisprudence and diplomatic discourse on assumption that they form part of customary international law will be a mistake. Additionally, Foster argues that, 'even if the standard is equivalent as the minimum standard of treatment of international law which the standard of FET is now compared to the extensive interpretations of FPS and FET which is being conferred by arbitrators who see them as separate'³³⁴. Some other authors have

³³² *ADF Group Inc v US* ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179.

³³³ See, George K Foster, *Recovering "Protection and Security": The Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 1113, available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>.

³³⁴ *id*

advocated in support of an autonomous notion of FET and FPS standard that is independent of and additional to customary international law.³³⁵

Having said that, it does not matter if the international minimum standard has not included all obligations to protect foreign investors from harm conducted by the host States, if a treaty provision does not warrant FPS obligation, a foreign investor can still get some solace from traditional international law but that will not provide a full and adequate protection and right like the one provided under FPS principle. An example of a case where an investor had found solace under traditional international law in the absence of the assistance of an agreement clause was in *Amco v Indonesia*. The case was about the Claimant's domestic associate (PT Wisma) who had a leasehold tenancy and administration agreement seized the investment (hotels) forcefully with the help of some Indonesian military forces. As a result of this event it was upheld by the tribunal that the capture of the hotel by use of force was not caused by the State of Indonesia. Nevertheless, the tribunal held Indonesia in contravention of international law for its omission to accord security to the investor that led to its nationals to seize the hotel. It was stated by the tribunal in the following way:

It has been a commonly acknowledged practice under international law, obviously stipulated within international orders and rulings and universally agreed in the written works, that a country has an obligation to shield aliens together with their investment from illegitimate conducts perpetrated by some nationals of its own (...), when such conducts are perpetrated with the strong support of State-entities a contravention of the international law is triggered.³³⁶

But despite the ruling by the tribunal in the above case law, it is imperative to still acknowledge that the standard of FPS is not limited to customary international law, but goes beyond international law of minimum standard of physical security to other ambits of security, for instance, legal and commercial security.

³³⁵ F. A. Mann, 'British Treaties for the Promotion of Investment' (1981) 52 British Year Book Int'l L 241, 244; R Dolzer and M Stevens, *Bilateral Investment Treaties*, Published by Martinus Nijhoff Publishers, 15 June, (1995), at p. 60; PT Muchlinski, *Multinational Enterprises and the Law*, 2nd ed., Oxford University Press, (1999), at p. 626; UNCTAD chapters on cases under international investment treaties, FET 1999) 13, 17, 23, 37-40, 53, 61; S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 7 British Year Book Int'L 104-5 139-44.

³³⁶ *Amco Asia Corp. v Republic of Indonesia*, ICSID Case No. ARB/8/1 (27 February, 1981 Para 72

On this note, this article is in support of the standard of FPS to be extended beyond physical protection to legal security which will ultimately galvanise and give stimulus to tangible and intangible investments. Such support will be in line with the arbitral tribunal decision in *ADF v United States*, which states that: traditional international law is not fixed in period and the minimum level of treatment can change... what traditional international law forecast can not be an unchanged picture of the minimum level of treatment of foreigners just as it was in 1927 during the ruling of the Neer Award when the tribunal first gave the ruling³³⁷ As the world is evolving quickly, any static photograph of the minimum standard created by customary international law must be removed and should evolve alongside with the time to cover the investment protective loophole that investments and investors face in these modern days, particular global cyber threats. But so far this type of cover security against investments is not adequately being offered by the States and arbitral tribunals to investors in the territories as we can in various case laws in the next chapter.

To sum up, the link amid investment treaty legislation of FPS and traditional international law has been ‘symbiotic (diverse organisms that live together): the practice informing what the treaty rights contained, and State custom in the investment agreements adding to the progress of traditional international law’.³³⁸ But the relationship is not necessarily beneficial to both since it does not assist much in giving full comprehension of how and where to place the judgement, whether standards are autonomous or not. In this regard, it is always the investors that bear the brunt of the States' lukewarm protection.

But where this is the case arbitral tribunal might seek a possible option for additional method of interpretation, including the preparatory work and the circumstances to which the Treaty was ratified and make their decision.³³⁹

Again, having carefully looked into sources of full protection and security rights from the 17th century onwards, there is no way one will suggest and imagine that the principle of FPS was

³³⁷ *ADF Group Inc v US* ICSID, Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179.

³³⁸ C. McLachlan, ‘Investment Treaties and General International Law’ (2008) ICLQ 361 at p. 57. Critical about the mentioning of traditional international law in the definition of carefully brokered compromise agreements and against their part in progressing traditional international law, see M. Sornarajah, *The International Law on Foreign Investment*, 2nd ed., Cambridge University Press (2004) 157-9

³³⁹ See article 32 of Vienna Convention of Law of Treaty, 1969

intended to accord physical security only to investment considering the language that was used in attempts to protect aliens property.

Most of the authorities seem to suggest that Arbitral Tribunal would not commonly apply customary international law unless the States highlighted this standard in their Treaties. Where it is not expressed in the treaty, there is the likelihood that tribunal would assume an intention to provide a wide degree of protection since the choices to interpret this obligation narrowly are now popular and the tribunal may think that a State that are parties to the contract made the choice intentionally by phrasing the clause broadly, as it was stated in *Azurix v Argentina* case.³⁴⁰ But doing so will definitely deprive investors FPS security which is often the case these days.

The view of this paper is that since the FPS standard is not standardised and treaties between two nations are different according to choice of words, equating the FPS standard with international minimum standard under international law as tribunals do will continue to render investors investment inadequately protected. This is because a lot of factors have to come to play and the world is no longer what it used to be when the minimum standard was first introduced. Foreign investors face more sophisticated threats on their investments in this era than they have ever been before. Therefore there is need for FPS standard to be expanded beyond international minimum standard of traditional international law.

3. 3 Conclusion

Following the above statements by the ICSID tribunals on this issue, one can see that there is a divergence of interpretation on the issue of precedent. In some cases tribunals referred to the earlier decisions. Sometimes they have ignored following past rulings. In some occasions they merely chose a divergent answer to the problem without moving away from the previous ruling. At times they would say that they were not satisfied by the decision of the previous tribunal and

³⁴⁰*Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006, Para 408

moved away from whatever ruling was adopted in the past.³⁴¹ This has created a gap in area of law and has expose investments to vulnerability of harms

As this paper progresses, this issue of divergence that has cropped up in the matter of precedent and which has confronted the full protection and security standard will be surveyed in generality below, especially in the field of physical and nonphysical protection of foreign investors and their investments to be precise.

It has also been established in this chapter that the relationship between the standard of FPS and traditional international law need not be controversial whilst reasoning whether the FPS and FET are aimed at illustrating principles of customary international law, or are aimed as autonomous standards above traditional international law. It has been stated by a few academic scholars and literatures, and even some case law that, the principle of FPS, just as FET standard, should stand as an independent treaty standard which is autonomous of minimum standard of treatment in international law. This is also the viewpoint of this thesis, owing to the fact that it has been established that the protective length to investment should be expanded to legal protection and should not be limited to police protection as has been accepted by NAFTA tribunals in their explanatory declaration of 2001 under Article 1105 (1). If the equating approach is adopted instead of the additive approach by all and sundry at tribunal arbitrary, it will cause a great deal of harm to the protection of investments since this is not what the standard has always stood for, going back to the inception of the standards that started from 17th Century until the present day.

Having looked at the interpretation under the VCLT framework and other interpretative methods, and the relationship between FPS and customary international law, it would be appropriate to have heightened insight on how arbitral tribunals have generally interpreted the concept of full protection and security by looking at some leading cases of the FPS standard. It may help us to expose more gaps in the protection of investments under FPS standards by host States.

³⁴¹ See for examples, *SGS v Philippines*, Decision on Jurisdiction, 29 January 2004, 8 ICSID Reports 518, at Para 97; *Eureko v Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335, at paras 256-258

CHAPTER FOUR

ANALYTIC ARBITRAL TRIBUNAL DECISIONS ON STANDARD OF FPS

4.1 Introduction

Several investment treaties have with them clauses guaranteeing FPS obligation for investments. The phraseology of these provisions indicates that host countries are under the duty to take strong steps to provide security for investment against any negative effect that emanates from State, its organ, and private parties. The FPS duty guarantees foreign investor's investment physical protection and also a legal protection for investors to discharge their rights. There is a lot of controversy surrounding this particular standard of investment protection as this article has mentioned often. One of the controversies is whether the concept of FPS extends further to legal security or whether it is just confined to physical protection. And this controversy has also created a gap in the protection of foreign investments by the States as well as the tribunals and this gap needs to be exposed and filled.

In line with this controversy, it was stated by one scholar that, if the standard is to be interpreted to accord for protection more than physical security and commercial security, States may face restrictions on their foreign prerogatives. Tribunals may find it difficult to draw a boundary between those laws and regulatory policies that develop to impose strict liability to the States hence they are considered to erode the basis or the foundation of the country's legal and commercial stability. Such wider reading may well find the State liable if it helps to cause, or is unable to successfully deal with financial crisis, for example a risk of any global financial crisis such as the one the world witnessed in 2008.³⁴²

On the opposite side, if the obligation of FPS should be interpreted or restricted to the protection of physical security alone, then the investor would not get remedy when nonphysical wrongs are done to investments, especially if their investments are not protected by another

³⁴² See, George K Foster, *Recovering "Protection and Security": The Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, (2012) 1113, Available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>.

standard.³⁴³ It would be judicious to accord investors and their investments with physical, legal, commercial, or even cyber-attack protection which will be discussed later in the thesis, so that investors and their investments will be adequately and evenly protected in the areas that are prone to threat.

This chapter will discuss Articles on State Responsibility within environ of international law, where the country can be held responsible for the act attributable to the States or its organ for the breach of FPS both in physical and legal security. The chapter will also evaluate various scholarly commentaries regarding these issues. This analysis will be achieved by looking at previous case-law as decided by ICSID Arbitral Tribunals and the findings by other arbitrary claims ruling bodies will expose this gap in the investment protection and security in FPS standard in BITs.

4.2 State Accountability for the Conducts of its Entities

The standard of FPS is a reflection of traditional international law on the State and particularly, the attribution of acts of non-State actors to the whole State. The International Law Commission, which defines Customary International law in respect to State action through its Articles on State Responsibility, stipulates that any act which contravenes a treaty obligation and is attributable to the State or its organ will be held as an international law violation.³⁴⁴ When this principle is applied to the FPS provision, it is of sound reasoning that the provision would protect foreign investors and their investments from actions that are directly attributable to the host State. The need for this protection begins to grow even more apparent when contemplating the motive behind signing of BITs, which is to increase investments between contracting States through risk reduction framework such as an FPS provision. Truly, the FPS provision would be worthless if it could not render protection to investor or investment from the host State's own action. A country is answerable for the actions of its entities and agents,³⁴⁵ and a required standard is refraining from such harmful acts.

³⁴³ *Id.*

³⁴⁴ International Law on Commission, Articles on State Responsibility, art. 1 and 2

³⁴⁵ *See*, the overview in I Brownlie, *Principles of Public International Law* (2009) 420-41.

4.3 Components of States International Unlawful Conduct

Draft articles on State Responsibility for International Wrongful Acts, in Article 1, stipulates as a general rule that, “every international unlawful conduct by a country invokes international responsibility of that country”.³⁴⁶ Article 2 identifies the prevailing situations that would create the actuality of such international illegitimate conduct by the country. The two defined components of such an act are, first, under Article 2 (a) which states that, the conduct at issue must be imputable to the country within the international law.³⁴⁷ Secondly, Article 2 (b) stipulates that, for the responsibility to be roped to the action of the country, the conduct must amount a violation of an international lawful duty that is in force for that country at that particular point in time.³⁴⁸ Those two components have been applied in various numbers of occasions. For instance, in *Phosphates in Morocco* case, the PCIJ upheld that if a country perpetrates an international unlawful conduct toward another country international responsibility has been created “instantly as among the two countries”.³⁴⁹ The Permanent Court of International Justice clearly connected the establishment of States international responsibility to the reality of a “conduct being ascribable to the countries and reported as opposite to the rights of treaty of another country”.³⁵⁰ This component could be likened to the international investment obligation of principle that guides FPS standard since the obligation of FPS under BITS are signed between two or more contracting States, and in this regard any breach of the standard could be interpreted to amount to a violation against the other State and would not be solely a breach for individual investors in the host State.

The court has as well made reference of the two components at various times. For example, in the *Iran v United States* case, it was of the viewpoint that, in the consideration to show the commitment of Iran: “[f]irst, it ought to be proven the extent, lawful, the conducts at issue may be considered as attributable to the State of Iran. And secondly, it ought to be contemplated their similarity and dissimilarity with the duties of State of Iran within the treaties that has been signed

³⁴⁶ Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, Art. 1

³⁴⁷ *Id* at Article 2 (a)

³⁴⁸ *Id* at Article 2 (b)

³⁴⁹ *Phosphates in Morocco, Judgement*, 1938, P.C.I.J., Series A/B No. 74, p. 10 at p. 28. See also *S.S. “Wimbledon”*, 1923, P.C.I.J., Series A, No. 1, p. 15, at p. 30; *Factory at Chorzow, Jurisdiction, Judgement* No. 8 1927, P.C.I.J., Series A. No.9, p. 21; and *ibid.* Merit Judgement No. 13, 1928, P.C.I.J., Series A. No. 17, p. 29.

³⁵⁰ See footnote *id.*

or within any other international law principles which can be implemented”.³⁵¹ The incompatibility in this respect with the obligation of any State on FPS standard under BITs that is in force would be applicable under international investment law if a State breaches FPS standard involving two contracting parties in any BITs.

Likewise, the Claim Commission observed in *Dickson Car (U.S.A.) v. Mexico* case³⁵² that, the circumstances that would be necessitated for a country to provoke international responsibility would be ‘that an illegitimate international conduct be attributed to it, that means, that there is the existence of a contravention of an obligation compelled under an international judicial principle’.³⁵³ In the international investment law atmosphere, the existence of violation of FPS imposed by customary international law minimum standard of treatment would also give rise to international responsibility in a situation where the obligation of FPS is breached by the State since that is equivalent to the international juridical standard that protects international foreign investments within bilateral investment treaties. This secondary rule of State responsibility for international wrongful act is consonance with primary international investment law rules and would be applicable to non-compliance of obligation of FPS concept of BITs by the States as we can see in the present-day case laws since BITs could be breached between nations because it is two or more nations that sign treaties and passes the protective rights to its national investing in the territories of those States.

4.4 The Conduct must be Ascribable under International Law to the State.

Action imputable to the country may comprise of commissions or inactions. There are cases by which the State’s international responsibility has been cited on the premises of neglect or of total failure which are to an extent as many as the ones subject to positive conducts, and there is no dissimilarity in rules that exist among the two. In *Iran v United States* case mentioned above, the court reached the conclusion that Iran’s international responsibility was generated by the “negligence” of its officials that “omitted to apply necessary measures” in situations in which

³⁵¹ *United States Diplomatic and Consular Staff in Tehran*, Judgement, I.C.J. Reports 1980, p. 3. At 29, Para 56. Cf. Page 41 Para. 90.

³⁵² *Dickson Car Wheel Company (U.S.A.) v United Mexican States*, UNRIAA, vol. IV (Sales No. 1951. V.I)

³⁵³ *Id* p. 669, and at p. 678 (1931)

such measures were obviously necessitated.³⁵⁴ In some other matters it may be conflation of commission and inaction that is the reason for culpability.³⁵⁵ There are cases of the obligation of standard of FPS where the conducts of States has been attributable to the omission and commission of the States in international investment law and this conduct is taken to have contravened international investment law, and also as a violation of International Law Commission on Article of State Responsibility. For example, the conduct of State of Zimbabwe in *Bernhard v Zimbabwe*³⁵⁶ case was held by tribunal to be in violation of the obligation to accord FPS in international law by its organ. The police failed to protect the claimant's property from the occupation of the properties or to eject Settlers/War Veterans from the premises, and also the standard was held to have been violated by the State in respect to the police non-responsiveness to various violent incidents because they did not take any firm measures to avert or redress the takeover.

For a specific act to be regarded as an internationally unlawful conduct, first, it ought to have been caused or attributable to the country. A country is an actual administrative corpus, a legal individual, company, or other corpuses which has legal rights with full power to function within international law. For certainty, a country cannot act in isolation or of itself. Any 'conduct of a country' ought to comprise to a certain length commission or inaction of either an individual or an entity: "Countries can apply measure, or do something just by and via their representatives and officials."³⁵⁷ This is also the same away by which the principle of FPS is violated. The breach of FPS standard occurs either by an action that has caused harm to the investments which either emanated from the State, its organ or by the third party. The vital question to be asked is which individual ought to be regarded as functioning as representative of the country? That is, what amounts to a conduct of the country for the intentions of State responsibility? The reality is

³⁵⁴ *United States Diplomatic and Consular Staff in Tehran*, *supra* note 311 above, pp. 31-32, paras. 63 and 67. See also, *Valasquez Rodriguez v Honduras* case, Inter-American Court of Human Rights, Series C, No. 4, Para 170 (1988): "in international law countries are liable for the conducts of its representatives shouldered in their functionary position and for their inaction"; and *Affaire relative à l'acquisition de la nationalité polonaise*, UNRIAA, vol. 1 (States No. 1948. V.2), p. 401, at p. 425 (1924).

³⁵⁵ For example, under Article 4 of the Convention relates to the Laying of Automatic Submarine Contact Mines (Hague Convention VIII of October 1907, a neutral Power which lays mines off its coasts but omits to give the required notice to other States parties would be responsible accordingly.

³⁵⁶ *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2016, at Para. 597.

³⁵⁷ *German Settlers in Poland, Advisory Opinion*, 1923, P.C.I.J. Series B, No. 6, p. 22.

that, what would amount to a conduct of the country for the role of that country's responsibility to be provoked is the conduct of the countries' entities to the omission of its officials that has neglected to apply necessary measures under the condition where such measures are absolutely necessary, as was found in the situation in the *Bernhard and others v Zimbabwe*.³⁵⁸ The commission of an act by State's organs or representative can equally be tantamount to the breach of State's responsibility in the guise of contravention of the standard of FPS under international investment law. Also, the conduct of the commission of s State authority where its action caused harm to the investor's investment will amount to a conduct of the country for role of State Responsibility in the semblance of breach of FPS. There are so many cases that depict acts committed by States' organs that violate the obligation of FPS standard that would be outlined below under various subheadings that can prove that foreign investments are not fully protected by host States.

Attribution to the country is interpreted to mean that the country is as citizen of international law. In legal methods, the country entities comprise of various legal individuals, like ministers and other legal corpuses that are considered as having different prerogatives and duties by which they singly can be liable. The State is considered as integrity, constant with its acknowledgement as a sole legal individual under international law. As a result of this, and in addition, the ascribable of act to the country is automatically considered as a normal and correct way of operation. The most essential thing in this respect is that a particular episode is adequately associated with conduct (be it a commission of an act or inaction) that is regarded as being caused by the country under one or another of the principles. This has always been one of the yardsticks that link the state to the breach of FPS apart from the action of the third parties in violation of the standard.

4.5 What Amounts to a Contravention of a State's International Obligation

The other situation that an international unlawful conduct of a country may exist is that, the act that is regarded to have been caused by the country ought to amount to a contravention of international duty of that country. The phrase contravention of international duty of the country

³⁵⁸ *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/16, Award, 28 July 2016 at Para 597.

has long been created and is applied to comprise for treaty obligations and non-treaty duties. In the *Factory at Chorzow* case, the Permanent Court of International Justice applied the phrase “violation of a commitment.”³⁵⁹ It used similar statement in its successive ruling on the awards.³⁶⁰ Violation of commitment is also breach of FPS in BITs under international investment law. When a State breaches the duty to proffer the standard of FPS to a foreign investor’s investment in the host country territories, obviously that would certainly amount to a contravention of international responsibility of that country, and this is what the obligation of Standard of FPS and international arbitral tribunals are up and against and such contraventions can be indiscriminately found in FPS case laws.. The International Court of Justice mentioned clearly to these phrases in their ruling in *Reparation for Injuries* case.³⁶¹ What is striking about this case is that such matter of the case is not unfamiliar with the principle of FPS standard in bilateral investment treaties considering that any breach of engagement of this standard will involve an obligation to make reparation. This has been demonstrated in FPS awards where the respondents have been compelled by tribunal to pay compensation to the claimant and the application of *Factory at Chorzow* case is used as a prerequisite for calculation of such compensation.

In the *Rainbow Warrior* case, the arbitral tribunal used the terms “any breach by a country of any duty”.³⁶² In principle, terminologies like “non-performance of international duties”, “conducts dissimilar to international duties” “breach of an international duties”, or “violation of a commitment” are as well applied.³⁶³ The whole of these wordings have crucially the same interpretation and are also applicable to the rules that foresee and obligation of FPS in the international investment law arena.

³⁵⁹ *Chorzow Factory*, Jurisdiction, Judgment No. 8, 1927, P. C.I.J., Series A, No. 9, Para 21 (emphasis added)

³⁶⁰ *Factory at Chorzow*, Merits (*ibid*).

³⁶¹ *Reparation for Injuries Suffered in the service of the United Nations*, Advisory Opinion, I.C.J. Reports 1949, at para184.

³⁶² *Rainbow Warrior* Affair, UNRIAA, vol. XX (Sales No. E/F.V.3), (1990), p. 251, Para. 75. Case regarding the dispute involving New Zealand and France regarding the meaning or enforceability of two treaties signed on 9 July 1986 among the both countries and which is similar to the challenges emerging from this particular case. (emphasis added)

³⁶³ See the Codification of International Law Conference, conducted in The Hague in 1930, the phrase “any omission ... to execute international duties of the country” was ratified (see *Yearbook ... 1956*, vol. II, p 225, document A/CN.4/96. Annex 3, article 1).

4.6 Collaboration

The country is responsible or answerable for third party actions, under Article 11 of the Articles on Responsibility of State, when it ‘accepts and approves these conducts as own action’.³⁶⁴ The typical instance for this sort of responsibility can be found in *Iran Hostages v United States* case.³⁶⁵ When the impregnability and impenetrability of the American embassy building and personnel was invaded by rioters, the Iranian regime did not just refuse to do anything to avert the action, rather Ayatollah Khomeini publicly announced the country’s approval of the takeover of the building and the incarceration of the captives. As a result of this endorsement by the State, the third party conducts were regarded to be the conduct of the whole country prompting State responsibility. These actions amounted to a breach of duty incorporated under the agreement of Amity, Economic Relations, and Consular Rights in 1955 by Iran and the United States following to which citizens of one contracting Member State must be accorded the ‘most constant security and protection under the jurisdiction of another Contracting Member State. Therefore, Iran ought to have been obligated to take measures to thwart the invasion of the embassy office and to accord compensation for the harm it has caused. For Iran’s inability to exercise such measure, the ICJ therefore found Iran in violation of international law. The same situation is likened to *Wena Hotels v Egypt* case³⁶⁶ when the Egyptian government refused to take action when the Hotels were forcefully invaded and occupied by workers of the State organ (EHC). The tribunal found Egypt in breach of its duty to afford FPS under international investment law for failure to take action to prevent the seizure of the hotel by its corpuses.

4.7 Liability for Country’s Omission to React

In relation with damaging act of third parties, the presumption of country responsibility is often dependent on the failure of the State’s entity against the harm committed by third party actors³⁶⁷ in spite of an obligation to interfere.³⁶⁸ To determine if such an obligation exists will be

³⁶⁴ Draft articles on Responsibility of States for Internationally Wrongful Acts, 2001, art. 11

³⁶⁵ Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran) Judgement, 24 May 1980, ICJ Report 1980, 3

³⁶⁶ *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896.

³⁶⁷ See the comment on Art. 23 of the ICL Articles on State Responsibility (1978) 30 ICL, Vol. II, Part II, 82: ‘the key indication if breach of the obligation is the occurrence of want’. See also JM Mossner, ‘*Privatpersonen als*

based on the level of security the State owed to foreigners on the country's jurisdiction. The non-performance can cover personal matters of harm or encompass systematic non-security, for instance, if there is a dearth of protective law.

4.8 State's Obligation to Accord Physical Security

However, some of the decisions given on security of a country upon foreigners against damage attributable by third parties in its jurisdiction centres on the duty to accord security against physical damage by the police. For instance, in the typical case of **Neer** in 1926, where a United States' national was killed in State of Mexico, a claim was instituted against Mexico for failure to act with due diligence by Mexican government to amount an investigation and initiate a legal proceeding against the offenders. The Tribunal handling the case was asked to rule if Mexico breached its obligations towards the foreigner.³⁶⁹

In respect to the level of protection owed, just a few early cases made mention of 'gross negligence' to consider culpability of the country for their failure to thwart damage caused by third party.³⁷⁰ The principle now regarded as traditional international law has become 'due diligence' principle³⁷¹ already applied by various BIT claims tribunals³⁷² to describe the distinctive nature of duty binding on the country. The sources of the custom of 'due diligence' rest in the principle and is constituted in 1871 in the agreement of Washington which was signed by UK and the US after the United States' internal war, to consider the liability of an impartial country in an intercontinental confrontations for harms attributed by acts perpetrated by third party in contravention of doctrine of neutrality. Under Article VI, in accordance of that treaty,

Verursacher volkerrechtlicher Delikte (1981) 24 GYBIL 63, 85; and J Wolf, 'Zurechnungsfragen bei Handlungen von Privatpersonen' (1985) 45 Zeitschrift fur auslandisches offentliches Recht und Volkerrecht 232.

³⁶⁸ The ILC Articles on State Responsibility failed to clearly tackle the matter. There was no consensus reached on ILC Art. 11.2 of Special Rapporteur Ago concerning 'Ascription to the country of any failure on the side of its corpses, where the State should have reacted to thwart or penalise the action of the private or collective of persons and omitted from doing do', see (1972) 24 ILC Yearbook, Vol. II, Part II, 71 and (1975) 27 ICL Yearbook, Vol. I, Part I, 23-41

³⁶⁹ *LFH Neer and Paulin Neer v United Mexican States* U.S.-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60.

³⁷⁰ See *Balderas de Diaz* US-Mexican General Claims Commission, Decision, 16 November 1926, 4 UNRIAA 106, 107.

³⁷¹ See, R. Pisillo-Mazzeschi, "The Due Diligence Rules and the Nature of the International Responsibility of States" in R Prevost (ed.), *State Responsibility in International Law* (2002) 97, 119-24.

³⁷² See e.g., *Laura Janes Claims* U.S.-Mexican General Claims Commission, Decision, 14 March 1927, 4 UNRIAA 82, 86, and *Sambiaggio Case* Italian-Venezuela Mix Claims Commission, Opinion, 1903, 10 UNRIAA 499, 524

every party to the treaty had to employ the duty of ‘due diligence with its own seaports, also like every body in its territory, to thwart any contravention of the ‘duty and responsibility ‘obligated on an impartial country’.³⁷³ Although it was the case that, latter codification efforts concerning country responsibility comprising failure to thwart conducts by third parties failed.³⁷⁴

However, the due diligence’ principle is not frequently the principle to be employed in the relation to security from harm attributed by third party. A duty of result that goes beyond ‘due diligence’ happens in some particular situations, and specifically, on the magnitude of suppression. Chapter 5, below, will take a closer look at the various elements of ‘due diligence’.

4.9 State’s Obligation to Accord legal Security

Traditional international law expands physical security obligations of countries into duties associated with legal security. These duties both prefaced and support physical security in the limited sense.

On the level of prevention, the country is mandated to keep a managerial and legal framework in existence which would ascertain a successful thwarting of damage. This is a duty of result,³⁷⁵ whereas the actual content concerning the actions taken accords respect to country’s autonomy. The *Iran v Unite States* is a classic instance in which the legal framework may have permitted all reasonable steps, but the State deliberately refrained from using the mechanism.³⁷⁶

If the necessitated prevention principle was reached, but nonetheless harm was caused, the country is required to bring a proceeding against the offenders.³⁷⁷ Moreover, the duty to keep a framework that permits such implementation and the duty of using the framework must be differentiated by exercise of due diligence. This use will encompass the proper enquiries,

³⁷³ T. Bingham, ‘Alabama Arbitrations’ in R Wolfrum (ed.), *Encyclopaedia of Public International Law* (1992) Vol. I, 1110, 1111.

³⁷⁴ See, Art 10 of the Harvard Law School Draft of 1929, Research in international law, Vol. II, Responsibility of States (1929) 23 AJIL (Supp) 228, See also the ILC Special Rapporteur Draft on Responsibility of the State for injuries caused in its territory to the person or property of aliens in (1961) 13 ILC Yearbook, Vol. II, Part II, 46.

³⁷⁵ *LFH Neer and Paulin Neer v United Mexican States* U.S.-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 62

³⁷⁶ (*US v Iran*) Judgement, 24 May 1980, ICJ Report (1980), Para 3.

³⁷⁷ See, *George Adams Kennedy v United States Mexican States* US _Mexican General Claims Commission, Decision, 5 May 1927, 4 UNRIAA 1998 (concerning the imposition of an adequate penalty); *Francisco Millen v Unite State*, US-Mexican General Claims Commission, Decision, 21 July 1927, 4 UNRIAA 270 (excessively and unwarranted allowance of pardon and remission).

bringing proceedings, penalty, and implementation. Particularly in relation to the enquiry, no result should be owed, just a particular standard of due diligence should be maintained. As soon as the wrongdoers have been found, though, taking legal action against them is a duty of result. If the perpetrators are found guilty by the court, the implementation of the punishment imposed on wrongdoers is owed. Having said that, there is no single concrete evidence to ascertain that such legal proceedings and implementation of punishments had been imposed to perpetrators to achieve this result by host States in the FPS case laws in BITs.

There is also no concrete evidence that can be seen or where it is written verbatim in black and white in traditional international law for expansive duties to give legal protection to foreigners outside of the legal duties connecting with police security³⁷⁸, apart from the ancient time political writings, judicial rulings, and other scholar opinions. Also, such wider duties that have been extended on legal duties owed to foreigners can be seen in recent investment case laws and in human rights law and the States and some tribunals are not comfortable with it.

4.2 Detail Analysis of Arbitral Awards on FPS Provisions

The succeeding segment examines awards of FPS provisions in investment treaties, in the circumstances where the convention have been read independently, or in line with traditional international law. Additionally, they deal with various related group of issues, namely; security against damage attributed by countries, by country's entities and representatives organs; and security against harms and intrusion perpetrated by the third parties. The duties of a country are depended on traditional international law. It can either be on complicity, or it can be on the breach of an obligation to accord security through legal or by physical protection.

4.2.1 Decisions on Damage attributed by the Country

There are many other cases that prove that the State's organs action can have a devastating impact on the physical security of alien investor's investments and yet States are doing enough to stop such actions. Having said that, the host country's duty is not only limited to taking precautionary action to the prevention of physical harms attributable to the third parties. The host

³⁷⁸ See, M Sornarajah, *The International Law on Foreign Investment*, 2nd edition, Cambridge University Press, (2004), at p. 331.

country is also responsible for actions that prompted the investor sustained physical harms perpetrated by its organ.³⁷⁹ There is no doubt that the treaty provision is applied on the security and protection to the attacks directed on the investor as an individual and the investor's investment by the State's organ. Therefore, it is internationally recognised that States may be blameable for their actions, even by the omissions of its organs.

In *Biwater Gauff v Argentina*, Biwater Gauff³⁸⁰ (Tanzania) Ltd. (BGT), the tribunal found a breach of FPS clause through direct State action. In the case, a private company filed a contractual dispute with the United Republic of Tanzania. The dispute arose in regards to a contractual agreement that was entered into by BGT and Tanzania Republic for the Claimant to operate and manage the Dar es Salaam water system. BGT is a joint venture established by Biwater International Limited and HP GauffIngenieure GmbH & Co. For the purposes of the Tanzanian project; Biwater has 80% of BGT while Gauff owns 20%. The project was launched by Tanzania in order to revamp the water sewerage infrastructure of Dar es Sallam which got its funding from the Word Bank. Tanzania rescinded the contract with BGT allegedly for failure to meet up with the performance guarantees set forth in the contractual agreements. BGT filed the case before the ICSID arguing that Tanzania's cessation of the contract had violated their agreements and had caused an illegal expropriation. The Tribunal held that, 'the tribunal as well does not contemplate that the standard of FPS is restricted to a country's omission to thwart conducts by private parties, but as well it extends to conducts that emanate from its organs and representatives'.³⁸¹

The ICSID tribunal finally held that, "these unwarranted and inhumane behaviours, even as there was no force used in getting the officials out of the premises of the City Waters sites still equals to the breach of duty to offer FPS to its investors by the host State, and it does not matter that the above finding conducts by the State do not indicate to have created any significant financial loss or suffering to the investor"³⁸²

³⁷⁹ See, The International law Commission's Article on State Responsibility.

³⁸⁰ *Biwater Gauff Tanzania (Ltd) v United Republic of Tanzania* ICSID Case No. ARB/02/25, Award, 24 July 2008, Para. 731.

³⁸¹ *Id* Para 730

³⁸² *Id* Para 731

This brings to mind that actions or violent threats perpetrated by the State's organs or its representatives which have adverse effects on the investor's investment may breach the standard of FPS and the host State will be responsible for such action.

In the case concerning *AAPL v. Sri Lanka*,³⁸³ which was the first case for the test of FPS, the Claimant, a Hong Kong corporation AAPL, a Sri Lankan joint venture company that was created to plough and export shrimp to Japan. Serendib made only two shipments of the shrimp when its major facility, a shrimp farm, was destroyed and many of its employees killed when the Sri Lankan Security Forces clashed with Tamil Tigers in a counter insurgency operation, as a result of that attack, Serendib went out of business and AAPL's investment was lost. The treaty provides that alien investments must be accorded the enjoyment of FPS. The Tribunal declined AAPL's claim on FPS, and also, the Tribunal rejected the proposition that this clause imposed an absolute liability upon the host State. However, the Tribunal concluded that the exercise based on due diligence is required. It said that what is required is for the host country to apply reasonable diligence that would prevent the investors' investments against injuries both physical non physical. The tribunal found that there was sufficient evidence that the government Task Force had damaged the investor's investment.³⁸⁴ It is observed as a universal concept of law that a claimant has to show evidence for commission of harmful acts done by the State.³⁸⁵ This is vital since the level of duties owed varies, and based on, if it is the country's organ that are perpetrating the damage, the State abstinence³⁸⁶ or third party perpetrators (the State's lack of due diligence to thwart and to enquire in a situation where harm took place). In the matter at issue, since no party could provide a well-founded proof on the real events, the tribunal quoted the principle that the international obligation of the country was not supposed to be assumed but instead centred on the regime's omission to afford appropriate security.³⁸⁷ For this reason it was held by the arbitral Tribunal in this case that the weight of force that was used by the Security

³⁸³ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990).

³⁸⁴ *Id* Para 60

³⁸⁵ Bin Cheng, *General Principles of Law* (1953) 327.

³⁸⁶ See R. Pisillo-Mazzeschi, "The Due Diligence Rules and the Nature of the International Responsibility of States" in R Prevost (ed.), *State Responsibility in International Law* (2002) 111.

³⁸⁷ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990) Para. 85.; see also, *Mahmut Kaya v Turkey* Judgement, 28 March 2000 ECHR Rep 2000-III, 149, Para 87.

Forces was immoderate and unjustified by the situation that was connected with the event and the tribunal found the defendant liable.³⁸⁸

Although it was held by the tribunal that the actions used by the country's organ namely the Sri Lankan armed forces were excessive and unwarranted, it did not give full explanation as to why that was the case, considering that neither the investor nor the government could prove whether it was the insurgents or the security forces that the damages were attributable to. But what was clear from the Tribunal's ruling is that the host State failed to provide security to the investment and is culpable for the actions of its organs that caused negative impact on the investor's investment if it had failed to take reasonable steps to prevent the investments of investors against both physical and nonphysical injuries against such conducts. This is another prove that investors investments are not fully protected by some host States.

In the case concerning *Saluka v Czech Republic*,³⁸⁹ the applicant asserted that the alteration of the law is preventing business in shares of Saluka, amount to a violation of the standard of FPS provisions in the pertinent investment agreement. The tribunal failed to consider the conduct to be appropriate under this provision and also failed to investigate more on the question concerning country conduct. Furthermore, complaint concerning the searches that the police conducted was dismissed since the applicant had previously gotten redress in a domestic court.³⁹⁰ It is absurd for the tribunal not to have carried out more investigation on the action of the State to establish the truth of the matter. This failure by the Tribunal could be tantamount to denying the claimant justice and right of investment protection under FPS obligation.

An unusual ruling also was reached in the case of *Eastern Sugar v Czech Republic*.³⁹¹ The arbitral tribunal refused to include the harm that emanated from the country itself from the obligation of the FPS provision, which it regarded to be restricted to damage attributed to private parties which the country was obligated to thwart. Constructive State conduct, according to the tribunal's viewpoint, was only meant to be evaluated under other duties, like the standard of FET.³⁹² The argument does not hold water, taking into account the fact that, where the duty of the country

³⁸⁸ *Id.* paras. 78-86.

³⁸⁹ *Saluka Investment BV v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006.

³⁹⁰ *Id.* Para 490-496.

³⁹¹ *Eastern Sugar BV v Czech Republic* SCC Case No. 088/2004, Partial Award, 27 March 2007,

³⁹² *Id.* paras 203-207.

needed to be expanded for the prevention of harms from the action of the private parties, the phrase ‘full’ should for a stronger and convincing reason as well comprise the obligation to prevent harm which had resulted from the conduct of the country itself.

In *Eureko v Poland*,³⁹³ the Applicant made a claim of harassment by State of Poland against the investor’s high-ranking officials.³⁹⁴ The Tribunal said that there was no obvious proof that Poland orchestrated and encourage the actions in question. In spite of the fact that the Tribunal doubted that the molestation contravened the FPS standard, it however stated that some of the conducts raise concerns and came near to the boundary of agreement violation. The Tribunal in addition said that in the event that similar activities were to reoccur and protracted, possibly the obligation FPS reposed on the State would be aroused or provoked³⁹⁵

This is another grey area and a gap in the protection of investors’ investments in full and protection and security decision by the tribunal. The arbitral tribunal said that it found the State of Poland not in breach of the standard because there was no proof that indicated that Poland had orchestrated the acts. But it went further and said that, however, if such actions should be repeated often by State of Poland without taking precautionary measures their stance might be different. What the tribunal failed to address in this case is the extent to which the assertion of molestation and persecution meted out to senior officials of the investment would have reached before it could have been considered as a violation of the standard. It only said “had such action occurred repeatedly the obligation of the government might be provoked. This could be interpreted as a betrayal of **T. W. Walde’s** viewpoint, that a host State has “a duty, practicable by investment adjudication, to apply the State’s powers to guarantee that investment of an alien can operate thoroughly or satisfactorily by the same set of rules, unobstructed and unmolested by the State government and commercial local powers that exist”.³⁹⁶ But the tribunal once failed again to have the back of the investor.

However, the only good news that comes out of this decision for foreign investors is that the host States will be held responsible for the breach of the standard where its organ, or officials,

³⁹³ *Eureko v Poland*, Partial Award, 19 August 2005, 12 ICSID Reports 335.

³⁹⁴ Regrettably, the Order in this case does not narrate the persecution.

³⁹⁵ *Id* paras 236-237

³⁹⁶ TW Walde, ‘Energy Charter Treat-based Investment Arbitration’ (2004) 5 J World Investment Trade 390-1.

caused harassment to an investor and the investment and that harassment caused adverse effect to the investor and its investment.

Since it has been acknowledged that unfavourable effects on the investment can come from the host country's conducts, its entities, or actions of the private persons, it is important to add that "anytime government bodies themselves take action in the breach of the FPS standard, or materially contributed to such reaction, the concerns of ascription or obligation of due diligence will not arise since the host country will be found personally culpable".³⁹⁷ If the damages actually emanates directly from the action of the State, it is needless to opt for the idea of due diligence as it will not be necessary in such circumstances.

This situation was confronted in *Wena v Egypt*,³⁹⁸ where the tribunal expressed their dissatisfaction over Egypt for their failure to accord Wena Hotels the minimum security and concluded that Egypt has contravened the treaty of obligation of standard of FPS. The reasons behind the tribunal reasoning were the failure by the Egyptian police to act over the unlawful seizure of the hotels by EHC, coupled with failure by the government to revert to Wena the serenity and legal management of the premises, encompassing the reason that Egypt omitted in its responsibility to impose penalties to EHC. The whole of these points according to the tribunal suggested a contravention of the standard of FPS, and were also indications that Egypt approved the actions of EHC. It is worth knowing that in this claim the Egyptian authority had failed and bluntly refused to observe the FPS principle because of its actions directly or indirectly, and also it contravened the BIT due to its inactions, although some people states otherwise

In its defence, Egypt asserted that the type of step that the Egyptian government took was approved by the domestic law. This permitted the arbitrators to reach the following conclusion, giving form to the standard of FPS.

- (a) The host country will not depend on domestic law to prevent the observance of its duty of diligence and to avoid its responsibility obtained from this principle.
- (b) The host country will not assert for dearth of wealth to take necessary steps so as to defend nonconformity of its duties.

³⁹⁷ See e.g., Rudolf Dolzer & Christoph Scheruer, *Principle of International Law* (2008) p.150.

³⁹⁸ *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896.

The last point takes us back to the issue of lack of resources which was used to justify the inability of Albanian State in *Pantechniki* case to offer protection to the investor's investment because the State's limited resources could not match the social tension on a scale that was before it. There is no doubt that there are huge divergences in the interpretation of the concept of FPS considering the different conclusions reached by tribunals in these two cases, as well as the failures by States to fully fulfil the obligation of FPS in BITs reposed on them by international law

Notwithstanding, the aforementioned arbitral decisions demonstrate that any use of unlawful threats in form of harassment, or any forceful measures meted out against the investor and their investments by the State or by the organs of the host State would be tantamount to breaches of the FPS standard mostly, if those measures are detrimental to the investor's investment to a significant scale as it was in this case, although the defendant States failed to apply it in this case.

4.2.2 Liability Dependent on Collaboration on Damage Attributed to Third Parties

As mentioned earlier, physical damages or violence of investor's investment can be attributable to the third/private parties. Arbitral tribunals have held that when the perpetrator to damage is a particular individual or individuals with no link with State, the State may take the blame for it. The justification for this responsibility even in situations where the action is not directly attributable to the State is the hallmark of full protection and security as an obligation on average, meaning that the State has a due diligence to act. That due diligence involves of taking steps against those particular individuals that threaten the physical safety of the investor and their investments. The host State must order its public power to prevent any possible interference if it wants to fulfil its obligation under the standard of FPS. It was accepted in the case of *Spain v United Kingdom*³⁹⁹ that countries are not liable for the episode of fighting wars, revolution or rioting but are nonetheless liable for commissions or inactions of the governments intended at preventing the intervening situation. The commitment is to employ necessary steps of due diligence not just to prevent but to thwart riot.

³⁹⁹ *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision, 23 October 1924, 2 UNRIAA 639, 646.

The steps employed by arbitrators in investment issues for collaboration is similar as that employed under traditional international law as well as in international investment law. In the case of *Tecmed v Mexico*,⁴⁰⁰ the arbitrators in that case did not see any endorsement by State corpuses amounting to complicity.⁴⁰¹ In this case, a Spanish company was the parent company of *Tecnicas Medioambientales Mexico, S.S. de C.V. (Tecmed)*, a company incorporated under Mexican law. The parent company owned 99 per cent of the shares of Tecmed, who in turn held over 99 per cent of the stock of *Cytrar, S. A.de C.V. (Cystrar)*, also a Mexican company. Tecmed had organised Cystrar to run a hazardous industrial waste landfill in the municipality of Hermosillo, which is located in the State of Sonora, Mexico. Cystrar was issued with a license for its operation by the Mexican agency for hazardous waste known as the INE in 1996. This license was issued at the request of Tecmed. Subsequently, the license was to be renewed yearly each year till 1998 when INE relying on a resolution refused to renew the license and rather sought to have Cystrar close the landfill. The action taken by INE was due to political change of government of the Municipality of Hermosillo. The Claimant alleged that not renewing the license amounts to expropriation and on this premise, sought damages and compensation for damages to reputation and interest in connection with damages alleged to have accrued as the date INE rejected the renewal application. The Claimant argued that the government of Mexico methodically failed to do enough to stop the social unrests and perturbations at the premises of the disputed sanitary disposal area. But the Tribunal having applied a treaty clause which provides for the standard of FPS to the investor's investment in conformity to International Law, held that it can not find a enough evidence to show that the government of Mexico or its organs have reacted unreasonably beyond its boundaries in a democratic State by supporting or directing the action movements conduct by those who were against the landfill as the Claimant has alleged. Accordingly, the tribunal refused to hold the State of Mexico in contravention of the obligation of FPS provision under Spain and Mexico BIT.⁴⁰²

⁴⁰⁰ *Tecnicas Medioambientale TECMED SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May, 2003.

⁴⁰¹ *Id.* at Para. 176.

⁴⁰² *Id.*

The tribunal's finding was accordingly also applied to the judicial system.⁴⁰³ An investor can bring a claim against the host State where a private person cause harm to the investor's investment in its territory. The State of Mexico failed to protect the investor's investment in this case in two fronts. First, it failed to renew the permit that was agreed in the contract. And secondly, the State failed to prevent the public unrest that perturbed the investor. Thought the action of the unrest was not carried out by the States rather than the third parties yet the State should have prevented it.

In Noble Ventures v Romania,⁴⁰⁴ the local union started civil unrest with the aim of forcing the government to withdraw the privatisation contract due to Noble Ventures' failure to make an increase in the capital at the CSR facility, an increase that they thought could not be made until Romania changed the State's budgetary debts. The government under the counsellor of the Prime Minister made a statement to the press that the sale of CSR was disrespectful and that SOF officials should be placed under investigation over their role in the sale of CSR. His action prompted the local people to stage a labour demonstration at CSR while Noble Ventures was in control. The local police did not take adequate measures to protect Noble Ventures' investment and CSR from illegal activities on its premises. As a result of the illegitimate demonstration and occupations, Noble Ventures' premises were repeatedly seized, its files and cash were pilfered, facilities were ransacked and vandalised, and its employees were either confined or beaten up. Noble Ventures alleged that the State of Romania omitted to accord to its investment the standard of FPS during the period of the extreme social tensions in 2001 by the actions of the third parties. The treaty stated that the investment of the investor must enjoy and have the full benefit of the FPS. The Tribunal relying on the decision of the ELSI finding held that the defendant's behaviour in the present case caused no greater harm than the one that the State of Italy had caused in the initial case. The Tribunal dismissed the application saying that it had been hard to detect any particular neglect on the Romania's side to apply reasonable steps of due diligence for the protection of Noble Ventures' investment. And also, it cannot be proven that any failure to consent with the obligation was detrimental to the claimant to a material degree.⁴⁰⁵

⁴⁰³ *Id* at Para 175-7

⁴⁰⁴ *Noble Ventures Inc. v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

⁴⁰⁵ *Id* at paras 164-6

This ruling by the tribunal seems preposterous since the tribunal did not explain why it came to such a conclusion. From the facts of the case, the investor's investment suffered adverse effect as a result of the demonstration and occupation by private individuals as a result of their rioting. Yet the best the tribunal could come up with was to reject the Claimant's claim because according to the tribunal it found it difficult to detect how the State of Romania failed on its part to apply reasonable measures of due diligence for the security of the Claimant's investment when it is obvious the host State breached the standard of FPS in this case. Not only did the State fail in its obligation to provide protection to the investor's investment, it can also be said that the tribunal denied the investor justice having made some efforts to bring the case to the knowledge of the arbitral tribunal who ended up ruling against the investor.

In *Pantechniki v Albania*⁴⁰⁶ the Claimant, Pantechniki S.A Contractors & Engineers, a Greek company, signed two contracts with Albanian's General Road Directorate to perform construction work on bridges and roads in Albania, in 1994. The Claimant eventually carried out those contracts. In 1997, several major Albanian ponzi schemes collapsed, significantly affecting a high percentage of the Albanian adult populace following the collapse of the schemes and violent scenes erupted in many areas of the country, including the terrain where the Claimant's work site was situated. The Claimant was forced to flee and abandoned its work site and repatriated its personnel, and its equipment and facilities were looted and destroyed by the third persons. As a result of the riots, the Claimant sought for U.S. \$4.9 million in compensation for its losses. The Ministry of Finance refused to pay the compensation, on the ground that under Albanian law, the government could not be held culpable for losses caused by riots undertaken by private individuals. In response to the refusal to pay the compensation, the Claimant initiated a court proceeding in an Albanian court against the Ministry of Public Works to compel the payment of the compensation. The Claimant's claim was dismissed, the dismissal was upheld on Appeal Court, and the Claimant appealed further to the Supreme Court of Albania, the Claimant later abandoned the Supreme Court appeal. The Claimant alleged that not only has the State of Albania failed in its obligation to protect its investment; it also failed to take precautionary measures to thwart these occurrences from taking place, and also, that Albanian courts had committed a denial of justice. The applicable treaty clause provides for the accordance of the

⁴⁰⁶ *Pantechniki SA Contractors & Engineering v Albania*, ICSID Case No. ARB/07/21 Award, (30 July 2009).

FPS obligation to the other Contracting State Member. However the tribunal concluded that the degree of the country's obligation in this clause is determined to a degree on the wealth at the disposal of the country and the country's level of development and safety under that particular situation. A State with limited resources will be incapable and powerless to prevent a social tension of that scale before it⁴⁰⁷.

Jan Paulsson, the Sole Arbitrator held that the causes of action failed on their merits. This is because the Claimant was not able to prove that the State of Albania failed with its obligation to proffer the standard of FPS to the investor's investment. The question is, what else should the claimant have proved when the claimant flee and abandon its works site and send back its workers to their various countries as a result of the riot? Not only did the Claimant abandon their work and fled, their equipment and facilities were looted and destroyed as a consequence of the demonstration yet the State of Albania could not be held responsible by the tribunal for the losses incurred by the Claimant. This would be a free ticket for some States to hide under the umbrella of this decision to deprive foreign investors their rights of investment protection under international law. This would even be more so if this type of ruling persist as a norm by tribunals when making decision on such issue. A host State that is incapable of preventing demonstration no matter how remarkable scale such demonstration is should not be allowed to sign a BIT with other States. Also, any State that is incapable and powerless to defend an ordinary demonstration no matter the magnitude or scale is not capable of defending its territory in times of war and therefore investors should not invest in such countries. To make this happen there should be an international requirement by which every State should be expected to attain before signing up BITs with other contracting parties. Where this required height of expectation is not achieved by host States investors investing in those countries will be taking immeasurable risks. This is because there is no way investors' investments would be protected in times of civil disobedience perpetrated by third persons with the excuses of the State's limited resources like the one used in this case by the tribunal in defence of State of Albania's breach of the obligation of FPS standard.

⁴⁰⁷ *Id.* at Para. 77.

In *Easter Sugar v Czech Republic*⁴⁰⁸ case, the tribunals comprehended the duty of FPS as a duty that has been mandated to the host country to give protection to the investors from private parties. It held that, ‘...in a situation whereby a host country omits to provide FPS, it neglects as well to react to thwart conducts by private parties which it is obligated to prevent’⁴⁰⁹ The restrictive definition, comprehension of investment security is only focused against violence perpetrated by private parties, it is not the tribunal general practice when treating the standard of FPS issues. It is worthy to note that in this case, the most essential claim of the applicant was the contravention of FET duty.

All the cases mentioned above relate to unfavourable activities that have cause harm to foreign investors’ investments that not only were conducted by State’s organ but by third parties or groups. They paint an overall picture that the forceful takeover with the intrusion of the investment, including by a third party can impose a penalty in the FPS standard, especially where the State fails to protect such investments. However, the Tribunal found that in all these situations the host country’s only obligation was to apply due diligence reasonably so as to protect the investors against violent attack or intrusion. Notably, Wena Hotels in all these cases was the only case that was found by tribunal where a violation of the standard of FPS involved a controlled establishment as culprit of the attack. They also dealt with, physical, legal, and commercial protection of investments.

If Wena Hotel case is actually the only case, which we are certain it is, that was found by tribunal for violation of full protection and security involving a controlled entity as liable for violence, amongst other numerous cases that have been brought by investors to various tribunals one will begin to raise the question, can foreign investors really and fully rely on the standard of full protection and security provision for the protection and security of their investment in the territories of the host States? The answered to this question is in affirmative considering the failures by the tribunals to hold or to have held host States culpable for their omission to protect investments in many case laws as seen above have created a huge gap in the protection of foreign

⁴⁰⁸ *Eastern Sugar BV v Czech Republic*, UNCITRAL, Ad hoc arbitration SCC N. 088/2004, Partial Award, (March 27, 2007).

⁴⁰⁹ *Eastern Sugar B.V. (The Netherlands) v The Czech Republic*, SCC Case No. 088/2004, Partial Award, (27 March 2007) at Para 203.

investments in the standard of FPS in BITs and this breach and blatant lacuna that exist must be bridged. And the aim of the thesis is to help to expose and fill this gap that exists.

4.2.3 Liability Dependent on Omission to Accord Physical Security

Various investment claims, including a quite number of the past claims filed before arbitral tribunal institutions during the 19th centuries and in the beginning of 20th centuries, see the standard of FPS provisions in relation to physical security, against damage perpetrated by third parties. The level of security that the country owed to a foreigner and their investment is akin in every award. The claimants have endeavoured in various cases to assert that the obligation of a country in investment security cases amount to absolute liability.⁴¹⁰ This notion, nevertheless, has been dismissed by various arbitrators. In the case of *ELSI*, the ICJ reached the verdict that the prerequisite for FPS standard clause in a separate FCN agreement was not a guarantee to any investor that disturbance of investment will never happen in the circumstances.⁴¹¹ In the same vein, ICSID arbitral tribunals reaffirmed in the cases of *AAPL v Sri Lanka*,⁴¹² *Wena v Egypt*,⁴¹³ *Noble Venture v Romania*,⁴¹⁴ and also in *Tecmed v Mexico*, that the warranty of the standard of FPS 'is never an absolute one and therefore will not place absolute liability on the country which provides it'.⁴¹⁵ However, in *AMT v Zaire*, the tribunal appears to go beyond that assertion by affirming that a 'duty of warranty for the investments security and protection'⁴¹⁶ within the U.S/Zaire BIT, but failed to give a detailed explanation on its rulings. Most tribunals⁴¹⁷ have employed similar due diligence principle to the standard of FPS provisions in investment agreements as in traditional international law. The concepts of 'strict liability' and 'due

⁴¹⁰ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990) Para. 26.

⁴¹¹ *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15.

⁴¹² *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, (27 June 1990) Para. 48.

⁴¹³ *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896, Para. 84

⁴¹⁴ *Noble Ventures Inc. v Romania*, ICSID Case No. ARB/01/11, Award, (12 October 2005), Para 165-166

⁴¹⁵ *Tecnicas Medioambientale TECMED SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (29 May, 2003) Para. 177. On the character of fault as a condition for responsibility under general principles of law., also see Bin Cheng, *General Principle of Law* (1953) 321.

⁴¹⁶ *American Manufacturing & Trading Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 I.L.M. 1531 (1997) Para. 6.05.

⁴¹⁷ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990) Para. 68 and *Noble Ventures Inc. v Romania*, ICSID Case No. ARB/01/11, Award, (12 October 2005) Para. 164.

diligence' will be discussed in detail later in this paper below. Nevertheless, theoretical interpretations of the principle for investment agreements are not present. The *Mondev* arbitrators ruled that, 'the customary rules that was mentioned in NAFTA under its Article 1105 (1) and related clauses should unavoidably be construed and implemented to the specific facts'⁴¹⁸.

The different formulas in investment treaties give rise to the issue of whether, in the lacking of a clear reference to traditional international law, if the level of security the country owe to investors could be extended more than the minimum standard of treatment, that is, beyond physical protection, or whether this traditional international law principle can be read distinctively in relation to investment treaties.

In the *ELSI* case, the ICJ left the door ajar concerning the question if a treaty that has incorporated the standard of FPS provision and also national and most-favoured-nation treatment clauses could be extended above the international law minimum standard of treatment.⁴¹⁹ The ICJ in *ELSI* case used a clause in an FCN treaty that guaranteed for the standard of the most constant protection and security to the citizens and their investments of the both countries. Italy seized the plant that belongs to the U.S. claiming debts, and labour disputes. The Palermo mayor wanted to protect his citizens. The U.S. said that Italy has breached FCN (Friendship, Commerce, and Navigation) Treaty (1948 - now called the FC Establishment Treaty) by not letting the U.S. organise, control, manage its corporation. The Claimant had argued that the government of State of Italy had permitted its employees to seize and capture the plant but it was held by court that, in that event, the government of Italy responded adequately.⁴²⁰ The tribunal held that this provision cannot be interpreted as to giving warranty that investment will never in any situation be seized or occupied. The Court's Chamber stated that, 'the reference within the Article V of the treaty to the clause of the standard of FPS cannot be interpreted as the offering of a guarantee that investment would not in any situation be seized or perturbed'.⁴²¹

⁴¹⁸ *Mondev International Ltd. v United States of America*, ICSID Case No. ARB (AF)/99/2 (NAFTA), Award, (11 October 2002) Para. 118, supported in *ADF Group Inc. v United States*, ICSID Case No. ARB/(AF)/00/1 (NAFTA), Award of 9 January 2003, Para 184.

⁴¹⁹ *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15. Para.111

⁴²⁰ *Id.* Para. 105-108.

⁴²¹ *Id* Para. 108.

Although there was no detailed explanation as to why the Chambers reached such a decision, however, the ELSI decision demonstrates that when a treaty has a clause of this sort the host State is obligated to exercise reasonable steps to offer protection. In respect of the particular authentic situation of the matter, the ICJ decided that the State of Italy's response was unquestionable. This is another preposterous ruling by the tribunals.

In *Iran v United States*⁴²² case it was concluded by the ICJ that the treaty entered into by Iran and the United States in 1955, which necessitated the both States to give assurance that the FPS clause, does not limit the obligation of FPS to physical security, but rather has established duties 'additionally to the duties of Iran that is already in existence in traditional international law'.⁴²³

Many other investment awards also indicate greater openness to the long developed definition of the this FPS standard, despite the 2001 reading by NAFTA's Free Trade Commission of Article 1105 of NAFTA, which ruled out an autonomous interpretation by most NAFTA tribunals.⁴²⁴ In *Mondev v United States* case however, the arbitrators made reference to the reality that FET and FPS provisions were classical parts of BITs ratified subsequent to the World War II, and for that reason, supposed to be read by taking into consideration the present day principle of international law.⁴²⁵ Again, notwithstanding, the fact that Canada had contended for the dependent on this customary standard, arbitral tribunal however had held that the notions of both the FPS and FET standards develop gradually with time by expansive international custom. It added that, 'it is quite shocking if this tradition and the colossal number of clauses it embodies had to be read as to meaning that it is not higher than the *Neer* that the tribunals meant in the year 1927'.⁴²⁶

Likewise, in *ADF v United States* case, the tribunal held that, 'what traditional international law forecast can not be an unchanged picture of the minimum level of treatment of foreigners just as

⁴²² *United States Diplomatic and Consular Staff in Tehran*, Judgement, I.C.J. Reports 1980

⁴²³ *Id* at Para 67

⁴²⁴ See e.g., *the Loewen Group Inc and R Loewen v United States of America*, ICSID Case No. ARB(AF)/98/3 (NAFTA), Award, 26 June 2003, Para 128

⁴²⁵ *Mondev International Ltd. v United States of America*, ICSID Case No. ARB (AF)/99/2 (NAFTA), Award, (11 October 2002) Para. 123.

⁴²⁶ *Id* Para. 117.

it was in 1927 during the ruling of the *Neer* Award.⁴²⁷ For both traditional international law and foreigners' minimum level of treatment that it inserted, are steadily under a mechanism of evolution'.⁴²⁸ It stated further that, 'there seems no reasonable requirement and no agreeing or consistent State custom to substantiate the opinion that the development of *Neer* is inevitably expandable to the present-day atmosphere of treatment of alien investors' investments by any host country or beneficiary country.'⁴²⁹ The Tribunal as well spotlighted that the US also had acknowledged that traditional international law that was made reference to under Art. 1105 (1) of NAFTA was not 'fixed or static in time'.⁴³⁰ Nonetheless, in ADF case the tribunal ruled that the Applicant had not given enough evidence that the present investment treaties have provided 'a common and independent requirement to provide FET and FPS to alien investments...into the entity of current traditional international law'.⁴³¹ Accordingly, it only formed its rulings on the customary minimum principle of treatment found in traditional international law.⁴³² Some of these expansive interpretations will be emphasised in arbitral claims in the legal security section. However, before looking into the arbitral rulings and claims on legal security, there are so many investments jurisprudence that deal with physical security of investors' investment attributable to third parties under FPS obligation which this paper first considers.

4.2.4 The Decisions of Arbitral Courts on Physical security

The standard of FPS undoubtedly is connected to the physical protection of an investor's investment. Tribunals in some cases are of the presumption that the standard relates only or more importantly to physical protection and for that reason it is the host nation's obligation to secure foreign investor's investment from interference that comes from the State itself, or from the State's organs and/or from private parties. There are many cases where tribunals held that the

⁴²⁷ *LFH Neer and Pauline Neer v United Mexican States* US-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60. *ADF Group Inc v US* ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179

⁴²⁸ *ADF Group Inc. v United States*, ICSID Case No. ARB/(AF)/00/1 (NAFTA), Award of 9 January 2003, Para. 179.

⁴²⁹ *Id.* para181.

⁴³⁰ *Id.* para179. See also *Mondev International Ltd. v United States of America*, ICSID Case No. ARB (AF)/99/2 (NAFTA), Award, (11 October 2002) Para. 119.

⁴³¹ *ADF Group Inc. v United States*, ICSID Case No. ARB/ (AF)/00/1 (NAFTA), Award of 9 January 2003, Para. 183.

⁴³² *Id.* at Para. 186.

standard is solely designed to provide physical protection to investment.⁴³³ But as this thesis has frequently explained, there is the conviction that this standard does not only accord protection to investors based on physical damage, or civil unrest alone. The full picture of the protection that the standard affords to investment is much more expanded beyond physical security and it can be extended to legal, commercial or even to cyber/digital security. Let's first take into account situations where the tribunals have reached the decisions that FPS accords protection to physical security and see whether the States have really provided protection for investors' investments in such host States' territories.

In *Gold Reserve v Bolivarian Republic of Venezuela*,⁴³⁴ the tribunal finds that the claimant's claim under the BIT, to extend that it accords for the duty to provide FPS to claimant's investments, is to be dropped. The tribunal stated that, 'while some arbitral tribunals have expanded the notion of FPS to an obligation to afford regulatory and legal protections, the more conventional, and common welcome view, as established in various cases quoted by the Respondent is that this standard of treatment refers to protect against physical harm to persons and property, and accordingly the tribunal concluded that the duty to afford the standard of FPS under the BIT refers to the protection from physical harm'.⁴³⁵ It was stated by the tribunal in *Crystallex v Venezuela*⁴³⁶ that FPS standard only expands to the host State's obligation to offer protection and security, 'more traditional interpretation better accords with the ordinary meaning of terms',⁴³⁷ which is the provision of physical protection and security to the investment. However, it was agreed by the tribunal in *Joseph Hoban v Burundi*⁴³⁸ that where the phrase of the treaty expands the coverage of the FPS standard to the protection of "right," the standard must be understood to go beyond the traditional protection of the investor's physical protection.⁴³⁹ Therefore, it will be prudent for the contracting parties to use phraseology that

⁴³³ *PSEG v Turkey*, ICSID Case No. ARB/02/5, Award, (19 January 2007).

⁴³⁴ *Gold Reserve Inc v Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF)/09/1, Award, 22 September 2014.

⁴³⁵ *Id.* at paras 622-623

⁴³⁶ *Crystallex International Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB (AF) 11/2, Award, 4 April 2016.

⁴³⁷ *d.* para632.

⁴³⁸ *Joseph Houben v Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016 (French).

⁴³⁹ *Id.* at Para. 160.

limits the protection of their investment to physical protection while incorporating the standard to their respective BITs if they want to limit the principle to physical security solely.

In the *Rumeli v. Kazakhstan* case⁴⁴⁰ for example, the tribunal took the approach that the provision of FPS is restricted to physical attack with non-physical attack exclusive. This is an indication that it read protection and security narrowly just for the protection of physical threats. The tribunal stated that it ‘concur[s] with the Defendant that the standard of FPS...compels the country to afford a specific floor of security to alien investment against physical harm’.⁴⁴¹

The specific floor of security from physical harm which the tribunal stated above cannot be disputed that host States must provide physical protection for foreign investments in their territory. In *Saluka v. Czech Republic*,⁴⁴² the Tribunal said that host States ought to accord physical protection to foreign investment of an investor at the time of any civil disobedience and physical violence that adversely affects the investments in its territory. The ‘standard of FPS relates crucially when the alien investment is impacted by public disorder and unlawful exercise of physical force or attack...the ‘FPS’ provision is not suppose to shield just any type of harm against the foreign investor’s investment, instead it is to safeguard more exceptionally the physical unit of the investment from obstruction by employment of force’.⁴⁴³ That would mean that a host State will be in violation of the standard if it fails to accord such security and protection as it is required under international law.

In *BG Group v Republic of Argentina*,⁴⁴⁴ the Tribunal maintained that the FPS standard in international law is linked in a situation where the investors’ investment physical security has been undermined. The Tribunal repeated the reasoning in the previous case above that ‘the duty is not supposed to shield just any type of damage that affects an investor’s investment, but to secure more particularly the physical unit of the investor’s investment from impediment by the application of force.’⁴⁴⁵ Where there is a use of force and physical damage or destruction of the investor’s investment such as killing, looting, and/or seizure and expropriation occurred without

⁴⁴⁰ *Rumeli v Kazakhstan*, ICSID Case No. ARB/05/16 Award, (29 July 2008), Para 608.

⁴⁴¹ *Id* Para 668

⁴⁴² *Saluka Investment BV v Czech Republic*, UNCITRAL, Partial Award, (17 March 2006) Para 203

⁴⁴³ *Id* paras 483-484.

⁴⁴⁴ *BG Group Plc v Republic of Argentina*, UNCITRAL, Award, 24 December 2007.

⁴⁴⁵ *Id* Para 323.

intervention by the host State to prevent it from happening that would be regarded as undermining of the physical integrity of the investment because the investment has suffered physically.

In *Easter Sugar v. Czech Republic*⁴⁴⁶, the Tribunal emphatically stated that the principle of FPS protects investors from violence like, large crowds, rebels, rented ruffians, and others involved in physical brutality attributable to third parties. The Tribunal stated in this regard that, ‘the yardstick under Art. 3(2) of the BIT between Czech Republic and Netherlands relates to the duty of the country to safeguard the investor against private parties, in the case the Parties quoted, such as, large crowds, rebels, rented ruffians and others involved in physical brutality against the foreign investor in contravention of the country exclusive control of physical strength’⁴⁴⁷. The tribunal went further and stated that, ‘consequently, in the situation in which a host country omits to provide FPS, it omits to react to thwart conducts by private parties which it had the need to prevent’.⁴⁴⁸ In *Bernhard v Zimbabwe*,⁴⁴⁹ the tribunal concluded that the Republic of Zimbabwe contravened the FPS standard with regards to the failure of the police to protect the Claimant’s investment from invasion or evicting Settlers/War Veterans from the premises. It also found that the Respondent violated this standard with regards to the non-responsiveness of the police to numerous brutal occurrences that happened as detailed in the witness statement by the witnesses. Therefore, according to the tribunal, the Respondents’ defences that the police were overwhelmed or that intervention would have required disproportional force, were implausible. Accordingly, the tribunal found the Respondent in violation of its obligation under the BITs to accord FPS to the claimants in relation to the claimant’s investments.⁴⁵⁰ This case exposes the systematic failures by the States to provide the standard of FPS obligation to foreign investments in their territories. The outcome of this case is a welcome development looking back at the decision in the *Pantehniki* case where the State of Albania was let off the hook because of the Proportionality Test rule.

⁴⁴⁶ *Eastern Sugar B.V. (The Netherlands) v The Czech Republic*, SCC Case No. 088/2004, Partial Award, (27 March 2007)

⁴⁴⁷ *Id* at Para 203

⁴⁴⁸ *Id* at Para 203

⁴⁴⁹ *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015.

⁴⁵⁰ *Id.* paras. 597-599.

This section has proven by the consideration of the above authorities that foreign investments are required to protect foreign investments against physical attacks and against other adverse effects of physical violence or damages that are attributable to private parties or from activities which can emanate from the host States and from their organs. But as we can see, the States have in some occasions failed to deliver on the promise thereby depriving investments the protection that is required for them to be provided to investors under international law.

4.3 Legal Protection

But as we will see in this following section the FPS standard is not solely designed for the physical protection of investments as were sometimes held by many tribunals and as some States have argued. Full protection and security standard does not only provide physical security against civil disobedience as some States are meant to believe, it certainly protects investors against the threats like mobs, insurgents, rented thugs and militias and other legal security. And the most controversial debate in all the debate of FPS standard is the scope of the duty to accord legal protection under FPS provisions in investment treaties. Indisputably, the duty to afford FPS is not limited to according physical security to investments, but also requires legal protection⁴⁵¹ for the investors and their investments.⁴⁵² That means the principle of FPS includes to a certain extent, the obligation to grant legal protection by having a legal framework in place that permits the investor to bring claims in case any harmful act is done by State or third parties to the investor's investment could not be averted.⁴⁵³ This has already been mentioned in the beginning of this chapter, especially in chapter 2 where the historical background of FPS established that the standard extends to legal security of investments. This thesis is going to examine if the host States have fully apply this obligation to the full protection of investments

⁴⁵¹ *Siemens A.G. v Argentina Republic*, ICSID Case No. ARB/02/6, Award, 6 February 2007.

⁴⁵² See also, *Saluka Investment BV (The Netherlands) v Czech Republic*, UNCITRAL, Partial Award, (17 March 2006) n 7, paras, where the Tribunal after stating that the standard applies to physical integrity, proceeds to apply it to the investment's legal protection.

⁴⁵³ *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896, Para. 82, 84, 94, 95; *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15 Para 110

4.3.1 Legal Principles and Political Similarity

The obligation of FPS and security has been designed to accord legal protection and security to foreign investments for a very long time now. Even at the time that the U.S was busy changing and interpreting its FPS standard clauses to the limitation to police protection, other bodies of international law were constantly suggesting for an obligation to accord the standard of FPS to aliens, and expressing clearly that the standard necessitated both legal and physical protections.

Even before the United States started making changes to its interpretation of the standard of FPS provisions in recent times, the U.S. – Mexico General Claim Commission which dated as far back as September 8, 1923,⁴⁵⁴ in more than one occasion in that case, alleged that a state is under the international law obligated to protect alien in its jurisdiction in accordance with a reasonable measure of due diligence and care, and occasionally had held the Defendant culpable for failing to fulfil what is expected of the standard.⁴⁵⁵ However, it is worth remembering that this case wholly involved physical harm.

And also, in **Brown (U.S v Great Britain)** of 1923,⁴⁵⁶ another Claim Commission found that a Boer-dominated political organisation named Transvaal Republic was in contravention of international law because it left the interest of a national of the United States in particular mining applications “manifestly *insecure*”.⁴⁵⁷ Such international violation of the law at issue was branded by the Commission as a “denial of justice” and it emphasised that it was as a consequence of joined conducts of all the three arms of the government (legislature, executive, and judiciary) that discredited the *legal system* of the State incapacitated of protecting the property rights of the U.S. national.⁴⁵⁸ This ruling could be comparable to **Paulsson’s** remarks of the modern time that the denying people justice in traditional international law amounts to a

⁴⁵⁴ See, Convention between the United States and Mexico for the Reciprocal Settlement of Claims, U.S.-Mex., Sept. 8, 1923, 43 Stat. 1730 (describing the composition and establishment of the Commission).

⁴⁵⁵ See, e.g., Youmans (U.S. v. Mex.), 4 R.I.A.A. 110, 114-15 (U.S.-Mex. Gen. Claims Comm’n 1926) (upholding a claim that predicated on “the failure of the Mexican Government to exercise due diligence to protect the father of the claimant from the fury of the mob at whose hands he was killed, and the failure to take proper steps looking to the apprehension and punishment of the persons implicated in the crime”); Home Ins. Co. (U.S. v. Mex.), 6 R.I.A.A. 48, 52 (U.S.-Mex. Gen. Claims comm’n 1926) (holding that Mexico was not liable because it discharged its “duty to protect the persons and property within its jurisdiction by such means as were reasonably necessary to accomplished that end”).

⁴⁵⁶ Brown (U.S. v. Gr. Brit.), 6 R.I.A.A. 120 (perm. Ct. Arb. 1923).

⁴⁵⁷ *Id* at 129

⁴⁵⁸ *Id.* at 129

catalogue and a mechanism of a failure of a State's legal framework to the provision of due process. He stated that denial of justice in customary international law is a *mechanism* of "a failure of a national legal system to the provision of due process".⁴⁵⁹ Paulson also stated that there is "no such proportionality factor that has been generally accepted with respect to denial of justice, and that it is only two reasons that appear salient".⁴⁶⁰

According to Paulsson:

The first is that international responsibility does not relate to physical infrastructure; counties are not accountable for denying people justice because they are capable of affording to put at the public's disposal spacious buildings or computerised information banks. What is important instead is the human element of obeying the principle of law. Aliens that come into a poor State do not have the right to think that they will be accorded something like word to word reproduction of every court judgement-but they have the right to making decisions that is not xenophobic or arbitrary.⁴⁶¹

Also, at the same period, the State Department of the United States representatives alleged to Spanish officials that the traditional obligation of security necessitated recompense in the occurrence of government takings (expropriation). Particularly, in a missive that was sent at the time of the Spanish Domestic War of the 1930s, the United State representatives make references to current seizures of asset belonging to the nationals of the United States and alleged that the "security to which one had the right to in international law" necessitated immediate and full recompense to the possessors."⁴⁶²

These aforementioned references to an obligation of international law for the provision of protection and security to property rights of foreigners is an additional prove and affirmation that the traditional standard of FPS was contemplated during that era as expanding further more than physical protection.

Furthermore, the FPS clauses in some other Unites States early treaties also showed a necessity that the host country's legal system should incorporate certain fundamental characteristics by

⁴⁵⁹ Jan Paulssons, *Denial of Justice in International Law*, Cambridge University Press , 6 October, (2005) at p. 36

⁴⁶⁰ *Pantehniki SA Contractors & Engineering v Albania*, ICSID Case No. ARB/07/21 Award, (30 July, 2009), at Para.76

⁴⁶¹ *id.* 76

⁴⁶² Dep't of State, file 352.115/45 (on file with author) (emphasis added).

which alien property and the persons can be covered. For instance, the FCN Treaty signed in 1824 between the United States of America with Colombia stipulates that all parties were “to accord their specific *protection* to the individuals and assets of the nationals of one another ... *allowing open-mindedness and liberty to the arbitrators of law for their juridical option.*”⁴⁶³ In a clearer word, that is to say, the State’s legal mechanism ought to accord to the protected aliens with openness to the availability to the judiciary. Additionally, the diplomatic instruction of the United States from the year 1866 alleged that this clause inserted under the Treaty would help to debar “any arbitrary conduct that may emanate from either the Government by which a national of another could be denied of his prerogatives or damaged in his asset without following the court procedure through the normal judicial system.”⁴⁶⁴ This connotes that the concept of FPS did not just require access to judiciary, but as well that, the judiciary must abstain itself from arbitrary administrations of the law to make a provision for due process.

The United States FCN treaties that were ratified between Costa Rica, Argentina, and Japan in the 19th century had almost the same wording, with the exception that they made references to “the most complete protection and security”, or to “full and perfect protection,” instead of “special protection.”⁴⁶⁵ One distinguishable characteristic of the Treaty between the United States and Japan, nonetheless, was the inclusion in the treaty that the citizens of one party “must benefit in the jurisdiction of another contracting State the same *protection* like home nationals or subjects *in regards to patents, trade- marks and designs*, on the fulfilment of the principles prescribed by law.”⁴⁶⁶ The use of this phrase protection may have been intended for nonphysical protection, because it connects to intangible asset.

These positions are totally the opposite of that which some of the present-day tribunals have taken and accepted. Especially in the new investment Agreements entered by the United States,

⁴⁶³ General Convention of Peace, Amity, Navigation and Commerce, U.S.-Colum. 3 October, 1824, art.10. 8 Stat. 306.

⁴⁶⁴ Robert R. Wilson, *Property-Protection Provisions in United States Commercial Treaties*, 45 AM. J. INT’L L. 83, 97 (1951) (citing the diplomatic instruction by the United States of 9 April, 1886). During the time of this particular order, Colombia had already taken a different name and was known as New Granada, and the Agreement of 1824 was managed by a different Agreement signed in 1846.

⁴⁶⁵ Treaty of Commerce and Navigation, U.S.-Japan, art. 1, Nov. 22. 1894, 1 U.S.T. 352 [hereinafter U.S.-Japan FCN Treaty]; Treaty of Friendship, Commerce and Navigation, U.S.-Argentina, Arts. II, VIII, 27 July, 1853, 5 Bevans 61; Treaty of Friendship, Commerce and Navigation, U.S.-Costa Rica, arts. II, VII, July 10, 1851, 6 Bevans 1013.

⁴⁶⁶ U.S.-Japan FCN treaty, art. XVI (emphasis added).

which stipulate that the standard of FPS within traditional international law restrict this concept only to physical security as in NAFTA 1105.

Many other countries started incorporating the standard of FPS provisions within their business Agreements within this era too. In 1861, for instance, the Agreement that was entered by Italy with Venezuela stated that “the nationals and citizens of one country must benefit in the jurisdiction of another the *fullest measure of protection and security* of individuals and asset”⁴⁶⁷ Subsequent to the conclusion of the treaty, **Salvatore Sambiaggio**, an Italian, encountered “confiscations and compelled the credit facility granted to him by rebellious troop” throughout the period of domestic fighting in the State of Venezuela.⁴⁶⁸ The State of Italy filed a proceeding against Venezuela before a Claim Commission on behalf of its citizen Sambiaggio, alleging for the contravention of the standard of FPS clause by Venezuela for failure to provide security to Sambiaggio against those sustained losses.⁴⁶⁹ **Jackson H. Ralston**, the Arbitrator in the case ruled that the protection and security provision was intended to provide an obligation to apply due diligence from one contracting party to the protection of citizens of the other contracting State party.⁴⁷⁰ Nonetheless, he dismissed the assertion on several premises, encompassing his own conclusion that Venezuela failed to curb the revolutionaries and could not have realistically averted the losses.⁴⁷¹ One could assert that this case marked the beginning of placement of a duty of due diligence upon the host States.

As one can see, this case and the word of a due diligence test especially, that was used by Ralston would be seen as authoritative to successive arbitral tribunals and as well as to intellectuals searching to establish the level of protection that is required by this principle. This means that reasonable measures must be applied by host States to prevent harm befalling foreign investors and their investment within its territories.

Still going forward in respect to the ambit of the duty to afford a successful judicial framework, the only appropriate question that needs be asked is whether a particular mechanism in

⁴⁶⁷ See *Savatore Sambiaggio (Italy v Venezuela)*, 10 R.I.A.A. 499, 518 (Italy v Venezuela Mixed Claims Comm’n 1903) (emphasis added (quoting Article 4 of the treaty)).

⁴⁶⁸ *Id* at 500

⁴⁶⁹ See *id.* at, 500-02

⁴⁷⁰ See *id* at, 524

⁴⁷¹ See *id.*

hypothesis is able of filing a lawsuit against third parties wrongdoers possible in relation to basic due process warrantees for every side. It was ruled by **Max Huber** in *Spain v United Kingdom*⁴⁷² that, ‘It cannot be possible to request the same application in every case of a mechanism of justice that fulfils the international law minimum standards of treatment; one ought to acknowledge that there can be circumstances, like in the issue of preventive conduct, at which the ambit of conduct of a country can be fundamentally restricted or even incapacitated’.⁴⁷³ Investors do not have prerogative to a juridical mechanism in the countries that completely satisfy their specific demands. Any other reading to it would harshly or strictly meddle with the independence of a country to tailor a juridical framework in consideration of every of the various interests and concerns of its nationals. However, where an investor’s needs or rights is trampled upon by the failure of a State to provide a functioning juridical framework that would enable the investor to seek redress for any grievances the investor is nursing may lead to a breach of international law of protective investment. And therefore, such a State is culpable as its justice and administrative system has failed that particular investor by making him/her worse off or even more unsuccessful than in all other cases.

But despite the question facing the demand for equivalent application in every matter of a mechanism of justice that meets the expectations of the international law minimum standards of treatment in lodging legal action against non-State offenders, **T. W. Walde** accordingly, while writing in the Energy Charter Treaty, which promised most constant protection and security relates the standard of FPS as a practice that expands more than physical protection in a real perception of security, and he stated that the principle would comprise commercial, legal and regulatory powers by the State. He said that, ‘this duty will not just be contravened by operative and offensive application of the country’s power but as well by the failure of the country to intercede where it had the obligation and political control to act to safeguard the common capacity of an investor’s investment to operate,’ and that ‘this obligation which is achievable by investment arbitration, to use governmental powers to make sure that the alien investment can

⁴⁷² *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision, 23 October 1924, 2 UNRIAA

⁴⁷³ *Id* at paras 639, 646

perform satisfactorily by the same set of rules, unobstructed and unmolested by the government and commercial national authorities that be'.⁴⁷⁴

This opinion if it is to be accepted by all tribunals will counteract and contrast the US policy which was not drawn up until 2004 when it abruptly changed course by altering its model BIT to define the standard as restricted to the so-called obligation of police power or protection,⁴⁷⁵ which is intended to the opinion of this thesis to cause harms to investors' investments.

Another testament that envisages that the concept of FPS is expanded more than the provision of physical security is based on one testimony in a journal drafted in 1985 by **Pamela Gann** which was titled *The U.S. Bilateral Investment Treaty Program*, soon after she finished her work in the United State at the Investment Trade Representative.⁴⁷⁶ **Gann** stated that the FPS principle "obligates the host country to accord protective investments of the standard of FPS of its *legal, juridical, and protective entities*", which should "not be lower than that the international law requires". For **Gann** to have referred to "legal and juridical entities", depicts that she recognised that the obligation of the FPS standard goes further than physical security, according to how it was perceived at the time of the FCN agreement era, and extends to putting a legal mechanism available that is made of the three organs of democratic government, the (legislative, judicial, and executive) that has the capability of providing protection and security to investments.⁴⁷⁷

4.3.2 The Decisions of Arbitral Courts on Legal Security

Accordingly, as stated earlier, even soon subsequently that **Gann** finished writing her work on this issue that the principle of FPS obligates the host country to afford businesses legal, juridical, and protective corpuses, the United States obvious accepted that the standard of FPS is viewed to have some proportion of legal security apart from just physical security. This was seen in (ICJ)

⁴⁷⁴ T.W. Walde, 'Energy Charter Treaty-based Investment Arbitration' (2004) 5 J World Invest Trade 390-1.

⁴⁷⁵ Treaty Concerning the Encouragement and Reciprocal Protection of Investment, art 5, 2 (2004) [hereinafter 2004 U.S. Model], available at: <http://www.state.gov/documents/organisation/11760.pdf>.

⁴⁷⁶ Pamela B. Gann, *The U.S. Bilateral Investment Treaty Program*, 21 STAN, J. INT'L 373-74 (1985) at 390

⁴⁷⁷ See, George K Foster, *Recovering "Protection and Security": The Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance* (2012) 1113, available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>.

ELSI case.⁴⁷⁸ This case has been mentioned above already but the thesis just wanted to add a little dimension to it. Raytheon's Italian subdivision corporation, ELSI, had stopped operations after some employees seized the facility in dispute over redundancy issues, and the domestic mayor gave an official written request that led the company into involuntary liquidation.⁴⁷⁹ There was an allegation by the United States that the Italian Government has violated the security and protection provision of the United States and Italy FCN Agreement⁴⁸⁰ on two fronts. First off, that Italy allegedly had omitted to prevent and redress the occupation and seizure of ELSI's factory by the employees.⁴⁸¹ In addition, a domestic managerial representative reportedly took a period of one year and four months to reach decision on retrial against the confiscation order. There was no doubt that the first count of the failure was based on absence of physical protection, the second was on the premise of presumption of absent of legal security, an omission to rule on legal claim with adequate promptness. The counsel representing the US saw such asserted omission by the State of Italy as a denying the US of "methodical justice",⁴⁸² which has resulted from the dearth of a proper remedial framework.⁴⁸³ The ICJ Chambers after investigating this claim held that the period of time that the petition lasted for, although it was obviously protracted, did not breach the agreement's obligation considering other system of protections within Italian law.⁴⁸⁴ The ICJ concluded that Italian government had provided an adequate degree of protection under the circumstances⁴⁸⁵ The ICJ refused to question the grounds that the security of investment provision could have been violated if the legal framework of Italy was adequately flawed to handle an alien's claim. Truly, some scholars have alleged that

⁴⁷⁸ See *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15. (Describing the nature of the protection and security standard).

⁴⁷⁹ *Id.* at Para 16

⁴⁸⁰ See, Treaty of Friendship, Commerce, and Navigation between United States and Italy, 2 February, 1948, 12 U.S.T 131, Art. V 1

⁴⁸¹ *Saluka Investment BV v Czech Republic*, UNCITRAL, Partial Award, (17 March 2006) Para 105 (noting the assertion that Italian authorities breached the FPS clause of the U.S.-Italy FCN Treaty by allowing ELSI workers to occupy the plant).

⁴⁸² *Id.* Para 110

⁴⁸³ *Id.*

⁴⁸⁴ *Id.* Para 109

⁴⁸⁵ *Id.* Para 108

the ICJ indirectly agreed on this premise.⁴⁸⁶ This case showed that the US came to the opinion at the period that the agreement principle of security in BITs suggests a kind of legal security.

As we can see in the case law, tribunals interpreted this principle as necessitating that the host country abstain from enacting new legislations, or altering their meanings of current legislations, in a manner that it may have impact negatively to covered alien investments.

The weakness of this case with regards to investment protection under the stand of FPS could be that some people may argue that since the Chamber dismissed the assertion on the grounds of fact that it would not be wise to quote ELSI in assistance of the claim that FPS standard extends to legal protection. However, the strength of the decision if it is to be considered carefully would mean that investors can take solace from the fact the decision of this case could be cited in the assistance of the assertion that the standard of FPS is not limited to physical protection, but expands to legal protection via national courts, although ICJ took time to consider it on the bases of providing investment with physical security.

However, the duty to accord for a juridical mechanism also comprises particular framework for that type of method.⁴⁸⁷ In *Loewen v United States* case, the applicant was of the argument that the US, acting via a court of Mississippi breached its duty to afford investment protection by ‘failing to take action to restrict many of personal retrials by claimant’s lawyer to State honour, to discrepancies in resources, and also ethnic bias’.⁴⁸⁸ Whereas a full discussion of ‘denial of justice’ petition goes beyond the ambit of this part of thesis, it is worthy to state that the arbitral tribunal, in its judgement, held that the verdict by the judge of the Mississippi court did ‘not go beyond the limit of the international law of minimum standard of treatment obligated by Article 1105. It was an incorrect verdict at its worst.’⁴⁸⁹ This is a reference to the principle of duty of

⁴⁸⁶ For examples of the differences amid FPS provisions, see Andrew Newcombe & Lluís Paradell, *Law and Practice of Investment Treaties: Standards of Treatment* 308 (2009) at 311012.

⁴⁸⁷ See *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15, Para 111

⁴⁸⁸ *R. Loewen and Loewen Group v US* First Memorial on the Merits of the Loewen Group, Inc. 18 October 1999, Para 215, available at (<http://www.nafatclaims.com>).

⁴⁸⁹ *Id* Para 189

care and ‘due diligence’ independent of the ambit of physical security,⁴⁹⁰ giving respect to the country corpuses.

Another case that dealt with the infringement of the investor’s right by laws and regulations of the host State is *CME v Czech Republic* case. The Media Council altered the media regulation and established a legal condition that allowed CET to rescind service agreement with CNTS for failure to deliver a daily log by CNTS to CET, which the Claimant depended upon. The tribunal underscored that: ‘there cannot be lawful supposition that clauses legislations become static the moment that they meet the concerns of an alien investor’.⁴⁹¹ Nevertheless, it subsequently held that some acts and omissions ‘were intended to withdraw the legal safety and protection of the Applicant’s business. The tribunal stated that....‘The host country is mandated to assure that it does not by alterations of its regulations nor by conducts of its official entities is the accepted and ratified protection and security accorded to the investor and its investment by the State be terminated or depreciated’, therefore, the tribunal stated that ‘the defendant is consequentially in contravention of the duty of FPS because the Media Council’s behaviours both in 1996 and 1999 were intended to withdraw the legal protection and security of the applicant’s investment in the State of Czech’.⁴⁹²

The decision of the tribunal in this case is favourable to foreign investors’ investments in the sense that it tends to protect and prevent covered investment from unlawful enactment or alteration of the laws by host States which have had a devastating effects on such investment. Whenever the legal protection and security of investment a foreigner is rescinded, or in other words trampled upon by the actions of the State or its organ knowingly or unknowingly that obligation of protection owed to the investor has been breached. And this would have disadvantaged the investment in which the investor invested.

However, the tribunal failed to explain in detail the proportion of the protection and security standard, apart from the assertion that it commits the host State to make sure that the accepted

⁴⁹⁰See The Free Trade Agreements (FTAs) with Singapore, Morocco, Australia, and Peru, and the BIT with Uruguay. The first draft of the US-Chile FTA, available via < <http://ustr.gov>> See, DA Gantz, ‘The Evolution of FTA Investment Provisions: From NAFTA to the United States-Chile Free Trade Agreement’ (2004) 19 AU ILR 679. See, *R Loewen and Loewen Group v US*. US Counter- Memorial on the Merits, 30 March 2001, Para 176, available at < <http://www.nafatclaims.com> >.

⁴⁹¹ *CME Czech Republic B.V v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001, Para 356

⁴⁹² *Ibid* Para 613

and ratified protection and security of the alien investor's investments neither by changing its laws nor by acts of its official corporations would those terms be cancelled or reduced. And that the Defendant breached the duty because it did not give consent to the agreement that the both parties reached. This type of unclear method of ruling is worrying since it did not render any detail information as to when a disadvantageous legal alteration or official actions is not in conformity with the security owing to an investment, and consequently could have a terrifying result on good faith legislative or regulatory action.⁴⁹³ Furthermore, the action of the State that led to this judgement is a further proof to support the thesis' argument that host States have often failed to protect investors' investment in their territories.

Another award that opened the door to a potential extended reading of FPS clause as including a claim to legal protection is the case of *Lauder v The Czech Republic*. It has the same factual issues as in CME but was filed by another investor in CNTS, in a different agreement. The treaty provision between the Contracting Parties stipulates under their BIT that: ... '[i]nvestment... shall be accorded full protection and security'⁴⁹⁴. The tribunal in the case dismissed a commitment of the country 'to protect alien business from any conceivable deprivation of worth that resulted from the conducts of private parties whose conducts could not be attributable to the nation'.⁴⁹⁵ It held that accordingly 'such security would truly constitute to absolute liability'.⁴⁹⁶ The tribunal also dismissed the claim in relation to adverse alterations of legislation. Nevertheless, in debating in the particular case whether the alterations were 'not centred at, nor designed to, damaging Mr Lauder's business, the tribunal did not exclude that it could have contemplated otherwise, had these situations been established by the applicant'.⁴⁹⁷

The Tribunal applied a preferable method and did not find the defendant in breach of the clause because there were no commissions or omissions that the Media Council exhibited and dispensed any harms directly or indirectly to the business of the applicant and the cessation of the agreements which the investor's domestic associate CET initiated was not caused by the

⁴⁹³ J. W. Salacuse, *The Law of Investment Treaties*, published by OUP, 7th January (2010) (2010) at p. 233

⁴⁹⁴ Article 2 (2) of the U.S. and Czech Republic BIT 1991

⁴⁹⁵ *Ronald S. Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, Para 314.

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* Para. 311

State rather by an individual. It therefore stated that ‘the investment does not impose duty of care upon the State of Czech to interfere in a disagreement between the firms on the state of their legal relationship’, and that ‘the defendant’s obligation within the Agreement was to make its court system accessible for the applicant and any organisations it manages to lodge their petitions’.⁴⁹⁸

The tribunal’s viewpoint is that the obligation of FPS expands to legal security, but expressed its limitations more directly. It ruled that the obligation does not only oblige the Parties to employ a due diligence measures in the security of alien investment as appropriate at the circumstances, but it also necessitate that the host country have an appropriate legal mechanism and should make it accessible to protected investors, so that such applications can be correctly investigated and resolved in conformity with national law, including international law. The Lauder tribunal’s view of the protection and security standard seems consistent and not contradictory with the traditional ideas of that standard that investment should be accorded legal security, as has been described in the evolution section of this research, and gives the host State enough freedom to legislate and administer its law.

Both cases of *CME*⁴⁹⁹ and *Lauder*⁵⁰⁰ demonstrate that the notion of FPS is preeminent in the provision of legal security and accessibility of juridical mechanism to the protection of the investor’s rights and benefits under international law. As for the different verdicts reached in the two cases, one would not take a second guess that the differences were as a result of conflicting opinions of the facts. But still in these two cases the State of Czech failed on their FPS obligations to provide adequate protection and security to the investors’ investments.

In *CSOB v Slovakia*,⁵⁰¹ the Claimant Ceskoslovenska Obchodni Bank, A.S. (CSOB) brought a dispute against the Slovak Republic, claiming a breach of Consolidation Agreement (agreement entered into between an existing bank and a new bank, agreeing that they will merge). The Consolidation Agreement was concluded by the Czech Republic, Slovak Republic and CSOB in order to carry out the Bank’s financial restructuring in advance of its then planned privatisation.

⁴⁹⁸ *Id.* para.314

⁴⁹⁹ *CME Czech Republic B.V v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

⁵⁰⁰ *Ronald S. Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001.

⁵⁰¹ *Ceskoslovenska Obchodni Banka AS v Slovak Republic*, ICSID Case No ARB/97/4, Award, 29 December 2004.

The bank expanded the credit facility to another Slovak collection firm known as (SI) whose losses were meant to be protected by Slovak Republic. Under the Agreement, the Czech Republic and Slovak Republic each established a special-purpose collection company to which CSOB assigned certain non-performing receivables. To enable the collection companies to pay for the assigned receivables, CSOB extended to each of them a loan facility in an amount equal to the nominal value of the non-performing loans that had been allocated. Since the non-performing loans allocated to the companies were not expected to yield revenues adequate to the satisfaction of the collection companies' loan obligation to CSOB, in the Consolidation Agreement the Czech and Slovak Republics each agreed to "cover any loss" of respective collection companies. The Slovak Republic, however, failed to cover these losses, with the Slovak collection company as a result defaulting on its loan obligation to CSOB.

The tribunal did not have any question that the rights of the investor emerging from this particular agreement were safeguarded under the BIT's provision on FPS. It ruled that the defendant's refusal of the claimant's entitlement to get remuneration on the loan successfully warranted by the host State would dispossess CSOB from significant protection for its credit facility and therefore violated the duty to accord FPS. The tribunal stated that, 'the State of Slovak's refusal of CSOB's right to desire from the State that SI's depletions are protected would deny CSOB against any purposeful security for the money it borrowed and consequently contravened State of Slovak's obligation to allow CSOB 'enjoy FPS' as stipulated within Article 2(2) of the BIT'...⁵⁰²

The decision in this case shows that consolidation Agreements are also covered by full protection and security standard whenever it is included in a treaty between the two contracting parties. Any denial of such covered protection deprives the investor meaningful protection and security of their investments. The tribunal went further and said that, "accordingly, it is clearly shown by this strong evidence that the clauses of CA were completely understood, unquestionable and clear to the State of Slovak Republic. Therefore, any different stance taken by Slovak Republic in this matter does not have any backing from Czech law, and it is also incompatible with Article 2 (2) of the BIT, that has been included in CA which obliges Slovak

⁵⁰² *Id* 170

Republic to guarantee FET and FPS to CA's investment in Slovak Republic's jurisdiction".⁵⁰³ In this case, the host State once again failed to provide protection to the investor's investment as stipulated in the FPS clauses in the BIT.

Another award that has gone further and accepted a right of the investor to a well organised legal system beyond the physical/police protection context bases as pointed out, but where the case failed to give protection to the investor's investment by the State, is in *Azurix v Argentina*.⁵⁰⁴ Azurix, on the terms 'when the phrase "protection and security" are 'described by "full" and without another clarification of word or adjective accompanying it', they expands, in their common interpretation, what this standard contain further than physical protection'⁵⁰⁵. In the case, a U.S. corporation won through its Argentina subsidiary (ABA). The tender was for a thirty-year licence for the supply of drinkable water and remedy of waste water and excrement in the region of Buenos Aires. ABA paid a "Canon" of \$438.5 million for the concession. From 1999 to 2001, the local authorities let political interests to impede with the tariff regime applied by ABA to charge customers for water services, debarring ABA from increasing its revenue. The local authorities also failed to accomplish the duties under the Concession Agreement in respect of the fulfilment of the infrastructure revamp works, which ensued in an algae outbreak. As a result of the epidemic, the government blamed the foreign investor and encouraged consumers to boycott payment of their water bills. Azurix then sent notification and later ceased the Concession agreement, but the local authority refused the cessation. However, after ABA filed for insolvency proceedings, the local authority rescinded the Concession alleging ABA's failure to provide the service under the concession. The Tribunal confirmed in this case that FPS could be violated it does not matter whether no physical attack or harm took place.⁵⁰⁶ The tribunal stated that 'the FPS concept does not just deal with an issue of physical protection; the stability accorded by a safety of environment is also significant looking at it from the view point of an investor'.⁵⁰⁷ The tribunal went further by stating that 'when the phrase 'protection' and 'security'

⁵⁰³ *Id* 161

⁵⁰⁴ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006.

⁵⁰⁵ *Id* at 408

⁵⁰⁶ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006, Para 406

⁵⁰⁷ *Id* at Para 406

are described by the word ‘full’ and with no other clarification of word or adjective that follows it, they expands in their common interpretation beyond physical protection’.⁵⁰⁸

The tribunal for the above reason concluded in the same paragraph 408 that since it has already been ruled that the Defendant omitted in its duty to render FET to the investor’s investment, it also holds the Defendant in violation of the FPS standard within the BIT in the matter.

This case was developed as a result of the State’s failure to follow the due process to terminate the claimant’s Concession Contract. The standard of FPS does not only accord physical protection but exceeds to stability of secure environment investment. The State of Argentina should have made its legal system available to the Claimant by following the due process so that the case will be properly investigated and decided in conformity with internal and international law before the termination of the contract, not merely asserting that the claimant failed to provide the service under the concession. In other words, if the other party wanted the standard to be restricted to physical security it should have made it aware to the other party and then clearly include it in the contract. Those difference awards indicate that in arbitration practice wording of the treaties play a significant role.

The most far-reaching awards so far have probably been *Biwater Gauff v Tanzania*⁵⁰⁹ and *Siemens v Argentina*.⁵¹⁰ In *Biwater Gauff v Tanzania*,⁵¹¹ which facts of the cases has been stated earlier, the word ‘full’ was the reason why the tribunal contemplated that the clause implied ‘a country’s warranty of protection within a secure climate, to accord physical, legal and commercial protection to investments’.⁵¹² The Tribunal re-echoed the extension of the standard to more than physical security by stating that, ‘any time the phrase ‘protection’ and ‘security’ are restricted or are described with the word ‘full’, the real and essential meaning of the FPS standard could be expanded to more than physical protection, and it will be unreasonably

⁵⁰⁸ *Id* Para 408

⁵⁰⁹ *Biwater Gauff Tanzania (Ltd) v United Republic of Tanzania*, ICSID Case No. ARB/02/25, Award, 24 July 2008.

⁵¹⁰ *Siemens A.G. v Argentina Republic*, ICSID Case No. ARB/02/6, Award, 6 February 2007

⁵¹¹ *Biwater Gauff Tanzania (Ltd) v United Republic of Tanzania*, ICSID Case No. ARB/02/25, Award, 24 July 2008.

⁵¹² *Id* Para 729

accepted to limit the concept just to one angle of protection, especially looking at the application of this phrase in a BIT, pointed at the security of commercial and financial investments'.⁵¹³

The ruling in this case even went deeper in its scope of protection because the tribunal talked about legal, commercial and financial security of investment. It was held by arbitral tribunal that Tanzania breached the obligation of full protection and security by its unwarranted and inhumane behaviours. However, in the particular case, even if no force was used, the actions the claimant disputed against, the deportation of City Water's management and the seizure of its assets were still quite closely associated to the traditional notion of physical protection.

In the case of *Siemens v Argentina*,⁵¹⁴ which lends the hypothesis that the standards of FPS expands further than physical protection to the legal security because the BIT's between the Contracting Parties defines investment to encompass intangible assets and explicitly required Argentina to provide FPS. The fact of this case is that, in 1996, Siemens A.G., a German corporation bided for the provision of services associated with immigration control, personal identification and electoral information technology systems and won the tender through its Argentinean subsidiary SITS. SITS and Argentina signed a contract to provide these services for a 6-year term that will be renewable for another 2-3 year term (investment). Under the contract a performance bond was paid to Argentina to guarantee the performance of SITS' obligations under the Contract. But prior to the election in Argentina, the provision of certain services under the contract was suspended at Argentina's order. Furthermore, as a result of the new Argentinean Government's action, other services were suspended. A new Argentinean Government sought to renegotiate the contract. Agreement was reached after the renegotiation process, but despite Siemens' efforts, no conclusion was reached. At the same time of the renegotiation, Argentine Congress enacted a new law which gives the President the powers to renegotiate public sector contracts. Siemens was issued with a new drafted proposal that was inconsistent with what was seemingly agreed previously. Siemens was notified that the "proposal" was non-negotiable. The contract was then terminated by a decree by Argentina because Siemens refused to agree to the new proposal. Siemens initiated ICSID arbitral proceedings under Argentina-Germany BIT, alleging that Argentina's action is tantamount to a violation of FPS. This unusual clear reference

⁵¹³ *Id.*

⁵¹⁴ *Siemens A.G. v Argentina Republic*, ICSID Case No. ARB/02/6, Award, 6 February 2007.

to ‘legal’ security led the tribunal to argue that the State of Argentina’s commencement of the negotiation of the contract again for the mere intention of bringing down its costs, which was not supported by any announcement of general interest, impacted on the legal protection of the investment of Siemens.⁵¹⁵ The Tribunal stated that, ‘as a common matter and on the basis of the meaning of investment, which includes tangible and intangible assets, that the duty to accord FPS is broader than physical protection and security, and that it is hard to comprehend how the physical protection of intangible assets would be reached’⁵¹⁶. The tribunal therefore held Argentina in violation of the obligations of FPS under the treaty.⁵¹⁷

This case also brings to mind the importance of the host State in making its legal system available to the covered investment before rescinding the investor’s contract. The State of Argentina failed to accord the investor legal protection for its investment therefore breaching its commitment to provide FPS to the investor as the international law requires.

In *Vivendi v Argentina*,⁵¹⁸ the Claimant Vivendi Universal, a French investor, and Compañia de Aguas del Aconquija S.A. (CAA), an Argentinean company, where Vivendi was the principal shareholder entered into a 30-year Concession Agreement with Argentine Province of Tucuman for the provision of water and excrement overhauls. In relation to the Concession Agreement, CAA made considerable investments to improve the quality of the service. The Claimants encountered increasing set back from the new government of Tucuman elected soon after the Concession Agreement was granted. The new Governor and his party opposed the privatisation and declared that the Concession Agreement is defective. The legislature adopted a resolution that proposed the Governor to enforce a unilateral price cut. Again, as a result of two episodes of epidemics caused by drinking water, government officials called for non-payment of invoices for the services provided by CAA. There were a lot of pressures from various government agencies to reduce tariffs which was agreed on the Concession Agreement. Finally, the government tried to force the Claimants to re-negotiate the agreement in order to lower the tariffs. After three

⁵¹⁵ *Id* Para 308

⁵¹⁶ *Id* Para 303

⁵¹⁷ *Id* Para 309

⁵¹⁸ *Compañia de aguas del Acomquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007.

failed attempts of re-negotiation, CAA rescinded the Concession Agreement in August 1997 but was forced by the Provincial authority to provide services until October 1998.

As a result of these facts, the Claimants initiated ICSID arbitral proceedings alleging that the provision of FPS has been violated by the Defendant. The Defendant in their counter argument said that the standard of protection and security was limited to its application to physical interference.⁵¹⁹ However, the Tribunal rejected the argument and said, ‘if the party members that entered into the BIT wanted to restrict the duty to physical intrusion they would have stated it by incorporating phrases to that extent in the clause. But where such words restriction is lacking, the ambit of Article 5 (1) must be read to cover to extend any action or courses that strip an investor and the investment of FPS. Therefore, in relation to the treaty’s particular wordings, the action and steps as well amount to FET. Such acts and courses do not need to jeopardise physical control or legally secured conditions of the investment operation.⁵²⁰ The tribunal concluded by saying that, ‘FPS can be extended beyond physical protection of an investor and its investment, since both the investor and the investment could be subjected to molestation without being physically damaged or taken’⁵²¹.

In *National Grid v Argentina*,⁵²² the dispute, such as many others is associated to measure taken by Argentina in 2002 during its financial crisis. Argentina passed laws from 1989 to 1991 that provided for the privatisation of, inter alia, its electricity sector, while it was also pegging the peso to the US dollar for a fixed exchange amount that equals one peso to one dollar. As the consequence of the those changes and through a series of corporate transactions, National Grid became a shareholder in the corporations, Transener and Transba, which were granted a 95-year concession to provide high-voltage electricity transmission services. Further to the concessions, National Grid, via Transener, made investments in the upgrading and expansion of Argentina’s electricity transmission systems. Transener was later awarded three contracts to construct, operate and maintain transmission lines in return for periodic payments from beneficiaries of the lines. These payments were to be calculated in dollars and adjusted periodically according to the US Consumer Price Index (“CPI”) and the U.S. Producer Price Index (“PPI”). Argentina,

⁵¹⁹ *Id* Para 7.4.14

⁵²⁰ *Id* Para 7.4.17

⁵²¹ *id*

⁵²² *National Grid Plc v Argentina Republic*, UNCITRAL, Award, 3 November 2008.

because of its economic crisis, amended its State's Reform and Convertibility legislations and as a result the following changes happened: Firstly, the claimant lost its right to calculate public utility tariffs in dollars and to adjust those tariffs on the basis of international price indexes. Secondly, Public services tariffs were converted into Argentina pesos at the rate of one peso to one dollar and were frozen at that rate. Thirdly, other dollars-denominated payments obligations and their adjustment by international indices became subject to those same exchange-rate restrictions. And fourthly, electricity transmission and public utility companies could not suspend or change agreement with their obligations under their concessions and licenses. National Grid asserted that these amendments destroyed the remuneration arrangement made available for the concessions and the previous regulatory structure, therefore, National Grid initiated arbitral proceedings against the Respondent for the breach of protection and constant security provision of the BIT. The Tribunal emphatically held that the 'protection and constant security' as associated with the topic of the Agreement can not go along with the insinuation that this protection is permanently restricted to physical protection of assets alone'.⁵²³

That means the UK-Argentina BIT provision guaranteeing "protection" as well as "constant security" considered to accord both for legal and physical protection.⁵²⁴ The words "protection and constant security can be interpreted to cover non-physical harms that the treaty did not in any way limit the standard to physical protection alone"⁵²⁵ The tribunal concluded that the State of Argentina has violated the obligation to guarantee protection and constant security at the equivalent date on 25 June 2005, as it breached its duty to accord FET to the investor's investment.⁵²⁶ Changes introduced in the Regulatory Framework by the Measures, which effectively dismantled it, and the uncertainty reigning ... with respect to any possible compensation on account of the impact of the Measures on Claimant's investment are contrary to the protection and constant security' owed under the BIT.⁵²⁷ Along the lines of this award, legislative alterations like in this particular situations has constituted to a violation of the obligation to accord FPS causing harm to the investment.

⁵²³ *Id* Para 189

⁵²⁴ *National Grid Plc v Argentina Republic*, UNCITRAL, Case 1:09-cv-00248-RBW, Award, paras. 187-893 3 November 2008.

⁵²⁵ *Id*

⁵²⁶ *Id* at Para 190

⁵²⁷ *Id* Para 189

In *Siag v Egypt*,⁵²⁸ the Egyptian government had sold property in Egypt to a joint stock company that was incorporated in Egypt, and was owned wholly by the Claimants who planned to develop a tourist resort. In the middle of the construction process, the Egyptian government confiscated the property. The individual Claimants then tendered a claim asserting that Egypt had violated Article 5 of Italy-Egypt Treaty (BIT), which prohibits expropriation. Meanwhile, there was an issue over the legality and the right of the claimants bringing the matter to ICSID as the Claimants held Egyptian and Italian citizenship (dual nationalities), as Article 25(2)(a) provides that “national of another contracting State” does not include any person who is also national of the “Contracting Party”, in this case Egypt. The Claimants further asserted that they made various futile appeals to the law enforcement agents demanding for the protection of their investment but to no avail. The tribunal concluded that ‘it is of the opinion that Egypt behaviour in the matter was below the level of protection expected of the claimant, both in permitting the expropriation to take place and also by failing to take measures to give back the investment to the applicant after several rulings by Egyptian courts that the government taking was illegitimate’.⁵²⁹ The tribunal in this case held that the Egyptian authorities’ failure to follow Egyptian domestic court decisions breached the duty of FPS, therefore confirming that the obligation of protection and security can be found to encompass the need to provide a legal mechanism that accords legal security to foreign investors.⁵³⁰

The most important issue to the tribunal in this case was the protection of the investors’ investment and not the issue of nationality. But this issue of dual nationalities was ignored by the tribunal. Egypt’s conduct was not up to scratch rather it fell below reasonable standard of protection that was expected of it by failing to provide protection to the covered investment. For this reason the tribunal found Egypt in contravention of the duty of FPS of Article 4(1) of Italy – Egypt BIT.

Similarly, the duty to have a well-performing mechanism of judiciary and legal solutions accessible to the foreign investor was also confirmed in *Frontier v Czech Republic*. In spite of

⁵²⁸ *Waguih Eli George Siag & Clorinda Vecchi v Ara Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

⁵²⁹ *Id* Para 448

⁵³⁰ *Waguih Eli George Siag & Clorinda Vecchi v Ara Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009, Para 448.

the fact that the tribunal did not ultimately rule that the State violated the FPS standard, however, the tribunal observed that the duty of States to provide a functioning system of courts and legal redress should be made available to the investor by the State.⁵³¹

The extension of FPS from physical protection to legal protection could also be assisted by the argument that new investment treaties encompass the protection of intellectual property rights against which physical breaches are logically excluded. This will be discussed in the digital segment of this thesis. FPS in this regard therefore would need to be extended above physical protection if the clause were not to lose its value and contents.⁵³² Notwithstanding, some awards have clearly ruled out any wider interpretation of the obligation for legal security.⁵³³

In *Yury Bogdanov v Moldova*,⁵³⁴ the Claimant under Article 2.2 of the BIT was provided with a full protection and unlimited protection for his capital investment according to the State or national law of the Republic of Moldavia. The Claimant later brought a proceeding against the Respondent alleging that the obligation standard has been violated after the State of Moldova introduced a new levy on its customs regime that prompted alteration in the Custom Authority in breach of the stabilisation clause which was not there from the beginning. In addition, the claimant asserted also that the custom regime fees imposed on the Claimant which was in an uneven proportion in contrast to the fees which applied to others under the same law on the Custom Tariffs contravened the standard.

The sole Arbitrator found that the applied law in respect of the fees which Mr Bogdanov, the Claimant expressed dissatisfaction was in infringement of the stabilisation clause law, and therefore is in breach of the FPS standard under Article 2 (1) of the agreement applicable. This ruling indicates that the obligation of FPS extends from more than physical security, to even where a host State introduced a new Custom Tax law that breached the stabilisation clause, which the investor has suffered from the hands of the host State.

⁵³¹ Frontier Petroleum Services Ltd v Czech Republic, UNCITRAL, Final Award, 12 November 2012 at Para 263.

⁵³² See, J Robbins, 'The Emergence of Positive Obligations in Bilateral Investment Treaties' (2006) 13 U Miami ICLR 403, 430; A. Newcombe and L. Paradell, 'Law and Practice of Investment Treaties-Standards of Investment Protection' (2009) Para 6.45; UNCTAD, *International Investment Agreements-Key Issues (2004) Vol. 1, 160*.

⁵³³ *Saluka Investment BV v Czech Republic*, UNCITRAL, Partial Award, (17 March 2006) Para 484; *BG Group Plc v Republic of Argentina*, UNCITRAL, Award, 24 December 2007, Para 324; *Rumeli v Kazakhstan*, ICSID Case No. ARB/05/16 Award, (29 July 2008), Para 668.

⁵³⁴ *Yury Bogdanov v Republic of Moldova*, Arbitration No. V1114/2009, Final Award, 30 March 2010 paras 77-85.

In *Parkerings v Lithuania*⁵³⁵ case, the tribunal is in equal footing or on a par with the Tribunal stand in other decisions of the obligations of the host State to accord legal security to investments under the FPS standard. The decision reached in this case advocate for the making of the judicial system available to investors in order to bring their contractual assertions for redress, and also, for the petition to be investigated thoroughly in conformity with national and international law by an unbiased and a just court. The Tribunal explained this in the following manner:

“The respondent’s duty under the Treaty was, first, to keep its judiciary available for the Claimant to bring its contractual claim, second, that the claims would be properly examined in accordance with domestic and international law by an impartial and fair court. There is no evidence – not even an allegation – that the respondent has violated this obligation.⁵³⁶ The Claimant had the opportunity to raise the violation of the Treaty and to ask for reparation before the Lithuanian Courts. The Claimant failed to show that it was prevented to do so. As a result, the Arbitral Tribunal considers that the Respondent did not violate its obligation of protection and security under the Article III of the BIT”.⁵³⁷

The Tribunal in this particular case did not explain the type of judiciary system that was operative in that country. The tribunal did not mention whether the judiciary system was corrupt and biased, or are always on strike such as in some developing countries. The truth of the matter is that it is difficult for any corrupt and biased judicial system in a corrupt country to sincerely make its legal system available for investor to seek redress for a breach of treaty obligation reposed on such State and we hope this is not the case here.

In some other cases the tribunals have continued to express that the duty of FPS is not restricted to physical protection but extends to legal security. In *Antoine Goetz and others v Burundi*,⁵³⁸ the Award in French finds a contravention of FPS standard based on the measures suspending export activities in breach of a special agreement. Also in *Vannessa Venture v Bolivia Republic of Venezuela*⁵³⁹, the tribunal held that as far as what FPS standard content is concern, it applies at least in situations where action of the third parties involving either physical

⁵³⁵ *Parkerings Compagniet As v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, 11 September 2007.

⁵³⁶ *Id.* Para. 360

⁵³⁷ *Id.* Para 361

⁵³⁸ *Antoine Goetz and others v Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award, 21 June 2012 (French) Para 209.

⁵³⁹ *Vannessa Ventures Ltd v Bolivian Republic of Venezuela*, ICSID Case No. ARB (AF)/04/06, Award, 16 January 2013 Para 223.

violence or where infringement of legal rights takes place, although it was accepted by the tribunal that FPS standard was not violated in this case. It was also altogether agreed by the tribunal in *Renee Rose v Republic of Peru*⁵⁴⁰ that the standard of FPS has been extended beyond mere physical security and has expanded to the rights of the investors.

When the further-reaching question was posed of whether an FPS clause required a preventive obligation to predict problems in bringing certain investor claims under the relevant national legal framework,⁵⁴¹ the claim was dismissed by the tribunal in *CME v Czech Republic*, as ‘absurd’.⁵⁴² A wider understanding would have allowed an investor to bring a claim for breach of contract before an investment tribunal as amounting to a breach of FPS. The dismissal of such a wide interpretation of FPS clauses matches the recent reading of the ‘fair and equitable treatment’ clause of a BIT. The Annulment Committee in *Vivendi v Argentina*⁵⁴³ held that “mere” breaches of contract, unaccompanied by bad faith or other aggravating circumstances will rarely be tantamount to a contravention of FET standard’.⁵⁴⁴ The requirement of ‘bad faith’ or ‘aggravating circumstances’, which are other ways of expressing the traditional respect of the *Neer*⁵⁴⁵ standard, some people might argue, will in most cases rule out the finding of a contravention of FET and may also be used for the interpretation of FPS clause.

However, it is very difficult to ignore the fact that foreign investor’s investment extends to legal security and other security, like commercial security, considering all the above case-law which suggest that the State’s obligation of protection with security is expanded according to legal mechanism that provides legal security to investor’s investment.⁵⁴⁶ Not only do the above authorities and commentators’ viewpoints include firm measures protecting investments but also, it provides suitable processes that qualify investors to defend their rights in so many other ways other than in only physical security. There are cases where tribunals have held the breaches of FPS by host State and most of them are reached based on violation of legal security, either by

⁵⁴⁰ *Renee Rose Levy de Levi v Republic of Peru*, ICSID Case No. ARB/10/17, Award, 26 February 2014 Para 406.

⁵⁴¹ D Wallace, ‘Fair and Equitable Treatment and Denial of Justice’. 669.

⁵⁴² *CME Czech Republic B.V v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001 Para 354.

⁵⁴³ *Compania de aguas del Acomquija S.A. and Vivendi Universal S.A. v Argentina*, ICSID Case No. ARB/97/3, Decision on annulment, 3 July 2002.

⁵⁴⁴ *Id* Para 101.

⁵⁴⁵ *LFH Neer and Paulin Neer v United Mexican States* U.S.-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60.

⁵⁴⁶ For different view see JD Salacuse, *The Law of Investment Treaties*, 2008-10 (OUP, Oxford 2010) pg 213-16.

enactment of law that resulted to cancellation of contracts or the inability of the state to make adequate legal system available for the investors to vindicate their rights, etc, as has been demonstrated in the following cases above, for example, CME,⁵⁴⁷ Azurix,⁵⁴⁸ ADC,⁵⁴⁹ Siemens,⁵⁵⁰ Biwater,⁵⁵¹ National Grid,⁵⁵² Siag,⁵⁵³ Yury,⁵⁵⁴ and Antoine.⁵⁵⁵ These cases demonstrate that full protection and security has really gathered momentum and that the standard provides legal and economy security to foreign investors apart from physical security. However, it is equally right to say having examined a whole lots of these FPS case laws that foreign investors' investments are not fully and adequately protected by the States and this lacuna that exists must filled. This can be achieved if arbitral tribunals will be more focus by bring the States culpable for breaches of FPS obligation. As we can see from the case laws foreign investors are suffering immense harms in hands of the host States.

4.4 The Role of Domestic Judicial System and the Need to Resort to Domestic Court in Investor-State Dispute

The question that may be asked is that why is it relevant for a host State to be obligated to provide effective local court systems to investors within its territory when it is BITs that cater for investment arbitration? The answer to the question is not far-fetched. First off, where there is a vacuum in a treaty to the opposite, an investment dispute between a country and an alien investor would sometimes supposed to be resolved by the courts of the host country. The rules that govern conflict of law will usually direct towards these courts, because the matter is possibly to have a direct link to the country where the investment is run. This is so because within conventional international law, prior to an international petition or claim being initiated in international litigations by a representative of, or in a proxy for an investor, such an investor ought to have depleted the local remedies that the host country's local courts has provided or

⁵⁴⁷ *CME Czech Republic B.V v Czech Republic*, UNCITRAL, Partial Award, 13 September 2001.

⁵⁴⁸ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006.

⁵⁴⁹ *ADC v Republic of Hungary*, ICSID Case No. ARB/03/16, Award, 2 October 2006.

⁵⁵⁰ *Siemens A.G. v Argentina Republic*, ICSID Case No. ARB/02/6, Award, 6 February 2007.

⁵⁵¹ *Biwater Gauff Tanzania (Ltd) v United Republic of Tanzania*, ICSID Case No. ARB/02/25, Award, 24 July 2008.

⁵⁵² *National Grid Plc v Argentina Republic*, UNCITRAL, Award, 3 November 2008

⁵⁵³ *Waguuh Eli George Siag & Clorinda Vecchi v Ara Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

⁵⁵⁴ *Yury Bogdanov v Republic of Moldova*, Arbitration No. V1114/2009, Final Award, 30 March 2010 paras 77-85.

⁵⁵⁵ *Antoine Goetz and others v Republic of Burundi (II)*, ICSID Case No. ARB/01/2, Award, 21 June 2012 (French).

under the treaty on forum choice for investment dispute in the host country and such a local court is expected to be unbiased.

And it is also the case that, in a situation in which permission has been granted to investor-State arbitration, there would no longer be the need to exhausting domestic remedies. The ICSID Convention under its Article 26 makes it abundantly obvious that a country could make the depletion of domestic remedies a prerequisite of agreement to adjudication but that alternative is barely always employed. Also, tribunals in a number of cases have demanded an effort to seek remedy in local courts not in the guise of an issue of territory or admissibility rather as a proof that the appropriate principle under international law truly had been breached. In *Waste Management case*,⁵⁵⁶ the tribunal has recounted this fact in the following terms, ‘... in this regard the concept of exhaustion of domestic remedies is embodied into the substantive standard (i.e., right and duties in civil law, and crimes and punishments in criminal law) and is not just a court procedural requirement to an international claims’.⁵⁵⁷ However, it must be said that it sometimes depends on what the BIT governing the particular investment protection says. A lot of BITs stipulate that prior to a foreign investor to initiate a proceeding in the presence of international tribunal such investor must first seek settlement in the presence of the host country’s local courts for a specific duration of time, most usually, eighteen months,⁵⁵⁸ as also stated in Article 10(2)(b) of the Argentina-German BIT 1991

4.5 The Fork in the Road Provision

Secondly, the other way by which BITs occasionally make mention to local court is the supposed ‘Fork in the Road clause’.⁵⁵⁹ The Fork in the Road provision stipulates that an investor must make a choice between the lawsuits of claims within the host country’s local court, or via international arbitration and that once that option is made, is final. Alien investors are frequently drawn to domestic judicial disagreements of one kind or the other during the period of investment ventures. Nevertheless, not all appearances in the presence of a domestic court

⁵⁵⁶ *Waste Management v Mexico*, ICSID Case No. ARB(AF)/00/3 Award, 30 April 2004, 43 ILM 967 (2004)

⁵⁵⁷ *Id* at Para 97

⁵⁵⁸ For more detail, see C. Schreuer, ‘Calvo’s Grandchildren: The Return of Local Remedies in Investment Arbitration’ (2005) 4 *Law and Practice of International Courts and Tribunals* 1, 3-5.

⁵⁵⁹ See Article 1121 of NAFTA

reflects an option that would exclude international arbitration in a BIT, especially where the appearance to the local court was made as a result of breached of contractual claims and not as a result of treaty claims, this will not prevent submission of treaty claims to arbitration.⁵⁶⁰

4.6 Selection of Local Courts in Contracts

The rulings of many ICSID arbitrations have ruled that since claims for contract are separate from treaty claims, even where there was or presently was a choice to the domestic courts for contravention of contract, this never would have halted lodgement of such treaty claims to international adjudication.⁵⁶¹ In contract, an investor can bring litigation claims to domestic court of the host State, which is conditionally upon the choice of contractual forum clause, and can also bring treaty claims under an international arbitration tribunal, which are unaffected by such clauses, as the contractual preference of domestic courts is limited to breaches of the individual contracts.⁵⁶² The difference between treaty claims and contract claims has emerged in several investment adjudications. The defendant's (State) disapproval that the matter merely comprises contract claims and the applicant's demands that treaty prerogatives are also included have turned out to be a habitual characteristics of countless new cases. As a matter of fact, the difference between treaty claims and contract claims can not be a simple one at all times. A specific commission of an act by a host country could also amount to a violation of contract which will have to be dealt with in the local court of the host State and also as a breach of international law which will have to be settled by international arbitrary jurisdiction. The investor-State Dispute is beyond the ambit of this thesis but is worth mentioning for clarification of dispute jurisdictions' sake.

4.7 Review of Domestic Court Decisions by International Tribunals

An international tribunal will evaluate the domestic court's decision since it is obvious that a State is responsible for the actions of its judiciary⁵⁶³ and a violation of investor's right that may

⁵⁶⁰ *CMS v Argentina*, Decision on Jurisdiction, 17 July 2003, 42 ILM 788 (2003), 7 ICSID Report 494, paras 77-82.

⁵⁶¹ *Id.* Para 80.

⁵⁶² *Id.* at Para 70-76.

⁵⁶³ See ILC Articles on State Responsibility, Article 4.

happen as a result of the actions of the domestic courts.⁵⁶⁴ The typical case would be a denial of justice which is well recognised under customary international law.⁵⁶⁵ Almost by definition, denial of justice would be perpetrated by domestic courts. In *Azinian v Mexico*, the tribunal defined denial of justice as when the appropriate courts decline to consider a proceeding, if they treat it with unwarranted procrastination, or if the courts deliver judgment in a grave insufficient manner ... and the fourth kind of denying people justice is when there is obvious and spiteful abuse or misuse of the law.⁵⁶⁶

Denial of justice encompassing other failings in domestic courts will also be contrary to a number of standards embodied in treaties for the protection of investors, this also includes FPS standard. The 2004 of United States BIT Model specifically explains that the fair and equitable treatment which sometimes overlaps with FPS in BITs includes protection against denying investors justice and gives assurance for the following of due process. Under Article 5(2) (a) of the United States Model BIT 2004, it states that, ‘FET comprises the duty not to refuse anyone justice in civil, criminal, or governmental adjudicatory hearings in conformity with the practice of due process incorporated in the main legal system internationally’.⁵⁶⁷

There are authorities to the influence that the FPS treaty standard⁵⁶⁸ expands to more than physical harm protection and needs legal security in order to safeguard the foreign investor including protection by domestic courts.⁵⁶⁹ Therefore, it is explicit that an investment tribunal may assess the legality of decisions of domestic courts and that it may hold the State responsible for any breaches of international standards perpetrated by its courts.

⁵⁶⁴ See, A. Bjorkund, ‘Reconciling State Sovereignty and Investor Protection in Denial of Justice Claims’, 45 Virginia Journal of International Law 809 (2005), *Duke Energy v Peru*, Decision on Jurisdiction, ICSID Case No. 1 ARB/03//28, 1 February 2006, paras. 160-162, 165

⁵⁶⁵ Juan Paulsson, Denial of Justice in International Law (2005).

⁵⁶⁶ *Azinian v Mexico*, Award, 1 November 1999, 5 ICSID Reports 272, paras. 102, 103.

⁵⁶⁷ Article 5(2) (a) of the United States Model BIT 2004

⁵⁶⁸ See C. Schreuer, Full Protection and Security, Journal of International Dispute Settlement, Vol. 1, No. 2 (2010).

⁵⁶⁹ *Elettronica Sicala SpA (ELSI) (United States of America v Italy)*, ICJ Reports 1989. P. 15, Para. 109; *Ceskoslovenka Obchodni Banka A.S. v The Slovak Republic*, Award, 29 December 2004, 13 ICSID Reports 181, Para. 170; *CME v Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Reports 121, at Para. 613; *Azurix Corp. v The Argentine Republic*, Award, 14 July 2006, 14 ICSID Reports 374, paras. 406, 408; *Siemens v Argentina*, Award, 6 February 2007, 14 ICSID Reports 518, Para. 303. For contrary opposition see *Suez, Sociedad General de Aguas de Barcelona and Inter Aguas Servicios Integrales del Agua v Argentina*, Decision on Liability, 30 July 2010, paras. 152-173.

Some of the non-ICSID awards, for example, Awards originating from other arbitration bodies such as the ICC, the LCIA or the Arbitration Institute of the Stockholm Chamber of Commerce also as *ad hoc* arbitration under the UNCITRAL Rules are likely to review procedures by the courts of arbitration forum. The same also is applicable to arbitration within the ICSID Additional Facility⁵⁷⁰. Contrary to ICSID awards, these awards are not covered from national law and their review, acceptance and implementation is governed by national law of the place of arbitration and by any applicable treaties including the 1958 [New York] Convention on the Recognition and Enforcement of Foreign Arbitral Awards. This means that a non-ICSID ruling will be subject to annulment of proceedings that the national law or court of the place of the arbitration may provide,⁵⁷¹ particularly where those decisions amount to bias or denial of justice. It also means that in proceedings before a domestic court for the award's enforcement, the award will be subject to the reasons for non-enforcement listed in Article V of the New York Convention. This happens where the State's justice and administrative system has failed that particular investor by making the investor being worse or even more unsuccessful than in all other cases. For example, it can apply in a situation where the host State has accorded an alien investor's investment treatment a favour to a smaller extent than the one which it has accorded to its national investors, known as 'national treatment', by failing in its action to provide legal protection under the obligation of FPS clause embedded in a BIT.

4.8 Requirements of Environmental Law, Human Rights, and Child Labour

There are public policies considerations that can drives host States to context the obligation of the principle of FPS in BITs in international investment law against investors while investing overseas which we did not find in any of those FPS case laws that the host States have contravened above. However, the duty to protect will also refers to the country's positive duties to take preventive measures to mitigate or stop contraventions by non-State actors, such as

⁵⁷⁰ The Additional Facility Rules can be access at ICSID website:
<<http://www.worldbank.org/icsid/facility/facility.hmt>>.

⁵⁷¹ See e.g., *CME v Czech Republic*, Judicial Review, Sweden, Svea Court of Appeal, 15 May 2003, 9 ICSID Reports 439; *Occidental Exploration and production Company v Ecuador*, England, High Court, Queen's Bench Division, 29 April 2005, Court of Appeal (Civil Division), 9 September 2005, 12 ICSID Reports 104, 129, High Court, Queen's Bench Division, 2 March 2006, Court of Appeal (Civil Division) 4 July 2007, [2006] EWHC 345 (Comm); *Nagel v Czech Republic*, Judicial Review, Sweden, Svea Court of Appeal, 26 August 2005, 13 ICSID Reports 96.

foreign investors within and pertaining to corporate conducts. These measures can take place if foreign investors refuse to protect and respect environmental law, obey human rights, and prohibit child labour. In this case, host States will have no option but will find it absolute necessary to enact laws to compel foreigner investors to comply with these measures and regulations. However, host States while imposing such laws that are absolutely necessary to fight against such illegitimate activities that emanate from investors must also endeavour to apply the principles of due diligence, reasonableness, and proportionality while enacting and executing such laws, so that they will not breach the obligation of the standard of FPS that accord protection to investments which we have seen occurred frequently in the case laws that we have examined in this thesis. Or the State may even be cut up with abuses of human rights against foreign investors. It is undoubtedly the case that in respect of the involvement by arbitral tribunals in issues concerning public practices, it is salient to look attentively at the reality that host countries can alter legislation and the reality of the situation could have been altered after the investment and the investor were first enticed. In this regard, there seems to remain a settled situation by which modifications are indispensable and inevitable, and regulatory steps could be contemplated, in as much as the country does not defeat the legal, fair and sensible expectations of the foreign investors and the investments. This was observed in the case of *EAS Summit v Hungary*, where the tribunal held that the obligation of the States on FPS “can not protect against a country’s rights to enact law or regulate in a such a way which may have adverse effect on a claimant’s investment, provided that the country behaves properly in the situations and with a viewpoint to obtaining objectively rational populace policy aims”.⁵⁷² This means that a host State also has an obligation upon itself to prevent polluters of its environment, prevent human rights abuses, and prohibit child labour by the enactment of laws.

4.8.1 Host States Environmental Law Measures

Host States can later put regulatory measures in place that did not exist when the investor first arrived. Also, there is an international clamour from non-governmental organisations demanding for responsible conduct from multinational companies, when investing particularly in countries with slack environmental laws where the emission is high. For this reason, the OECD Guidelines

⁵⁷² *AES Summit v Argentina*, ICSID Case No. ARB/07/22, Award, (23 September 2010) para13.3.2.

for Multinational Enterprises to Protect Human Rights and Social Development was signed in May, 2011, so that multinational companies can play a deciding factor in environmental development of countries. It also comprises new proposals on human rights abuses and company responsibility for their chain supply. The guidelines also promote the constructive inclusion that corporations investing in foreign States can make to the environment of those communities, and have appropriate due diligence process in place to make sure this happens. However, the observance of these guidelines is not legally binding but just a mere ordinary suggestion. Since it is not a compulsory instrument many multinational companies have taken advantages of it by refusing to obey this guidelines. Foreign investors should promote the investment policy framework for sustainable development which has been elaborated by the United Nations Conference on Trade Development; and the Model International Agreement of Sustainable Development. There is the need to incorporate these measures to FPS clause in BITs to enforce and force mega companies and foreign investors to heed to them.

4.8.2 Measure for the Protection of Human Rights and Child Labour

There is also an existing debate regarding the duty of corporations investing overseas to promote and respect human rights, and it has been accepted now that agreement is at least, not to hinder human rights when doing business in foreign countries. For example, “the UN Global Compact Programme....has map out two different duties of companies concerning issue of human rights. First, is to accord respect to human rights in their area of influence; and secondly, to keep away from being involved with others in an unlawful activities in human rights abuses.⁵⁷³ The particular circumstances that are connected to the FPS standard cannot be more visible than in human rights protection. Even where the host State in its capability and incapability in providing FPS in relation to these situations, the summary is that the described international standard concerning human rights and prohibition of child labour must be recognised and respected. There can not be enough tangible reason for investors to develop unlawful practices against human rights, child labour or other illegalities in the territories where the investment are situated. Also, there can not be any prudent and justifiable reason for host States not to apply reasonable steps of prevention which a well-governed government is expected to apply in all circumstances to

⁵⁷³ Surya P. Subedi, *International Investment Law: Reconciling, Policy and Principle*, (2008) at p. 170

thwart investments from being harmed. Foreign investors' duties must include and inspiration of minimum standard of treatment in international law. In this regard, investors investing within the host States and beyond should give respect to human rights in their domain of influence and prevent themselves directly or indirectly in human rights abuses and child labour. The failure by the investors to abide to the recommendation such as that of the OECD principles can drive host States to context international law, especially in FPS standard in BITs. The full detail of this narrative is shown in chapter 8 of this thesis.

4.8.3 The United Nations Guiding Principles on Business and Human Rights 2011

Apart from the New OECD Guidelines for Multinational Enterprises to Protect Human Rights and Social Development and “the UN Global Compact Programme that have been mentioned above to tackle the these issues, the obligation of countries to govern company behaviour is the topic of the UNGPs on Business and Human Rights 2011.⁵⁷⁴ The framework of obligations to respect, protect and remedy is connected to due diligence expected from corporations. There is corporate due diligence to accord respect to human rights by foreign investors. However, international human rights regulation employs binding legal duties directly on countries alone. In spite of numerous endeavours, and various statements put by various human rights treaty corpuses, to employ these duties on third parties or non-State actors, and not on the State alone, the international human right mechanism has not yet developed this area. Nevertheless, there are few developments within the department of the duties of companies that show a way forward, and this encompasses contemplations of due diligence.

The United Nation Human Rights Council in 2011 ratified the Unite Nations Guiding Principles on Business and Human Rights (UNGPs),⁵⁷⁵ which been created by Professor John Ruggie as Special Representative of the Secretary-General on the matter concerning Human Rights and Transnational Corporations and Other Business Enterprises (SSRG). These developed a mechanism of three “pillars”, being a country obligation to protect human rights, a company

⁵⁷⁴ See account of the Special Representative of the Secretary-General on the matter concerning human rights and transnational corporations and other business enterprises, John Ruggies: Guiding Principles on Business and human rights: Implementing the United Nation ‘Protect, Respect and Remedy’ Framework, UN Doc A/HRC/17/31(21 March, 2011) (UNGP 2011)

⁵⁷⁵ *SSRG, Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework*, UN Human Rights Council, UN Doc. A/HRC/17/31 (21 March, 2011).

responsibility to accord respect to human rights, and to give access to remedy. Significantly, the SRSG made it clear that companies (called “business enterprises”) may abuse every kind of human rights – economic, social, cultural, civil, political, and collective – and that every commercial enterprise, it does not make different their magnitude, type, location, must be subject to the framework and Guiding Principles.

The notion of due diligence is mentioned all over in this second pillar,⁵⁷⁶ with Guiding Principle 15 as one of the underlying fundamental principles, providing as follows:

- In order to keep their obligation to respect human rights, business or commercial enterprises must have policies in place and procedures pertinent to their size and circumstances, encompassing:
 - (a) a policy dedication to meet their obligation to respect human rights;
 - (b) a human rights due diligence procedure to recognize, thwart, reduce and account for how they confront their effects or influence on human rights;
 - (c) Procedures to ascertain the remediation of whichever adverse human rights effects they provoked or to which they caused.

Guiding Principle 17 to 21, that provide the narrative of the practical measures that business enterprise must undertake to commission this obligation, emerge within the heading “Human rights due diligence.”. These measures encompass having a human rights principle; evaluating human rights effects of commercial activities, bringing together those values and discoveries to large company cultures and administrative mechanisms; and tracking as well as announcing accomplishment or performance.

This notion of due diligence is interpreted by UN as the following:

- This type of steps of prudence, activity, or assiduity, as is correctly anticipated from, and commonly apply by, a reasonable and wise [individuals or enterprise) under the specific situations, not assessed by any absolute standard, but based on the comparative facts of the particular matter. In relation to the Guiding Principles, human rights due diligence

⁵⁷⁶ This abstract is depended on R. McCorquodale, ‘International Human Rights Perspective on the UN Framework and Guiding Principles on Business and Human Rights’ in L. Blecher, N. Kaymar Staffor and G. Bellamy (eds) *Corporate Responsibility for Human Rights Impacts: New Expectations and Paradigms* (2014, forthcoming).

encompasses an ongoing administrative process which a reasonable and wise business or enterprise needs to take, considering its circumstances (encompassing sector, operating context, magnitude and alike components) to meet the obligation to respect human rights.⁵⁷⁷

This seems to be a combination of the international human rights legal duty of due diligence in connection to the conducts of third parties or non-States actors,⁵⁷⁸ and the common voluntary business practice of due diligence.⁵⁷⁹ The general fundamental statement in principle 11 of the Guiding Principle is that "Business enterprises must show respect to human rights. That means, they must refrain from infringing on the human rights of others and must confront unfavourable and harmful human rights negative effects with which they are connected.

There are so many cases, such as *Chiquita Brand*, *Balfour Beatty's*, and *Premier Oil's* that have been brought to the public domains by the media indicating the unsuccessfulness of these types of measures proposed by the States and other international organisations, like the OECD Guidelines for Multinational Enterprises to Protect Human Rights and Social Development. This is the reason why it is better to incorporate these measures in clause of FPS within the BITs of international investment law urging foreign investors to observe them to help host States achieve this goal. The detail analysis of this narrative is shown in chapter 8 of this thesis.

However, despite the unsuccessfulness of States to implement these types of measures as recommended by some international bodies, there is a particular case law of international investment law that gives support to host States and other international bodies who have been advocating for stricter regulatory measures of illegal activities displayed by foreign investors. In *PMI v Australia*,⁵⁸⁰ Australia enacted the Tobacco Plain Packaging Act, a tobacco control legislation that removed brands from cigarette packs on 21 November, 2011. On the very same day, Philip Morris Asia Limited (PM Asia) served a Notice of arbitration against Australia under the Hong Kong/Australia BIT, claiming that the plain tobacco packaging amounted to an

⁵⁷⁷ UN Human Rights Office of the High Commissioner, *Corporate Responsibility to Respect Human Rights: An Interpretive Guide* (2012), at p. 4

⁵⁷⁸ See *Velasquez Rodriguez v Honduras*, (1989 28 ILM 294)

⁵⁷⁹ See, for example, *Jeffery S. Perry & Thomas J. Herd, Mergers and Acquisitions: Reducing M&A Risk through Improved Due diligence*. (2012) 32 *Strategy and Leadership* 12, p. 12

⁵⁸⁰ *Philip Morris Asia Limited v The Commonwealth of Australia*, UNCITRAL, PCA Case No. 2012-12

expropriation of its intellectual property rights. Australia first considered plain packaging of cigarette packs in 1995, but the initiative gain momentum ten years latter after the World Health Organisation (WTO) Framework Convention on Tobacco Control entered into forces for Australia. State parties to this treaty are under a duty to develop and implement tobacco control measures, including comprehensive bans on advertising, promotion and sponsorship.

In 2009, Australian National Preventive Health Taskforce proposed plain packaging of tobacco products, and a bill by the State to remove brands, trademarks and logos from tobacco packaging was initiated in the Australian Senate. A heated argument regarding plain packaging legislation ensued in Australia all through the following months. Philip Morris strongly challenged the recommendation all through the whole legislative process, voicing his “concerns over the unconstitutionality” of the measure,⁵⁸¹ and preparedness to oppose it by legal proceedings if the need be. In November 2011, the Australian Senate at last voted in consensus to approve the bill. Australia then passed the law on the Tobacco Plain Packaging Act and applied the ensuing laws.

In summary, the tribunal ruled that Philip Morris committed abuse of rights because it changed its company structure to benefit from BIT protection when a particular dispute against Australia about tobacco plain packaging was reasonable.

Therefore, Australia won the internal legal battle to uphold its world leading control measures, with Phillip Morris failing its long-running efforts to challenge plain packaging laws under bilateral investment treaties with Hong-Kong. The decision could give other host States greater confidence to follow Australia lead in banning tobacco company trademarks on cigarette packets and moving to dull, uniform layout controlled by graphic health caution advice. The outcome of this case might as well encourage other host States to challenge illegal activities by mega corporations that will force multinational companies to obey environment law, respect human rights, and provide prohibition for child labour, and the best place to include these measures and guidelines is in FPS clause in the BITs under international investment law.

However, and most importantly, while host States are craving for attempts to enact regulatory measures to curb illegal activities and to enforce them on foreign investors in their territories

⁵⁸¹ *id.*, para 110

they must also be wary and precautionous to ensure they do not contravene the obligation of standard of FPS in BITs reposed on them by international law to provide security to investments. Host States must ensure the application of the duty of due diligence, proportionality, and reasonableness in pursuit of such course. This is because protection and security of investors' investments is ultimate and very paramount to this thesis, and this is exactly what this thesis is advocating for.

4.9 Conclusion

In sum, this section has proven by the consideration of the above authorities that foreign investments are by law protected against the adverse effects of physical violence or damages that are attributable to private parties⁵⁸² or from activities which can emanate from the host State and its organs.⁵⁸³ Additionally, it has also been proven by jurisprudence in this section that the standard of FPS is not solely designed to provide physical protection to investments as some States and tribunals believe. It also protects investors against actions like: mobs, insurgents, rented thugs and militias, also as affordance of legal protection to investors which encompasses cancellation of contracts by promulgation of legislations by the host countries. In this light, it is coherent to believe by the various considered case laws that the host State are culpable for the actions or inactions of its organs and the third parties that have contributed to infringement of foreign investors and their investments as stipulated in the international law on State Responsibility and mostly, as it is required in FPS standard clause under International Investment law. The frequent failures and contraventions by the States to provide full protection and security is so glaringly clear in many case laws that we have examined above in this chapter. This has demonstrated to a very large extent that there is a huge gap in the protection of investors' investments in the host State territories and this gap that exist must be filled by the States and arbitral tribunals in order provide foreign investors with necessary protection and security that their investments need. And finally, this section highlighted and addressed the policy considerations that might lead the host States to contest international investment law, such as failures by companies investing overseas to promote and respect human rights, to obey

⁵⁸² see HE Zeitler, 'The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Cause by Private Actors' (2005) 3 Stockholm Int'l Arbitration Rev 1

⁵⁸³ *Parkerings Compagniet AS v Republic of Lithuania*, ICSID Case No. ARB/or/8, Award, (11 September 2007) n 4, Para. 355.

environmental laws, and the prohibition of child labour. It has been proven that although States are obligated to provide investors and their investments with both physical and legal security, host States can equally enact laws so as to prevent foreign investors from exhibiting obnoxious behaviours and illegitimate activities which can be harmful to the citizenry and the States as been demonstrated in the ruling by arbitral tribunal in *PMI v Australia* case above. However, it is better to insert such obligation in FPS in BITs.

CHAPTER FIVE

THE OBLIGATION OF FPS STANDARD AND IMPOSITION OF STRICT LIABILITY TO HOST STATES

5.1 Introduction

This chapter addresses obligation of strict liability to the host State. It explains whether the obligation of FPS imposes strict liability to the host State, or rather places only a duty of due diligence to States. The chapter will start by giving a brief definition of what a strict liability is all about. It will be proceeded by stating that the obligation of FPS does not impose a strict liability to the host States, rather an obligation of due diligence. That means that, the states need to exercise reasonable measures of prevention which a good government must practice in all circumstances. This notion of strict liability will be elaborated further under the headline of history of due diligence. The chapter will try to link due diligence with the international Law Commission's on Article of State Responsibility where a State's wrongful acts can be attributable to the State, and the wrongful acts tantamount to a contravention of an international obligation of that State. Many case law that deals with rule of due diligence will be surveyed and be explored to evaluate how arbitral tribunals have addressed the issues of strict liability and due diligence in relation to the standard of FPS to cover investments.

5.2 What is Strict Liability?

There are so many definitions of Strict Liability, but this thesis will focus on the definition used in business dictionary which defines Strict Liability as follows: The legal definition of strict liability is 'absolute legal responsibility for an injury that can be imposed on the wrongdoer without proof of carelessness or fault'. Strict liability, also known as absolute liability, is the lawful responsibility for damages, or injury, even if the individual found strictly culpable was not at fault or negligence.⁵⁸⁴

⁵⁸⁴ See, legal dictionary *available* at <http://www.Legal-dictionary.the freedictionary.com/strict+liability>

5.3 Obligation of Strict Liability on FPS

There is a general consensus that the duty to accord FPS does not impose strict liability upon the host State. Instead, the standard imposes a duty of due diligence, whereby the state is required to exercise an “appropriate level of care”.⁵⁸⁵ Dolzer and Stevens pointed out that FPS standard places a general duty upon the host country to apply an appropriate measure of due diligence in order to protect foreign investment contrary to the establishment of absolute liability, which will cause the host country to be culpable for any kind of harm to the investment notwithstanding if the harm is generated by private persons whose conducts could not be ascribed to the State.⁵⁸⁶ This has been widely established in international law and in the case law in different arbitral rulings. However, before engaging fully with arbitral rulings on due diligence that deal with full protection and security standard it will be appropriate to look at the origin of the concept of due diligence under international law.

5.4 The Interpretation of Principle of Due Diligence

The issue regarding the stage by which the conduct creating liability, that is, the omission to accord security against the conduct of a third party, does truly provoke the country’s duty to perform, is of great importance. It is indicated throughout the thesis that the universally acknowledged standard, in both traditional international law or in the court rulings of investment law, is whether the country has contravened its duties of due diligence. However, this practice needs to be evaluated further.

5.5 The History of Due Diligence in Relation to International Law

Due diligence in international law appeared as a concept to arbitrate interstate relationships where there is a big change. This crucial concept was laid down in the 17th century by Grotius,

⁵⁸⁵ Mahnaz Malik, “The Full Protection and Security Comes of Age: Yet another challenge for states in investment treaty arbitration? Available at: http://www.iisd.org/Sites/default/files/pdf/2011/full_protection.pdf.

⁵⁸⁶ R. Dolzer & M. Stevens, “*Bilateral Investment Treaties* “. (Nijhoff, The Hague 1995) 61. See also R. Dolzer and C. Schreuer, “*Principles of International Law* (OUP, Oxford 2008) 149-150.

⁵⁸⁷ however the concept did not take shape until the 19th century, and it was implemented as an obligation and a constraint upon State behaviour.

Considering the large movement of nationals on all parts of jurisdictional borders, it was now agreed that States were under a responsibility to take rational measures to protect foreigners in their jurisdiction.⁵⁸⁸ It was observed in the case of *SS Lutos*,⁵⁸⁹ by Justice **Moore** when referring to a ruling reached by the Supreme Court of the United States in 1887 regarding the faking of foreign legal tender,⁵⁹⁰ “it is completely accepted that a nation is obligated by law to employ due diligence in preventing the execution in its colony of fraudulent conducts against another State or its citizens”.⁵⁹¹

Also, with the inception of strong beliefs of State supremacy presented the acknowledgement that countries were required to defend the protection of other countries at the times of conflicts and peace. In the case of *Alabama Claims Arbitration*,⁵⁹² the tribunal laid down the standard of international due diligence required of neutral States in order to meet up with their duty of neutrality.⁵⁹³ By using the accepted standard held in Article 6 of the 1871 Treaty of Washington,⁵⁹⁴ the question that was raised was whether Britain had acted with due diligence so as to comply with its obligations of neutrality. The UK government contended for a due diligence that is limited to national standard, arguing that an absence of due diligence indicated “an omission to employ...such diligence as States mostly apply in their national matters, and may appropriately be anticipated to exercise in issues of international concern and obligation”.⁵⁹⁵ The tribunal however, accepted to the more précising standard asserted by the United States that standard of

⁵⁸⁷ Grotius contemplated that a State could get involved in offences of personals offences via practices of *patientia* (where a society or its head is aware of offences perpetrated by a citizen but refuse to thwart it when it is possible and ought to be) and *receptus* (where a State or a leader refused to penalise or repatriated refugees). See Jan Arno Hessbruegge ‘The Historical Development of the Doctrines of Attribution and Due diligence in International Law’ (2003-2004) 36 *New York University Journal of International Law* (2002).

⁵⁸⁸ Riccardo Pisillo-Mazzeschi, ‘The Due Diligence Rule and the Nature of the International Responsibility of States’ in Rene Provost (ed.), *States Responsibility in International Law* (2002).

⁵⁸⁹ *SS Lotus (France v Turkey)* 1927 PCIJ (Ser. A) No. 10.

⁵⁹⁰ *United States v Arjona* (1887) 120 US 479.

⁵⁹¹ *Id* at 479

⁵⁹² *Alabama Claims Arbitration (United States/Great Britain)* (1872) 29 RIAA 125, p. 129.

⁵⁹³ Bin Cheng, *General Principles of Law as applied by International Courts and Tribunals* (1953) 221-222.

⁵⁹⁴ Agreement of Great Britain and the U.S. for the Amicable Settlement of all Causes of Differences among the Two Countries, ratified 8 May 1871, [1870-1871] 61 BSP 40.

⁵⁹⁵ Claim submitted on the Side of the Authorities of Her Britannic Majesty in writing concerning Foreign Relations of the United States 1872 part 2 vol. 1, p. 412.

due diligence needs a neutral State to react in precise level to the threats to which hostility and aggression may be revealed from any omission to accomplish duties of neutrality.⁵⁹⁶ In the beginning, due diligence was not a rigid concept, its content differed based on the situation of the matter. Significantly, the Arbitral Tribunal refused the claim by Britain that it was restricted by English administrative law from intervening with individual actions, and confirmed and supported the international law superiority and supremacy.⁵⁹⁷ Taking into account of Britain's originally refusal to yield to arbitration, based on the premises that Britain was the only protector of her personal integrity,⁵⁹⁸ the *Alabama Claims* case was indeed of great importance in attributing State liability concerning personal conducts transpiring inside its jurisdiction, and conditioning such culpability by making reference to an internationally interpreted due diligence principle. This case may also be interpreted to include attributing States' responsibility on to third parties action on FPS in BITs under international investment law where such action caused harm to foreign investors and their investments within the host State territory.

Between the nineteenth and twentieth centuries, the concept of due diligence had specific importance in relationship to the security of foreigners. In Vattel's book titled: *the Law of Nations*, which has already been mentioned in chapter two of this paper, Vattel had affirmed the concepts of traditional international law that a State or a ruler, in giving aliens the permission of access to his country, "accepts to defend them like his own citizens and to ensure that they benefit, as long as relies upon him, ideal society".⁵⁹⁹ This assertion encompasses an obligation by the State to protect nationals against individual unlawful conducts and as well an obligation to bring legal proceedings and penalise those that inflicted damage to foreigners and to their investments. This idea was being tried out in the 19th century in connection with the sizeable group of aliens and large-scale alien property businesses within the topographical region of developing States. Obviously, it was impossible then for the emerging nations to be held liable for each personal or third party conduct that breached the rights of aliens inside its terrain and the issue turn out to be, what level of security could be anticipated. The same impossibility that various tribunals still express today is that absolute liability should not be placed on host States

⁵⁹⁶ *Alabama Claims Arbitration* (United States/Great Britain) (1872) 29 RIAA 125, p. 129.

⁵⁹⁷ *Ibid.* p. 131

⁵⁹⁸ CC Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (1922) vol. 2 at p. 120.

⁵⁹⁹ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law* (1758) reprinted in *3 Classics of International Law* 145 (1916).

for breach of duty of FPS, rather than due diligence. One of the reasons could be that in doing so it might open up a floodgate of claims by aggrieved investors against host States and such claims will have a significant negative financial impact on a host State, especial those with limited capacities or proportionality of resources.

Whereas all the complaints regarding the reception and behaviour towards foreigners were formerly done based on the support of international relationship of nations for their mutual benefits and the maintenance of friendly relations, States slowly began to add in their treaties with other countries clauses demanding the security of their citizens and their investments.⁶⁰⁰ Based on this, countries started to employ the use of Arbitral Tribunals and Claim Commissions to pursue their plea against compensation for damages incurred by their citizens, which is today not different from the one applied by tribunals in FPS matters. It is as a result of these procedures mostly carried out as juridical legal proceedings with verdicts made by reference of the practices and concepts by international law, that has provided ample of the original case laws of due diligence.

A case instance is *Wipperman* case, where it was held that no country is culpable for the conducts of persons “so far as sensible care is applied in trying to impede the eventuality or repeat of such wrongful acts.”⁶⁰¹ The case was associated with physical harm suffered by a national of the United States, which was inflicted on him by indigenes in a faraway region of Venezuela. The Commission refused to accept the compensation claims filed by United States. Again, an assessment of the same kind of arbitral proceedings involving the State of Mexico and the United States of America shows that although everything that due diligent contains cannot be exactly explained, a whole load of intention characteristics could come to play in the determination of what due diligence duty holds in any particular case. These encompass the level of efficacy of the country’s administration over particular zones of its jurisdiction,⁶⁰² the level of foreseeability of damage and the greater significance of the benefit to be

⁶⁰⁰ F. S. Dunn, *the Protection of Nationals; A Study in the Application of International Law*. Batimore: The Johns Hopkins Press. (1932) at p. 55.

⁶⁰¹ J. B. More, *History and Digest of the International Arbitrations to which the United States has been a Party*, Washington 1898-1906, III, 2947) vol. III, 3041, emphasis added.

⁶⁰² See, *J. J. Boyd (U.S.A.) v Mexico 1886 (UNRIAA IV)* at p. 380

safeguarded.⁶⁰³ Additionally, it was made clear in the case of *Janes Claim* that due diligence as well applied to examples of past-hoc of denial of justice, ‘the offender is responsible for killing an American citizen; the State is answerable for not taking adequate measures to engage in its obligation diligently by instituting legal proceeding against the wrongdoer and appropriately penalising the perpetrator’.⁶⁰⁴ This ruling is in consonance with the concept of FPS which mandates the host country to employ a due diligence that is appropriately required to safeguard foreign investors and their investments, and also, to have and make accessible a suitable legal framework in order for investors to seek redress. This decision is in line with an FPS ruling where the tribunal held that, ‘... where the State fails to succeed in preventing the wrongful acts, it must at least exercise due diligence to punish the perpetrators of the act’.⁶⁰⁵ But today it is hard to find any case law of FPS standard in BITs where host States have penalised the perpetrators of the act that have caused harm to foreign investors and their investments.

These cases mentioned above are the confirmation that the substance of due diligence is reached by making reference to international, rather than national standards. In *Neer Case*,⁶⁰⁶ for instance, the Arbitration Commission stipulated that “the appropriateness of governmental conducts must be tested to the level of global standards, and.... treatment to be given a foreigner, for it to amount to international wrongdoing, must constitute an indignation, intent to deceive, to deliberate abandonment of obligation, or to inadequacy of States reactions so far below of international standards that every rational and unbiased person would easily acknowledge its inadequacy”.⁶⁰⁷

Notwithstanding, even if one accepts the proposition that the substance of due diligence is determined by international legislation, this does not still answer the central question, which is, to what extent can there be a general principle under international law for due diligence in relation to the principle of FPS for the security of alien investments? Nonetheless, there is still the persistency that the idea is a common standard.

⁶⁰³ See, *E. Chapman (U.S.A.) v United Mexican State, 24 October 1930(UNRIAA IV) at p. 632*

⁶⁰⁴ *Laura M. B. Janes et al. (United States) v United Mexican States (16 November 1925) (UNRIAA IV), p. 87.*

⁶⁰⁵ *Sergei Paushock v Government of Mongolia, Award on Jurisdiction and Liability, 28 April 2011 at Para 323*

⁶⁰⁶ *LFH Neer and Paulin Neer v United Mexican States U.S.-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60 .*

⁶⁰⁷ *Id.* UNRIAA IV, p. 60. See also *H. G. Venable (U.S.A.) v United Mexican States (8 July 1927) UNRIAA volume IV pp 219-261.*

The duty of due diligence can be found in the Abs-Shawcross and Organisation for Economic Co-operation and Development Draft Conventions when the writers of the document were narrating the need for the standard of FPS to be extended not just to physical security but as well to legal security of investors' investments.

The continuation of the aforementioned efforts was instituted by **Herman J. Abs**, a renowned German banker, and **Lord Hartley Shawcross**, a British lawyer and a top-notch politician, who in 1959 publicised a Draft Convention on Investments Abroad (the Abs-Shawcross Convention).⁶⁰⁸ Article I of their blueprint stipulated as follows:

Every Party must always guarantee *FET* to assets of the citizens of another Contracting Party. Such asset must be afforded *the most constant protection and security* in the jurisdictions of another Contracting Parties, the administration, application, and benefit thereof must not by any means be damaged by irrational and prejudicial conducts.⁶⁰⁹

This kind of narration by the writers renders few perceptions on how they assimilated this clause. It clarifies that the Draft Convention proposed to point out the “*international legislation rudimentary rules*” in respect to the treatment of the property, rights, and concerns of foreigners,” that had a wide support in the custom of civilised countries and the rulings of international tribunals,” even if “at the last few decades in some States there was the inclination to ignore them.”⁶¹⁰ It was in addition included by the writers that the document proposed to give assurance to investors an “action of *protection and security to their assets, entitlements, and concerns*.”⁶¹¹ This may well show that the protection and security standard that Article I stipulated expanded further than physical protection, since rights and concerns are intangible and as such, any security afforded to them is appropriately not a physical one in essence. Furthermore, it was

⁶⁰⁸ See, Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 54

⁶⁰⁹ The text of the ABS-Shawcross Draft Convention, together with an introduction by the authors and their formal commentary on the draft, were published in a special issue of the *Journal of Public Law* in 1960. See Ignaz Seidl-Hohenveldern, *The Proposed Convention to Protect Private Foreign Investment: A Round Table*, 9 J. Pub. L. 115, 116 (1960) (emphasis added).

⁶¹⁰ *Id.* at 119 (emphasis added).

⁶¹¹ *Id.* (emphasis added).

also of the acceptance by the writers that Article I was constructed on the sameness of wording used in the United States FCN agreements⁶¹²

Although Abs-Shawcross Draft Convention was rejected by the international community, however, it motivated explicitly one more effort to secure a multilateral agreement. Within the periods of 1962 to 1967 to be precise, the OECD and its European forerunner drafted blueprints of a Treaty on the Protection and Foreign Property (the OECD Draft Convention), in accordance with the Abs-Shawcross Drafts.⁶¹³

The Organisation for Economic Co-operation and Development Convention in its article 1 (a) was written almost entirely word for word from the Abs-Shawcross Draft with its Article 1.⁶¹⁴ Statement 1 to the OECD Draft pointed out that all of the 3 standards of obligation made references to in Article 1(a) (i.e., FET, FPS, and the prohibition on irrational or partiality impairment) altogether signify a “well-created common rule under international law which a country is compelled to accord *respect and secure* foreign citizens’ property of another country.”⁶¹⁵ To put it differently, the writers were of the viewpoint that these concepts as articulating a traditional obligation to “protect” asset become what is famously today the minimum standard of treatment under international law.⁶¹⁶

Statement 4 made detailed expansion on this issue in the following way:

The terminology “FET”, traditional in the applicable BITs, shows the standard that has been outlined under international law for each country concerning the treatment entitled to every country in respect to the asset of alien citizens. The standard necessitates that...*protection* accorded within the Treaty must be that commonly afforded through the Contracting Party affected to its native citizens, although it was international law that set it, the standard can be more précising where principles of domestic legislation or local administrative customs fails to meet the requirements that the international law has set. *The standard*

⁶¹² *Id.*

⁶¹³ OECD Draft Convention on Protection of Foreign Property, 7 I.L.M. 117 (1968) [hereinafter OECD Draft Convention]; see also J. C. Thomas, *Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators*, 17 ICSID REV.-For INVEST. L.J. 46 (2002), (discussing how the Abs-Shawcross Draft was considered by the OECD during drafting). See generally Council of the Org. for Econ. Co-operation and Dev., *Draft Convention on the Protection of Foreign Property*, 7 I.L.M. 117 (1968) [hereinafter OECD Draft Convention].

⁶¹⁴ Compare OECD Draft Convention, *id.*, art. 1(a), with Seidl-Hohenveldern.

⁶¹⁵ OECD Draft Convention, *id.*, cmt. 1 (emphasis added).

⁶¹⁶ Kenneth J. Vandeveld, *Bilateral Investment Treaties: History, Policy, and Interpretation*, OUP USA (2010), at 199 (comparing the duty to which statement 1 made reference to with the minimum standard of international law).

*necessitated complies essentially to the standard of minimum treatment that makes part of traditional international law.*⁶¹⁷

Statement 5 in addition stated that the phraseology “[m]ost constant security and protection” found in Article 1(a) was “(e)pressed in wording customarily applied under United States BITs” and “shows the duty of every Party to *employ the duty of due diligence concerning conducts by government authorities including others* in connection with such property.”⁶¹⁸

Statement 4 and 5 are self-explanatory and plain in so many respects. Statement 4 did not just repeat or couch the link between minimum standard of international law and the principle of FET, but at the same time it also connotes an overarching with security and protection in alleging that FET demands that the host country satisfy international standards in respect to the security that has been afforded to aliens. Also, Statement 5 is of the assertion that “security and protection” make references to a duty “to apply due diligence concerning actions that are attributable to public entities and also as those that emanate from the third parties in respect to those type of assets” and this brings back to memory the mentioning of a due diligence standard in cases like *Sambiaggio*.⁶¹⁹ Still, it is observed that this section of report is phrased widely, recounting a duty to application of due diligence in relation to alien property as a whole, not just in respect to physical attacks.

In the same capacity, wide ideas of a due diligence duty may be found in other references or authorities from the after the Second World War period. A case in hand is that of the assertion by **Andreas Roth** that a host country has a duty under traditional international law towards the employment of due diligence whenever it is applying its legislation to aliens:

The foreigner has no protestation to make where the host country’s legislations are implemented genuinely and with the application of due diligence. However, since there is no governmental corpus of any kind that

⁶¹⁷ OECD Draft Convention, , cmt. 4(a) (emphasis added)

⁶¹⁸ *Id.* cmt. 5 (emphasis added)

⁶¹⁹ See, Salvatore Sambiaggio, (*Italy v Venezuela*). 10 RIAA at 524 (It – Venez. Mixed Claims Comm’n 1903)

is flawless, there can be a great likelihood that he can be contravened in his prerogatives by representatives in the application of their obligations.⁶²⁰

Roth further alleged that such duty would be accomplished should the country's action in relation to the alien "be taken in compatibility with the due process of law as generally applied in the legal framework by which it was established"⁶²¹ This additionally strengthens the judgement that duty of due diligence, as long as Roth is concern, needs a level of legal security more than just physical protection. Actually, it was obviously claimed by Roth that if countries are to permit aliens to make acquisition of assets in their jurisdictions, those States will "be classified under the international duty to accord the similar protection or as successful *legal protection* for it like is necessitated for those rights which are protected under the legislation of States."⁶²² Considering all the commentaries that have been put forward by the authors in relation to Abs-Shawcross Draft Convention and how it has motivated yet another effort to the securing of multilateral agreement, especially the Organisation for Economic Co-operation and Development (OECD) (and) its European predecessor Convention on the Protection of Foreign Property (the OECD Draft Convention, these seemed to have brought into play the ideas of security and protection including the duty of due diligence in a way which is akin to Roth's comment.

Be that as it may, the OECD supporters at last did not bring themselves to the acceptance of this written document, same as with the others that were before it. From the beginning it was indicated too hard to reach a common agreement within a multilateral atmosphere in respect to the treatment and security to be guaranteed to alien investors.⁶²³

⁶²⁰ See Andreas H. Roth, *the Minimum Standard of International Law applied to Aliens*, printed book, Leiden: A.W. Sijhoff, (1949) at p. 139 (emphasis added)

⁶²¹ *Id.* at 141-42 (emphasis added).

⁶²² *Id.* at 165-66 (emphasis added).

⁶²³ The OECD Draft finally failed to obtain the approval of States Members like Greece, Portugal and Turkey, as particulars clauses . . . were deemed excessively to benefit capital-exporting countries. Not for the very last time, the United States government refused to give its approval with complete sincerity and commitment, and was sceptical that the Draft would be welcomed by various developing countries, and seemingly wanting to mastermind its own BITs arrangements. See also, Anthony C. Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection', 20 *ARB. INT'L*, (2004) 411, 432

5.6 The Host States and Obligation of Due Diligence

The International Law Commission's Articles on State Responsibility does employ the phrase 'due diligence' in the Article.⁶²⁴ The provision takes a sceptical view to the issue of mistake, merely demanding, under Article 2, that every wrongful action be ascribable to a country to amount to a violation of an international duty of that country.

While the subject of fault drew important awareness in the establishment of the Articles on State Responsibility, it is the main practices of behaviour, instead of lesser practices of commitment that we must envisage to decide the appropriate standard of conduct. As the commentator, **James Crawford** has explained, the Articles did not lay down any universal standard, whether they include "some degree of mistake, liability, carelessness, or due diligence".⁶²⁵ The evolution of the Articles on State Responsibility is of importance to this paper because it draws a common lesson from international law to FPS standard in BITs and places liability to the host States where the State, its organ or the third party breaches the FPS obligation.

The evolution of the 'due diligence' standard in the second-half of the 20th century has been controlled by procedure in international environmental law arena. The exclusion of due diligence out of the Article on State Responsibility in connection with country's wrongful acts comprehensively, gave rise to the Commission eagerness to monitor the concept in a different subject areas, most especially, under Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities⁶²⁶ where the reports narrated that the obligation to apply 'preventive or reduction steps is taken as a due diligence',⁶²⁷ also that, "[t]he principle about due diligence from which the behaviour of the country of origin of [transboundary environmental damage] must be assessed is the sort that is commonly contemplated to be suitable and in pro rata to the threat of transboundary destruction in the specific example."⁶²⁸ Although the account on the report of this Article is beyond the scope of this paper, still it is worth mentioning for the purpose of illustration and clarification of due diligence on obligation of FPS.

⁶²⁴ Articles on Responsibility of States for internationally wrongful Acts, Report of the international Law Commission, 53rd Session, UN Doc. A/56/10 (2001), 43-59 (note in GA Res. 56/83, 12 December 2001, UN Doc. A/RES/56/83 (2001)).

⁶²⁵ James Crawford, 'The International Law Commission's Article on State Responsibility' (2002), p. 82.

⁶²⁶ Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001)

⁶²⁷ *Ibid.* p. 154.

⁶²⁸ *Ibid.*

Crawford's observation of the Draft Article is that, 'In spite of the unpredictability encompassing their prospective position, the written reports render a definitive declaration on the extent of a country's global legitimate responsibility to thwart the menace of transboundary damage.'⁶²⁹

Under Article 3 of the Draft, it states that 'the country of origin must take all reasonable steps to hamper serious transboundary damage at any event to limit the peril thereof'.⁶³⁰ And in its Article 7, it stipulates that 'any conclusion in regards to the permission of a scheme in the ambit of the current report shall, in specific, be depended on an evaluation of the likelihood of transboundary damage attributed by that scheme, encompassing any environmental effect evaluation'.⁶³¹

Tim Stephens has explained that '[t]he duty to apply deterrent steps is regarded as a due diligence, however, it is not a definite assurance against the eventuality of damage.'⁶³² He then draws a support from the report he got from the accounts, which importantly stipulate that, 'due diligence can be demonstrated in fair and sensible efforts by a country to inform itself of accurate and lawful elements that link predictably to an envisaged mechanism and to apply proper steps in a good time, to resolve them'.⁶³³ The account of the Draft Articles further states that: "The State origin's duty to apply deterrent or reduction actions is regarded as due diligence. It should be the action of the country of origin which will ascertain if the country has conformed to its duty in the current reports. The obligation for the application of a due diligence that is involved, nevertheless, is not aimed at the assurance that serious damage be completely thwarted, where it is impossible to achieve it. At the occurrence, the country ... '[must] employ its optimal viable endeavours to limit the possibility of the peril. By doing so, it would not warranty that the damage would not happen'.⁶³⁴ **Tim Stephens** went further by saying that: 'the report contemplates States policy mostly, where it has been found to be a considerable unwillingness to acknowledge or welcome a more stringent standard. In the case of *Trail Smelter*, actually it was

⁶²⁹ James Crawford, *Brownlie's Principle of Public International Law* (8th ed. 2012), pp 356-7 (citations omitted).

⁶³⁰ See, Article 3 of the Draft Article on the Prevention of Transboundary Harm from Hazardous Activities 2001

⁶³¹ *Id* at Article 7

⁶³² Tim Stephens, *International Courts and Environmental Protection* (2009), p. 158.

⁶³³ Report of the International Law Commission, 53rd Session, UN Doc. A/56/10 (2001), p. 154.

⁶³⁴ *ibid*

acknowledged that the standard of due diligence was to exercise having consideration to the ability of Canada, by means of enhancing radiations management technologies, to restrict transboundary destruction'.⁶³⁵

The account as well make reference to so many other treaties where a principle of 'due diligence' duties can be or presumed.⁶³⁶ The commentary also makes reference to a 1986 dispute that concerns Germany Republic and State of Switzerland, in which State of Switzerland acknowledged 'due diligence' similarly as being the standard.⁶³⁷

It is worthy to say that various case laws and the account from the International Law Commission have revealed that due diligence practically is a basic facet of International Investment Law as this paper has explored and will continue to explore below.

5.7 The Host State Duty of Due diligence on the Standard of FPS

In the notion of the FPS standard of treatment, however it is worded, the host country is in violation of its international duty if it omit to accord protection to foreign investors and their investments against harm resulted from the country itself, or by its entities, or by private parties.⁶³⁸ As we know, this duty pertains to conducts perpetrated by the country, and of persons within its territory.⁶³⁹ The country should apply due diligence in order to provide security to alien investors and their investments. However, this obligation does not in any way include any kind of absolute liability upon the host country as this paper has repeatedly mentioned, both in the cases of physical and legal protection and security. This view of FPS principle of treatment is accepted by various tribunals and some of them have applied the same wording without making

⁶³⁵ Tim Stephens, *International Courts and Environmental Protection* (2009), p. 158

⁶³⁶ Convention on the Prevention of Marine Pollution by Dumping of Other Matter, Article I, II and VII (2); Vienna Convention for the Protection of Ozone Layer, Article 2.; Convention on the Regulation of Antarctic Mineral Resources Activities, Articles 7(5); Convention on Environmental Impact Assessment in a Transboundary Context, Article 2(1); Convention on the Protection and Use of Transboundary Watercourse and International Lakes.

⁶³⁷ Account of the International Law Commission, 53rd Session, UN Doc. A/56/10/ (2001). P. 154

⁶³⁸ See UNCTAD, *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*. New York and Geneva, 2007, 132, available at: http://unctad.org/en/Docs/itelia20065_en.pdf. See also Jeswald W. Salacuse, *The Law of Investment Treaties* (2010), 132 and 209-210 and George K. Foster, 'Recovering Protection and Security: The Treaty Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance', (2012) 45 Vand. J. Transnat'l 1095.

⁶³⁹ See, Christopher Schreuer, 'Full Protection and Security', (2010) *Journal of International Dispute Settlement*, 310, see also, *Biwater Gauff (Tanzania) Ltd. v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award. 24 July 2008, Para 730.

reference to an obligation of ‘due diligence’. Tribunals instead made reference of an obligation of vigilance which is importantly similar in practice.

The obligation of the host State is to be diligent and take adequate measures to protect the foreign investments which can be considered reasonable under the circumstances. This concept was developed from international law as the last section has clearly explained. It has been used by tribunals in many case laws to deal with FPS of investors and their investments in host States, and to figure out what is required of host States should the need arise.

While not directly mentioning about due diligence, the ICJ reaffirmed this matter in the case of *ELSI*.⁶⁴⁰ The Tribunal in the *ELSI* case supported the fact that full protection and security standard does not impose an absolute liability upon the host country rather an application of due diligence that is reasonable in all the circumstances. In that case the ICJ stated that, ‘the reference of the clause of FPS cannot be interpreted as the affording of a guarantee that investment must not in any situations be seized or perturbed’.⁶⁴¹

Of a fact, the comprehension of this standard was also mentioned in the ruling of the case between Italy- Venezuela in the *Sambiaggio case*.⁶⁴² In that case, a dispute was settled by the Commission for reclamations under a treaty ratified by Italy and Venezuela. The parties argued about the classification of the FPS obligation as an obligation of result. The Commission agreed with Venezuela that the State could not guarantee the standard but only the due diligence regarding the FPS standard.

In the case concerning *AAPL v. Sri Lanka*,⁶⁴³ the Claimant, a Hong Kong corporation AAPL, a Sri Lankan joint venture company that was created to plough and export shrimp to Japan. Serendib made only two shipments of the shrimp when its major facility, a shrimp farm, was destroyed and many of its employees killed when the Sri Lankan Security Forces clashed with Tamil Tigers in a counter insurgency operation, as a result of that attack, Serendib went out of business and AAPL’s investment was lost. The treaty provides that alien investments must be

⁶⁴⁰ See, *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15.

⁶⁴¹ *Id.* Para 105.

⁶⁴² *Italy-Venezuela Mixed Claims Commission, Sambiaggio Case*, 10 UNRIAA (1903), 499-525, at p. 524

⁶⁴³ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990).

accorded the enjoyment of FPS. The Tribunal declined AAPL's claim on FPS, and also, the Tribunal rejected the proposition that this clause imposed an absolute liability upon the host State. However, the Tribunal concluded that the exercise based on due diligence is required. It said that what is required is for the host country to apply reasonable diligence that would prevent the investors' investments against harms. The tribunal found that there was insufficient evidence that the government Task Force had damaged the investor's investment.⁶⁴⁴ It is observed as a universal concept of law that a claimant has to show evidence for commission of harmful acts done by the State.⁶⁴⁵ This is vital since level of duties owed varies, and based on if it is the country's organ that are perpetrating the damage, the State abstinence⁶⁴⁶ or third party perpetrators (the State's lack of due diligence to thwart and to enquire in a situation where harm took place). In the matter at issue, since no party could provide a well-founded proof on the real events, the tribunal quoted the principle that the international obligation of the country was not supposed to be assumed but instead centred on the regime's omission to afford appropriate security.⁶⁴⁷ For this reason it was held by the arbitral Tribunal in this case that the weight of force that was used by the Security Forces was immoderate and unjustified by the situation that was connected with the event and the tribunal found the defendant liable.⁶⁴⁸

What was clear from the Tribunal's ruling is that the host State will be held culpable for the actions of its organs that caused negative impact on the investor's investment if the State had failed to take reasonable steps of due diligence to prevent the investments of investors against injuries from such conducts., and it indicated the country's culpability for not have exercised due diligence. It stated that:

'... the tribunal proclaims baseless the Applicant's principal request intending to contemplate that the Government of State of Sri Lanka presumed in Article 2 (2) of the BIT an absolute liability, without any requirement to demonstrate that the harms sustained were ascribable to the country itself or its organs, and to show the country's liability for not exercising with 'due diligence'.⁶⁴⁹

⁶⁴⁴ *Id* Para 60

⁶⁴⁵ Bin Cheng, *General Principles of Law* (1953) 327.

⁶⁴⁶ See R. Pisillo-Mazzeschi, "The Due Diligence Rules and the Nature of the International Responsibility of States" in R Prevost (ed.), *State Responsibility in International Law* (2002) 111.

⁶⁴⁷ *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990) Para. 85.; see also, *Mahmut Kaya v Turkey* Judgement, 28 March 2000 ECHR Rep 2000-III, 149, Para 87.

⁶⁴⁸ *Id.* paras. 78-86.

⁶⁴⁹ *Id.* Para. 53.

The Tribunal opted for the applicability of an autonomous treaty standard and found that the Respondent was culpable for its inability to take preventive steps to prevent damage to the investment. The Tribunal was of the view that it was not needful to show intent to deceive based on malice and negligence, but that the mere lack of diligence would be enough. The Tribunal gave a useful definition for due diligence that must be observed by the host State:

‘Due diligence principle is not something that is higher, nor lower than the sensible level of prevention which a well-governed State is anticipated to employ under related or akin circumstances’.⁶⁵⁰

This definition means that expressions such as “full”, “constant” or “complete” that qualify the obligation of protection and security, cannot be construed as referring to an absolute obligation or liability which guarantees that no damage will be suffered, in that any breach thereof creates automatically an ‘absolute liability’ on account of the country.⁶⁵¹ Notwithstanding, it was upheld by the tribunal in this case that the lack of measures to prevent the killings and the damages done upon the assets of the investors was an indication of inaction and omission of the Sri Lankan Government and as such it was possible to establish its responsibility. But what was painful and disappointing in this case was that no single person was penalised for the perpetration of the harm against the claimant’s investments either to the State or the insurgency.

AAPL is not the only case that includes this feature. There are a whole lot of cases that cover this feature that are worth mentioning below. There was no strict liability for the host State in very early cases when the full protection and security was first discussed.

The same reasoning was followed in *Hesham Talaat v Indonesia*⁶⁵² by arbitral tribunal, where it was of the view that the host State does not have a duty to afford more than a sensible degree of prevention which a good-ruling government is required to employ in related situations.⁶⁵³

In *Tecmed v Mexico*,⁶⁵⁴ it was held by the Tribunal that the FPS granted to an investment cannot be an absolute one and would not place an absolute culpability on the host country which

⁶⁵⁰ *Id.* Para. 18.

⁶⁵¹ *Id.* Para. Para. 48.

⁶⁵² *Hesham Talaat M. Al-Warraq v Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014.

⁶⁵³ *Id.* at Para. 625.

permits it. Neither the State, nor its organs reacted unreasonably beyond its boundaries in a democratic State by supporting or directing the actions movements conducted by those who were against the landfill as the Claimant has alleged. The Tribunal in its own words said that:

The Tribunal concurs with the Defendant, including the cases cited by it, that the warranty of FPS is not definite and cannot place an absolute liability on the country that accords it.⁶⁵⁵

In *AMT v Zaire*,⁶⁵⁶ AMT, a U.S. company, was a major shareholder of the Zairian company (SINZA), which was involved in the production of and sale of automotive and dry sell batteries, and was also engaged in the importation and resale of consumer goods and foodstuffs. The investment was jeopardised by stealing by groups of military forces of Zaire Republic. Soldiers and Zairian armed forces destroyed, damaged or carried away the property, finished goods, raw materials and other objects of value belonging to SINZA. In 1993, another incident of looting occurred in relation to SINZA's property. The treaty that applied to the both Parties stipulated that investment must in conformity to applicable domestic regulations be protected and secured, and should not be given a lower level of treatment than that acknowledge under international law. It was held by the tribunal that the agreement clause placed on Republic of Zaire an obligation of care that can not be lower in standard than the minimum level prescribed by the international law. The tribunal finally found 'that State of Zaire had contravened this commitment by employing no step that would warranty the investor's investment security and protection, and for that reason, Zaire Republic was in violation of the agreement's obligation'.⁶⁵⁷

This case was developed as a consequence of State of Zaire's military forces in fighting internal war in the State which subsequently led to the destruction and looting of the investor's property by the Zairian armed forces. The strength of the case is that the tribunal after examining the argument was able to recognise by its ruling that the Respondent by the action of its organ violated the obligation of FPS reposed on the Respondent by not taking adequate measures that would have ensured that the investment was properly protected and secured under the applicable

⁶⁵⁴ *Tecnicas Medioambientales TECMED SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (29 May, 2003).

⁶⁵⁵ *Id.* at Para 177

⁶⁵⁶ *American Manufacturing & Trading Inc. v Republic of Zaire*, ICSID Case No. ARB/93/1, Award, 21 February 1997, 36 I.L.M. 1531 (1997).

⁶⁵⁷ *Id.* para.6.02-6.11.

treaty but yet refused to find in favour of the Claimant. No member of the Zairian military was brought to justice for this horrendous harm and act perpetrated against the investor's investment.

Similarly, in *Wena Hotels v. Egypt* case,⁶⁵⁸ the dispute arose out of two long-term contracts among Wena Hotels Limited (“**Wena**”), a British investor to lease, operate and supervise two hotels in the State of Egypt, and the Egyptian Hotels Company (“EHC”). ECH was wholly-owned by the State of Egypt. Shortly after the contract was endorsed, Wena asserted the condition of the hotels to be far below that which was agreed in the lease. Wena therefore withheld part of the rent under the terms of the lease.

Due to the non-payment, EHC threatened to repossess the hotels by force. Wena informed the Egyptian Minister of Tourism about this impending situation, however there was no solution. One night witnesses reported that more than one hundred EHC workers stormed the two hotels, threatened and physically attacked the hotels' staff and visitors. They were also reported to have stolen a number of properties belonging to the hotels.

The Chief Prosecutor of State ruled that the capture of the hotels were illegitimate and that Wena has the prerogative to take back the hotels. The hotels were subsequently handed back to Wena but in a deplorable condition, that means the hotels were vandalised.

Wena initiated an ISDS claim against Egypt under the ICSID Convention, alleging contravention of investment protection in the United Kingdom-Egypt investment treaty. What is significant in this case is that after the workers of a State entity (EHC) seized two hotels by force in which the investor is contracted to, the police authorities were aware of the seizure and yet did nothing to prevent or avert the invasion before it took place. Even after the invasion of the hotel, the police did not make any efforts to return the hotels to the rightful owners. There was no government official that was involved in the taking. The treaty in application in this case said that investments must be accorded FPS. The Tribunal unequivocally held Egypt in breached of its duty to afford the obligation of FPS.⁶⁵⁹ This ruling was reached by the Tribunal because of the fact that the State of Egypt fully had the knowledge of the plans to the seizure of the investments and did not react to avert EHC against the execution of their intentions. Further to that, the law

⁶⁵⁸ See, *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M.

⁶⁵⁹ *Id.* Para. 84.

enforcement agency and the government officials did not take expeditious steps to revert the hotels to the investor. Lastly, there was no weighty punishment that was ever imposed on the perpetrators of the wrongdoing to make sure that justice was served. That means that, the state of Egypt failed to exercise reasonable measures of prevention necessary which a good government must practice in all circumstances to prevent the investor's investment against harm that is required by international law.

In *Saluka v. Czech Republic*,⁶⁶⁰ the tribunal accepted that the concept of FPS does not place strict liability upon the host State. The tribunal made reference to the *Tecmed*⁶⁶¹ case where it was held that warranty of FPS is not definite and therefore cannot place an absolute liability on the host country that agrees to accord it. And said that, but on the other hand, the FPS principle is a concept that is not regarded as universally valid, although it is something that may be viewed in relation to other things.⁶⁶²

In *Plama v Republic of Bulgaria*,⁶⁶³ the tribunal concluded that the FPS standard does not impose an absolute liability upon the host State,⁶⁶⁴ end off. Rather, it stated that the Parties agreed in Article 10(1) of the BIT that the standard placed the duty of due diligence to the host State. The duty that is binding on the host State is a duty of vigilance, which its requirement is to take all necessary measures to make sure that alien investments get benefit from the FPS, and also, for the State not to use its own local law to take away from the investor any such duty that the concept of the standard has reposed on the State.⁶⁶⁵

Similarly, in *Noble Venture v Romania*, the arbitral tribunal refused the application ruling and said that it would be hard to detect at all particular omission on the Respondent to use due diligence for the protection of the Applicant's investment.⁶⁶⁶ The tribunal continued by saying

⁶⁶⁰ *Saluka Investment BV v Czech Republic*, UNCITRAL, Partial Award, (17 March 2006).

⁶⁶¹ *Tecnicas Medioambientales TECMED SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (29 May, 2003).

⁶⁶² *Id* at Para 484.

⁶⁶³ *Plama Consortium v Republic of Bulgaria*, ICSID Case No. ARB/03/24, Award, 27 August 2008.

⁶⁶⁴ *Id* Para.181.

⁶⁶⁵ *Id* Para 179.

⁶⁶⁶ *Noble Venture v Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005 at Para. 164.

as follows: ‘the latter can not be an absolute standard, but one which requires the exercise of due diligence by the country.’⁶⁶⁷

In *Ronald Lauder v Czech Republic*, the Tribunal held that the agreement only requires the Members to apply such attentiveness and care in the security of investment like is rational under the circumstances. The treaty does not require its Members to shield investment from any probable reduction of profit attributed by individuals whose conducts could not be ascribed to the country. Although the aforementioned protection and security can truly be tantamount to absolute liability, but it is impossible to force it upon a country unless there is a specific provision in treaty that contains that such liability has been imposed.⁶⁶⁸ This statement may indicates that there could be circumstances where strict liability could be imposed to a host State if a provision in a BIT contained such wording, and not generally that strict liability cannot be place on a State as arbitral tribunal has unanimously often expressed in different case law. Moreover, tribunals have not been able to give a convincing reason why strict liability should not be placed on a host State on a violation of the obligation of FPS. But in the opinion of this thesis it could be for the avoidance of opening up of floodgates of claims by foreign investors against host States

In *Rumeli v Kazakhstan*,⁶⁶⁹ the tribunal accepted the Respondent’s argument in the matter that the FPS standard of the UK/Kazakhstan bilateral investment treaty in its Article II (2) must be interpreted in conformity with accepted rule of the treaty. It said that the standard compels the host country to provide security to an alien investment from physical damage. The tribunal went further to say that full protection and security place an obligation on the nation to employ such a due diligence that is not more than the one that the ICSID tribunals have observed in *Wena Hotels*.⁶⁷⁰

In *Siag v Egypt*,⁶⁷¹ the Egyptian Courts in many occasions before now scrapped and abandoned the decisions of the official order that seems to have given legitimacy to the taking of

⁶⁶⁷ *id*

⁶⁶⁸ *Ronald Lauder v Czech Republic*, UNCITRAL, Final Award, (3 September 2001). Para 308.

⁶⁶⁹ *Rumeli v Kazakhstan*, ICSID Case No. ARB/05/16 Award, (29 July 200).

⁶⁷⁰ *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896 Para. 668

⁶⁷¹ *Waguih Eli George Siag & Clorinda Vecchi v Ara Republic of Egypt*, ICSID Case No. ARB/05/15, Award, 1 June 2009.

the investment. But despite the dropping of the decision the Claimants' investment was not given back to them for 12 years after the expropriation. The tribunal while dealing with the case made reference to the Wena Hotels case, and said that in Wena Hotels the investment that was seized was given back to the Claimants after just a year. But despite the fact that the investment was returned back to the claimant after just a year in the Wena Hotels case, the tribunal still held that the full protection clause of the BIT has been breached. However, the tribunal ruled that the standard of FPS expected of the host State can not be an absolute one, but the one which the State must exercise due diligence in halting harm that might befall on the investment.⁶⁷²

In *Frontier Petroleum v Czech Republic*, it was held by the tribunal that the duty to grant protection plus security does not create a duty that results in absolute liability. When a State grants the clause of FPS to investment that does not mean that it is giving a guarantee that the investment will never in any circumstances be invaded or disrupted.⁶⁷³

In *AWG Group v Argentina*,⁶⁷⁴ the tribunal held that both the Courts and the Tribunals construed that FPS standard only obligates a host country to use due diligence to cover the investor and his investment against physical jeopardy and harms, but it does not place a duty to shield investments and investors totally from injuries. It went further to say that the previous tribunals have not explain what due diligence meant, but that those previous tribunals and scholars have in many occasions made references to the statement of **Professor A.V Freeman** regarding the meaning of "due diligence" in his International Law lecture at the Hague Academy, where he stated that "due diligence" is something that is not greater or lower than rational plans of stopping something from arising or happening that a well-governed country may be anticipated to employ under akin situations.⁶⁷⁵ That means, the definition of due diligence is when a democratic State employs the rational course of actions that will hinder something from happening or arising that is required in a particular circumstances, no more, no less. The tribunal in this case also made reference to the statement of **Professor Ian Brownlie**, who also noted that none of the tribunals' decisions has given the definition of due diligence, and

⁶⁷² *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896 Para 447

⁶⁷³ *Frontier Petroleum Services Ltd v Czech Republic*, UNCITRAL, Final, Award, (12 November 2010) Para 269

⁶⁷⁴ *AWG Group Ltd v Argentina Republic*, UNCITRAL, Decision on Liability, 30 July 2010 Para 162

⁶⁷⁵ A. V. Freeman, *Responsibility of States for the Unlawful Acts of Their Armed Forces*; 88 Recueil de Cours (1956) 261

he therefore said that: “clearly, there is no particular or opinionated definition of due diligence that would be proper or suitable, since what is required as a standard would be different depending on a particular circumstances”.⁶⁷⁶

Professor Brownlie’s statement seems to be a confirmation of the interpretation given by some scholars of the maxim found in the case of *Corfu Channel* that, ‘every country’s duty not to deliberately permit its region to be utilised for actions against the rights of other countries’⁶⁷⁷ could be a suggestion that the judiciary wanted to create a general commitment of good vicinity or neighbourhood.

All these statements both from the tribunal and the scholars raise a question mark as to how host States can be held responsible for the lack of due diligence required of them since there is no clear definition of due diligence that is fixed for culpability apart from to evaluate the particular circumstances and to determine if due diligence should have been applied by the host State in that very situation. There should be a particular definition for the concept of due diligence whereby if a host State fails to comply with those measures it would be held in the breach of it.

Also, the tribunal held that, it is a fact and has been widely acknowledged that FPS only implies an obligation of due diligence, and cannot place a duty of absolute liability or answerability on the host country.⁶⁷⁸

In *AES Summit v Republic of Hungary*, the Tribunal held that although the standard protects investor’s investment or enable investors to protect themselves against harassment by third parties or State’s organs, however, the standard is certainly not one of absolute liability. It does not fortify the State against its right to regulate and legislate. And it does not matter if the enacted laws have negative impact on the Claimant’s investment, as far as such law is reasonable in the circumstances and is in parallel to reaching fair and justifiable public policy goals.⁶⁷⁹

⁶⁷⁶ I. Brownlie, *Principles of Public International Law* (1990)454.

⁶⁷⁷ *Corfu Channel Case (United Kingdom of Great Britain and Northern Ireland v Albania)*, (1949) ICJ Rep 4, at Para 22

⁶⁷⁸ *AWG Group Ltd v Argentina Republic*, UNCITRAL, Decision on Liability, 30 July 2010. At Para. 164

⁶⁷⁹ *AES Summit Generation Limited and AES-Tisza Eromu KFT v Republic of Hungary*, ICSID Case No. ARB/07/22, Award, 23 September 2010 at Para. 13.3.2.

This is again a statement that could be interpreted as being complicated. Any law that has impacted negatively to an investor's investments no matter how just and fair it is to the reaching of public policy goal should still be a violation of full protection and security standard. What matters is that the covered investment has been damaged as a consequence of the host State's failure to protect the investment it has guaranteed to protect under the standard, therefore should be held culpable for the failure.

In *Gemplus v Mexico*,⁶⁸⁰ the tribunal highlighted that such protected provision as it is worded in the BIT of this particular case does not in most cases place strict liability upon the host State under international law. The tribunal statement does not appear to be glaringly clear in this ruling when it stated that FPS standard 'does not in most cases place strict liability upon the host State'.⁶⁸¹ One could construe such statement to mean that there may be some situations where a strict liability can be imposed upon the host State. If that is the case, the tribunal should define such circumstances clearly rather than being general about it.

In *Sergei Paushock v Government of Mongolia*,⁶⁸² a company called GEM engaged in the mining of gold in Mongolia since 1997 and was the second largest gold mining corporation and employing more than one thousand personnel. Claimants argued that the investment generated more than 100 million US dollars yearly sales. In May 2006, Mongolia initiated a windfall profit tax ("WPT") on sales of gold at price in excess of 500 US dollars per ounce, with the exceeding amount being taxed at 68 per cent rate. Moreover, in July 2006, the prerequisites applicable to employment of alien citizens in the mining sector were altered. While previously mining corporations were obligated to pay just a fee for each alien citizen employed, the new laws imposed a monthly penalty of ten times the minimal monthly payment for each alien citizen employed if the number of alien personnel exceeded ten per cent. With the applicants' Mongolian investments employing nearly fifty percent Russians citizens, the applicants argued they were mandated to pay 500,000 US dollars monthly in penalties. In July 2006, GEM ratified a complex contract with the Central Bank of Mongolia in pursuance to which it placed gold into protective custody of the bank with the main aim of selling it to the bank. Notwithstanding, the

⁶⁸⁰ *Gemplus, S.A., SLP, S.A. and Gemplus Industrial, S.A. de C.V. v United Mexican State*, ICSID, Case No. ARB (AF)/04/3 & ARB (AF), Award, 16 June 2010 at Para. 9-10

⁶⁸¹ *Id* at Para 9

⁶⁸² *Sergei Paushock v Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011.

sale was to take place only on a separate authorisation from GEM. GEM received 85 per cent of the purchase price during the duration the gold was placed into protective custody. In November, 2007, GEM noticed that the bank moved the gold to the United Kingdom. GEM wanted to attach the gold, but its application was rejected by the English courts on the premise of the sovereign immunity of the central bank. Meanwhile, Mongolian tax authorities lodged so many claims against GEM seeking rebate of tax arrears that accrued from the claim of the WPT. With GEM failing to meet up with those applications, the tax authorities and debt recovery company (bailiffs) eventually confiscated the investments and bank accounts in December, 2008. In the light of this account, the claimants argued that the conflation of these measures constituted to eventual damage of their investments in Mongolia and amounted to expropriation and contravention of full legal protection and FET guarantees of the BIT.

The Tribunal held that FPS placed an obligation of vigilance and due diligence upon the Government of a host State. The minimal level of attentiveness and caution that international law requires is made up of a duty to deter, and duty of keeping things in check. The State must exercise due diligence to prevent wrongful injuries to investors, including their investments in the host State's territory.⁶⁸³ If the State does not succeed in preventing the wrongful acts, it must at least, exercise due diligence to punish those that perpetrated the act.⁶⁸⁴ The tribunal argument here is in line with Vattel's argument in his book titled: *The Law of Nations*, where he stated that the State should at least bring proceedings and punish those perpetrators that inflicted the injuries to the aliens and their property where it failed to have taken due diligence to thwart occurrence. There is no tangible proof that anyone was punished for perpetrating this act in this particular case against the investor's investment. The question here is how many host States are keen to bring legal proceedings to punish those that caused harms to foreign investors and their investments when and where they have failed to applied due diligence that is required by law? In the light of this reasoning the tribunal in *Joseph Houben v Burundi*⁶⁸⁵ has stated that, where the State has the knowledge of a forthcoming threat to the investment but refuses to do something, or does very little to avert the harm against the investment, the State has failed to live up to its obligation to provide FPS to the investment. The tribunal agreed that that was the issue in this

⁶⁸³ *Id* Para 323

⁶⁸⁴ *Id.* 324

⁶⁸⁵ *Joseph Houben v Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016.

matter. The State of Burundi in this dispute contravened its FPS obligation with no follow-up after two letters from the prosecutor's office to the local administrator on the measures the administrator was expected to take to protect the investment.⁶⁸⁶

On the other hand, some decisions by arbitrary tribunals can be regarded as puzzling when considering the resounding reliability of the protective protection of FPS to the investors. For example, in *MNSS v Montenegro*,⁶⁸⁷ the tribunal stated the needfulness of the government to have a more robust and pro-active attitude in all circumstances to ensure the security of individuals and their investment for the standard of most constant protection and security, especially when it has been pre-warned of an imminent threats to the applicant's investment. Nonetheless, it was held by the tribunal that although the standard was contravened, there is no basis for an award of damage in respect to the behaviour of the police throughout the duration of the whole strike. The tribunal reached such a conclusion, because according to them the claimants have failed to demonstrate that they suffered damage as a consequence of the Defendant's action.⁶⁸⁸ It seems preposterous for the tribunal to have reaches such decision. The decision in this case seems to be absurd in the sense that the tribunal has held that the standard has been breached by the host State and yet it stated that there was no basis for damage to be paid to the investor. It did not state what happened and how it came to the conclusion that the standard was violated since no compensation was necessary as a result of the contravention. The tribunal went further and said that, where the State fails to apply due diligence by takings steps to exercise reasonable measures to deter or punish the perpetrators of such acts, the host State will be held responsible for its failure or omission, and it would be liable for paying compensations for such damages as a result of its failure.⁶⁸⁹ It is very apparent that no one was held responsible in this very case for the failure to apply due diligence which resulted in the contravention of the standard, not to mention paying compensation.

Nevertheless, the good news that came out of this ruling was that this ruling can really help to encourage foreign investors to invest in foreign territories of their choices if they know that

⁶⁸⁶ *Id.* At Para 171

⁶⁸⁷ *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB (AF)/12/8, Award, 4 May 2016.

⁶⁸⁸ *Id.* Para. 356

⁶⁸⁹ *Id.* Para 325

State's failure to apply due diligence to deter or punish wrongdoers will assist them get compensation for damage as a result of its failure. And again, if peradventure that at the time the damage was committed the State were not able to prevent such harm the foreign investor would at least draw consolation from the fact that justice has been served where the State had punished the perpetrators of the wrongful acts to the investment, and where physical injuries was done to the investor. This ruling also would put pressure on the host States to take extra vigilance so as to protect foreign investors' investments with the full understanding of the repercussions should they fail to comply. Since the obligation requires the host State to take reasonable steps as it ought to in order to prevent injuries whenever it acknowledged any risk of it. However, the exact reasonableness of due diligence degree of care expected from the host State will depend on the circumstances at hand since every case and situation is different.

In *Spyridon v Romania*, the tribunal held that, it is in most cases agreed and accepted that the duty to accord FPS can not give rise to a duty of strict liability to the host State.⁶⁹⁰ Again, in this case the tribunal was general in its ruling and failed to specify if there could be cases or circumstances where it can be agreed and accepted by any tribunal that the obligation of FPS could create a strict liability upon the host State. By using the term "in most case", it seems that tribunal is suggesting that there could be an iota of chance were the obligation of Full protection and security standard reposed to the State may create an absolute liability. The opinion is that what the tribunal may tend to be suggesting in this case and in the other cases where they have used similar phrase is that there could be a time in the future where the duty of FPS will impose upon the host country strict liability thereby sending conflicting messages about the standard of FPS on strict liability and due diligence

In *Toto v Lebanon* case,⁶⁹¹ the tribunal held that the obligation of security is not a strict liability upon the host State, but one that requires a due diligence. In December 1997, the applicant (Toto) and Lebanon signed a contract for the construction of a highway linking Beirut and Damascus. The contract incorporated a forum selection provision in favour of Lebanese judiciaries. Toto argued that different government corpuses created a lot of problems that caused physical harm to the construction of the express highway road, endangered Toto's investment in

⁶⁹⁰ *Spyridon Roussalis v Romania*, ICSID, Case No. ARB/06/1, Award, 1 December 2011 at Para. 322

⁶⁹¹ *Toto Construzioni v Republic of Lebanon*, ICSID, Case No. ARB/07/12, Award, 7 June 2012.

Lebanon and damaged the reputation of the Toto group. Toto initiated legal proceedings in the Lebanese courts in pursuance to the contractual jurisdiction provision, and also filed arbitration claim against Lebanon in pursuance to the BIT, asserting contravention of the bilateral investment treaty clauses regarding with the discrimination and FET.

Lebanon raised a quite number of objections to the tribunal's jurisdiction, and debated that:

- The organisations with which Toto had contracted were not government bodies because they had different legal personality. The claims therefore did not emerge because of conducts for which the government could be held culpable under the BIT.
- Toto had not made an investment under the definition of the Convention.
- The dispute arose prior to the enforcement and signing of the BIT on 9 February, 2000, barring Toto from pursuing arbitration under the BIT.
- Some of Toto's petitions of claims were applications emerging under the contract, instead of under the BIT.
- The "fork in the road" clause in the treaty, and Toto's pursuit of local remedies, excluded Toto from that moment advancing claims in arbitration under the bilateral investment treaty

But looking at the whole case, the tribunal said that the Claimant Toto was unable to provide any helpful evident that indicate that the State of Lebanon had failed in its duty of care by its action in connection with the destruction of the Claimant's investment. The tribunal also agreed with the Respondent that FPS can not impose a strict liability to the State in this case.⁶⁹²

In *Tulip Estate v Republic of Turkey*,⁶⁹³ the Tribunal held that the duty of FPS does not put the State on a strict liability. A State cannot grant a warranty that investment of nationals can never be invaded or disrupted. But in order to evaluate whether the State has failed in its commitment to accord FPS to a foreign commercial business will depend solely on how quick a State react to the circumstances of that particular case at that particular time.⁶⁹⁴

⁶⁹² *Id* Para. 227

⁶⁹³ *Tulip Real Estate and Development (Netherlands) v Republic of Turkey*, ICSID, Case No. ARB/11/28, Award, 10 March 2014-12-01

⁶⁹⁴ *Id.* Para. 430

The obligation of FPS does not impose absolute liability, save that it requires host nations to apply due diligence in order to thwart molestation and harms to alien investors, says the tribunal in *Mamidoil Jetoil v Albania*⁶⁹⁵ case. It continued by saying that the measure of due diligence that is required by States is conditioned by the circumstances. This statement could be regarded as concurring with the general agreement that due diligence does not place a responsibility on the States to prevent each and every injury.

The same view has been reiterated by the Tribunal in *Pantechniki v Albania*,⁶⁹⁶ that the warranty of FPS does not impose strict liability upon the host country. However, the tribunal added a deep dimension to their explanations of the exercise of due diligence expected of a host State. It said that the degree of due diligence anticipated from a host State to be exercised will be based on the State's development and stability. A country's capability to guarantee FPS will depend on the level of resources it has available.⁶⁹⁷ Then the tribunal went further and differentiated between the circumstances that involve violence, and that which is similar to a refusal of justice. It concluded that the culpability in circumstances that involves civil disorder will depend on the availability of the State's resources. On the opposite, the tribunal found that the proportion of State's resources will not be considered where there is a denial of justice. Judicial protection is not the belief that truth, knowledge, and morals change depending on a particular culture or situation.⁶⁹⁸ This suggests that due diligence is a standard that can be amended in a civil strife circumstances but not where there no adequacy of legal mechanisms. Taking into consideration the level of country's state of development would take away any motivation and encouragement for advancement.⁶⁹⁹

The question to be asked is should due diligence be determined based on host nation's progress, safety and the wealth which the States may have available in order to decide an effect to provide protection and security? One would assume that the answer to this question would be a

⁶⁹⁵ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015 at Para 821

⁶⁹⁶ *Pantechniki S.A Contracts & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009

⁶⁹⁷ *Id* at Para 81, the tribunal citing A. Newcombe and L. Paradell, *Law and Practice if Investment Treaties Standards of Treatment* 310 (Kluwer Alphen ann Rijn 2009)

⁶⁹⁸ *Id* at Para 76

⁶⁹⁹ *Id.* Para 76

resounding ‘NO’. As responding in affirmative would mean that host States will use the finding in this particular case to shy away from its objective international obligation of investment protection that is required to be accorded to foreign investors on investment bilateral treaties, which the thesis has found to be factual in this particular case. The tribunal seemed to have placed a high priority to denial of justice over causes of harm by public disorder in this case. Considering the decision in this case one would now see that there are risks and challenges to invest in some countries, especially those with poor resources.

Following the tribunal’s findings in *Pantechniki*, it is contended that, it is the responsibility of the host country to provide a workable and operational judicatures and rights that are due to persons by law accessible to an alien investor where the conducts of the judicial authorities are in question so as to provide full protection and security to investments.

5.8 Strict or Relative Protective Standard

Various applicants in investment law, especially in BIT claims assert for strict liability. Whereas the decisions of courts and case law incline to read the duty of ‘due diligence’ standard relatively, that is, in respect of and in absolute connection to the specific State where the claim occurred. For instance, an arbitral tribunal has held that due diligence insinuated an ‘appropriate steps of prevention that a good governed State administration could be anticipated to apply under equivalent situations’.⁷⁰⁰ The onus of proof lies on the applicant.⁷⁰¹ The phrases as it was originally written in the passages, ‘under similar situations or circumstances’ do not exclude that the principle could not be rigidly objective and employed internationally, rather it meant that, its substance varies depending on the circumstances of the host country in question as the thesis has stated in some of the cases above. The same thing applies to the assessment in respect to negligence matters in criminal law of a State, and the issue that has to be checked is what the ‘reasonable country’ in the particular situation supposed to have done, bearing in mind the

⁷⁰⁰*Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990, Para. 77; see also *LESI SpA and ALSTALDI SPA v Algeria*, ICSID Case No ARB/05/3, Award, 4 November 2008, Para 154.

⁷⁰¹*Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990, Para. 56 referring to Bin Cheng, ‘*General Principles of Law* (1953) 327, and references therein.

wealth and the choices of action at hand.⁷⁰² The mentioning of the word circumstances may as well be seen in previous efforts in the codification of the duty of due diligence principle,⁷⁰³ as well as in the tradition of the US-Mexican Claims.⁷⁰⁴ This has been specifically significant for matters associated to civil disobedience,⁷⁰⁵ where the nature and magnitude of the disorder were deemed ‘a significant characteristic in respect to the issue of power to accord security’.⁷⁰⁶

In another way, the relativity (the absence of standards of absolute and universal application) of security is, against the concept of minimum standard of international law threshold that intends at disconnecting, to a particular level, the protection of foreign investors from the host State circumstances. But even in the treaties of international human rights, which solicit to protect personal rights the highest, the judiciary has dismissed the concept of strict liability, encompassing the respect to the prerogative to life. The judiciary contemplated the presumption of ‘strict liability’ to exceed the control of the country. As a result, foreign investors as well may merely anticipate a measure of duty of ‘due diligence’ which balances up to a certain extent to the circumstances of the individual State.

Various third world countries for many years have duly tried to restrict the level of protection that the host country is obligated to accord to its investors to national treatment.⁷⁰⁷ A language

⁷⁰²This is as well the stance showing US custom; see *Restatement (third) of Foreign Relations Law of the United States* s 711, lit e (1987): the concept of ‘reasonableness’ is to be evaluated further below.

⁷⁰³ See, the interpretation of the Institute de Droit International of 1927 (1928) 22 AJIL (Supp) 330: “steps by which under the situation, it was necessarily common to employ so as to thwart or examine such conducts”, and of the Preparatory Committee of the Hague Codification Conference of 1929, League of Nations, Conference for the Codification of International Law, Vol. III, *Responsibility of States for Damage caused in their Territory to the Person or Property of Foreigners* (1929)

⁷⁰⁴ See, *Elvira Almaguer v United Mexican States* US-Mexican General Claims Commission, Decision , 13 May 1929, U UNRIAA 523, 525; see also *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision, 23 October 1924, 2 UNRIAA 639, 646.

⁷⁰⁵ See, the full contemplations concerning the circumstances under the UK controlled and protection of Sierra Leone in 1898 in *Home Frontier and Foreign Missionary Society of the United Brethren in Christ v Great Britain (Great Britain-US)* Decision, 18 December 1920, 6 UNRIAA , at para 42, 44. See, *Asian Agricultural Products Ltd (AAPL) v Republic of Sri Lanka*, ICSID Case No. ARB/87/3. Award, 27 June 1990, para43, and *American Manufacturing & Trading v Zaire* Case No ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997) Para. 6.12, for the employment of particular principles within bilateral investment treaties concerning harms sustained at the time of public disorder

⁷⁰⁶ *GL Solis v United Mexican States* US-Mexican General Claims Commission, December, 3 October 1928, 4 UNRIAA 358.

⁷⁰⁷ On the background of the disagreement amid developed and underdeveloped countries, see M. Sornarajah, ‘*The International Law on Foreign Investment*,’ 2nd edition, Cambridge University Press, (2004). 148-56, with special referral to the Calvo Clause encouraged about number of years in the countries of Latin America.

of this mechanism is found in the Charter of Economic Rights and Duties of States,⁷⁰⁸ the endorsement of which was predominantly controlled by developing countries.⁷⁰⁹ A course of action has been recommended in the guidelines of the World Bank for the Legal Framework for Foreign Investment. These Guidelines proposal of standard of a national treatment prescribed that investors' benefits and prerogatives over their investments, encompassing intellectual property, by that means are completely safeguarded in all facets of possession, management, and interests and, more traditionally, that investors treatment is also fair and equitable.⁷¹⁰

Looking at the underdeveloped States' point of view, national treatment principle appears to be a reasonable standard. It could be of one's presumption that every State under the practice of 'good governance' endeavours to give the most excellent standard feasible for its nationals taking into consideration the available wealth. Accordingly, it would be resultant from a national principle viewpoint to direct investors to the standard that is provided for the citizens of the host country. In lots of cases, this standard can exceed the minimum level provided in international law, and it would as well be strengthened by the assertion that a foreign investor realizes what to anticipate in a particular State. The mechanism as well finds some support in the very first trials awards that necessitated *diligentia quam in suis* (a guardian's duty of care in respect to issues regarding the interests).⁷¹¹ It matches with the common rule of law that liability can only be presumed where the course of actions at issue would have accordingly been 'likely'.⁷¹²

Ideally, the underlining emphasis described previously for traditional international law, that has been summed up as necessitating the country to exercises all necessary and adequate steps, taking into consideration the proportionality of its obtainable wealth and the circumstances prevalent in the territory during that specific time, seems capable to be fair and the right decision

⁷⁰⁸ See, Art 2(2)(a) of the Charter of Economic Rights and Duties of States, Un General Assembly Resolution Res 3281 (XXIX), UN GOAR, 29th Sess, 2319th plen mtg, UN Doc A/Res/3281 (XXIX) (12 December 1974), 14 ILM 251 (1975).

⁷⁰⁹ B. H. Weston, 'The New International Economic Order and the Deprivation of Foreign Proprietary Wealth: Some Reflections Upon the contemporary International Law Debates' in R Lillich (ed.), *International Law of State Responsibility for Injuries to Aliens* (1983) 89, 91. See also TW Walde, 'A Requiem for the "New International Economic Order"' in G. Hafner et al (eds.), *Liber Amicorum: Professor Seidl-Hohnevelde in honour of his 80th birthday* (1998) 771.

⁷¹⁰ World Bank, *Legal Framework for the Treatment of Foreign Investments (1992) Vol. II, Para 27.*

⁷¹¹ *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision, 23 October 1924, 2 UNRIAA 639, 644; BIN Cheng, 'General Principles of Law' (1953) 220.

⁷¹² "Ad impossible nemo tenetur", see Bin Cheng, 'General Principles of Law' (1953) 223

for both parties, and the variation between this principle encompassing a national treatment principle could be an extremely trivial one, but could undermined the protection objective of FPS.

Nevertheless, in *AMT v Zaire* case, the tribunal rejected Zaire's argument concerning the clause in the BIT which stated that the agreement must not be prioritised over or be deviated against domestic laws.⁷¹³ In municipal or local authority law, every conduct in State liability matters for harms sustained as a consequence of social disobedience were announced impermissible, and Zaire contended that the applicant was not provided with a treatment less favourably than that given to every other citizen or foreign corporation. The tribunal centred on the impartial integrity of the minimum duties of State of Zaire in international law notwithstanding the overall condition of the country.⁷¹⁴ Since the BIT clearly protected harms sustained as a result of public disorders, disturbances, or actions of attacks, no domestic law to the contrary could vindicate Zaire.⁷¹⁵

5.9 According Respect to Sovereignty of a State and Authority

Evaluating the duty of due diligence of security measures could pressurise the judicial to assess State procedure options which are associated with a State's sovereignty. Can it be possible, for instance, for an investor to initiate a proceeding when a country has applied as many of its military personnels as it had to secure the investor's investment whereas the size of those armed personnels was obviously scanty compared to what other States would be capable to provide? O' Connell said that '...it should not be stipulated with utter conviction that the country is liable just because the episode may have been prevented if an adequate military personnels had been deployed or nearby'.⁷¹⁶

Traditional international law, dependent on matters since the 1920s, indicates a great level of respect to the State authorities. For instance, in 1926 in the *Neer* case, it was held by the

⁷¹³ *American Manufacturing & Trading v Zaire* Case No ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997) Para 6.10.

⁷¹⁴ *Ibid.*

⁷¹⁵ *Ibid.* Para 6.13.

⁷¹⁶ *Pantehniki SA Contractors & Engineers v The Republic of Albania*, ICSID No. ARB/07/21, Award (30 July, 2009) Para 80.

Commission that ‘an international arbitrator could not make the decision on the matter...to determine, if a different path of approach undertaken by the national authorities ...should have been to a greater extent successful’.⁷¹⁷ It held that an international law could not have been contravened except, ‘the treatment that was accorded to the foreigners constituted to indignation, to intent to deceive, to a deliberate disregard, or to an inadequacy of State conduct that so far fall below international levels which every rational and unbiased person would easily acknowledged its inadequacy’.⁷¹⁸ Likewise, in 1929 in the *Mechem* case, the tribunal held, in relation to the murdering of a foreigner, that it could not have been really significant if greater effective steps may have been actioned, but just if ‘the killing or what has taken place indicates such a level of carelessness, flawed management of judicial process or intent to deceive that the system falls short to a lower level of requirement in international law.’⁷¹⁹ Supporting these two rulings, the act must be, to quote the frequent recited phrase, of an ‘egregious and shocking nature’ as it was originally quoted in this case, for it to be regarded as a breach of the global legal duty of security- a justly high standard,⁷²⁰ even if it is included as follows: ‘[t]here are certainly limitations to the scope in which [the restricted ability to provide security] will defend an omission efficiently to confront the criminality or anarchy’.⁷²¹

Past court rulings have not degraded the high standard considerably, in spite of the current sovereignty notion in international law.⁷²² Yet, State’s international responsibility can not be assumed.⁷²³ In the *ELSI* case in 1989, it was held by ICJ that the prerequisite for the availability of legal proceedings needed to be weighed in contrast to the principle of ‘arbitrariness’⁷²⁴ that

⁷¹⁷ *LFH Neer and Pauline Neer v United Mexican States* US-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60. Para 5

⁷¹⁸ *Ibid* Para 4

⁷¹⁹ *Laura A Mechem and Lucian Mechem Jr. v United Mexican States* US-Mexican General Claims Commission, Decision, 2 April 1929, 4 UNRIAA 443.

⁷²⁰ P. G. Foy and R. J. C. Deane, ‘Foreign Investment Protection under Investment Treaties: Recent Developments under Chapter 11 of the North American Free Trade Agreement’ (2001) 16 ICSID Rev-FILJ 299, 313, with further references.

⁷²¹ *Mrs Elmer Ellsworth Mead v United Mexican States* US-Mexican General Claims Commission, Decision, 29 October 1930, 4 UNRIAA 653, 654.

⁷²² J. F. Jackson, ‘Sovereignty Modern-A New Approach to an Outdated Concept’ (2003) 97 AJIL 782.

⁷²³ See *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision, 29 December 1924, 2 UNRIAA 651, 699; see also the Special Rapporteur for the International Law Commission on State Responsibility (1957) 9 ILC Yearbook, Vol. II Part II, 121-3.

⁷²⁴ *LFH Neer and Pauline Neer v United Mexican States* US-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60, Para. 128.

was considered as a ‘deliberate failure to follow the due process, a conduct that appals, or at the minimum, astonishes a perception of judicial appropriateness or decorum’.⁷²⁵

Countries that are involved in investment legal actions have clearly approved the traditional international law policy⁷²⁶ and a vast number of awards take the same inclination of wide respect. For instance, in *D Myers v Canada*, the tribunal ruled that:

States need to take various possible contentious decisions. In so doing, they might seem to have taken the wrong decisions, to have misconstrued the realities, begun a course of action on the footing of an erroneous economic or anthropological opinion, lay impossible importance on some community values above many different others and chosen answers that are eventually unsuccessful and ones that have the opposite of the desired effect. The general solution, in case one can find one, for mistakes in present-day regimes is by governmental and legitimate procedures, encompassing general elections.⁷²⁷

It went further with the mention of the ‘high levels of respect which international law universally expands to the prerogative of the national government to control issues in their territories’.⁷²⁸ At the same vein, in *Saluka v Czech Republic*⁷²⁹ the tribunal dismissed the application for contravention of the standard of the FPS provision, asserting that the country’s action ‘cannot be stated to be completely unnecessary and indefensible by few reasonable legitimate policy’.⁷³⁰

In *Mondev v United States*,⁷³¹ the tribunal appeared to contemplate that the measure by which the actions of a country are assessed should be altered, if nothing else, when construed in relation to the duties to accord more than physical security. The tribunal held as follows:

...improbable to limit the definition of FET and FPS of alien investment to what those words, if they were new during that period, could have intended during 1920s when used in the application of physical

⁷²⁵ *Ibid.* It must be taken note of that the case of *ELSI* did not use the minimum standard of international in traditional international law, rather an FCN agreement. The obiter dicta connect to the prevention of arbitrary conducts by the agreement of FCN.

⁷²⁶ See, the statements of the US, Canada, and Mexico cited in *ADF Group Inc v US*, ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, (9 January 2003), Para 179.

⁷²⁷ *SD Myers Inc v Canada*, UNCITRAL/NAFTA, Partial Award, 13 November 2000, Para 261

⁷²⁸ *Ibid.* Para 262

⁷²⁹ *Saluka Investments BV v Czech Republic* UNCITRAL, Partial Award, 17 March 2006

⁷³⁰ *Id.* Para 490, 493, 496.

⁷³¹ *Mondev v International Ltd v US*, ICSID Case No. ARB(AF)/99/2 (NAFTA), Award, 11 October 2002

protection of foreign investment. Today, what is unjust or impartial required not to be equal with what is shockingly bad or outstandingly bad.⁷³²

A clear departure to the general viewpoint is the ruling found in the case of *AAPL v Sri Lanka*. The arbitral tribunal in this case made reference to the principle of a ‘well governed government’.⁷³³ Dependent on this principle, the arbitrators challenged the conducts of the State against the Tamil Tiger rebel organisation and demonstrated that other options could have been accessible, which had better warranted the investment protection, for example, like the advance warnings that was issued to the police, better teamwork in the running of the corporation, or commands to dismiss accused persons.⁷³⁴ The dissenting adjudicator, Mr. Samuel Asante, on the opposite, expressed powerful scepticism concerning if this was achievable in relation to the conditions in the State at that time.⁷³⁵ In Asante’s opinion he stated as follows:

The preventative steps that the tribunal insisted upon would disproportionately and excessively limit the optional powers of autonomous States in taking every reasonable protection and soldiery steps at the time the lives of the citizens of the country and the country itself is at risk.⁷³⁶

Taking a look at traditional rules of law, especially in the mechanism of human rights, one would see that it promotes the respect which pays homage to the independence of a State. Necessitating, for instance, from the regime that it ought to have deployed more police agents includes an encroachment and interference into the autonomous judgements that are reached in the ceilings of a national legal command. The common custom in the US⁷³⁷ takes the capability of the individual State into consideration so far as this ability is not evidently insufficient. For example, in law of Germany, a breach of the obligation to provide security can merely be seen in rare situations, provided that the country reacts to any extent and applies an acceptable method.⁷³⁸ The ECtHR as well uses juridical prevention prior to the presumption that a country omitted to fulfil its positive duties, for instance, to safeguard and provide security to a person’s life. While, for instance, a country is obligated to hold a successful law in place, and to the

⁷³² *Id.* Para 116

⁷³³ *Asian Agricultural Products (AAPL) v Sri Lanka* ICSID Case No. ARB/87/3, Award, 27 June 1990 para 77, citing A. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Forces* (1957) 15-16.

⁷³⁴ *Ibid* Para 85.

⁷³⁵ *Ibid.* see diverging Viewpoint of Adjudicator Samuel KB Asante at paras 628, 652

⁷³⁶ *Ibid.* Para 653

⁷³⁷ See *Restatement (third) of Foreign Relations Law of the United States*, s 711, lit e (1987).

⁷³⁸ German Constitutional Court, BVerfGE 46, 160, 161 and BVerfGE 85, 386, 401.

making of the availability of police and judicial frameworks to comply with these laws, it is just with obvious evidence that the entities of the State are aware or should have been aware concerning an actual and instant danger to life which the judiciary adjudges as a contravention of the deterrent obligation to security and protection.⁷³⁹ However, having expressed all these facts, according deference to the country sovereignty where it has failed to apply the due diligence correctly as required under international law to protect investment would still leave the investors to bear the brunt of such failure.

5.10 The Principles of Reasonableness, Necessity, and Proportionality

Many phrases have been employed to explain the ceiling of the homage paid to a sovereign country. The ILC has stated that: '[d]uties of deterrent are generally interpreted as an excellent endeavours duties, necessitating countries to apply all appropriate or adequate steps to avert a given occurrence from happening, but without guaranteeing that the particular episode will not eventually take place again'.⁷⁴⁰ The word 'reasonableness' has as well been applied by other bodies. In the *Iran v US* case, the national treatment duty was associated with the necessity of reasonableness by the tribunal when it stated that: '[g]enerally, the principle of police security for alien citizens is unacceptable when it is lower than that accorded normally to the country's citizens'.⁷⁴¹ Adjudicator **Max Huber**, while adjudicating in *Spain v UK* case, made mentioned of an evocative circumstances for violations of what was tagged as 'the obligation to apply a definite diligence',⁷⁴² This obligation is contravened in case 'likelihood of help are, without credible justifications, obviously abandon or omitted, or if those in power were informed at the appropriate time and ways but they failed to exercise reasonable step to deter the conduct, or where the security is not afforded in the same terms to citizens or all countries'.⁷⁴³ According to traditional international law, any bias against aliens is however customarily regarded a barometer

⁷³⁹ *Mahmut Kaya v Turkey* Judgement, 28 March 2000, ECHR Rep 2000-III 149, Para 100; and *Osman v UK* Judgement of 28 October 1998, 29 EHRR 245 (1998), Para 116.

⁷⁴⁰ See, accounts of the Draft Articles on Responsibility of States for Internationally wrongful Acts approved by the ILC at its fifty-third session (2001) 53 ILC Yearbook, Vol. II, Part II, 145.

⁷⁴¹ *Emanuel Too v Greater Modesto Insurance Associates and the United States of America* Award, 29 December 1989, 23 Iran-US CTR 378, Para 22. See also *Restatement (Third) of Foreign Relations Law of the United States*, s 711, lit e (1987).

⁷⁴² *British Claims in the Spanish Zone of Morocco (Spain v UK)* Decision, 23 October 1924, 2. UNRIAA 639, 642 (translation by author).

⁷⁴³ *Ibid.*

for ‘unreasonableness’. The tribunal procedure in *D Myers v Canada* suggested, in respect to the duties to accord FET, from a violation of the entirely traditional national treatment principle⁷⁴⁴ a contravention of the protection of the minimum standard of treatment in traditional international law of minimum standard,⁷⁴⁵ has been condemned, and nevertheless should not be applied in the FPS circumstances either. The conclusion, equalling discriminatory treatment with an accomplishment of a country’s duty, should also be permissible and should go with the policy outlined above, regarding a security standard exceeding more generally than national treatment.

The arbitrary rulings in investment law have been applying the phrases ‘reasonableness’⁷⁴⁶ or ‘necessity’ to interpret the necessitated standard, and accordingly takes much the same route to those used by the bilateral claims commissions of the past. The second term of ‘necessity’ was used *AMT v Zaire*. The tribunal ruled in this case that Zaire is culpable for not exercising ‘all steps necessitated in providing the full benefits of the standard of FPS’.⁷⁴⁷

This approach in many different legitimate orders is in favour of this comprehension. Each of these three concepts, namely, ‘reasonableness’, ‘necessity’, and as well as proportionality’, have all been applied with identical interpretation. Reasonable is used to perform what is necessary, and whatever that is necessary and reasonable will not compel a disproportionate responsibility on the States. Whereas the concept of ‘proportionality’ has been mentioned mostly in European surroundings,⁷⁴⁸ ‘reasonableness’ is extremely general in the United States custom,⁷⁴⁹ but as well

⁷⁴⁴ The national treatment duty is not the traditional International Law in any part or form, see KS Gudgeon, ‘United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Treatment Standards’ (1986) 4 International Tax & Business Law 117.

⁷⁴⁵ *SD Myers v Canada* UNCITRAL/NAFTA, Partial Award, 13 November 2000, para265; see J. C. Thomas, ‘Reflections on Article 1105 of NAFTA: History, State practice and the Influence of Commentators’ (2002) 17 ICSID Rev-FILJ, Vol. 17, No. 1, p. 21-101.

⁷⁴⁶ *Tecnicas Medioambientales TECMED SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, Para 177

⁷⁴⁷ *AMT v Zaire* Case No ARB/93/1, Award, 21 February 1997, 36 ILM 1531 (1997) Para 6.05

⁷⁴⁸ See in general Nicholas Emilou, ‘*The Principle of Proportionality in European Law- A comparative Study*’ (1996); M-A Eissen, ‘*The Principle of Proportionality in the Case Law of the European Convention on Human Rights*’ in R Macdonald *et al* (eds.) *Dordect; Boston: M. Nijhoff, (1993), The European System for the Protection of Human Rights*’ Dordect; Boston: M. Nijhoff, (1993) Chapter 7

⁷⁴⁹ See the letter of the Legal Adviser of the Department of State (Hackworth) to Maurice F Lyons of 7 February 1935, cited in GH Hackworth , ‘*Digest of International Law* (1942) Vol. III, 633, Stating that: ‘States are obligated....to apply reasonable proper steps.’

has been applied in the ECtHR cases.⁷⁵⁰ The issue concerning what is ‘reasonable’ can be specifically hard to determine. Various common law States know the notion of administrative law like they know the different of the principle of juridical review in relation to *ultra vires* (without legal power or authority) administrative conduct.⁷⁵¹ Quite a good number of ICJ awyers have defined it as a duty concept of honesty and sincerity of intention – good faith,⁷⁵² and it has been employed in international criminal law both domestically and internationally, inter alia, for the interpretation of negligence.⁷⁵³

The principle of ‘Necessity’ is also used at the ECJ court in a 1977 case of *Commission v France*.⁷⁵⁴ The European Community Treaty enshrines clauses, in relation to the principles upon the freedom of movement of commodities inside the borders of European Union, which intends, just like international investment agreement do, for the security of economic and investment dealings of citizens of one contracting country in the terrain of another contracting State. This encompasses an obligation to act against any agitation which might violate this objective, by country organs or third parties. In a matter concerning the culpability of France for its inaction over countless years to deter violent rioting by the farmers of France from cross-country means of transport and to make the wrongdoers accountable, the ECJ ruled that ‘by omission to take every *necessary* or proportionate actions so as to deter the freedom of movement of their vegetables and fruit produce from being blocked and impeded by conducts of the third parties, the French government has omitted to accomplish its duties mandated in the Treaty of EC’.⁷⁵⁵ The Treaty of EC enshrines special provisions for the preservation of peace and public order however, it was ruled by the Court that this can not warrant a vague excuses for an unwillingness

⁷⁵⁰ See *Osman v UK* Judgement, 28 October, 29 EHRR 245 (2000), Para 116, stipulating that ‘it should be shown that the State, ‘omitted to apply steps within the ambit of their authorities that, ruled appropriately, could have been anticipated to prevent that jeopardy’; see also, *Storck v Germany* Judgement, 16 June 2005, 43 EHRR 96, Para 101

⁷⁵¹ See, T. R. Hickman, ‘*The Reasonableness Principles: Reassessing its Place in the Public Atmosphere*’ (2004) 63 Camb LJ 166.

⁷⁵² See, Joint Dissenting Opinion by Judges Lauterpacht, KO, and Spender, *Aerial Incident of 27 July 1955 (Israel v Bulgaria)* Judgement, 26 May 1959, ICJ Reports 1959, 188.

⁷⁵³ See, R. Ehrenreich Brooks, *Law in the Heart of Darkness: Atrocity & Duress*’ (2003) 43 Va JUL 861, 869-73.

⁷⁵⁴ Case C-265/95 *Commission v France* (1997) ECR I-6959, Judgement, 9 December 1997.

⁷⁵⁵ *Ibid* Para 66

to interfere over countless years.⁷⁵⁶ This ruling seems to augur well in favour of foreign investor under FPS obligation where the State is unwilling to protect their investments.

Lastly, the word ‘reasonableness’ has been applied by the ECtHR, the court has ruled that the notion of reasonableness must be read in a manner which ‘does not place an unbearable or unreasonable responsibility on the shoulders of authorities’.⁷⁵⁷ In a trial concerning the inaction about the London Metropolitan Police to safeguard an individual’s life, the Court described the appropriate level of protection that is expected: ‘it should be proven to [judiciary’s] contentment that the State was aware or should have been aware at that point in time of the occurrence of a genuine and instant danger to the individual’s life...and still they omitted or neglected to apply steps within the ambit of their authorities which when considered reasonably, could have been anticipated to deter that jeopardy’.⁷⁵⁸ The Court as well upheld contravention of practical obligation where the government neglected to apply steps which were ‘reasonably obtainable to the State’ if those steps ‘might have had an actual likelihood of changing the result or hindering the damage’.⁷⁵⁹ There are some other case laws of FPS that have been mentioned in this thesis where the authorities were informed about the harm that was about to befall the investors and their investment yet the authority did nothing thereby failing this test of reasonableness.

5.11 Awareness and Predictability

In traditional international law, the doctrine of State responsibility is comprehended as being of purposive nature; accordingly, liability is frequently not an essential prerequisite but, instead, a barometer. That means it is an instrument for measuring the level of the fault.⁷⁶⁰ The salient necessities are ‘knowledge’ or ‘awareness’ on the side of States. The Applicant, therefore, has the onus of proof in demonstrating that the circumstances were either made aware to the public or were put forward to the awareness of the State. Whereas the State has to rebut this *prima facie*

⁷⁵⁶ *Ibid* Para 52

⁷⁵⁷ *See, Osman v UK* Judgement, 28 October, 29 EHRR 245 (2000), Para 116, saying that ‘it should be proven that the government, ‘neglected to exercise appropriate steps within the ambit of their authorities that when considered reasonably, could have been anticipated to prevent that danger’.

⁷⁵⁸ *Ibid* Para 116

⁷⁵⁹ *E and ors v UK* Judgement, 26 November 2002, 36 EHRR 31; *Z v UK* Judgement, 10 May 2001, 24 EHRR 13 54.

⁷⁶⁰ *Laura A Mechem and Lucian Mechem Jr. v United Mexican States* US-Mexican General Claims Commission, Decision, 2 April 1929, 4 UNRIAA 443.

(accepted as correct until proved otherwise) proof by showing that measure was applied to avert it.⁷⁶¹ A specific demand for security is not a crucial necessity for presuming culpability, but is commonly salient evidence if disregarded by the State.⁷⁶²

‘Predictability’ or ‘foreseeability, as a ‘should have known’ principle, is as well, generally applied, specifically in connection to the practical obligations of countries with their police authority. Once a person had communicated to the State or its organs on various occasions the horror of a particular episode which eventually happened after an omission to take adequate measures by the State or its corpuses, the foreseeability of the consequences prompts the States’ responsibility.⁷⁶³

The traditional international law principle has been supported and upheld by the investment legal jurisprudence. For instance, the tribunal in *Wena Hotels v Egypt* made reference to ‘awareness’,⁷⁶⁴ despite the fact that the tribunal did not see any proof that Egyptian representatives had encouraged or involved in the occupation of the hotel, it found Egypt culpable on the premises that its organs were ‘aware’ about the aim to capture the hotel but refused to take any action to avert it. The same reasoning was applied in the case of *Joseph Houben v Burundi*,⁷⁶⁵ where the state was aware of a coming danger to the investment but failed to take adequate action to thwart the damage to the investment occurring. Burundi was held liable for falling short of its obligation to accord FPS to the investor.⁷⁶⁶

⁷⁶¹ See, *Mexico City Bombardment Claims (Great Britain) v United Mexican State* British-Mexican Claims Commission, Decision, 15 February 1930, 5 UNRIAA 76.

⁷⁶² For the requirement of a demand see, *George Adams Kennedy v United Mexican States* US-Mexican General Claims Commission, Decision, 6 May 1927, 4 UNRIAA 198; in opposition to such a requirement see *Mrs Elmer Ellsworth Mead v United Mexican States* US Mexican General Claims Commission, Decision, 29 October 1930, 4 UNRIAA 653. See also *Emanuel Too v Greater Modesto Insurance Associates and the United States of America* Award, 29 December 1989, 23 Iran-US CTR 378, Para 23; and the *Poggioli* case, Italian-Venezuelan Mixed Claims Commission, Decision, 1903, 10 UNRIAA 669, 689.

⁷⁶³ See, *William E Chapman v United Mexican States* US-Mexican General Claims Commission, Decision, 28 February 1931, as cited in Jacobus G De Beus, *The Jurisprudence of the General Claims Commission United States and Mexico* (1939) 222; *Kilic v Turkey* Judgement 28 March 2000, 33 EHRR 1357, Para 62

⁷⁶⁴ *Wena Hotels Ltd v Arab Republic of Egypt* ICSID case No ARB/98/4, Award, 8 December 2000, 41 ILM 896 (2000), Para 84.

⁷⁶⁵ *Joseph Houben v Republic of Burundi*, ICSID Case No. ARB/13/7, Award, 12 January 2016.

⁷⁶⁶ *Id.* at Para 171

5.12 Causes and Effects

The part that cause and effect play on the side of the investor in the standard of FPS obligation has been generally ignored by investment arbitrators.⁷⁶⁷ For example, in *Noble Ventures v Romania*, the tribunal examined the detail that the applicant had ‘omitted to establish that its asserted losses and damages may have been averted if the defendant had employed the care of due diligence in connection to the circumstances’ is just an extra supporting component in its general ruling that it could not find any violation of the standard of FPS provision in the particular BIT.⁷⁶⁸ It was ruled that ‘the basis of this argument is difficult in principle’, and that... an application presented to an international arbitrators simply cannot be made good by casual mentions of universal perception’.⁷⁶⁹

The procedure of human rights legal system varies in this respect. The ECtHR necessitates, for instance, where there are insufficient law a ‘close link’ of ‘first hand and conclusive cause of an action’ linking the omission to enact laws and the damaging occurrence.⁷⁷⁰ In some other matters, it was deemed adequate to establish that the neglected actions could have had a ‘proper likelihood of changing the end result’.⁷⁷¹

5.13 Disputing Investors’ Rights and Third Parties Rights

The issue concerning a thinkable dispute between the rights of an investor and third parties’ rights came to light in *Tecmed v Mexico*.⁷⁷² The Applicant had argued that the officials of Mexican State ‘failed to react as promptly, effectively and scrupulously as they were expected to have reacted to circumvent, halt or bring to conclusion⁷⁷³’ the protests which had caused

⁷⁶⁷ See, S. Vasciannie, ‘Bilateral Investment Treaties and Civil Strife: discussing The *AAPL v Sri Lanka* Arbitration’ (1992) 39 *ILR* 353. Referrals concerning the necessitated cause and effect were included in the narrative to the early Draft of Articles on State Responsibility by Special Rapporteur Ago, however, it was removed afterward; see the commentary to Art 23, (1978) 30 *ILC Yearbook*, Vol. II Part II, 81

⁷⁶⁸ *Noble Ventures Inc v Romania* ICSID Case No. ARB/01/11, Award, 12 October 2005, para 166.

⁷⁶⁹ *Pantehniki SA Contractors & Engineers v The Republic of Albania*, ICSID No. ARB/07/21, Award (30 July, 2009) Para 85

⁷⁷⁰ See *LCB v UK* Judgement, 9 June 1998, 27 *EHRR* 212, Para 39, see also *Tugar v Italy*, European Commission for Human Rights, Decision, 18 October 1995, ECHR App No 2869/93, where the claimant’s harms might ‘not be found as a first hand results’ of the State’s ‘negligence to enact laws on weaponry movements.

⁷⁷¹ *E and ors v UK* Judgement, 26 November 2002, 36 *EHRR* 519, Para 99.

⁷⁷² *Tecnicas Medioambientales TECMED SA v United Mexican States* ICSID Case No. ARB (AF)/00/2, Award, 29 May 2003, Para 177.

⁷⁷³ *Ibid* Para 175

interferences to the investor's business performances and endangered the individual safety of the personnel. The arbitrators in this case did not clearly make references to the protesters' civil rights which needed to be contemplated, but instead just ruled in broad words that no enough proof presented in the case to substantiate the assertion that the State of Mexico 'failed to act appropriately, in conformity with the framework fundamental within a democratic country'.⁷⁷⁴ In this surrounding, it is important to examine a decided case in 2003 by the European Court of Justice,⁷⁷⁵ regarding the duty by the Austrian government to intercede against individuals who were obstructing vehicles carrying commodities via one key crossing passages with the aim to demonstrate in position to the environmental emission harms created by excessive travelling congestion. The ECJ had to balance the right of freedom of transport of commodities, promised in EC Treaty under Article 28 (presently in Article 34 of the Agreement on the Function of the European Union-TFEU), with the right of expression and congregation of the demonstrators, promised in ECHR within its Article 10 and 11. The ECJ granted a broad perimeter of respect to the State of Austria and centred on the extent of the action. In the specific situation, it rejected to find a breach of the European Community Treaty.⁷⁷⁶ The ruling in this case varies from the handling of the case that was made reference of above about France,⁷⁷⁷ where the ECJ had regarded the failure of the State of France against the protesters to amount to contravention of their duties to guarantee for the freedom of movement of cargoes. The disturbance in the case concerning Austria was restricted in duration and ambit and did not focus particularly at interrupting the right of freedom of movement of cargoes. This can indicate that a State's excessive commitment to exercise its FPS responsibilities could lead to the possibility of threatening human rights. If a State is too anxious to protect an investor's investment from local protesters it might turn to and adopt the use of force that could be regarded more than necessary under international human rights law, that is, unreasonable use of force.

An identical result, using the different principles outlined above, could be seen in the circumstances surrounding the arbitration of investment treaty, especially if the two parties that signed the treaty were as well parties to any treaty of international human rights which has

⁷⁷⁴ *Ibid* Para 177

⁷⁷⁵ *Case C-112/00 Eugen Schmidberger v Austria* [2003] ECR I-5659, Judgement, 12 June 2003.

⁷⁷⁶ *Ibid* Para 69

⁷⁷⁷ See *Case C-265/95 Commission v France* [1997] ECR I-6959, Judgement, 9 December 1997.

warranted for the rights for the liberty of expression and gathering. It might also emerge in other relationships, for instance, in an issue of dispute between particular rights accorded to local citizens, in a way, and the security of investment, in another.⁷⁷⁸

Furthermore, as this paper has mentioned earlier, a State's over-commitment to keep its FPS obligations has the possibility to threaten human rights. If a State is overzealous to protect an investor's investment from local protestors, it may lead to applications of force that would be regarded excessive under human rights law. The following account is not based on an arbitral claim, but it shows the danger of protecting foreign investments at the expense of the rights of local residents.

The eastern precinct of Odisha in the jurisdiction of India is setting the peasant farmers up in conflict against international business concerns in a war that jeopardises the Indian State's concept of development.

“POSCO go back!” is a usual slogan between many of residents hailed from Jagatsingpur community who have been positioned as security guards in the village boundaries starting from June 2, 2006, to stop the forceful procurement of their landed properties to build a steel factory, the State's biggest, which the Republic of South Korea located Pohang Steel Company (POSCO) intends to layout. Twenty police regiment have been deployed some kilometres in a distant, anticipating for orders to act or the State.

POSCO, is partly financed by Warren Buffett, Citibank and JP Morgan Chase at \$12 billion, and is listed to be the biggest FDI to be produced within India, as claimed by State of India's Department of Commerce and Industry. The government of Precint of Odisha in India alleged that the mega-venture will end impoverishment in the country. But six years on after the claim

⁷⁷⁸ See, the debate of 16 October 2006 submitted by the Quechan Indian Nation in the case *Glamis Gold Ltd v US* UNCITRAL Award, 8 June 2009, citing the rights that should be protected, for example, Convention (No 169) regarding the Indigenous and Tribal Peoples in Independence Countries, ratified on 27 June 1989, came into use on 5 September 1991, 28 ILM 1384 (1994) (and many other human rights agreements. The Tribunal, nonetheless, did not contemplate it obligatory to investigate this matter more, because it went over its matter-specific authority and direction, Para 8. In *Biwater Gauff Tanzania (Ltd) v United Republic of Tanzania* ICSID Case No ARB/02/25, Award, 24 July 2008, Para 356-392, the arbitrators contemplated thoroughly the arguments of many human rights corpuses as *amici curiae* (an impartial adviser to a court of law in a particular case) in the surrounding of expropriation (government takings). The Disagreement between a positive action schedule and the principle of national treatment in the BIT entered by Italy-South Africa might be debated in the uncompleted case *Piero Foresti, Laura de Carli and ors v Republic of South Africa* ICSID Case No ARB (AF)/07/1, Award, 4 August 2010.

was made to wipe out poverty from the region the State could not accomplish the acquisition of the land so as to build the factory.

Ten groups of policemen, on July 16, 2006, walked towards Nuagaon small municipality with the local authority representatives to start again the action of the land purchase. More than 300 women from the village attempted to prevent them from cutting down the trees inside the woodland. The police pounced on them with truncheons harming eight women, prior to their eviction out of the village by the inhabitants of the village.

Odisha has an abundance of mineral resource, for it to draw investments from the outsiders the State has made compromises for companies in the like of tax-free Special Economic Zones and mineral-ore at cheap rates. But all over the country, from Niyamgiri the area that the Dongria clans are waging war against UK-located Vedanta's bauxite mining scheme, to Kalinganagar, the region that the resistance to Tata's recommended Steel factory, has caused the murder of 19 rural dwellers starting from January 2006, these mega scheme have attracted a lot of opposition from many individuals they claim to benefit.

Apart from the steel factory, a Memorandum of Understanding (MoU) was entered by the State of India and POSCO encompasses six hundred tonnes of iron ore to be excavated in the mounts of Kandahar, a secure port in Paradeep, a one thousand and three hundred large-watt energy factory, exceptional railway tracks, and deviation of water channel from the Mahanadi stream, eighty-six km apart.

'This programme will not just offer direct enjoyments, but will generate additional investment that will add value to the area's economy' explains Dama Raut, the individual that was voted as Legislative Assembly official of the district at the time the POSCO scheme commenced. He said that 'for people to profit from something they must sacrifice something in return', when questioned concerning the displacement of the rural dwellers of the area. The eight communities that POSCO is considering for the land acquisition have a productive agriculture-situated economy growing betel-vine, rice, and cashews. The demonstrating communities consider the steel factory as a danger to the land cultivation livelihood of 22,000 people, apart from

detrimentally impacting the ecology.⁷⁷⁹ The threats and the killings of the 19 village residents for sole protection of foreign investment in this region are tantamount to human rights abuse under international human rights law and would not be for the commitment to keep India's FPS obligations.

5.14 Conclusion

It has been established in this section that the concept of due diligence has existed under international law right from the 17th century onwards to mediate interstates relations at the time of significant change, and later has been used to mandate the States to protect and deter foreign investments from infliction of harms to investors and their investments. This has been stated by arbitral tribunals in various case laws. From the vast majority of findings in the above authorities the duty to accord FPS is restricted, in the sense that it does not create strict liability, but requires the maintenance of a high level of due diligence on the side of the host States. Fortunately for the States, Tribunals have refused to impose absolute liability upon the host State, but in the future Tribunals may change their mind and might consider that the ordinary meaning of the phrase really provides a strict liability and another controversy will ensue over such debate. Such presumption is being made considering the type of the languages that have been used by arbitral tribunals in some of the case law of FPS in respect to strict liability.

And as for the ruling as whether or not the level of diligence necessitated of the host country is determined on its condition of progress and on the availability of its wealth still lingers and is still under debate and will continue to damage the investors investment if it is persisted and be allowed to continue as a norm. Also, the high degree of diligence anticipated of a State should not necessarily be in proportion to the State's availability of resources as tribunal had held in some cases. Rather it should as well comprise of making the juridical mechanism accessible to investors to seek remedy for their contractual prerogatives and a prerequisite that a country must

⁷⁷⁹ See, Fazio Ahmed Khan, *Indian farmers protest massive steel plant India's largest ever direct investment project, valued at \$1 billion, could displaced 22, 000 people*, ALJAZEERA.COM (19 July, 2011, 2:07 PM), <http://english.aljazeera.net/indepth/features/07/201171711310873319.html>. See also this report in Krista Nadakavukaren Schefer, 'International Investment law, Text, Cases and Materials', (2013) Edward Elgar Publishing Limited (2013) at p. 326-327.

abide by. But having look at many case laws of FPS regarding due diligence, it obvious that host States have not been able to apply step of measures that are reasonably necessary in all circumstances to prevent foreign investments against harm that emanate either from the States itself, its organs, or from third parties. This is so sad and disappointing to foreign investors and undermines the purpose of the obligation of FPS reposed on the host States by international law. These shortcomings have created a gap in the protection of foreign investments by the States, and this must gap must be filled by applying the necessary due diligence measures mandated on the States by international law and by bringing the perpetrators of these harmful acts against investors' investments to justice and eventually penalising them, which so far both the States and tribunal have adequately failed to apply.

CHAPTER SIX

THE RELATIONSHIPS BETWEEN FPS AND FET

6.1 Introduction

Another problem that is looming which has created a gap in the protection of foreign investment is the argument over the relationship between FET and the standard of FPS standard. This chapter will be analysing the relationship between FPS and FET as follows: First, it will start by assessing the evolution and the definition of the FET standard and relates both issues with State behaviours that can breach both FPS and FET standards. Secondly, it will be followed by looking at how some arbitrary tribunals have interrelated the meaning of the standard of FPS to the principle of FET, while others tribunals have separated the meaning of the both standards. It will at the same time examine how some tribunals have given a wider interpretation to FPS, while other arbitrary tribunals have intertwined the interpretation of FPS to FET. It will proceed by critically looking at the reasoning against which arbitrary tribunals interpret FET and FPS standards with focus on VCLT guidelines of interpretation and possibly look at the divergence that comes with it. Lastly, the chapter will be concluded by advocating for the need to incorporate FPS standard and FET in two different Articles in BITs, and also for the need for a more substantial consistency of interpretation of FPS by tribunal in the decisions of claims. But before going further to discussing the relation between FPS standard and FET standard it is imperative to write briefly what the standard of FET is all about and how it originated.

6.2 The Development of the FET Standard

FET standard is clearly a very wide one, and to determine its real definition will obviously be based on the particular situations of the matter at hand⁷⁸⁰ contrary to the comparative principles incorporated in National Treatment and Most-Favoured Nation protective standards that interpret the prerequisite treatment by reference of the treatment afforded to some other investments.⁷⁸¹ Despite the fact that, most investment protection agreements necessitate that investments and

⁷⁸⁰ G. Sacerdoti, 'Bilateral Treaties and Multilateral Instruments on Investment Protection (1997) 269 *Recueil des Cours* 251, 346; UNCTAD Series on the Matters in International Investment Treaties, *Fair and Equitable Treatment* (1999) 22

⁷⁸¹ See UNCTAD, *Bilateral Investment Treaties in the MID 1990s, 1998*. Also see A. A. Fatouros. "States Warranty to Foreign Investors", *Columbian University Press (1962)*, pp. 135-141, 214-215

investors covered receive FET, there has been no general consensus on the exact meaning of this principle.⁷⁸² For this reason, *Professor Muchlinski* has stated:

The notion of FET is not meticulously interpreted. It gives a common viewpoint in expressing an assertion that the foreign investor has not been offered a good treatment on the ground of prejudicial or other unjust steps being meted out against its investments. It is, accordingly, a notion that is based on the definition of particular realities for its text or subject matter. To the greatest extent, it may be contemplated that the notion suggests the standard of fair, unprejudiced and impartiality in dealing with alien investors.⁷⁸³

In agreement with Muchlinski's statement, the tribunal in *Mondev v The United States* was of the viewpoint that "[a] judgment concerning what is just and impartial should not be concluded in theory, rather it should be based on the realities of the specific case".⁷⁸⁴ The tribunal as well similarly stated in *Waste Management v Mexico* case that 'the FET principle is to a degree an adjustable one that should be changeable to the situation of every case'⁷⁸⁵

Having said all these, it is better to first of all start the discussion of FET standard for foreigner which has frequently been found in 1926 in the history of the *Neer case*.⁷⁸⁶ The fact of this case was not about a business transaction but rather the case ensued from the killing of a national of United States of America living in Mexico City. The arraignment was due to the fact that the Mexican government indicated an absence of exercise of due diligence while probing and instituting legal proceedings of the crime. The Commission stated as follows:

...for a treatment given to a foreigner to amount to an international wrongdoing, it must comprise of an indignation, to intentional dishonest act by not fulfilling legal and contractual obligations, to deliberate failure of obligation, or to inadequate of State conduct that is to certain extent insufficient of international standards which all rationale and unbiased person should easily acknowledge its inadequacy.⁷⁸⁷

⁷⁸² Rudolf Dolzer and Magrete Stevens, 'Bilateral Investment Treaties', ICSID 1995. D; Mahmoud Salem, in << Le developement de la protection conventionnelle des investissements etrangers >>, *Journal du Droit International*, No. 3 (1985) pp. 579-626.

⁷⁸³ Peter Muchlinski, "Multinational Enterprises and the Law", Blackwell Publishers,(1995) p. 625

⁷⁸⁴ *Mondev Int'l Ltd v United States of America*, Award, 11 October 2002, 42 ILM (2003) 85, Para 118.

⁷⁸⁵ *Waste Management, Inc. v United Mexican States*, Award, 30 April 2004 (2004) 43 ILM 967, paras 99; See also, Peter Muchlinski, "Multinational Enterprises and the Law", Blackwell Publishers, (1995) p. 625.

⁷⁸⁶ *LFH Neer and Pauline Neer v United Mexican States*, Opinion, US-Mexican General Claims Commission, Decision, 15 October 1926, 21 AJIL (1927) 555.

⁷⁸⁷ *Id* at 556

Nevertheless, it was held by the Commission that what the case says failed to indicate any absence of duty of care that would make Mexico culpable of the offence and the tribunal dismissed the application.

The *ELSI (United States v Italy)*⁷⁸⁸ is another constantly cited case that was held by the ICJ. The appropriate treaty in the case forbids arbitrary conduct, and this principle equally may as well throw a light on FET principle. The case was filed because of a requisition order that was made against a business factory by mayor of Palermo which belonged to corporation of an Italian possessed by US directors. The ICJ stated as follows:

Arbitrariness does not mean very much of a thing that was against a principle of law, with appearance of a thing that was against the principle of law...It means a deliberate non-observance of fair and impartial treatment through the normal judicial mechanism of law like lack of due process, a conduct that appalls, or at minimum astonishes, a perception of juridical respectability.⁷⁸⁹

The ICJ in its finding held that the requisition order was not in contravention of the principle of FET.

Considering the unsuccessful outcome of the two cases, successive tribunals have particularly kept themselves at arm's length against the extremely extensive criteria that would otherwise breach the international law, especially like the one couched in *Neer*. Instead, tribunals have continuously adopted the strict principle in *ELSI* case and gave the expression that it was addressing a progressing principle.⁷⁹⁰

ADC v United States is a case related to local contents prerequisites concerning government acquirement for a building scheme. The tribunal interpreted Article 1105 of NAFTA in respect to the case as follows:

that the traditional international law that was mentioned under Article 1105 (1) is not fixed for a particular period of time and that the minimum level of treatment can change... what traditional international law

⁷⁸⁸ See *Electronica Sicula SPA (ELSI) (US v Italy)* Judgement, 20 July 1989, ICJ Reports 1989, 15.

⁷⁸⁹ *Id.* at Para 128

⁷⁹⁰ See for examples, *Pope & Talbot v Canada*, Award on Merits, 10 April 2001, 122 ILR (2002) 352. Para 118; *GAMI v Mexico*, Award, 15 November 2004, 44 ILM (2005), Para 95; *LG&E v Argentina*, Decision on Liability, 3 October 2006, Para 123

forecast can not be an unchanged picture of the minimum level of treatment of foreigners just as it was in 1927 during the ruling of the *Neer Award*.⁷⁹¹ For both traditional international law and foreigners' minimum level of treatment that it inserted, are steadily under a mechanism of evolution.⁷⁹²

Despite the extensive criterion level for a breach under international law formulation in *Neer case* that tribunal has detached themselves from, and the less harsh standard of ELSI adopted by tribunal, the standard of FET has become the extremely important standard within investment disputes. The principle of FET is basically not a new one because it has been found in international documents for quite some time now as we can see from the some of the case law mentioned above.

There are some documents where the concept of FET has appeared as non-binding documents, whereas there are some documents that have been ratified as binding instruments inform of either bilateral or multilateral agreements.⁷⁹³ The FET is created to serve as a tradition of international law which does not base its determination by the domestic laws enacted by the host States. There are so many bilateral investment treaties and few other investment agreements that accord the standard of FET to alien investments. For example, the bilateral investment treaty signed by Argentina and the U.S. It stipulates under its in Article II (2) (a) that: 'Investment must always be afforded fair and equitable treatment....'⁷⁹⁴

In *Metalclad*⁷⁹⁵ and *Maffezini*, the investment tribunal gave content to definition of FET and have put it into use to a wide range of situations. The notion of FET seems to have originated from the treaty that was practiced in the U.S. at the time the treaties on FCN existed⁷⁹⁶ For example, the U.S./German Treaty of 1954 in Article I (1) states:

⁷⁹¹ *LFH Neer and Pauline Neer v United Mexican States* US-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIAA 60. *ADF Group Inc v US* ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179

⁷⁹² *ADF Group Inc v US* ICSID Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179

⁷⁹³ S. Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 *British Yearbook of International Law*, at pg. 99,100-111, 107-119

⁷⁹⁴ See Article 11 (2) between Argentina and United States of America (1991)

⁷⁹⁵ *Metaclad v Mexico*, Award, 30 August 2000, 5 ICSID Reports 209; *Maffezini v Spain*, Award on the Merits, 13 November 2000, 16 ICSID Review-FIJ (2001) 248.

⁷⁹⁶ See RR Wilson, '*United States Commercial Treaties and International Law* (1960) 113, 120.

‘Every Party must always, afford FET to property, businesses and other concerns to citizens and corporations of another Party’.⁷⁹⁷

Again, ‘fair and equitable treatment’ standard was made reference to, and first surfaced in Havana Charter of 1948 under Article 11(2).⁷⁹⁸ It contemplates that alien investments must be provided with fair and equitable treatment. The Article stipulated that the ITO could:

“Make proposals for and encourage bilateral treaties on the scales outlined To guarantee fair and impartial treatment in favour of the businesses, expertise, capital, arts and scientific knowledge carried from one Party State to the other.”⁷⁹⁹

The organisation was to be given the power, among other things, to stimulate agreements that foster “equal dispensation of expertise, crafts, scientific knowledge, materials and apparatus, in respect with the requirements of every member country”.⁸⁰⁰ Also, in the Abs-Shawcross Draft Protocol of 1959 that deals with alien investments, under Article 1 of the Protocol made references to the standard of ‘FET to the investment of the citizens of another party’,⁸⁰¹ and the successive OECD Draft Convention on the Protection of Foreign Property of 1967 under Article 1 has the same wording.⁸⁰² Furthermore, the blueprint which deals with United Nations Code of Conduct on Transnational Corporations within its 1983 report refused to drift away from similar terminology that was used by OECD rather it uses the same viewpoint and stipulated that transnational companies should be afforded FET.⁸⁰³ The Recommendations on how the FDI should be treated which was ratified by the Development Committee of the Board of Governors of the IMF and the World Bank in 1962 was not left out. In their Section III of business transaction with ‘Treatment’ it states that ‘2. Every country will expand to investments formed in its jurisdiction by citizens of another country FET in accordance with the principles proposed

⁷⁹⁷ Treaty of Friendship, Commerce and Navigation, 29 October 1954, US-FRG, 273 UNTS 4. See also Treaty of Amity, Economic Relations, and Consular Rights, 15 August 1955, US-Iran, 284 UNTS 110, 114.

⁷⁹⁸ UNCTAD, I *International Investment Instruments: A Compendium* (1996) 4.

⁷⁹⁹ UNCTAD, I *International Investment Instruments: A Compendium* (1996) 4. All attempts to bring the Havana Charter into force failed.

⁸⁰⁰ See, Havana Charter on International Trade Organisation, art. 11 (2)

⁸⁰¹ UNCTAD, 5 *International Investment Instruments: A Compendium* (2001) 395. The Draft Protocol epitomised a personal scheme by H Abs and Lord Shawcross.

⁸⁰² OECD Draft Convention on the Protection of Foreign Property (1967), 7 ILM (1968), 117 at 119.

⁸⁰³ UNCTAD, 1 *International Investment Instruments: A Compendium* (1996) 172.

under those guidelines'.⁸⁰⁴ The Multilateral Agreement on Investment, 1998, incorporated as follows in its wording in section 1.1 that deals with investment protection:

'Every Contracting Party must afford to investor's investment within the jurisdiction of the other Party the standards of FET and FPS. Under no circumstances must a Party afford lower favourable treatment than that international law necessitated'.⁸⁰⁵

There are also a quite good number of multilateral agreements which are in force that the principle of FET has gained entrance into. For example, the 1985 Convention of Establishing the Multilateral Investment Guarantee Agency states that fair and equitable treatment must be made available as a condition before any extension of insurance is covered. Article 12 that deals with 'Eligible Investment' stipulates partly as follows:

(d) 'In warranting any investment, the Organization must have self conviction concerning: ... (iv) the investment atmosphere within the territory of the host State, encompassing the accessibility of FET and legal security of the investment'.⁸⁰⁶

The 1992 Article 1105(1) of NAFTA has in its content the FET concept which provides that: 'all parties must afford to investments of the other Parties the treatment that is in conformity with international law, encompassing FET and FPS'.⁸⁰⁷ And lastly, the 1994 ECT under its Article 10 (1) also has in it a detailed but complicated wording about the necessity of FET. The section provides that:

Every Contracting Party must, in respect of the clauses of this agreement, promote and bring into existence steady, fair and impartial, beneficial, and unambiguous circumstances for investors doing business in the region of another Contracting Party. These circumstances comprise an obligation to always provide to Investor's Investment of another Contracting Party the standard of FET.⁸⁰⁸

The concept of FET may be breached notwithstanding whether the alien investor has been accorded similar treatment as the investors from the host country's citizenship. An investor, similarly, could have been given treatment that is unfair and discriminatory even in a situation

⁸⁰⁴ Guidelines on the Treatment of Foreign Direct Investment, 7 ICSID Review-FILJ (1992) 297, 300.

⁸⁰⁵ UNCTAD, 4 *International Investment Instruments: A Compendium* (2001) 148.

⁸⁰⁶ UNCTAD, 1 *International Investment Instruments: A Compendium* (1996) 219.

⁸⁰⁷ North American Free Trade Agreement, 8-17 December 1992 (1993) 32 ILM 605, 639

⁸⁰⁸ UNCTAD, 1 *International Investment Instruments: A Compendium* (1996).

where it lacks the opportunity to profit from a most-favoured-nation provision where it cannot prove that foreign investors from other countries have been offered a better treatment. Possible identified typical fact situations to which the standard of FET has been applied by investment tribunals will depend on many factors.

6.2.1 Transparency, Consistency, Reliability and Security of the Investors legitimate Anticipations

Unambiguous and the security of the legal anticipation of the investor are almost nearly interwoven. Transparency is an indication that the legal mechanism that operates with the investment of the investors is easily and clearly evident, and that whichever rulings that have an effect on an investor can be found through that legal mechanism.⁸⁰⁹ Both the necessity for transparency plus the security of the investor's legitimate anticipation are both strongly embedded in arbitral principle.

Legitimate expectations of an investor are dependable on this legal mechanism and on the guarantees and statements that has been put forward clearly and absolutely by the host country.⁸¹⁰ The legal mechanism of the host state that the investor has the right to depend upon is made up of laws and agreements, of guarantees embodied in statutes, permits from authorities and related administrative guarantees as well, as commonly found in contractual pledges. An alteration of guarantees that any host country initiates and which hence results to the cutting off the legitimate expectations of foreign investor will breach the concept of FET.⁸¹¹

6.2.2 Conformity to Contractual Agreements Duties

What is nearly associated to the matter concerning the security of the foreign investor's lawful expectation is the issue as to what degree this security expands to the acknowledgement of the duties that stems from contractual arrangements. Contract arrangements are very instrumental to every legal mechanism for the building of judicial stability and foreseeability. For this reason, *pacta sunt servanda* (agreements must be kept) may appear to be an explicit

⁸⁰⁹ UNCTAD Series on Issue in International Investment Agreements, *Fair and Equitable Treatment* (1999) 51.

⁸¹⁰ see, Dozer 'New Foundations of the Law of Expropriation of Aliens Property' (1981) 75 AJIL, pg. 553-589

⁸¹¹ See W. M. Reisman and M. H. Arsanjani, 'The Question of Unilateral Governmental Statements as the Applicable Law in Investment Disputes' (2004) 19 ICSID Review-FILJ 328; S. Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 British Yearbook of International Law 99, 146-147

employment of the legal reliability prerequisite that is highly important under the obligation of the principle of FET. The link that connects this area of the principle of FET with the umbrella clause is very conspicuous. (An umbrella clause protects investments by bringing obligations and commitments that the host State entered into in connection with a foreign investment under the protective umbrella of the BIT).

Tribunals appear to be in consensus that a State's omission to execute a contractual agreement could constitute a breach of the principle of FET. Considering vast of case laws that dealt with the security of legitimate anticipation of the foreign investors and their investments, those legitimate expectancies were truly depended on contractual agreements reached between the investor and the host country. However, it is an open question by the current arbitral rulings whether a breach of an investor's contractual duty that stems from the host country or from its organs spontaneously constitutes a contravention of the principle of FET.

6.2.3 Procedural Due Process of Law

A just process of law is basic necessity of the principle of law as well as the essential characteristic of the standard of FET. This is direct opposite to the international misconduct in connection to denial of justice.⁸¹² The obligation could be contravened by all arms of government's action, namely; judiciary, legislative or executive.

The 2004, Article 5(2)(a) of the US Model BIT, particularly made it clear that the principle of FET comprises of security against the State denying justice and assurances of due process to investors.⁸¹³ It stipulates as follows:

The standard of 'FET' comprises the duty to avoid the denial of justice in the cases that involve crime, private disputes between persons or organisations, or managerial arbitrary litigations in conformity with the due process concept incorporated in the key legal frameworks of the globe.⁸¹⁴

There have been multiple of cases where tribunals have held that an absence of an unjust process, or severe systematically failings, amount to predominant components in an upholding of

⁸¹² See, *Azinian v Mexico*, Award, 1 November 1999, 39 ILM (2000) 537, Para 102, 103 on how the denial of justice has been described in general

⁸¹³ See, Rudolf. Dolzer and Christoph. Schreuer, *Principles of International Law* (OUP, Oxford 2008), at p. 162.

⁸¹⁴ See, Article 5 (2) (a) of the United States Model BIT 2004

a contravention of the standard of FET. A majority of those cases are associated to the prerogative to be listened to in courts or administrative legal actions. For example, in *Metalclad v Mexico*,⁸¹⁵ the tribunal held Mexico in breach of the obligation of FET guaranteed in Article 1105 of the NAFTA because its local authority denied the grant of a building licence to the applicant. One of the important elements in this ruling was the government failure to observe the rules that are expressly laid down in the legislation by which its jurisdiction is conferred and which in this case was dearth of procedural propriety, and which particularly was a non-performance to pay heed to the foreign investor.⁸¹⁶ Similarly, the tribunal in *Middle East Cement v Egypt*⁸¹⁷ used the clauses guaranteeing the standards of FET and FPS under the Greece/Egypt BIT. Amongst the grievances that were tendered by the applicant was related to the takeover and a public sale of the applicant's vessel including the dearth of appropriate warning to the claimant of the public sale of the property belonging to the applicant. It was held by the tribunal that such an issue as significant as the government takeover and a public sale of the applicant's vessel ought to have been disclosed to the claimant by a first-hand transmission or conveyance of the message. The tribunal concluded that the method that was employed had not measure up with the FET and the FPS requirements of these principles⁸¹⁸

6.2.4 Honesty or Sincerity of Intention (Good Faith)

Good faith (honesty or sincerity of intention) is a very wide concept, and it is also generally one of the core bases found in international law and in the law of foreign investment to be specific.⁸¹⁹ It has been reaffirmed by arbitral tribunal that sincerity of intention (good faith) is an integral part of FET standard.⁸²⁰ In *Tecmed v Mexico*,⁸²¹ the tribunal while reading a BIT clause under FET, stated that: 'the Tribunal rules that the obligation of FET engagement is an indication and partly related to the sincerity of intention (*bona fide*) standard acknowledged under international law.'⁸²² In *Waste Management v Mexico*,⁸²³ the tribunal held that the duty to

⁸¹⁵ *Metalclad v Mexico*, Award, 30 August 2000, 5 ICSID Reports 209.

⁸¹⁶ *Ibid* at Para 91.

⁸¹⁷ *Middle East Cement v Egypt*, Award, 12 April 2002, 18 ICSID Review-FILJ (2003) 602

⁸¹⁸ *Ibid*, at Para 143

⁸¹⁹ See R. Dolzer and C. Schreuer, "*Principles of International Law*" (OUP, Oxford 2008), at pp. 5, 6

⁸²⁰ *Genin v Estonia*, Award, 25 June 2001, 17 ICSID Review-FILJ (2002) 395, at Para 241, at Para 367

⁸²¹ *TECMED v Mexico*, Award, 29 May 2003, 43 ILM (2004) at Para 133

⁸²² *Ibid* at Para 153. Quoting, Ian Brownlie, *Principles of Public International Law* (1989) 19.

⁸²³ *Waste Management v Mexico*, Final Award, 30 April 2004, 43 ILM (2004) 967

conduct itself with sincerity of intention (good faith) was considered to be the key duty of the standard of FET as stipulated in NAFTA Article 1105. An intentional plot by the State's organs to frustrate the business certainly would contravene this standard. It stated as following:

The tribunal is not doubtful that a willful plot-or to be more precisely, an intentional collaboration of several governmental organisations without any defensible reason to make it impossible to achieve the aim that an investment treaty is set out to achieve-would amount to a contravention of article 1105 (1). An obligation which is of fundamental of the country within this article 1105 (1) is for the State to take necessary step in honesty and sincerity of intention and shape, and not intentionally to seek to damage or defeat the business by unacceptable methods.⁸²⁴

Another case that deals with good faith is *Bayindir v Pakistan*,⁸²⁵ It was alleged by the investor in this case that the reason that he was forced to leave the organisation was built on community unfair preferential treatment including bad faith, because the justifications for the action stated by the government did not match the true reason for its behaviour.⁸²⁶ The tribunal found in its rulings that 'the asserted unjust preferences of removal, if it is found to be correct, are qualifications of upholding a claim of standard of FET in the BIT.'⁸²⁷

All these authorities suggest that the activity concerning bad faith by a host State against foreign investor would amount to a breach of FET. The question to be asked is whether all breaches of standard of FET require intentional dishonesty (bad faith). The answer to this very question is that, it would not be a well-founded justification for a country to assert that, in spite of the fact that the conducts it took could have made the investor to suffer harm, that these deeds were made with honesty of intention and as a result may not have breached the principle of FET. Arbitral custom has obviously shows that the principle of FET could be contravened, even where no bad faith, with no intentional dishonesty (*mala fides*) has been involved.⁸²⁸ For example, in *Mondev v US*,⁸²⁹ it was stated by arbitral tribunal that:

⁸²⁴ *Ibid* at Para 138

⁸²⁵ *Bayindir Insaact Turizm Ticaret Ve Sanayi A. S. v Pakistan*, Decision on Jurisdiction, 14 November (2005)

⁸²⁶ *Ibid* at Para 242, 243

⁸²⁷ *Ibid* at Para 250

⁸²⁸ The only opposition to this ruling is found in obiter dicta in *Genin v Estonia*, Award, 25 June 2001, 17 ICSID Review-FILJ (2002) 395, at Para 371

⁸²⁹ *Mondev v USA*, Award, 11 October 2002, 42 ILM (2002) at Para 116

In the eye of the present time, anything that is unjust or unequal does not need to be equated with the shocking or the outstandingly bad. In specific, a country could treat alien investment unfairly and impartially without certainly reacting with intentional dishonesty (bad faith).⁸³⁰

In *Tecmed v Mexico*,⁸³¹ it was stated by the tribunal that the standard of FET is an indication of the sincerity of intention standard that has been accepted under international law, and cited in the *Mondev* passage above to highlight that ‘intent to deceive (bad faith) that emanate from the country can not be a prerequisite for the violation of the standard of FET’.⁸³² The same interpretation was reached in *Loewen v USA*,⁸³³ where it was highlighted by the tribunal that intentional dishonest or spiteful intentionality can not be regarded as a necessary prerequisite for a contravention of FET principle.⁸³⁴

Considering all the authorities that have mentioned above, a host State must be very wary in the ways it deals with investor and its investment with regards to good faith on FET standard, since it has been concluded that conducts that have resulted to harm against the investor which are attributable to the host State whether *bona fides* or *mala fides* could contravene the FET principle.

6.2.5 Emancipation from Persuasion and Molestation

A lot of authorities have stated that the standard of fair and equitable treatment could as well be applied in circumstances where persuasion and molestation is focused at the foreign investor. In the case of *Pope Talbot v Canada*,⁸³⁵ for example, the SLD, a State supervisory power initiated an accreditation investigation against the foreign investor which was very hostile and antagonistic. It was concluded by tribunal that this type of enquiry was tantamount to a breach of NAFTA, Article 1105.⁸³⁶ Again, it was concluded that where a State’s actions that relate to the supervisory authority are seen as ‘dangerous and misleading’ and as ‘causing difficulty and

⁸³⁰ *Ibid* at Para 116

⁸³¹ *TECMED v Mexico*, Award, 29 May 2003, 43 ILM (2004) 133

⁸³² *Ibid.* at Para 153

⁸³³ *Loewen v UAS*, Award, 26 June 2003, 42 ILM (2003) 811

⁸³⁴ *Ibid* at Para 132, see also *Azurix v Argentina*, Award, 14 July 2006, paras. 369, 372

⁸³⁵ *Pope & Talbot v Canada*, Award on Merits, 10 April 2001, 122 ILR (2002) 352, Para 156-181

⁸³⁶ *Ibid* at Para 181

annoyance and argumentative’ to an investor it would be interpreted as a breach of the standard of FET.⁸³⁷

In the case of *Tecmed v Mexico*,⁸³⁸ a limitless permit to operate a landfill was superseded for a limited time permit. The tribunal applying the clause in the Mexico/Spain BIT that guaranteed FET in accordance with international law held that the refusal to allow for the extension of the permit was orchestrated to compel the foreign investor to move to a new area, taking care of the expenses and the dangers that come with a new investment. The tribunal found such persuasion to be inconsistent with the FET to be accorded to investment in Article 4 (1) of the BIT under international law.⁸³⁹ These cases indicate that any bullying, coercion or harassment attributable to the State towards the investor will be taken to be a violation of the FET standard.

An evaluation of the historical record has revealed that the notion of FET more currently is nearly interconnected with, and taken from, the former concept of FPS as this paper has elucidated in chapter 2 Section and the two standards are by no means the same.

6.3 THE LINK BETWEEN FPS AND FET

It could be argued that the modern FPS standard derive its foundation from the United States customary treaty practice. Some people have claimed that FPS is somehow as familiar as fair and equitable treatment standard and unfortunately for many years arbitral tribunals had thoroughly failed to address it. Quite a lot of tribunals have treated FPS standard with FET obligations as recognisably different,⁸⁴⁰ contending that the principle of FET is a “catch all” standard, having the ability of covering any action that seems to the Tribunals to be unjust and unwarranted⁸⁴¹

⁸³⁷ *Pope & Talbot v Canada*, 31 May 2002, 41 ILM (2002) 1347, at paras 67-69

⁸³⁸ *TECMED v Mexico*, Award, 29 May 2003, 43 ILM (2004) 133

⁸³⁹ *Ibid* at Para 163

⁸⁴⁰ *Enron Corp. v Argentina Republic*, ICSID Case No. ARB/01/3, Award, Para 251-68 & 284-86 (22 May 2007), 19 World Trade & Arb. Materials 109 (2007) (analysing that the standards of FET and FPS claims are autonomous and arguing that it can be troublesome to interpret the both standards as encroaching at each other).

⁸⁴¹ See Fiona Marshal, *Int'l Inst. For Sustainable Dev., Fair and Equitable Treatment in International Agreement 2*, 7 (2007). Available at: <http://www.iisd.org/pfd/2007/inv_fair_treatment.pdf> (claiming that States are worried that extensive interpretation of FET offer arbitral tribunal much more option that the procedure have a similar quality to a ruling of *ex aequo et bono*, i.e. a ruling established exclusively on the impressionistic opinion of impartial and just treatment by arbitrators and that just and fair treatment will possibly grow to “a ‘catch all’ clause that have the potential of being cited with regards to almost any unfavourably investment treatment melted out to foreign investors; also see, Mathew T. Parish & Charles B. Rosenberg, *An Introduction to the Energy Charter Treaty*, 20 AM. REV. INT’L. Arb. 191, 203 (2009)

thereby casting shadows over FPS. Some have combined the two obligations into one⁸⁴² while on the other hand others have asserted that the two standards are like a bicycle with seats and pedals for two riders, one behind the other, without the explanation of their obvious connection. Some people think customarily, the main value of the principle was the needfulness to shield the investor from different kinds of physical attacks, encompassing the intrusion of the investment establishments or offices. But from the ancient history the comprehension of the FPS has always been expanded its protection to exceed physical protection so as to safeguard the standard from contravention against the rights of an investor by the functioning of legislations and directives in the territory of the host country. The length of the provision gives rise to problems of determining the limits and boundaries in connection with the ambit of other treaty clauses, for example, the standard of FET. Mostly, when it comes to guaranteeing against the employment of the laws impacting on the investment security and protection, FPS may receive exceptional significance, especially if the agreement does not incorporate other provisions with a wider ambit.

6.3.1 State's Behaviours that can Breach both FPS and FET standards

There are behaviours that can breach both the standards of FPS and the FET, for example, like denying foreign investors justice; the state's unfairness of the law; and the intentional harassment, yet the assessment of these factors may differ from each standard. In full protection and security the conduct can be wrong if it shows absence of an adequate legitimate process of an inability to act with due diligence. The obligation of 'FPS compels the host country to apply a due diligence while in taking appropriately reasonable measures to afford security to foreign investors and their investments, and also, to put in place the availability of an adequate legal mechanism, presenting such safeguards as proper solution systems, due process, including a prerogative to payment for expropriation or government taking in the hand', while on the other hand, 'the standard of FET is about the way that the country acts towards the investment during

⁸⁴² See e.g., Oxy I, LCIA Case No. UN3467, Award, at Para 187

the time it is taking measures about it, demanding that the country conducts itself rationally and in honesty of intention which is otherwise known as good faith’.⁸⁴³

6.3.2 Tribunals’ interrelated same meaning of Interpretation of FPS and FET

In *Wena Hotels v Egypt*,⁸⁴⁴ the standard of FPS, and FET standard were dealt together by the tribunal without arriving at any difference between the two standards.⁸⁴⁵ Likewise, in that case of *PSEG v Turkey*⁸⁴⁶, it was stated by the tribunal that standard of FPS may only in a few occasions be extended beyond physical protection, and if that happens, its relation with fair and equitable treatment would get extremely close.⁸⁴⁷ The circumstances were not counted under FPS as an independent heading of responsibility for the reason that the inconsistencies were entirely inserted under the principle of FET.⁸⁴⁸ The tribunal in *Occidental v Ecuador*⁸⁴⁹ appears to view the standards as mostly identical after it held that the Defendant contravened the principle of fair and equitable treatment. It also said that the Defendant has contravened the standard of FPS.⁸⁵⁰ In *El Paso v Argentina*,⁸⁵¹ the Tribunal held that, there is no contrast between the standard of FET and FPS standard. However, the standard of FET is aimed to warranty that if in any circumstances that the other standards are not breached but there is an unnecessary interference by the State which might result in unfairness to the expectation of the investor, the investor can allege for contravention of FET and can get compensation where the other standards are not breached.⁸⁵²

⁸⁴³ See, George K Foster, *Recovering “Protection and Security”: The Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance* 2012 1103, available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>.

⁸⁴⁴ *Wena Hotels v Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Rep 89.

⁸⁴⁵ See, *National Grid v Argentina*, Award, 3 November 2008, paras 187, 189.

⁸⁴⁶ *PSEG v Turkey*, Award, Case No. ARB/02/5 19 January 2007

⁸⁴⁷ *PSEG v Turkey*, Award, Case No. ARB/02/5 19 January 2007 Para 257-9

⁸⁴⁸ *Ibid* Para 257-9.

⁸⁴⁹ *Occidental Exploration and Production Co. V Ecuador*, Award, Case No. UN3467, 1 July 2004

⁸⁵⁰ *Id* Para 187.

⁸⁵¹ *ELPaso Energy International v Argentina*, ICSID Case No. ARB/03/15, Award, 30 October 2011.

⁸⁵² *ibid* paras 228-230.

6.3.3 Tribunals' Distinguishable Interpretation of FPS and FET

In contrast, the arbitral tribunal in *Mamidoil Jetoil v Albania*⁸⁵³ has stated that the duty to afford constant security and protection should never be contradicted with the duty to accord the standard of FET. The uniqueness amid the two principles in treaties like the Energy Charter Treaty is greatly important. Even more so, this can breach the concept of the treaty meaning within the VCLT of 1969 and complicate the definition of the standard of FPS with that of the principle of FET⁸⁵⁴. The tribunal in *Oxus v Uzbekistan*⁸⁵⁵ has stated that unless otherwise expressly defined in a particular BIT, the general FPS standard compliments the FET by providing protection toward the conducts of third parties (non-State parties), which are not protected by the FET standard.⁸⁵⁶ The arbitral tribunal concurred with the defendant that the claimant's characterisation of the BIT's full protection and security standard as wide protection for its investment that is 'essentially coterminous (i. e., having the same meaning) with FET standard is misplaced'.⁸⁵⁷ In some other BITs, the standards of FET and FPS emerge as separate protections. In *Azurix v Argentina*,⁸⁵⁸ for example, the two phrases that give a detailed account in words of the protection of investment appear in succession as separate duties under Article II.2 (a) of the treaty. The tribunal found that the two standards are not the same but separate. Therefore, since the two standards appear sequentially as two different obligations in the BIT clauses they should be interpreted differently.⁸⁵⁹ However, where the two clauses appear as a single standard it would be difficult to interpret the two as different obligations. To this effect the tribunal said that the circumstances cannot be construed within the standard of FPS as a different classification of responsibility in this case since the abnormalities were all listed within the FET principle⁸⁶⁰. In *Jan de Nul v Egypt*,⁸⁶¹ Jan de Nul and Dredging International, the two companies, were both registered in Belgium and won a bid to dredge sections of the Suez Canal in 1992, a job they accomplished after three years. However, an allegation ensued that Suez Canal

⁸⁵³ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S.A. v Republic of Albania*, ICSID Case No. ARB/11/24, Award, 30 March 2015

⁸⁵⁴ *Id.* Para. 819

⁸⁵⁵ *Oxus Gold Plc v Republic of Uzbekistan*, UNCITRAL, Final Award, 17 December 2015

⁸⁵⁶ *Id.* at Para. 353.

⁸⁵⁷ *Id.* Para. 354.

⁸⁵⁸ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006

⁸⁵⁹ *Ibid* Para 407

⁸⁶⁰ *Id* Para 407

⁸⁶¹ *Jan de Nul v Egypt*, Case No. ARB/04/13, Award, 6 November 2008.

Authority (SCA), the Egyptian agency responsible for the canal, misrepresented the size of the task which led to a protracted legal disputes in the Egyptian courts. The Claimants alleged a violation of the Belgium-Egypt BIT on the grounds of allegation of fraud, and charges that ten-year efforts to seek redress in Egyptian courts amount to denial of justice. The Tribunal said as following:

The concept of constant security and protection needs to be differentiated here against the standard of FET because the two principles are inserted in two independent clauses under the BIT, regardless if the both warrantees can extend over so as to cover partly or coincide partially or wholly. As the idea is suggested by the applicant for consideration, this notion connects with the State's employment of duty of due diligence and care.⁸⁶²

In the 2012 case of *Ulysseas v Ecuador*,⁸⁶³ the Tribunal held that the standard of FPS is a concept that differs from FET. The principle places a duty of vigilance and care upon the host State which includes an obligation of due diligence to prevent wrongful attacks caused by third parties to investors and their investments within the jurisdiction of the host country. And if peradventure the State cannot at the time of the incident prevent the attacks, it must ensure that it brings the perpetrator of the attacks to justice.⁸⁶⁴ In *Electrabel v Republic of Hungary*,⁸⁶⁵ the Tribunal found that since there are two separate standards under the ECT, FPS standard and FET standard must, according to the rule of law, have a separate principle and role.⁸⁶⁶ In *Liman v Republic of Kazakhstan*,⁸⁶⁷ the Tribunal held that the “most constant protection and security” must have a meaning that is further than, and must be separate from, the concept of FET. However, the principle can not be expanded to contractual agreements' rights, but aims to protect the wholeness of an investment from violent attack, especially of a material degree.⁸⁶⁸

The opinion that the two standards are to be considered as two separate obligations seems to be a desirable one, even if the two guarantees can encroach on each other. There is no way it is likely to be thought that two standards that are incorporated independently in the selfsame instrument

⁸⁶² *Id* Para 269.

⁸⁶³ *Ulysseas Inc. v Ecuador*, UNCITRAL, Final Award, 12 June 2012

⁸⁶⁴ *Id* Para 272.

⁸⁶⁵ *Electable S. A. v Republic of Hungary*, Case No. ARB/07/19, Decision on Jurisdiction, Applicable law and Liability, 30 November 12

⁸⁶⁶ *Id* Para 7.83

⁸⁶⁷ *Liman Caspian Oil BV and NCL Dutch Investment v Republic of Kazakhstan*, ICSID Case No. ARB/07/12, Excerpts of Award, 2010

⁸⁶⁸ *Id* Para 289

would have the selfsame definition. And any explanation that denies an agreement clause of definition would not be reasonable and convincing. And this has been the case over the argument of placing the meaning to FPS and FET. Placing the same definition on the two standards by arbitral tribunals had deprived the investors the full protection they deserve on their investments.

6.3.4 Tribunals' Wider Interpretation of FPS

Arguably, there are some situations where a wider interpretation of full protection and security can be right or reasonable, but if that occurs, it will be very hard to differentiate the breach of FPS from breach of FET, and even the breach of an expropriation, as was held in *Enron Creditors v Argentina*.⁸⁶⁹ In *Vivendi v Argentina*,⁸⁷⁰ the Tribunal held that any provision that guaranteed for protection and complete security in relation with FET rules should be interpreted to include any act that denies any investor's investment the right of protection and security. If stated in the treaty, the act will also amount to contravention of FET standard, and such actions should not be allowed to endanger the physical ownership and the lawful safeguarded conditions in which the investment functions.⁸⁷¹ In *Sempra Energy v Argentina*,⁸⁷² the tribunal stated that it was not in doubt that right from the origin that the standard of FPS has been evolved to provide employers, employees including their investments with physical protection and security. And it added that, it cannot rule out as a matter of policy that there are some cases, or occasions where a wider interpretation can be shown to be right and reasonable, but even at that, it will be very hard to differentiate such circumstances from violation of FET and even expropriation.⁸⁷³ However, in *AWG Ltd v Argentina*,⁸⁷⁴ the tribunal held that if much wider interpretation is given to the full protection and security standard this can extend over as to cover part of the other standards of investment protection, and such wider interpretation is neither necessary nor useful.⁸⁷⁵

⁸⁶⁹ *Enron Creditors Recovery Corporation (Formerly Enron Corporation) and Ponderosa Asset, L.P v Argentine Republic*, ICSID Case No. ARB/01/3, Award, 22 May 2007 Para 286.

⁸⁷⁰ *Compania de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, ICSID Case No. ARB/97/3, Award, 20 August 2007

⁸⁷¹ *Id* Para 7.4.13-7.4.15

⁸⁷² *Sempras Energy International v Republic of Argentina*, ICSI Case No. ARB/02/16, Award, 28 September 2007

⁸⁷³ *Id* Para 323

⁸⁷⁴ *AWG Group Ltd v Republic of Argentina*, UNCITRAL, Decision on Liability, 30 July 2010.

⁸⁷⁵ *Id* 174

6.3.5 The Intertwining Interpretation of FPS and FET

There are also interweaving readings of the concept of FPS by arbitral tribunals. For instance, in *Total v Argentina*⁸⁷⁶ the Tribunal ruled that the duty of FPS is relative to the FET. And as such, when the duty of the FPS is contravened, the obligation of FET is simultaneously presumed to have been violated also, rather than looking for a separate finding of breach.⁸⁷⁷ In *Gemplus v United Mexican States*,⁸⁷⁸ the Tribunal held that the full protection and security clause of the BIT has faced all kinds of illegitimate treatment which is prohibited by other clauses of the two BITs, especially those of FET and expropriation. The last one includes the investor and the host State, while the protection clause also includes the host State to protect the investment from the third party.⁸⁷⁹ It was also held by the tribunal in *Impregilo v Argentina*⁸⁸⁰ that any time investment has failed to be accorded fair and equitable treatment, it also would be necessary to investigate further to see whether the full protection and security standard has also been breached.⁸⁸¹ The Tribunal in *Spyridon v Romania*⁸⁸² did not have a different interpretation concerning the intertwining between FPS and FET standards. It held that the concept of FPS can be extended to cover FET.⁸⁸³ In *SAUR v Argentina*,⁸⁸⁴ the Tribunal found that the standard of FPS is an implementation of more general principle of FET.⁸⁸⁵ In *Anatoli v Republic of Kazakhstan*,⁸⁸⁶ the Tribunal held that the protection guarantee by the most constant protection and security and the protection guarantee by fair and equitable treatment standard could each be extended to cover part of the other. Nevertheless, it is debatable to know the extent that such an overlap can cover.⁸⁸⁷

⁸⁷⁶Total S.A. v Republic of Argentina, ICSID Case No. ARB/04.01, Decision on Liability, 27 December 2010.

⁸⁷⁷*Id.* Para 343

⁸⁷⁸*Gemplus v United Mexican States*, ICSID Case No. ARB (AF)/04/3 & ARB (AF) 04/4, Award, 16 June 2010.

⁸⁷⁹*Id.* Para IX, 11

⁸⁸⁰*Impregilo S.P A v Argentine Republic*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

⁸⁸¹*Id.* Para 334

⁸⁸²*Spyridon Roussalis v Romania*, ICSID Case No. ARB/06/1, Award, 1 December 2011.

⁸⁸³*Id.* Para 321

⁸⁸⁴*SAUR v International S.A v Argentine Republic*, ICSID Case No. ARB/04/4, Decision on Jurisdiction and Liability, 6 June 2012 (French).

⁸⁸⁵*Id.* Paras 480-482, 499-501.

⁸⁸⁶*Anatoli Stati Group v Republic of Kazakhstan*, Scc Case No. V116/2010, Award, 19 December 2014.

⁸⁸⁷*Id.* Para 1256

These mixed judgements elaborated in the above cases are all inconsistencies found in the reading of FPS principle in relation to FET and have created gaps in the full protection and security of investments in the host States' territories to disadvantages of foreign investors.

For the sake of appropriate methods for the interpretation agreement between States let's refer back to interpretative guidelines of VCLT 1969. Article 31 of VCLT interpretative framework, stipulated that 'a treaty must be read with sincerity of intention (i. e., in good faith) in conformity with the common interpretation to be accorded to the words of the agreement in their circumstances and taking into consideration the *objective and purpose*'.⁸⁸⁸ And that there should not be 'an intentional plot, i.e., an intentional composition of different tribunals without good reason to impede the motive of a BIT agreement as would form a contravention of the obligation to act in sincerity of intention and shape (good faith), and not wilfully to intend to damage or thwart the business by illegitimate method'.⁸⁸⁹ In this regard, it is difficult to take side with the tribunal arguments that FPS which has a far-reaching different meaning would be read to have the same or identical meaning with FET without regarding such conclusions as a form of bad faith.

Secondly, the treaty's objective and purpose, that is, the reason for which the treaty or the standards exist from the view point of the members is very important. There is no doubt that by looking at the *title* and *preamble* of the two standards that their titles show that their aim is for the same reason, which is the magnifying of protection for investment in order to encourage investment by national of one country party into the terrain of another. This does not mean that the meaning of the two principles should be read as the same however. The same thing applies for their preambles, whose intention is to encourage higher economic co-operation among two contracting Members, in relation with investment by citizens and organisations of every Party member in the region of the other side.

Thirdly, the ordinary meanings of the two concepts would invariably and definitely be different if we are to ascertain their meanings by making reference to dictionary definitions as it

⁸⁸⁸ See Article 31 (1) of the Vienna Convention on the Law of Treaties, 23 May 1969. 1155 U.N.T.S 311

⁸⁸⁹ Vienna Convention on the Law of Treaties, art 31(1), May 23, 1969, 1155 U.N.T.S. 331 (entered into force January 27, 1980)

is commonly the case when seeking to interpret terms. Therefore, it will be unusual, as it is already is, for tribunals to give or continue to give two different concepts that have two different wordings the same meaning without any difference between the two, when it is crystal clear that there is a huge different between them. The terms ‘Full protection and security’ and ‘Fair and Equitable Treatment’, as they are used in BITs either differently, or differentiated with a coma in some BITs as the case may be does not mean that the two standards are the same thing. Unlike the FPS dictionary definition that has been discussed above, the standard of FET dictionary view point is different. By their common interpretation, the word ‘fair’ including the term ‘equitable’ is interpreted as ‘just’, ‘even-handed’, ‘legal’. It is accompanies by the common definition of ‘fair’ and ‘equitable’ and the aim and intent of the agreement that these words symbolise treatment in a non-discriminatory and just way, favourable to assisting the advancement and security of the investments of foreigners and encouraging personal enterprises or schemes’.⁸⁹⁰ The only thing that they have in common is that they are being placed in the same Article and in the same sentence in BITs. Placing them in the same sentence does not qualify them as having the same meaning. For this reason this thesis is calling for their separateness in order to avoid a conflicting of the two standards, unless where the drafters (i.e., the two contracting parties) to the treaty have agreed to incorporate the two standards together in one article in a BIT, even so their meanings will still be different.

6.4 The Need to Incorporate FPS Standard and FET in Two Different Articles in BITs

There is a mix up between these two concepts considering how various tribunals have interpreted them in different case law. This mix up seems to occur because the two standards are phrased in single standard in one article in some BITs, while in some other BITs the two standards appeared as a separate protection. This invariably has created a lot of chaos and inconsistencies among tribunals in the interpretation of the two standards causing systematically failings and gaps in the protection of investments under the standard of FPS obligation.

⁸⁹⁰ Siemens v Argentina, ICSID Case No. ARB/02/8, Award, 6 February 2007 Para 270

Tribunals interpret FET as partly the reason for the rejection of a broader interpretation of FPS, arguing that FPS should be restricted to physical security because where it is interpreted more widely, it would trespass on the function they have assigned to fair and equitable treatment.⁸⁹¹

But even rebuffing the repetitive nature of this thinking, this principle of construing the two standards has come at a very serious cost. This is because the scope of FET as read by these arbitral tribunals give the impression to many to have been completely invented and has no basis under traditional international law and has added to an understanding that investment treaties place upon national sovereignty some troubling and unusual restrictions. Thus, this presumption has caused many to doubt the lawfulness of investment agreement adjudication and the prudence of ratifying investment treaties.⁸⁹²

One can see that there are a lot of inconsistencies and contradictions among Tribunals in respect to the relationship between FPS and FET obligation considering the different conclusions reached in these numerous cases that have been perused above. In spite of the fact that the principles of FET and FPS frequently appear together within the same phrase, and some Tribunals have held that the two standards are not differentiable, but the majority viewpoint is to keep the standards separate. Whereas some commentators have expressed worries over the extensive arbitral tribunal rulings on fair and equitable treatment, a similar argument is very likely to follow suit on full protection and security standard, since it brings up almost the same if not bigger worries. The assessment that the two standards are to be seen as different standards of obligation seems to be a better option. For interpretation's sake, it seems unconvincing to have the presumption that the two principles incorporated autonomously in the selfsame instrument have the selfsame meaning, as held in *Jan de Nul v Egypt*⁸⁹³ by tribunal above. A reading that denies an agreement clause of its true definition is not seemingly reasonable.

⁸⁹¹ *Suez v Argentina Republic*, ICSID Case No. ARB/03/17, Decision on Liability, (30 July 2010), at paras 167-68

⁸⁹² Stephen W. Schill, *Enhancing International Investment Law's Legitimacy: Conceptual and Methodological Foundations of a New Public Law Approach*, 52 VA. J. INT'L L. 62; M. Sornarajah, *A Coming Crisis: Expansionary Trends in Investment Treaty Arbitration*, in *APPEALS MECHANISM IN INTERNATIONAL INVESTMENT DISPUTES* 39, 40, 66 (Karl P. Sauvant & Michael Chiswick-Patterson eds., 2008).

⁸⁹³ *Jan de Nul v Egypt*, Case No. ARB/04/13, Award, 6 November 2008.

In reality, what the both principles hold *is* differentiable.⁸⁹⁴ FET mostly comprises of a duty upon the host country to deal with conduct that is unfair and inequitable. FET is an obligation of the State to make clearly every legislation, statute, and procedure to all foreign investors beforehand; to conduct itself in the principle of good faith also to have regard for the investors lawful expectations; to provide a consistent and foreseeable legal system; to abstain from partiality; and to allow due process,⁸⁹⁵ as has already been explained to a large extent in the beginning of this chapter.

On the opposite, the assumption of the obligation of security and protection requires the host country to take up a measure of due diligence that is as fairly required in all circumstances in order to provide security to foreign investors and their investments from adverse effects, and also to have and make accessible a satisfactory legal mechanism for the successful defence of investor's rights; providing legal remedy to investors against harmful conduct that affects them and their investments by following due process; also ensuring a prerogative to a compensation for government takings (expropriation).

However, some behaviour can possibly contravene both principles, like; a denying an investor justice, applying the law arbitrarily, or harassing foreign investor purposefully and the examination under each principle can vary. To be specific, under the evaluation of a FPS, these conducts would be unjust since they indicate the absence of a satisfactory legal framework, or an omission to action a due diligence. In contrast, under the evaluation of a FET, the unjust behaviour would be an omission to accord equitable treatment to the investment or treat it in good faith.

As we can see from this analysis, and from the case law, the both principles together include a lot of the concepts that the present-day tribunals have ruled to be inbuilt in the standard of FET. But still, the two principles are embedded under traditional international law, accordingly not unusual in any small degree.

⁸⁹⁴ See, G. Cordero Moss, 'Full Protection and Security' in A Reinisch (ed.) *Standards of Investment Protection* 146-9, 150 (OUP, Oxford 2010). For a different view, see A Newcombe and L. Paradell, '*Laws and Practice of Investment Treaties Standards of Treatment*' 314 (Kluwer Alphen an den Rijn 2009).

⁸⁹⁵ *Lemire v Ukraine*, ICSID Case No. ARB/06/18, Decision on Jurisdiction and Liability, Para 284 (14 January, 2010) Rudolf Dolzer & Christoph Schreuer, '*Principles of International Law*' 130-47 (2008) (summarising the jurisprudence involving fair and equitable treatment).

Furthermore, it is vital to express that there have often been a clear limitations on the scope of both obligations. Especially, there has never been any obligation imposed on the host States to guarantee the absolute stability and foreseeability of their judicial frameworks, which should not just be impractical, but also would disproportionately hamper the natural development of State regulatory frameworks.⁸⁹⁶

On this point, full protection and security standard should better be accorded a separate section in Article in Model BITs so as to make it distinctive from FET and so as to provide foreign investors with adequate protection to their investments. In doing so, it would be easier for arbitral tribunals to clearly distinguish between the two standards. It would also remove the unnecessary confusion created by tribunals' interpretations of the two standards thereby ending the argument whether the two standards conflate or not. It would also assist tribunals in interpreting the standards more accurately and consistently without mixing the meaning of the two principles up. The suggestive way of wording the standard could be helpful, and goes as follows:

- Each Party of this treaty shall accord to investors and their investments of another Party the obligation of full protection and security independently, and not with conjunction with the obligation of fair and equitable treatment. The obligation of full protection and security to be accorded to alien investors shall not be favourably lower in treatment than that to be accorded to its domestic investors or citizens; and shall require an additional treatment to or exceeding that that is necessitated by the traditional international law.

6.5 IMPLICATIONS FOR INTERNATIONAL INVESTMENT LAW

Having identified and explained an interpretation of full protection and security that would be consistent with the VCLT and all analytical discussions of the case law for the protection of both physical and non-physical security of the standard in relation to the VCLT, it is worth considering its implications for international investment law. To that end, the subsections that

⁸⁹⁶ *Feldman v Mexico*, ICSID Case No. ARB (AF)/99/1, Award, Para 103, (16 December 2002), 7 ICSID Rep. 341 (2003). See e. g., *EDF (Serves) Ltd v Romania*, ICSID Case No. ARB/05/13, Award, 217 (8 October 2009), available at: <https://icsid.worldbank.org/ICSID/FrontServlet>

follow employ that interpretation as the magnifier by which to inspect and give detailed analysis of present-day jurisprudence in relation to the standard.

6.5.1 Divergence of Tribunals' Interpretations of FPS standard

The most controversial issue confronting this concept of investment treatment right now is the disagreement whether or not this standard expands further than the investor's investment physical protection where the obligation is undermined. The two viewpoints the tribunals have taken on this matter could not be further apart.

In the both claims of *Saluka v Czech Republic*⁸⁹⁷ and *Azurix v Argentina*⁸⁹⁸ are case examples that depict the scale by which arbitral tribunals have taken different viewpoints on this issue. The tribunal in *Saluka* had held that, 'the standard of FPS provision is never intended to shield the investor's investment from every type of damage, but to safeguard more certainly the physical wholeness of the investment from intrusion by exercise of force.'⁸⁹⁹ Whereas, the tribunal in *Azurix* case ruled that 'it would not merely be an issue of physical protection; the stability accorded by a safe climate is also vital looking at the investor's opinion'.⁹⁰⁰ The divergent opinions found in these two cases are even more pronounced among arbitrators across tribunals providing rulings that appear contradictory or inconsistent upon the extent of the standard of FPS which seems to have given support to multiple of infringements of investors' investments by the States

The arbitral tribunal in the claim of *BG Group v Argentina* in 2007 ruled that, it would be 'unsuitable for the tribunal to deviate from the early comprehended principle of 'security and constant 'protection.'⁹⁰¹ Although the tribunal in that case recognised that 'different arbitral tribunals have held that the principle of 'security and constant protection' expands beyond circumstances of the physical protection of the foreign investors and their investments, this tribunal deem it unsuitable to reach the same conclusion on this matter.⁹⁰²

⁸⁹⁷ *Saluka v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006

⁸⁹⁸ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006

⁸⁹⁹ *Saluka v Czech Republic*, UNCITRAL, Partial Award, 17 March 2006 Para 484

⁹⁰⁰ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006 Para 408

⁹⁰¹ *BG Group Plc v Republic of Argentina*, UNCITRAL, Award, (24 December 2007) Para 323

⁹⁰² *Id* at Para 323

Just within the duration of a year after, it was held in *National Grid v. Argentina*⁹⁰³ by arbitral tribunal that ‘the term ‘security and constant protection’ as associated with the topic of the Agreement can not imply essentially that the security is permanently restricted to security and protection of physical investments or property.’⁹⁰⁴ The same adjudicator that sat on the tribunals of the two cases – in *National Grid* and *BG Group*, comprising the selfsame BITs, selfsame accused person, and nearly the selfsame factual case history, reached a contrary ruling just in one year, without giving any reason or clarification for it.

Also, in *Biwater v Tanzania*⁹⁰⁵ and *Rumeli v Republic of Kazakhstan*,⁹⁰⁶ there were regular arbitrators who sat as panellists in both cases and each of them had a divergence opinion in regards to the ambit of the FPS principle. The tribunal in *Biwater*, support the findings in *Azurix*, which states that, ‘when the phrases ‘security’ and ‘protection’ are accompanied with the word ‘full’, the content that applies to the principle can expand to issues beyond physical protection.’⁹⁰⁷ On the opposite, in the *Rumeli* claim held just few days after *Biwater* award, the tribunal stated that, it is in agreement of the treaty with Kazakhstan that ‘the FPS in Art. II (2) under UK-Kazakhstan bilateral investment treaty should be interpreted in conformity with the recognised principles of treaty definition’,⁹⁰⁸ and it thereby following a restricted ambit to the FPS principle. The tribunal in *Rumeli* in their ruling stated that the principle ‘requires the host State to accord a certain degree of security to alien investment against physical harm’.⁹⁰⁹

In the light of the above cases, there exists a clear divergence between various arbitral tribunals, especially among arbitrators, on the matter of whether it is possible or not the principle of FPS expands beyond physical security. The same inconsistency has applied in cases where arbitral tribunals have jumble up the meaning of FPS and FET together in their interpretations. This inconsistency as a further illustration of the division of opinions of interpretation of FPS obligation has prompted some people to think that divergent rulings on the extent of FPS’s

⁹⁰³ *National Grid Plc v Argentina Republic*, UNCITRAL, Award, 3 November 2008).

⁹⁰⁴ *Id.* Para 189.

⁹⁰⁵ *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, (24 July 2008).

⁹⁰⁶ *Rumeli Telekom v Kazakhstan*, ICID Case No. ARB/05/16, Award, 29 July 2008.

⁹⁰⁷ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006 Para 729.

⁹⁰⁸ *Rumeli Telekom v Kazakhstan*, ICID Case No. ARB/05/16, Award, 29 July 2008 Para 668.

⁹⁰⁹ *Id.*

‘could be the origin of problems now and in the future to arbitral adjudicators or applications for repealing, and in long period of time, it crops up hard questions concerning the natural consistency of the mechanism’.⁹¹⁰

6.5.2 Tribunals’ too Expansive Interpretation of FPS

Again, tribunals have accurately defined FPS standard as providing security exceeding physical protection and have in some occasions depicted the concept’s shape too extensively.

Arguably, the tribunal has defined the FPS too widely in many cases, and one of such cases is in *Occidental v Ecuador (Oxy)*.⁹¹¹ The tribunal ruled that Ecuador contravened the principle of FPS clauses in the Ecuador and the United States BIT after the State of Ecuador altered the definition of the tax legislation and denied VAT (valued added tax) rebate to Occidental, a United States corporation.⁹¹² The decision was concluded by the tribunal after practically equating the both standards, upholding that a contravention of FET is automatically the consequential of a breach of FPS. Furthermore, the tribunal as well argued that the principle of FET is the duty of the host country to keep the “stability of legitimate and commercial mechanism” of the State”⁹¹³ It further argued that when the State of Ecuador changed its approach to VAT refunds, “the mechanism by which the trade was to operate and made was altered in a significant way”, and the government current tax definition was “obviously wrong”.⁹¹⁴

It is important, therefore, to know that the arbitral tribunal did not in any way conditioned its findings in relation with FET and FPS on any ruling that the different definition was in intent to deceive (bad faith), tyrannical, or impartial,⁹¹⁵ also the tribunal did not appear to have

⁹¹⁰ See, Jeffery Commission, *The Full Protection and Security Standard in Practice*, available at: <http://www.kluwerarbitrationblog.com/blog/2009/04/16/the-full-protection-and-security-standard-in-practice/>

⁹¹¹ *Occidental Exploration & Products v Republic of Ecuador (Oxy I)*, LCIA Case No. UN3467, Award (London Ct. Int’l Arb. 2004) Para 183, 187.

⁹¹² *Id.* paras 1-7, 183-87.

⁹¹³ *Id.* paras 183-87.

⁹¹⁴ *Id.* Para 184.

⁹¹⁵ In different part of the viewpoint, the tribunal argued that the State of Ecuador tax office made a prejudicial distinction in the treatment of the applicant because it gave some Ecuadorian investment exporters VAT compensations, but refused to offer same to the applicant. Still, in the examination of the standard of FPS application, the arbitral tribunal made mention to this supposed prejudice and failed to connote that the occurrence of such prejudice was reasonable to its ruling that the State Ecuador breached the standard of FPS provisions in paras. 183-87 of (OxyI) above

contemplated it significant that the alien investor has the right to pursue and question the new interpretation in domestic courts.⁹¹⁶ The argument of the tribunal might have been that it is sufficient to contravene the FPS standard if the State of Ecuador chooses a different legal definition that changes the legal system in such a way which it has an adverse effect on the business and inaccurate therefore to the autonomous ruling of the arbitral tribunal.

If that was the case, its approach was troublesome in the sense that it omitted to differentiate meaningfully between FPS and FET and failed to determine the limits of any of the two principles. Had the tribunal in (Oxy1) interpreted the FPS properly in a manner compatible with its traditional, Ecuador may not probably have been held in contravention of that principle on the basis of the action of its organ without first of all ruling that the State of Ecuadorian legal framework was not capable of protecting the investor's rights of property. An ordinary ruling that the State tax department employed the legislation wrongfully should not have been enough to prove a refusal of security and protection, so far as the foreign investor may willingly have questioned and feasibly altered the meaning in the domestic courts.⁹¹⁷

The second case where the tribunal arguably interpreted the principle of FPS too widely is found in *CME v Republic of Czech*. The tribunal in that case held that the State of Czech contravened the FPS provision in the BIT between Czech Republic and Netherlands by, among other things, changing its media legislation in a manner that fails to benefit a domestic corporation (CNTS) to which the applicant made an investment, and consenting through the conducts of a managerial body (Media Council) the effort by CNTS's investment associate, to apply that alteration as a ground to rescind the corporation's contractual connection. The tribunal here was unable to express in full detail what the standard of FPS contend. The tribunal only

⁹¹⁶ It was observed by the arbitral tribunal in a different case that arose from similar alteration in method to VAT recompense that the applicant's Ecuadorian branch might have questioned the current definition in the courts of Ecuador, and no proof were presented that the Tax Authority of State of Ecuador reaches its current definition in intentional dishonesty. Bases on this reasoning, the arbitral tribunal refused to rule for the treaty contravention... See *EnCana Corp. v Republic of Ecuador*, LCIA Case No. UN3481, Award (London Ct. Of Int'l Arb. (2006) paras 194-97

⁹¹⁷ This is so since the standard of FPS centres on the behaviour of the Nation generally, that is, the whole governmental organisation. To put it differently, if a particular State corpus could constantly rectify an erroneous judgement by another on claim brought by a foreign investor, then that country in general cannot be accused to have omitted in its duty to safeguard the investment. For a full analysis of the importance of domestic remedies concerning investment agreement claims, see *George K. Foster, Striking a Balance between Investor Protections & National Sovereignty: The Relevance of Local Remedies in Investment Treaty Arbitration*, 49 COLUM. J. TRANSN'T'L L. (2011), at p. 201, 204-9

argued that the duty of the host country is ‘to make sure that it does not either by alteration of its legislation or by the conducts of its managerial corpus is the accepted and recommended protection and security that was reached with the foreign investor and its investment cancelled or minimised’.⁹¹⁸ This type of imprecise and ambiguous interpretation of the principle is again worrying since it does not provide any direction specifically as to the time when a disadvantageously legal modification or managerial conduct is incompatible with the protection required to a business, and for that reason could have a negative impact upon good faith juridical or regulatory measures.⁹¹⁹

Thirdly, the arbitral tribunal in different claim emanating from the exact facts, *Lauder v Czech Republic*,⁹²⁰ applied a better approach. The claim was initiated by another investor within CNTS by the name (Ronald Lauder), in separate BITs between Czech Republic and the United States bilateral investment treaty. The tribunal without doubt in this case accepted that the obligation of FPS as expanding to legal protection, but expressed its boundary more accurately. The tribunal ruled that obligation of FPS ‘mandates the Contracting Parties to apply such a degree of duty of care or due diligence in protecting alien investment as necessary under the situations’,⁹²¹ and necessitates the host countries to have and make proper legal mechanism obtainable to protected investors.⁹²²

The tribunal, whilst employing the concept to the background of the case, dismissed the security and protection assertion. It saw no proof that it department (Media Council) administered the legislation in an tyrannical or impartial manner, or that the alteration of the law was as a result of conspiracy theory on the part of the State to damage the business.⁹²³ Instead, it apportioned the blame on Dr. Zelezny, an individual investment associate, that it was his conduct

⁹¹⁸ See Susan D. Franck, *The Legitimacy Crisis in Investment treaty Arbitration: Privatising Public International Through Inconsistence Decisions*, 73 FORDHAM L. REV. 1559-63 (2005); see also *CME Czech Republic BV v Czech Republic*, Partial Award, (UNCITRAL Arb. Trib. 2001) Para 613

⁹¹⁹ See, Jeswald W. Salacuse, *The Law of Investment Treaties* 214 (2010) at 233 (asserting that investors must at all times anticipate reasonable progressions in host country legislation, ‘like the adaptation of climate laws to globally recognised principles or the development of labour regulations to the advantage of the country’s personnel’, and that this kind of advancement must not cause the development to culpability of investment treaty in as far as they are presented in honesty and sincerity of intention (good faith) without prejudice.

⁹²⁰ *Lauder v Czech Republic*, Final Award, (UNCITRAL Arb. Trib. 2001) Para 308

⁹²¹ *Id.* paras 308, 314

⁹²² *id*

⁹²³ *Id.* paras 310-11

that damaged CNTS, and that CNTS had the freedom to initiate a contractual legal proceeding against Dr. Zelezny in the State of Czech courts.⁹²⁴ Therefore, the tribunal held that the only duty Czech Republic is expected to render in regards to that argument was to ‘make its juridical mechanism accessible for the applicant and any organs he manages, to initiate their claims, and for that type of disputes to be correctly investigated and determined in compliance with international and national law’.⁹²⁵

The tribunal’s viewpoint in Lauder case of the standard of FPS seems to be compatible with customary notions of that principle that it provides more than physical security, and provides the host countries enough freedom to make new law and to apply its legislations only where it found it necessary to do so.

Another case where the tribunal has expressed the same interpretation of security and protection is *EAS Generation v Hungary*.⁹²⁶ A United Kingdom corporation was the applicant in this case who had financed a power generation corporation in Hungary. The company claimed that Hungary breached the FPS provision of the ECT when it changed its legislations that governed the tariff which they are entitled for electricity generators, and which contributed to the claimant to sustain financial losses.⁹²⁷ While assessing this dispute, the tribunal stated that the content of the FPS principle as following: The obligation to accord most constant protection and security to investor’s investment is a country’s duty to exercise appropriate measures to safeguard

‘[T]he obligation to accord most constant security and protection to businesses is a country’s duty to take necessary measures to safeguard their investors, or to make sure their investors safeguard themselves from molestation by private parties and State organs ... And whereas it may, in proper situations, expands the duty beyond a security of physical protection, it definitely can not provide protection against a country’s prerogatives to enact new laws or regulate in a way that could adversely impact on a claimant’s business,

⁹²⁴ *Id.* paras 311-12

⁹²⁵ *Id.* Para 314. The tribunal applied a similar interpretation of protection and security in another decision: See, *Parkerings-Compagniet A.S. v Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, (11 September 2007) Para 360.

⁹²⁶ *EAS Summit Generation Ltd. v Republic of Hungary*, ICSID Case No. ARB/07/22 Award, (23 September 2010) paras 13.3.I - 13.I.5.

⁹²⁷ *Id.* Paras 4.I, 13.I.I – 13.I.5

in as much as the State conducts itself reasonably under the situations and with the viewpoint to reaching objectively the State public aims'.⁹²⁸

Employing that standard to the reality before the tribunal, the tribunal dismissed the security and protection claim. It highlighted that Hungary has the prerogative to modify its legislation in good faith because it did not endorse any stabilisation consensus or similarly pledged that they would never alter its legislations.⁹²⁹ In the Lauder arbitral tribunal's perspective, this provides the host country with the freedom to change its legal mechanism, while still permitting the country to remain answerable under the standard of FPS where it acted in a way that constitutes to molestation or in a manner that is arbitrary.

6.5.3 The Need for a more Substantial Consistency of FPS Interpretation

The inconsistency of FPS definition and on many matters and tribunals' arguably excessively expansive interpretation of FPS standard that this paper has made reference to has raised some eyebrows and serious problems, and has resulted to the proposals to enhance the coherence of judgements. One of the ways to heighten the consistency of decisions is to create an appeals framework which could open the prospect of evaluating arbitral rulings in order to improve the possibility of a coherent case law, especial on the standard of FPS. Several United States signed investment agreements have predicted this prospect in the format of an appealing corpus or related comparable method.⁹³⁰ The 2004 of the US Model BIT has in it the following clauses within Annex D:

POSSIBILITY OF A BILATERAL APPELLATE MECHANISM

About 3 years subsequently to the time that the treaty came into force, the Parties must contemplate whether it is to create a bilateral appeal corpus or related framework to re-evaluate decisions delivered within Article 34 in adjudication started after they create the appellate entity or related framework.⁹³¹

It is not clear if the creation of different appellate bodies under separate treaties would promote a logical and consistent case law. A consistent and compatible result would be reached

⁹²⁸ *Id.* Para 13.3.2

⁹²⁹ *Id.* paras 13.3.4 – 13.3.6

⁹³⁰ Generally, *see* B. Legun, 'The Introduction of an Appellate Mechanism': The U.S. Trade Act of 2002, in E. Gaillard and Y Banifatemi (eds.), *Annulment of ICSID Awards* (2004) at p. 289.

⁹³¹ *See* the Uruguay-US BIT, 25 October 2004, Annex E, 44 ILM (2005) 269, 269

only if the conventional framework is used to all, or to an extent, numerous treaties. The multinational retrials system concept is shown under CAFTA-DR Free Trade Agreement (FTA),⁹³² and also in United States FTAs between Singapore,⁹³³ as well as that of Chile⁹³⁴

Even at one stage the ICSID put forward a blueprint that envisaged the establishment of an appellate provision under the ICSID⁹³⁵, but that proposal was abandoned untimely. This appeal provision proposal is not really the most desirable framework to obtain consistency and clarity in the definition of investment agreements. Accordingly, appeal requires a ruling that can be criticised for a number of asserted faults so as to be mended. “Instead of seeking to mend the harm subsequent to the reality through a retrial, it will to greater extent be low-cost and successful to confront it precautionary in advance before it happens”.⁹³⁶ This advice will be plausible if it is to be adhered to by all parties including arbitral investment tribunals.

A mechanism to obtain the logical and consistency which is considered to be outstandingly effective is to permit for preparatory verdicts whilst the actual or the original lawsuits are still waiting for a decision.⁹³⁷ In this type of mechanism an arbitral tribunal would adjourn the case and would demand for a judgement on an issue of legislation from a corpus which has been created for that particular intention. This system has been effectively employed within the European Community scheme to obtain the consistency of implementation of the treaty of European Community legislation by national courts.⁹³⁸ The accomplishment of this mechanism if it is to be implemented by tribunals would avoid the protracted schism amongst diverse arbitral tribunal’s interpretation of FPS principle, and it would also bring back any loss of confidence reposed in BITs between the host country and the aggrieved foreign investors where a breach of FPS arises.

⁹³² General America-Dominican Republic Free Trade Agreement, 5 August 2004, Article 10.20(10).

⁹³³ Singapore-US FTA, 1 January 2004, Article 15.19(10).

⁹³⁴ Chile-US FTA, 1 January 2004, Article 10.17(10).

⁹³⁵ ICSID Discussion Paper, ‘*Possible Improvements of the Framework for ICSID Arbitration*’, 22 October 2004.

⁹³⁶ See R.udolf Dolzer and Christoph Schreuer, *Principles of International Law* (OUP, Oxford 2008) 37-38.

⁹³⁷ See G. Kaufmann-Kohler, ‘Annulment of ICSID Awards in Contract and Treaty Arbitration: ‘Are There Differences?’ in E. Gaillard and Y. Banifatemi (eds.), *Annulment of ICSID Awards* (2004) 289

⁹³⁸ See Article 234 (formerly art. 177) of the Treaty establishing the European Community.

6.6 Conclusion

In conclusion, the relationship between FPS and FET, although it could be argued that the present-day's standard of FPS derives its origin from the United States customary treaty policy but that does not give the two standards the same meaning. Therefore, the tribunal should desist from making the two standards sound as if they are the same just because they appear together in the same section of Articles in BITs in some respective treaties. It would be better and more sensible for tribunals to endeavour and do away with the inconsistencies that surround their interpretation of the protective standard and achieve a better interpretation of the FPS provisions in BITs while interpreting the clause of FPS. Moreover, it is advisable by this thesis that contracting parties who involve themselves with FPS standard and FET should endeavour to incorporate the two standards in two different Articles in a BIT to enable various arbitral tribunals reach correct and predictable interpretation of the both clauses so as to achieve better and expected end result. The divergent opinions found in the interpretation of FET and FPS are even more pronounced among arbitrators across tribunals providing rulings that appear contradictory or inconsistent upon the extent of the standard of FPS which seems to have given support to multiple of infringements of investors' investments by the States, and gives foreign investors the feeling that they can not fully and adequately relied on the standard of FPS for the protection of their investments in the territories of the host States.

CHAPTER SEVEN

THE NEED TO APPLY FPS STANDARD TO CYBER SECURITY: DIGITAL ASSETS

7.1 Introduction

Another area in which investors could suffer adverse effects to their investments is through cyber-attacks. The principle of FPS that should be accorded investment protection is in the area of digital assets. It has already been explained in previous chapters above that the standard of full protection and security concerns a practice of physical and legal protection for foreign investments security, which a foreign investor may suffer against its investment and which can arise via war, civil strife or contraventions of the right of the investor by legislations and directives in the host country. FPS is common among many BITs concluded to draw foreign direct investment (FDI) and to provide protection to multinational investors⁹³⁹. To some people, the FPS principle in the past was originally used to provide protection for physical protection to shield investor's tangible assets, times have now changed, therefore the interpretation of the standards need to be adjusted so as to go along with the nature of threats that investors have to deal with in the 21st Century, specifically, the digital investments solidarity like computer systems and websites from harms imposed by, or directed at the internet, otherwise generally known as cyber security. Cyber attacks or cyber crime, even theft of trade secrets and corporate espionage by internet hackers are not immune from this threat. In order to combat and prevent the adverse effects caused to investors' digital assets by these attackers this article argues for an extension of FPS State's obligation that is stretched to cover cyber security generally, and the argument will be supported by the tribunal's statements while interpreting Article 1105 of the NAFTA, in *ADF v United States* which states as follows:

⁹³⁹ J. Salacuse, *The Law of Investment Treaties*, (OUP, 2010) Para 210); R. Dolzer and C. Schreuer, *Principles of International Investment Law* (OUP, 2008) Para 149; M. Sornarajah, *The International Law on Foreign Investment* (OUP, 2010) Para 359

that the traditional international law that was made reference to under Article 1105 (1) is not fixed for a particular period of time and that the minimum level of treatment can change... what traditional international law forecast can not be an unchangeable picture of the minimum level of treatment of foreigners just as it was in 1927 during the ruling of the Neer Award.⁹⁴⁰ For both traditional international law and foreigners' minimum level of treatment that it inserted, are steadily under a mechanism of evolution.⁹⁴¹

Cyber-attacks represent a gigantic, progressing and disputable class of occurrences. Truly, today there are vast numbers of "cyber weapons" in progress globally without any candid dialogue concerning the conditions in which it may be applied.⁹⁴² The menace of cyber conflict is not only the singular element of cyber harms; cyber threats, cyber attacks, cyber offences and espionage are increasing and constitute great difficulties to corporations (investments) and States uniformly.⁹⁴³ This necessitates international law/s formulation of cyber peace so as to help in monitoring the broad diversity of cyber threats, encompassing trade secrets theft, cyber offences, and other espionage. Employing international investment law by the use of BITs indicates one factor of this development.

The accurate magnitude of digital crime is not known, but it has been estimated that the losses sustained from such attacks amounted to about \$1 trillion just for 2010, compelling **Sheldon Whitehouse**, a US senator, to insinuate that "the US and the entire world are experiencing what is possibly the greatest transfer of resources through theft and piracy in the entire evolution of humanity".⁹⁴⁴ Furthermore, some countries are involving in cyber surveillance otherwise known

⁹⁴⁰ *LFH Neer and Pauline Neer v United Mexican States* US-Mexican General Claims Commission, Decision, 15 October 1926, 4 UNRIIA 60. *ADF Group Inc v US ICSID* Case No. ARB(AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179

⁹⁴¹ *ADF Group Inc v US ICSID*, Case No. ARB (AF)/00/1 (NAFTA), Award, 9 January 2003, Para 179

⁹⁴² See Thomas Rid, 'Cyber War Will Not Take Place' (2013) PARAS 37-38; Paolo Passeri, *What is a Cyber Weapon?*, HACKMSGEDON.COM (22 April 2012), available at:

<http://www.theguardian.com/world/2013/aug/27/nsa-surveillance-program-illegal-aclu-lawsuit>.

⁹⁴³ See, e.g., Jonathan B. Wolf, *War games Meets the Internet: Chasing 21 Century Cybercriminals with Old Laws and Little Money*, 28 AM. J. CRIM. L. (2000) 95, 96; Debra Wong Yang & Brian M. Hoffstadt, *Essay, Countering the Cyber-Crime Threat*, 43, AM. CRIM. L. REV. 201, 201-02 (2006); *Cybercrime Threat on the Rise, Says PwC Report*, BBC News 26 March 2012) (7:01 PM), available at:

<http://www.bbc.co.uk/news/business-17511322>.

⁹⁴⁴ Sheldon Whitehouse, U.S. Sen., Sheldon Speaks in Senate on Cyber Threats, Speech Before the U.S. Senate 27 July, 2010), available at: <http://www.whitehouse.senate.gov/news/speeches/sheldon-speaks-in-senate-on-cyber-threats>. But see, Peter Mass & Megha Rajagopalan, *Does Cybercrime Really Cost \$1 Trillion?*, *ProPUBLICA* (August 1, 2012, 12:12 PM), <http://www.propublica.org/article/does-cybercrime-really-cost-1-trillion> (critiquing various estimates of cybercrimes-base losses).

as espionage, encompassing trade secrets theft,⁹⁴⁵ causing the contemplation of new approaches to combat cyber crime. One such master plans of enhancing protection against cyber crime is by using international investment and trade law and especially BITs as a mechanism to reduce cyber threats and better secure and safeguard trade secrets, that by estimation accordingly, “contained a means of two-third of the worth of corporations’ data portfolios.”⁹⁴⁶ It is as a result of the fact that cyber attacks have multiplied in vast number, sophistication and worldliness, and extremity in the past years that have led some countries to announce proposals to begin brokering a deal for an extensive bilateral investment treaty which will comprise the problematic issue of combating bilateral cyber offence.⁹⁴⁷ Indeed, the application of cyber security to BITs, especially under the provision of full protection and security standard could be instrumental in passing laws of cyber attack protection akin to that of the armed war threshold, encompassing the law of neutrality.⁹⁴⁸

To apply the standard of FPS in this manner would be difficult since it is not a host State that has control over a digital network in their territory of jurisdiction. Moreover, it will be difficult for a host State to fulfil its obligation in a treaty of BITs because the security guarantee might be more than its economic volume, particularly in respect to developing nations, where cyber harms are presumed to be rampant. This part of the thesis will discuss a general overview of cyber security and cyber threats but will focus more on the digital aspect of cyber-attacks in the form of websites and computers than other areas of cyber security protection such as those that have already mentioned, namely, trade secrets theft, such as intellectual property; and espionage. But before going into detail about the possibility of including cyber security to BITs it would be appropriate at this juncture to firstly elucidate on the issues relating to cyber threats that may be initiated from foreign countries to other States, by addressing the issues relating to State sovereignty, jurisdiction, and control over cyber infrastructure, and in addition to those issues

⁹⁴⁵ See, Clay Wilson, *Cyber Crime*, in “Cyberpower and National Security” 415, 424-26 (Franklin D. Kramer et al. Eds., 2009); Ramona R. Rantala, ‘Bureau of Justice Statistics, U.S. Dep’t of Justice NO. NCJ 221943, *Cybercrime against Business*, 2005 1, 3 (2008), available at: <http://bjs.ojp.usdoj.gov/content/pub/pdf/cb05.pdf>.

⁹⁴⁶ Kurt Calia Et Al, ‘Economic Espionage and Trade Secret Theft: An Overview of the Legal Landscape and Policy Responses’, Covington & Burling LLP 3 (2013), at <http://www.gwumc.edu/hspi/policy/Economic%20Espionage%20and%20Trade%20Secret%20Theft%20-%20September%202013.pdf>.

⁹⁴⁷ See, Annie Lowrey, *U.S. and China to Discuss Investment Treaty, but Cyber security Is a Concern*, N.Y. TIMES, July 12, 2013, at A5.

⁹⁴⁸ See, Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT’L L. 192, 231 (2009) (Proposing international law implementation atop and beneath the armed conflict standard; above the standard is the stage that the regulation of war is triggered).

that deals with the application of typical public international laws of State Responsibility to cyber operations. This may be relevant as some cyber attacks are known to have their links from abroad.

7.2 States and Computer Network

There are sets of rules of a traditional international legal existence describing the linkage between countries, computer network infrastructure, and computer network activities. Phraseology is absolutely necessary in order to get a correct comprehension of this section of the thesis. ‘Computer network infrastructure’ represents the transmissions, storing, and computing facilities by which data mechanisms function (glossary).⁹⁴⁹ To a degree countries can apply supervision concerning cyber infrastructure. They support some rights and duties as an affair under international law. The phrase “cyber operation’ describes the application of cyber capacities with the main aim of reaching objectives by the application of cyberspace (glossary).⁹⁵⁰ In international law, countries could be accountable for cyber attacks (if it causes any adverse effects) which the country or their entities transmit, or in other words as regarded as being caused by the States by the strength of the law on State responsibility. Conducts of third party actors might as well be ascribed to countries. This section will be determined by rules and report from Tallinn Manual under the international law employable to cyber warfare as outlined in principles ruling of such issues and describing how the Groups of Experts defined applicable concepts in the cyber atmosphere, and indicates any differences within the group as to each rule’s accomplishment.

7.2.1 Tallinn Manual Rule 1: Sovereignty

Under Rule 1 of Tallinn Manual rule, a country could apply control on the subject of cyber infrastructure and operations in its sovereign jurisdiction. This rule highlights the reality that despite the fact that no country may allege autonomous concerning cyberspace *per se*, countries could exercise independence rights regarding any cyber infrastructure situated on their region, including activities that are linked to that cyber facility.

⁹⁴⁹ See in the glossary Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, *available at*, <http://ccdcoe.org/tallinn-manual.html>.

⁹⁵⁰ *Id.*

The recognised interpretation of ‘sovereignty’ has been outlined in the arbitral award of 1928 in *Island of Palmas*,⁹⁵¹ where it was stipulated that ‘Sovereignty in the connections between countries indicates independence. Independence with reference to a part of the sphere is the prerogatives to employ in that respect, to the exception of every other country, the tasks of a country.’⁹⁵² It is as a result of the independence that a country benefit concerning jurisdiction that grants it the prerogative to monitor cyber infrastructure and cyber operations in the borders of its jurisdiction. Consequently, cyber infrastructure sited in the State’s territorial land, national rivers, territorial ocean waters, island waters, or State air space is affected by the independence of the regional country.’⁹⁵³ Sovereignty signifies that a country could control access to its region and universally possesses and benefits, inside the restriction outlined by agreement and traditional international law, the full prerogative to use power and control on its region. A country’s sovereignty concerning cyber infrastructure in its region has two repercussions. Firstly, is that cyber infrastructure is likely to be affected by legal and supervisory monitoring by the country.⁹⁵⁴ Secondly, the country’s regional sovereignty safeguards cyber infrastructure, regardless of if it is owned by the State or individual bodies or private third parties. In the cases of cyber-attacks initiated from abroad to another country, for example, China, United States, or Russia, some of these cyber attacks reportedly originated from servers network situated in these countries. A cyber activity by a country launched against cyber infrastructure situated in another country may breach that country’s sovereignty which it was directed against. It surely does if there are damages done as a consequence of the launch. The International Group of Experts of the Tallinn Manual who came out with these rules could not reach to any agreement concerning whether the installation of malware which is specifically designed to disrupt or damage a computer system which does not cause physical damage (as with malware used to control operations) amounts to a breach of sovereignty or independence. If that sort of cyber activities

⁹⁵¹ *Island of Palmas (Neth v US)* 2 RIAA. 829, 838 (Perm. Ct. Arb. 1928)

⁹⁵² *id*

⁹⁵³ On independence concerning seas and aerospace above seas, see Law of the Sea Convention, Art. 2; on independence concerning over aerospace, see Chicago Convention, Arts. 1-3. Concerning cyber facilities within outer space, see Rules 3 and 4 and following report in Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, *available at*, <http://ccdcoe.org/tallinn-manual.html>.

⁹⁵⁴ In the 1949 Corfu Channel case, Judge Alejandro Alvarez added a different view where he stipulated: ‘By sovereignty, we infer all the areas of prerogatives and qualities that a country has in its region, to the exception of every other country, and as well in its connections with other country. Sovereignty accords prerogatives on countries and enforces duties upon states’ *Corfu Channel case* at 43 (personal viewpoint of Judge Alvarez).

are aimed to pressurise the State and are not in other respects allowed within international law, the activity may amount to a forbidden ‘intervention’⁹⁵⁵. With this reasoning in mind on sovereignty over control of infrastructure on its region, one would argue that any cyber-attack which emanates either from outside or within a sovereign State which causes devastating damage to investment may be attributable to that State for their failure to have prevented the damage from happening.

However, the rules on sovereignty permits a country to, amongst other things, limit or protect either partially or in wholly the access to the internet work, without being bias to relevant international law, like human rights or other international communication law.⁹⁵⁶ Even if cyber infrastructure situated in a particular country’s region is associated with the international communications network, still it cannot be read as an abandonment of such sovereignty prerogatives concerning that infrastructure. In spite of the fact that countries may not be able to exercise sovereignty on cyberspace *per se* (in itself), countries could use their region in relation to computer network offences and some other operations of a computer network nature in conformity with the concepts of jurisdiction acknowledged under international law (Rule 2).⁹⁵⁷

Customarily, the concept of the contravention of sovereignty was restricted to activities being handled by, or ascribable to States. Nevertheless, there are some underdeveloped opinions presented by some academics that computer network attacks conducted by non-State participants will also breach a county’s sovereignty, especially in part of its territorial unit. This will be addressed later in this thesis below.

7.2.2 Tallinn Manual Rule 2: Jurisdiction

Rule 2 of the Tallinn Manual stipulates that, ‘without being bias to relevant international duties, that a country may use its jurisdiction and control: (a) over individual involved in cyber operations on its territorial region; (b) over cyber infrastructure situated on its territorial zone; and (c) extraterritorially, according to international law’.⁹⁵⁸

⁹⁵⁵ UN Charter, Art. 2(1).

⁹⁵⁶ *E.g.*, the International Telecommunication Union Constitution 1992

⁹⁵⁷ *See, e.g.*, Council of Europe, Convention on Cybercrime, 23 November 2001, Eur. T.S. No. 185.

⁹⁵⁸ *See*, Rule 2 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, *available at*, <http://ccdcoe.org/tallinn-manual.html>.

The phrase ‘jurisdiction’ includes the power to stipulate, implement, and judge. It expands to all issues, encompassing the ones that are non criminal (civil matters), criminal matters and managerial in human kindness and existence. The main reason for a country to use its jurisdiction is bodily or lawful presence of an individual (*in personam*) or thing like object (*in rem*) on its territorial domain. For example, in accordance with the State’s *in personam* jurisdiction a country can endorse legislations and statutes controlling the cyber operations of persons on its region. It can as well control the actions of individually owned’ companies incorporated within its jurisdiction but bodily functioning overseas, like internet service providers (‘ISP’). Concerning the *In rem* jurisdiction, it would permit it to accept legislations controlling the activities of cyber infrastructure on its country.

It may be challenging to ascertain jurisdiction inside the cyberspace since cloud or internet network distributed mechanisms could cross State boundaries, as may the replication (the action of copying or reproducing data) including the constant movement of data processing. This causes it difficult at any point in time to establish where the whole of the user’s information and operating data programme are situated because such information may have been resided in various parts of the jurisdictions concurrently. These technological complexities do not prevent a country of its legitimate prerogative to use jurisdiction concerning individuals and cyber infrastructure situated on its borders. In respect of jurisdiction depended on territoriality, it should be observed that while persons using data and transmitting scientific knowledge have a particular physical site, the site of mobile appliances can move or switch off at computing activities. For example, an individual using some mobile computing gadgets like tablets and smart phones can open various database challenges or upgrades for processing by a digital data storage service. As those challenges and upgrades occur, the operator of the phone may switch to another site. Any country where the person has operated the phone from benefits jurisdiction since the person, and the associated gadgets, were situated on its jurisdiction when they were used.

Surprisingly, with scientific knowledge like mobile digital data storing computer services, the gadgets from which the user is opening an instruction to provide information or perform another function may be geo-located; and software services and computer database applications could follow the geographical coordinates of the computer gadgets, such as Wi-Fi connection position

or the gadget's global positioning system (GPS). Therefore, it is likely under particular conditions for somebody that does not want to be traced to spoof- (interfere with radar or signals so as to make them useless) the geographical-coordinates publicised by that person's computing mechanism. It is as well likely that the user-location could potentially not be made accessible by the infrastructure or those that provide the service, or by the computer programming, or even by the gadget itself. Real physical existence is needed and is adequate for jurisdiction based on territoriality; spoofed (interfere with radar or signals so as to make them useless) existence is not enough.

The territorial jurisdiction has resulted to the development of two unoriginal or imitative kinds of jurisdiction, namely: subjective territorial jurisdiction and objective territorial jurisdiction.⁹⁵⁹ The first one includes the use of the legislation of the country applying jurisdiction to a particular occurrence which is generated inside its region but accomplished in some other place (or State). It relates even if the criminal cyber-attacks or operation have not impacted negatively in the country exercising this jurisdiction. By the opposite, Objective territorial jurisdiction provides jurisdiction on persons to the country where the specific occurrence has impacted negatively despite the fact that the activity started outside the jurisdiction.⁹⁶⁰ Objective regional jurisdiction is of specific importance to cyber activities. For instance, Estonia in 2007 was attacked in cyber attacks that were launched from overseas. As for those conducts which contravened Estonian legislation, the State of Estonia would at least have been qualified to use jurisdiction on the persons, wherever situated, who launched the attacks. Especially, Estonian jurisdiction would possibly have been vindicated since the activities had considerable negative impacts on Estonian region, like intrusion in the system of its banks and State tasks. At the same vein, non-combatant implicated in cyber activities against Georgia

⁹⁵⁹ The ECJ Attorney General has expressed the notion as following: Territoriality ... has produced two different rules of jurisdiction: (i) *subjective* Territoriality, that allows a country to confront conducts emanated from inside its region, although these may have been completed overseas, (ii) *objective* territoriality, that, contrarily, allows a country to confront actions that emanated from overseas but were completed, to an extent partially, inside its own region ... [from the rules of objective territorialism] is obtained the effects notion, that, for the purpose of confronting the impacts at issue offers jurisdiction on a country despite the possibility that the act which generated them was not taken place within its region.' Opinion of Mr Advocate General Darmon, Joined Cases 89, 104, 114, 116, 117, and 125-9; *Osakeyhtio and Others v Commission [in re Wood Pulp Cartel]*, paras. 20-1. 1994 E.C.R. I-100.

⁹⁶⁰ Whereas the effects idea has extended to a general standard of approval, its use in many circumstances has resulted to dispute. American Law Institute Third Restatement of Foreign Relations Law Section 402(1) (C) (1987).

during that country's international arms confrontation in 2008 with Russian government could have been under the control of Georgian jurisdiction due to consequential intrusion on websites and disturbance of cyber transmission in breach of State of Georgian law.⁹⁶¹ The State of Estonia should have used jurisdiction to bring the perpetrators of these acts to book, especially if there had been a uniformity of international law that safeguards cyber-attacks.

Other acknowledged grounds concerning this extraterritorial jurisdiction, although with some limitations, encompass: (i) country of the wrongdoers; (ii) country of the individuals harmed by the operation; (iii) danger to national security of the country; and (iv) contravention of a general concept in international law, like commission of war crime. For instance, any important cyber intrusion with a country's military protective framework such as an air defence and early warning radars) amounts to a danger to State security and as a result is included in the defensive concept.

Considering the variation of jurisdictional positions under international law, two countries, even more can frequently benefit from jurisdiction on the same individual or thing in regards to the same occurrence. An example of this would be an insurgent organisation that stages a computer network attack or activities from the region of country A fashioned to inflict physical harm to country B's power generation facilities. The insurgents used a cyber-arsenal against the factory's control mechanisms, causing a detonation that caused harms to personnel. Inmates of the prison are from several different countries. Country A may assert jurisdiction on the premises that the activity happened there. Country B could as well assert jurisdiction based on the footing of the nationality of the victim known as passive personality and objective regional jurisdiction. Some countries possess jurisdiction on the basis of an attacker's citizenship. Considering these circumstances one would argue that it is not easy for a sovereign State to exonerate itself from cyber-attacks based on jurisdiction, especially where such cyber attacks are launched from inside its borders.

The term 'without bias to relevant international duties' is incorporated to acknowledge that, in some situations, international law might successfully restrict the use of jurisdiction upon some

⁹⁶¹ Non-combatants do not have the right for combatant exemption within the armed conflict law and consequently are completely vulnerable to the customary foundation of jurisdiction confronted here.

individuals or things of objects on a Country's region. Instances encompass exemption (e.g., military and consular exemption) and the provision of main jurisdiction to one country out of two countries benefitting simultaneously jurisdiction about an individual or specific crime, for example by the employment of a Status of Forces Agreement).

7.2.3 Tallinn Manual Rule 5: State Control of Computer Network Infrastructure

Rule 5 of Tallinn Manual on the international law applicable to cyber warfare that is initiated from abroad stipulates that 'a country must not wilfully permit the computer network infrastructure situated in its region or directly within its complete and individual State supervision to be used for conducts which unfavourably and illegally upset or damage another country'.⁹⁶² If a country is not deliberately allowing that computer network infrastructure situated in its region to be exercised against other countries disadvantageously and illicitly, that would mean that, a State should not also intentionally permit such cyber infrastructure within its State control be used against alien investments within the region of its own country in the case of international investment law.

This principle creates a guideline of conduct for countries in the context of two classes of computer network infrastructure: (i) any computer network infrastructure be it State agency in essence or not, situated on their border; and (ii) computer network infrastructure sited in some other places but upon which the country at issue has either *de jure* (entitlement or claim by legal right) or *de facto* (whether by legal right or not) total and individual control. It is applicable to each other notwithstanding of the ascription of the conducts at issue to a country.⁹⁶³ The duty of State equality demands an obligation of every country to accord due deference for the territorial independence of another country. In *Nicaragua v United States*⁹⁶⁴, it was ruled by the ICJ that, 'amongst autonomous countries, deference for territorial sovereignty is a crucial basis of global relationships.'⁹⁶⁵ The duty for deference to the independence of other countries, as observed in

⁹⁶² See, Rule 5 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, available at: <http://ccdcoe.org/tallinn-manual.html>.

⁹⁶³ *Id.* Rules 6 & 8.

⁹⁶⁴ *Military and Paramilitary activities against Nicaragua, (Nicaragua v United States of America)*, Merits, Judgement, I. C. J. Reports 1986

⁹⁶⁵ *Id Para* 202

the ICJ case of *Corfu Channel*,⁹⁶⁶ indicates that a country should not ‘permit wilfully its jurisdiction to be taken as a location for activities against the rights of another country’.⁹⁶⁷ Therefore, countries are necessitated to employ reasonable measures to shield those rights within international law.⁹⁶⁸ This could be regarded as the same reasonable steps of measures of due diligence that a country is mandated to maintain in safeguarding the investments of foreign investors in its territory under FPS clauses in BITs in international investment law that has been dealt with in chapter 5 above. These duties do not just cover unlawful conducts that are damaging to another country, but as well, for instance, actions that impose severe harm, or conducts that have the possibility to cause such harm, on individuals (investors) and objects (investments) protected by the regional sovereignty of the focus country,⁹⁶⁹ such as the ones posed by international computer network threats that have allegedly originated from China, Russia and United States to other countries. Therefore, if it is true that there have been serious computer network attacks against a vast number of corporations in foreign countries from network servers situated in China and the US as has been alleged, that would mean that China, Russia and United States have failed to accord due respect for the regional independence of those countries it launched such computer network attacks against.

However, these necessities are complex by the existing kind of damaging computer network activities, particularly time and room compression of data, and their frequently uncommon nature. There could be situations to which it can not be possible for a country to thwart damage to another country. For instance, country A might be aware that a damaging computer network operation is being made ready and is going to be activated from its region against country B. But, since it has not known the striker’s accurate identity and schedule time, the only successful choice might be to separate the computer connection that will be employed in the strike from that particular internet. By doing so will frequently result in the country A denying it provided the service for the attack against country B. The kind, level and ambit of the possible damage to both

⁹⁶⁶ *Corfu Channel Case (United Kingdom v Albania)*, Merits, Judgement, I.C.J. Reports 15 December 1949

⁹⁶⁷ *Id* Para 22.

⁹⁶⁸ *Case Concerning United States Diplomatic and Consular Staff in Tehran (US v Iran)* Judgement, 24 May 1980, ICJ Report 1980, paras 67-8.

⁹⁶⁹ See, *Trail Smelter Case*, the Adjudicators, quoting the Switzerland’s Federal Court, observed that, ‘The prerogative of sovereignty comprises ... not just the seizure and application of sovereign prerogatives ... but as well a real intrusion that could bias the real utilisation of the region and the liberty of movement of their citizens.’ *Trail Smelter Case (US v Canada)*, 3 RIAA 1905, 2963 (1941).

countries must be evaluated to consider whether this corrective step is necessitated. The yardstick in such conditions is one of reasonableness. The same thing will be applicable to where an infrastructure sited within a country's territory or under its complete governmental control is to be used for activities that unfavourably and illegally affect investors and investments within the host country under the obligation of FPS of BIT in international investment law.

As to the ambit of implementation, this Rule relates to all the activities that are illegitimate and which have harmful impacts on another country, notwithstanding if those damaging that it impacts happened on another country's region or occurred on objects that are protected in international law. The phrase unlawful has been applied within this Rule to indicate a conduct which is against the lawful prerogatives of the negatively impacted country. The International Experts of this Tallinn Manual intentionally decided not to restrict the prohibition of this rule to narrower notions, like the using of force in Rule 11⁹⁷⁰ or armed attack in rule 13,⁹⁷¹ as to highlight that the disallowance expands to every computer network operation from one country's region that impact the prerogatives of another country and have negative damage on another country's region. Especially, there can be no necessity that the computer network activity at issue ends in physical harm to objects or damages to persons; it requires only causation of adverse impact.

The Rule deals with circumstances to which the applicable operations are in progress. For example, a country that permits computer network infrastructure on its borders to be engaged by an insurgence organisation to launch a cyber attack against other countries would invariably be in contravention of this Principle, as also would a country that is warned by another country that a computer network is being prepared and omits to take adequate possible steps to prevent the action. This approach is in consonance with or would be likened to *Bernhard v Zimbabwe*⁹⁷² and *MNSS v Montenegro*⁹⁷³ cases on FPS obligation in international investment law, where the two

⁹⁷⁰ See, Rule 11 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, available at, <http://ccdcoe.org/tallinn-manual.html>.

⁹⁷¹ *Id.* Rule 13.

⁹⁷² *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID Case No. ARB/10/15, Award, 28 July 2015, Para. 597.

⁹⁷³ *MNSS B.V. and Recupero Credito Acciaio N.V. v Montenegro*, ICSID Case No. ARB (AF) 12/8, Award, 4 May 2016, at Para 356

states' authorities in the respective cases were forewarned about imminent attacks against the respective investors and yet they did nothing to prevent those attacks from happening.

The Experts of this Manual could not reach consensus on whether circumstances to which the applicable actions are merely possibly are included in this Rule. A large number of these experts of this Rule took the stance that countries should employ necessary steps to avert them. Few others insinuate that no obligation of thwart exists, especially not in relation to internet crime, considering the challenges of organising inclusive and successful protections against all feasible attacks. The Rule as well is used in relation to activities against international law initiated from internet infrastructure that is in the complete supervision of a State. It makes mention to circumstances where the infrastructure is situated externally out of the individual country's region, but that country nonetheless apply complete control upon it. Such instances encompass a military infrastructure in an alien country subject to entirely transmitting country control in accordance with a basing (more than one) agreement, State podiums on top of the high oceans or in global aerospace, or consular establishments.

This Rule is used if the applicable corrective computer network activities can be tackled by country corpuses or by persons under country control. Experts of this Manual as well reached consensus that where a corrective step could only be executed by a personal organisation, like individual Internet service supplier, the country would be mandated to employ every avenue within its reach to mandate that organisation to apply the steps reasonable to bring to an end such activity. This Rule is used if a country is truly aware of the conducts at issue. A country will be assumed of having real awareness if, for instance, country corpuses, like its intelligence bodies have discovered a computer network threats being masterminded or launched from its region, or where the country has obtained reliable information tip-off that a computer network operational attack is imminent from within its borders.

The international Experts on this Rule could not reach agreement if this Rule can as well be used if the individual country has just constructive ('should have known') awareness.⁹⁷⁴ To put it differently, it is not explicit if a country breaches this Rule when it omits to apply duty of due

⁹⁷⁴ Rule 11 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, page 28, *available at*, <http://ccdcoe.org/tallinn-manual.html>.

diligence in monitoring computer network operations within its region accordingly being ignorant of the conducts at issue. Even if constructive awareness is adequate, the standard of duty of due diligence and care is unknown in the computer network surroundings because of elements like problem of causation, the difficulties of connecting different collections of occurrences as a portion or a division of an interrelated and disseminated attack on a particular or more victims or directions, and the simplicity with which fraud can be organised through computer network infrastructure.

Again, the Experts could not reach agreement if this Rule is as well applicable to countries through which computer network activities are dispatched. Many of the Experts on this Rule took the stand that to the degree that a country of transit is aware of a wrongful activity and also have the capability to prevent it, the country must act accordingly so. They also acknowledged, accordingly, of the uniqueness of dispatching mechanisms of computer network communications. For example, should a communication be obstructed at one junction of internet connection, it will generally be re-sent through a separate communication route, frequently via another country. In that kind of situation, these Experts accepted that the country of passage has no duty to carry out any action, since by doing so can hardly have any significant impact on the result of the activities.

Other Experts position themselves differently stating that the Tallinn Rule is only applicable to the region of the country from where the activity originated or the region under its total control and monitor. They either asserted that the lawful rule did not expand to other region in *abstracto* (ordinary negligence arising from the failure to exercise the very degree of care that every prudent person would exercise under all circumstances) or defend their viewpoint on the ground of the individual challenges of employing the Rule in the computer surroundings. The International Group of Experts' disagreement on certain issues on internet attacks one would argue must have come as a result of a gap in the general cyber international law protection. To put it differently, it is as a result of failure to have one uniform international law that protects against computer network offences, and this loophole makes way for the inclusion of cyber security protection on FPS clauses of BITs under international investment law.

7.2.4. Tallinn Manual Rule 6: Countries Legal Responsibility on Computer Network Threats

Under Rule 6 of the Tallinn Manual, ‘a country carries legal responsibility internationally for a computer network activities imputable to that country and which amounts to a contravention of international duty’.⁹⁷⁵ This Rule basically is on the premises of traditional international law of State responsibility, which is widely shown on the Articles on State Responsibility by the International Law Commission, which has been addressed in Chapter 4 of this thesis. The typical rule under international law prescribes that country shoulder responsibility for a conduct when: (i) the conduct at issue is ascribable to the country in international law; also (ii) it amounts to a contravention of international legitimate duty relevant to that country either by any treaty or by tradition international law.⁹⁷⁶ This sort of contravention can comprise of commission or inaction.⁹⁷⁷ In the sphere of cyberspace (the notional environment in which transmission over computer networks occur) any international unlawful conduct can comprise, among other things, of a breach of the United Nations Charter, for instance, a use of force perpetrated via cyber mechanism under Rule 10, or as well, a contravention of the law concerning the arm conflict duty, for example, a computer network attack launched against non-combatants objects, Rule 37) ascribable to the country at issue.⁹⁷⁸

State responsibility law expands only to a commission, or omission to take measures, that breaches international law. To put it differently, an action perpetrated by a country’s entity, or on the other hands, ascribable to that State, can only constitute an ‘international unlawful conduct’ where the act is against international law.⁹⁷⁹ The law concerning State responsibility would not be complex if countries undertake in other conducts which are either allowed or uncontrolled

⁹⁷⁵ See, Rule 6 (1) of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, *available at*, <http://ccdcoe.org/tallinn-manual.html>.

⁹⁷⁶ Articles 1-2 of the Articles on State Responsibility.

⁹⁷⁷ *Id.* Art. 2.

⁹⁷⁸ See, Thomas Rid, *Cyber War will not Take Place* (2013) PARAS 37-38; Paolo Passeri, *What is a Cyber Weapon?*, HACKMSGEDON.COM (22 April 2012), *available at*: <http://www.theguardian.com/world/2013/aug/27/nsa-surveillance-program-illegal-aclu-lawsuit>.

⁹⁷⁹ This standard is a strict necessity because, as was devised by the International Court of Justice. ‘It is wholly likely for a specific conduct ... not to breach international law in the absence of certainly amounting to the use of a prerogatives granted by it’. ICJ Advisory Opinion on Kosovo’s Declaration of Independence (22 July 2010) Para 56,

under international law.⁹⁸⁰ International law for instance, has not confronted the issue of espionage *per se* (by itself). Therefore, any State's responsibility concerning an operation of computer network espionage committed by a corpus of the country in cyberspace can not to be connected as an issue under international law except specific areas of the cyber espionage contravenes particular international lawful disallowances, for example, where computer network surveillance is containing consular transmissions under Rule 84.⁹⁸¹

The attribution of harm can not be a prerequisite to the classification of a cyber activity for an international unlawful conduct on the law of State responsibility.⁹⁸² Although the principle at issue might comprises harm as a vital component. In such situations, harm can be regarded as a *conditio sin qua non* (indispensable and essential, condition or ingredient) of the extension and connection of country responsibility. Example, in a traditional principle in international law, countries are forbidden from causing crucial harm on another country through operations on its own regions. (Rule 5)⁹⁸³ This same principle applies to international investment law, since FPS obligation in BIT forbids States not to cause harm to foreign investors and their investments in their region as seen in many case law. And that includes in this case computer network attacks that can cause devastating damages to an investor and its investment if initiated within the region of the host State against the foreign investor. In the dearth of such harm there will be no responsibility attributes to States except another principle not including a component of harm has been contravened. Furthermore to a State being wrong internationally, a conduct ought to be ascribable to a country in order to fall in the scope of this particular Rule. Every commission and inactions of country's entities are certainly and inevitably ascribable to that country.⁹⁸⁴ The notion of corpuses of a country' under State liability law is wide. All individuals or organisations which have that standing in the State's domestic law must be grouped as an entity of the country in spite of their purpose or position within the governmental classification.⁹⁸⁵ Any cyber

⁹⁸⁰ *Id. Kosovo* Advisory Opinion, Para 84; the *Case of the S.S. "Lotos" (France v Turkey)* Judgement No. 9, 1927, P.C.I.J., Series A, No 10

⁹⁸¹ See, Rule 84 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, available at: <http://ccdcoe.org/tallinn-manual.html>.

⁹⁸² Articles on State Responsibility, commentary accompanying Art. 2.

⁹⁸³ See, Rule 5 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, available at: <http://ccdcoe.org/tallinn-manual.html>.

⁹⁸⁴ Art. 4(1) of the Articles on State Responsibility.

⁹⁸⁵ *Id.* Art. 4(2).

operation handled by the armed forces, intelligence, national security, customs and exercise, or other governmental organisations will connect to State responsibility in international law particularly, if it contravenes an international legitimate responsibility that applies to that country. It is immaterial whether the entity at issue acted in accordance with, extensively, or with lack of any orders. When perpetrated by a corpus of the country, as long as that corpus is reacting in a seemingly representative position,⁹⁸⁶ even the supposed ultra virus conducts activate a country's international lawful responsibility provided they violate international duties.⁹⁸⁷

For the reasons concerning the law on State's responsibility, individuals or entities that are not entities of the government of a country, that are particularly permitted by its national law to use 'governmental powers' are regarded to be a State entity.⁹⁸⁸ When functioning in that position, their commissions, as with country entities, are ascribable to that country. Instances encompass an individual company which has been accorded the power by State government to carry out hostile cyber activities against other countries or against its own citizens. Likewise, as an individual organisation authorised to participate in computer network intelligence information collection. It is vital to highlight that responsibility of State is on interconnected when the organisation at issue is applying components of governmental power. For instance, countries may have laws empowering individual department like Computer Emergency Response Teams (CERTs) to undertake computer network protection of government internet connections. During the time of the performance, their operations automatically interconnect the responsibility of their financing and equipping State. Still, there will be no connection or attraction of the responsibility of a State when an individual department CERT is executing data security works for individual corporations. In some situations, the action of private performers may be ascribable to a country and cause the country's international law responsibility.⁹⁸⁹ Article 8 on State Responsibility, stipulates again more clearly traditional international law, it observed that 'the action of an individual or a set of individuals shall be regarded as a conduct of a country by

⁹⁸⁶ See, Articles on State Responsibility, Para. 13 of report following, Art. 4

⁹⁸⁷ Art. 7 of the Articles on State Responsibility.

⁹⁸⁸ Articles on State Responsibility, Art. 5, accompanying commentary.

⁹⁸⁹ In Arts. 9, 10 of the Articles on State Responsibility, the Tallinn Experts came to the reasoning that it is presently problematic to think of a setting to which Art. 9 gives rise to State Responsibility because of its necessity that the act be conducted in the absenteeism or failure of the legal authorities. They were not sure if Art. 10, that deals with the acts of a revolutionary and other organisation that turns to a regime, correctly reflects traditional international law.

international law where the individual or a set of individuals is in reality acting to the commands of, or in the instruction of that country in executing the action'.⁹⁹⁰ This standard is specifically applicable in the computer network sphere. For instance, countries could have a written an undertaking with an individual corporation to handle computer network activities. In the same vein, countries have accountably requested individual nationals to launch computer network attacks against other countries or other focused areas overseas, or even within its own jurisdiction, (essentially, like cyber come forward).

The ICJ has ruled, in respect to military activities that, a country is liable for the actions of the none-State (individual or organisation that has significant political influence but not allied to any particular country or state) participants if it has 'official or operative control' on such participants.⁹⁹¹ For example, the equipment rendered by a country of computer network prowess at the time of the arrangement of a particular computer network attacks could, according to how extensive the participation goes, provokes State responsibility concerning any unlawful conducts perpetrated by those non-State participants. It is occasionally argued that unpredictability surrounds the magnitude of control necessitated for a private person or non-State participant's action to be ascribable to the country. In *Tadic* case, the tribunal for the one-time State of Yugoslavia supported the 'overall control' standard – a lower strict test, in respect of private wrongdoing responsibility for the aim of considering the nature concerning the armed dispute.⁹⁹² Nevertheless, during the *genocide* ruling, the ICJ differentiated such an assessment from that held for the intent of proving State responsibility.⁹⁹³ Notwithstanding, even by looking at the 'overall control' threshold, the required control must extend to more than 'the mere funding and providing of those military and encompassing as well involvement in the organising and

⁹⁹⁰ Articles on State Responsibility, Art. 8. 'In respect of Art. 8, the 3 phrases "instruction", "direction" and "control" are lacking connection and consistency; it is enough to prove any one of the three. Simultaneously, it has been made obvious that the instructions, directions or control should link to the act that is interpreted to have constituted to internationally illegitimate act.'

⁹⁹¹ The Court articulated the effect control standard for the first time in the *Military and Paramilitary activities against Nicaragua*, (*Nicaragua v United States of America*), Merits, Judgement, I. C. J. Reports 1986, Para 115. See also e.g., *Genocide Judgement (Bosnia and Herzegovina v Serbia and Montenegro)* (26 February 2007) Judgement, I.C. J. Reports 2007 paras 399-401.

⁹⁹² *Prosecutor v Dusko Tadic* (Appeal Chamber Judgement) (7 May 1997) paras 131, 145.

⁹⁹³ *Genocide Judgement (Bosnia and Herzegovina v Serbia and Montenegro)* (26 February 2007) Judgement, I.C. J. Reports 2007 paras 403-5.

controlling of military activities’.⁹⁹⁴ Additionally, even if this lesser ‘overall control’ criterion were to be embraced, it can not be used for private persons or State’s unrepresented groups.⁹⁹⁵

These circumstances must be differentiated from the ones by which individual nationals, on their own action, carried out computer network activities (known as ‘hacktivists’ or ‘patriotic hackers’⁹⁹⁶). The material ambit to be applied to Article 8 is comparatively strict for the fact this is restricted to orders, managements or supervision. The country must have given special orders or managed or supervised a specific activity to become involved in State responsibility.⁹⁹⁷ Solely promoting or in other respects, showing encouragement for the individualistic action of a third person or a non-State participant will not meet the test of Article 8.

The location where the action at issue was carried out, or the place where the participants that are associated with the action are situated, does not impact on the consideration of whether country responsibility is involved. Just for illustration purposes, for example, think of a bunch of people in country A that takes information from computers that are situated in country B in its botnet (a network of private computers infected with malicious software and controlled as a group without the owners’ knowledge, e.g., to send spam). Those people operate the botnet and overwork the computer system in country C dependent on the orders given by country D. In the law of State responsibility the action is ascribable to country D. It should be acknowledge that country A cannot be assumed liable merely on the ground that this bunch of people was based there, neither would it be assumed that country B shoulder the responsibility for this people’s action just on the fact of the position of the bots (internet program on network which can interact with systems or users) in its border.

This principle is only relevant to ascription for the determination in regards to State responsibility. Nevertheless, a country’s connection with non-State participant could by itself amount to international law contravention, even in matters where the activities of the private persons who participated cannot be ascribed to the country. For example, If Country A supplied

⁹⁹⁴ *Prosecutor v Dusk Attic* (Appeal Chamber Judgement) (7 May 1997) Para 145.

⁹⁹⁵ *Prosecutor v Dusk Attic* (Appeal Chamber Judgement) (7 May 1997) para.132

⁹⁹⁶ Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, pg 33. Available at, <http://ccdcoe.org/tallinn-manual.html>.

⁹⁹⁷ Article on State Responsibility Article 8, Para. 8 (Report following Art. 8).

hacking apparatus which is later used by a rebel or terrorist organisation by its own plan against country B (for instance, the organisation is not operating under the supervision of country A), the sole supplying of these devices is enough to ascribe the organisation attacks to country A. However, such help can itself amount to a contravention under international law.⁹⁹⁸

Even in a situation where Article 8 terms are originally met, actions which took effect from a date in the past may be ascribable to the country. In accordance with the Articles on State Responsibility, under Article 11, ‘action that is ascribable to a country under the foregoing articles shall nonetheless be regarded an action of that country in international law where and to the degree that the country recognises and approves the action at issue as their own.’⁹⁹⁹ For example, think about computer network activities carried out by non-State participant (third party) against a country. If another country over time indicated approval for them and employs its computer network skills to defend the non-State participant against counter-computer network activities, State responsibility would be linked with those activities and any associated successive activities of the group. It is useful to acknowledge that this plan or measure is barely used. Not solely are the terms of ‘acknowledgement’ and ‘adoption’ progressive, they as well necessitate more than trivial support or implied approval.¹⁰⁰⁰

Considering all the aforementioned, it is worth saying that any computer network attack that is initiated from a particular jurisdiction to another jurisdiction that causes adverse and unlawful effects to the other jurisdiction and its nationals undoubtedly breaches international law on State Responsibility. Also, any computer network attack that causes harm to investments that is initiated within the State might also breach the law on Articles on State Responsibility whether the action emanate from the country’s entities or from the non-State participants. However, based on control elements, ascription of State responsibility to a country for computer network attacks that emanate within a country might be difficult to achieve since country do not manage computer network connectivity. To this end therefore, it seems unfeasible to attribute responsibility of cyber offences on digital investments to a host country since internet suppliers

⁹⁹⁸ *Military and Paramilitary activities against Nicaragua, (Nicaragua v United States of America)*, Merits, Judgement, I. C. J. Reports 1986, Para 242.

⁹⁹⁹ Articles on State Responsibility. Art. 11.

¹⁰⁰⁰ Articles on State Responsibility, commentary accompanying Art. 11.

are more often left in the hands of individual corporations and its connectivity is not linked with the State government and as such the government do not have management and control over it.

Relating the issue of control and territory of digital assets to BITs, it is well known that BIT obligations are usually limited to investments that were entered in the region by the individual contracting members.¹⁰⁰¹ This custom comes into being since investments are supposed to strengthen the host country's economy, by either yielding capital flows or by generating new employments opportunities¹⁰⁰² in such a way that simply buying and selling goods and services can not create. On this note, territoriality is undoubtedly a more complicated quality to attribute to internet website, which may merely be available by customers within the host country as a method of advertising overseas products and services. This kind of singly on-line publicity could still be adequate, if the firm can establish of its physical existence in the region, like a managerial office, or a plant, or any establishment. In that sense, the centre of the evaluation to ascertain the territoriality can not be the area where the internet website is situated¹⁰⁰³ but instead the site of the corporation that it was linked to. For the interest of investment treaty security and of international investment law, therefore, it is possible that the excellence assertion that an internet is inside the region of a country is when or where the website is stored through a server which is physically situated inside the host country, which would seem to support the basic comprehension of internet territoriality.¹⁰⁰⁴ Accordingly, as a result of the logical contemplation of the ruling in case of *SGS v Pakistan* by the tribunal, it might help the investor's assertion of territoriality when the proof of disbursement to form the business inside the host country could be cited as evidence.¹⁰⁰⁵ Therefore, a foreign investor can prove that it made payment to a domestic internet storing firm to store its website or data in a server or computer in the jurisdiction, or prove that it bought or rented resident premises to store the pertinent server. On

¹⁰⁰¹ See, BIT between Canada and Peru 2006, Article 1

¹⁰⁰² Jeswald Salacuse, *The Law of Investment Treaties*, 2nd ed., (OUP, 2010) at 169.

¹⁰⁰³ See, e.g., M. Susan, 'The Critical Challenge from International High-Tech and Computer Related Crime at the Millennium' 9 *Duke Journal of International and Comparative Law* 451 (1999); R. August, 'International Cyber-Jurisdiction: A Comparative Analysis' 39 *America Business Law Journal* 531 (2002); and D Powers, 'Cyber law: The Major Areas, Development and Information Security Aspects' in H. Bidgoli ed., *Global Perspectives in Information Security* (John Wiley and Sons Inc., NJ, USA, 2009). See Rule 2 above on Jurisdiction of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, available at, <http://ccdcoe.org/tallinn-manual.html>.

¹⁰⁰⁴ *Id.*

¹⁰⁰⁵ *SGS Societe Generale de Surveillance SA v Islamic Republic of Pakistan*, ICSID Case No. ARB/01/13 (6 August 2003) at 13, under the Swiss-Pakistan BIT (entered into force 6 May 1996).

the other hand, where the website merely was available in the territory via the internet, its link to the region would supposedly be very weak, particularly if the firm do not have physical existence in that jurisdiction. It is probably clearer and better to claim that any computer network that belongs to an organisation which is physically situated within the host country jurisdiction, like the internet keeping the operation of a mining firm, would meet the territorial prerequisite since they are clearly within the boundaries of that party country and therefore must have had territorial and jurisdictional control and links to the host State.

7.3 Are Digital Assets Classified as Investments?

For aliens' digital assets like internets and websites to get protection under the FPS standard from its home country's investment agreement obligations, it should first be demonstrated whether digital assets fall within the ambit of the definition of "investment" in the applicable treaty. For it to fall under investment definition would be based to some degree on the particular terminology that the BIT at issue used, as some general rules come from treaty custom. In series of BITs, there is a common phraseology that defines investments as comprising "every asset", "all kinds of assets" or "every kind of asset,"¹⁰⁰⁶ followed by catalogue of instances. This phrase is appropriate for the intentions of websites including various computer information networks where a treaty agreement makes mention of 'intangible assets including movable and intellectual property'.¹⁰⁰⁷ Digital asset like websites may be classified under intellectual property provided they are created out of technical perception and frequently inventive innovation. For example, the Argentina-US BITs incorporate the extensive definition: 'inventions in every field of mankind effort' and 'confidential investment information'¹⁰⁰⁸ when defining intellectual property.¹⁰⁰⁹ Also, the Ukraine-Denmark BIT stated investment to signify all kinds of assets linked to economic affairs for the intention of creating long period of time profitable connection.¹⁰¹⁰ This appears to include computer networks and websites and in as much as they

¹⁰⁰⁶ See, UNCTAD, SCOPE AND DEFINITION 24 (2011), available at: http://unctad.org/en/Docs/diaeia20102_en.pdf.

¹⁰⁰⁷ R. Dolzer and C. Schreuer, *Principles of International Investment Law* (OUP, 2008) Para 63; J. Salacuse, *The Law of Investment Treaties*, (OUP, 2010) para160. Instance of such interpretation is in article 1(6) of the European Energy Charter Treaty; also Art. 1(1) of the 2001 Germany and Bosnia Herzegovina.

¹⁰⁰⁸ Art. IV Argentina-US BIT 2004.

¹⁰⁰⁹ Argentina- United State BIT, article 1 (IV) came to force in 29 October, 2004.

¹⁰¹⁰ Art. 1 Ukraine-Denmark BIT 1992.

are linked with a profit-oriented business with a long period of plan, not just a few simple business deals.

The early BITs brokered by the US did not demand for the inclusion of any specific intellectual property rights. They solely requested that host country expand to alien investors whatever intellectual property safeguards that exist in its national laws.¹⁰¹¹ Nevertheless, the United States-Poland BIT created a special set of prerogatives and duties concerning intellectual property.¹⁰¹² Additionally, the BIT outlines under Annex 3 that the fundamental rule for the security of propriety data, necessitating Poland to “accord appropriate and successful security for propriety data ... that is employed or may be employed in the person’s investment and has real or prospective economic worth from not being commonly known.”¹⁰¹³ Such data, whether practical or businesslike, must be safeguarded as far as it satisfies three tests - it “(i) has real or prospective business worth from not being familiar to the applicable people; (ii) is not easily obtainable; lastly, (iii) has been conditional to adequate endeavours, under the situations, by the legal respectability to keep the confidentiality.”¹⁰¹⁴

For the reason that digital assets have been established as part of intangible assets and intangible assets fall under the definition of investment, there is no doubt that digital assets are protected by FPS standard. In *Siemens v Argentina*, the Tribunal held that the duty to accord FPS can be expanded further than physical protection and security, especially since the ‘interpretation of investment encompasses tangible and intangible assets, though it is hard to see how physical security can be accorded to intangible investment’.¹⁰¹⁵

Since digital assets can be classified as tangible and intangible assets, the best security to be afforded to this type of investment under the obligation of FPS standard is to accord to it both

¹⁰¹¹ Kenneth J. Vandavelde, U.S. International Investment Agreement 762-63(2009)

¹⁰¹² The U.S.-Poland BIT establishes: a non-exhaustive, illustrative list of specific steps that each part agrees to take in order to establish protection of intellectual property rights,” see Para. 763, Art. IV. March 21, 1990, *available at*: < <http://www.state.gov/documents/organization/210528.pdf>. >

¹⁰¹³ U.S.-Poland BIT, Annex 3.

¹⁰¹⁴ *Id.*, Annex 3, Para. 1. As far as these yardsticks persist to function, Poland could restrict the length of time of the business confidential and should ‘accord appropriate legitimate redress ... and afford complete recompense for damages sustained.’ *Id.*, Annex 3, Para. 2(b). Poland as well pledges not to employ respectability information for “business or competitive” intentions where the business confidential ought to be revealed to the State. *Id.*, Annex 3, Para. 3(b).

¹⁰¹⁵ *Siemens v Argentina*, ICSID Case No. ARB/02/6, Award, (6 February 2007) Para. 303.

legal protection and physical protection. Salacuse argued by saying that these kinds of wide and open-ended interpretation are aimed to accord as broad variety of investment kinds as feasible.¹⁰¹⁶ It does not matter if a computer networks or websites is not classified in the listed group catalogued under any treaty, it could without doubt still be as eligible for the protection of BIT as any kind of asset except if it is grouped within a classification of scenarios that are completely outside of investment, like the extension of credit and claims to money, like it was expressed under the NAFTA.¹⁰¹⁷

Considering the wide phraseology that is used to interpret investments in treaty application, digital asset like websites coupled with internets must without doubt be seen as investments and accordingly be protected by BIT clauses, but only where they are specifically used for commercial purposes, and also if it has a serious jurisdictional control and connection to that of the host country. Digital investments may in supposition magnetise the security of FPS clauses that feature in standard investment treaties in a host State's jurisdiction.

7.4 Cyber Attacks on Corporate Entities

There are so many academic legal literatures that raise concerns against attacks committed via the internet, known as 'cyber attacks'.¹⁰¹⁸ It is a well-established fact in this modern technological era that the examples of computer network attacks generally against companies and State's classified information are rampant as the proportion of sophistication of spiteful software mechanisms grows. There have been instances of highly descriptive accounts of internet attacks today in the world. In the beginning of 2010, three US oil firms, encompassing Exxon Mobil, has in quick succession suffered cyber attack from an internet servers that was situated in China, where the sole motive was getting information about the area and exact worth of oil findings. On 12 January, 2010, Google announced that cyber attacks reportedly invented from around China was focused at thieving the intellectual property of Google together with

¹⁰¹⁶ J. Salacuse, *the Law of Investment Treaties*, (OUP, 2010) para162.

¹⁰¹⁷ Art. 1139 of NAFTA (entered into force 1 January 1994).

¹⁰¹⁸ Probably the excellent current instance concerning a treatment over this subject in one capacity is I Carr ed., *Computer Crime*, Second Series (Ashgate, UK, 2009). See also D Powers, 'Cyber law: The Major Areas, Development and Information Security Aspects' in H. Bidgoli ed., *Global Perspectives in Information Security* (John Wiley and Sons Inc. NJ. USA, 2009)

information that belongs to various numbers of other corporations.¹⁰¹⁹ These attacks which were nicknamed “Operation Aurora” according to the cyber protection company McAfee, created partially a sophisticated economic espionage crusade.¹⁰²⁰ The threats were unique in part considering the kind of intellectual property information that was taken: that is, the corporation’s proprietary information source secret language, which is exactly its main trade confidential.¹⁰²¹ The degree of sophistication used in this cyber attack made the Vice President of MacAfee, **Dmitri Alperovitch** who was in charge of threat research to stipulate that, “the country has never ever, apart from in the field of defence, found business industrial corporations on that scale of sophisticated attack.”¹⁰²² Attacks like Aurora had been tagged “advanced persistent threats” (APTs)¹⁰²³, and company corpuses have as well become focus of APTs as demonstrated by Operation Aurora.¹⁰²⁴ Furthermore, Aurora was specifically remarkable because the crusade showed the scope to which country-sponsored attacks, concerning this matter reportedly originating from China, are focusing on corporations” trade confidential.¹⁰²⁵

It is not just Google that is facing computer attacks in the world today. In 2013, Apple, Microsoft and Facebook, together with about who is who Fortune 500 corporations, were harmed or endangered, in various cases several times.¹⁰²⁶ Organised crusade like that of Operation Aurora are as well rapidly increasing in number. For instance, about seventy various States and

¹⁰¹⁹ See, e.g., Kim Zetter, *Google Hack Attack Was Ultra Sophisticated, New Details Show*, WIRED (Jan. 14, 2010, 8:01 PM) <http://www.wired.com/threatlevel/2010/01/operation-aurora/>.

¹⁰²⁰ See, Michael Joseph Gross, *Enter the Cyber-Dragon*, VANITY FAIR, Sept. 2011, at 220; Brian Grow & Mark Horsenball, *Special Report: In Cyberspy v Cyberspy, China Has the Edge*, REUTERS (Apr 14 2011, 3:52 PM), <http://www.reuters.com/article/2011/04/14/us-china-usa-cyberespionage-idUSTR73D24220110414>; Kim Zetter, “Google” Hackers Had Ability to Alter Source Code, *Wired* (March. 3, 2010, 11:05 PM), <http://www.wired.com/threatslevel/2010/03/source-code-hacks/>.

¹⁰²¹ See, e.g., Kim Zetter, *Google Hack Attack Was Ultra Sophisticated, New Details Show*, WIRED (Jan. 14, 2010, 8:01 PM) <http://www.wired.com/threatlevel/2010/01/operation-aurora/>.

¹⁰²² *Id.* (internal quotation marks omitted).

¹⁰²³ McAfee, *Protecting Your Critical Assets: Lessons Learned from :Operation Aura* 3 (2010), available at: http://www.wired.com/images_blogs/threatlevel/2010/03/operationaura_wp_0310_fnl.pdf.

¹⁰²⁴ See *id.*

¹⁰²⁵ See, U.S.-CHINA ECON. & SEC. REV. COMM’N, 2012 REPORT CONGRESS 168 (2012), available at: <http://www.scribd.com/doc/124212748/2012-REPORT-TO-CONGRESS-of-the-U-S-CHINA-ECONOMIC-AND-SECURITY-REVIEW-COMMISSION> (“In 2012, Chinese country-sponsored participants persisted to manipulate regime, armed forces, commercial, and organisations computer networks.”); VERIZON, ‘Data Breach Investigation Report’ 5, 21-22 (2013), available at: http://www.verizonenterprise.com/resources/reports/rp_data-breach-investigations-report-2013_en_xg.pdf [hereinafter DBIR 2013] commenting that government-sponsored attacks can be responsible for 19% of all accounted attacks, with arranged offences being the largest outside source at 55%).

¹⁰²⁶ See, Damon Poeter, *Microsoft Joins Ranks of the Tragically Hacked*, PCMAG.Com (Feb. 22, 2013, 8:18 PM), at: www.pcmag.com/articl2/0,2817,2415787,00.asp.

entities, encompassing the UN, International Olympic Committee, India, and other defence including security companies, were all the focus of computer network attacks that was nicknamed in 2011, by McAfee as “Operation Shady RAT”. It was alleged that this crusade was funded by China, though it was difficult to pinpoint exactly who carried out this particular crusade.¹⁰²⁷ The truth of the matter is that cyber attacks on both private and government corporations are increasing rapidly all over the world today either by States or third parties. Also, in the same year in August 2013, Syrian Electronic Army reportedly staged computer network attacks directed at the *New York Times* newspaper including Twitter amid other channels, the biggest computer network attacks in recent history directed at China, and recent reports loomed concerning the National Security Agency’s (NSA) reconnaissance activities.¹⁰²⁸ In March 2014, NSA hacked into Huawei’s computer systems, prompting the Chinese government representatives to cry out demanding for an end to cyber espionage.¹⁰²⁹

The United States’ ambitions of overseeing international endeavours to protect cyber attack security sustained a significant difficulties after it came into the open that NSA infiltrated into the telephones and internet transmission networks of millions people.¹⁰³⁰ **Dilma Rousseff**, the President of Brazil, had to cancel a visit to the US in reaction to accounts that NSA was spying on her including Petrobras, a Brazilian government oil firm.¹⁰³¹ In Germany the company executives have also cried out reaffirming President Rousseff’s anxiety that the US surveillance

¹⁰²⁷ See, Dmitri Alperovitch, Reveal: ‘Operation Shady Rat’ 6-9(2011), available at: <http://www.mcafee.com/us/resources/white-papers/wp-operation-shady-rat.pdf>.

¹⁰²⁸ See Dave Lee, *New York Times and Twitter Struggle After Syrian Hack*, BBC NEWS (August, 28, 2013, 7:05 AM), <http://www.bbc.co.uk/news/technology-23862105>; *China Hit by “Biggest Ever” Cyber-Attack*, BBC NEWS (Aug. 27, 2013, 7:53 AM), <http://www.bbc.co.uk/news/technology-2385041>; Karen McVeigh, *NSA Surveillance Program Violates the Constitution, ACLU Says*, GUARDIAN (AUG. 27, 2013, 3:31 PM), <http://www.theguardian.com/world/2013/aug/27/nsa-surveillance-program-illegal-aclu-lawsuit>.

¹⁰²⁹ See Andrew Jacobs, *After Reports on N.S.A, China Urges End to Spying*, N.Y.TIMES, Marr. 25, 2015, at A10

¹⁰³⁰ Geoff Dyers & Richard Waters, *Spying THREATENS Internet, Says Experts*, FIN. TIMES, Nov. 1, 2013, at 4 (“US credibility as a neutral steward of the internet has been severely damaged by the NSA revelations,” said Milton Mueller, professor at Syracuse University school of information studies.”); Anton Troianovski et al., *European Fury over U.S. Spying Mounts*, WALL ST. J. (Oct. 24, 2013, 10:58 PM). Available at: <http://online.wsj.com/news/articles/SB40001420527023047994045799154950188871722>

¹⁰³¹ See Paulo Trevisani & Mathew Cowley, *New Target of Outrage in Brazil Is Canada*, WALL ST. J., Oct. 8, 2013, at A11 (“The account stated that [Canada was spying on internet transmissions between leading Brazilian electricity representatives and the] outcome of the spy were distributed among four other associates which make up an surveillance circle known as the Five Eyes: the U.S., U.K., Australia and New Zealand.”)

program “may have been employed to thief trade confidential¹⁰³² after obtaining information that the US NASA had spied on **Angela Merkel.**, the German Chancellor. Germany in this regard said: “that powerful countries want to steal their highest valued confidential and this information must accordingly be protected by all means.”¹⁰³³ These are all cyber attacks that emanate from actions of the government or its organs that have caused adverse effects to investments. Actually, a German corporation known as Ernst & Young conducted a survey in July 2013 and reached the conclusion that business or commercial espionage including data theft posed a danger to companies.¹⁰³⁴In this milieu, a serious predicament may arise if digital assets are not accorded investment protection befitted of it under FPS obligation in BITs under international investment law. These aforesaid cyber attacks which reportedly originated from different regions to other countries is truly a contravention of traditional international law under the State Responsibility because countries are forbidden from causing crucial damages on another country region through actions that emanate from their own regions. (Rule5)¹⁰³⁵

Statistically, on February, 2010, about 2,800 company computers were violated by fraudulent ‘hackers’ situated within Europe, authorising them entrance to delicate individual records, encompassing the intrusion of that of the clients. An Australian mega financial corporation whose name was not disclosed for security reason was attacked via the internet in 2010, presumably from around China, incapacitated that corporation’s Server for many hours¹⁰³⁶ In October 2015, the telecommunication company Talk-Talk was violated by criminal hackers and approximately 4,000 personal customers’ records were stolen, although this time the hacking was launched within the UK. There are also similar attacks that have happened not long ago that have originated from contaminated computers situated in countries like Egypt, Turkey China, Saudi Arabia, and Mexico, where the possibility of identifying such attacks by governments is

¹⁰³² Gerald Jeffris, *Brazil’s President Pokes at U.S. Spying*, WALL ST. J. (25 September, 2013, 12:10 AM), <<http://online.wsj.com/news/articles/SB20001424052702304213904579095210325139486>>

¹⁰³³ Chris Bryant, *NSA Claims Put German Business on Guard*, FIN. TIMES, Nov. 1, 2013, at 4

¹⁰³⁴ *Id.*

¹⁰³⁵ See Rule 5 of Tallinn Manual on International Law applicable to Cyber Warfare, Published by Cambridge University Press, 2013, available at:

<http://ccdcoe.org/tallinn-manual.html>.

¹⁰³⁶ R. Sullivan, ‘Company: Chinese Cyber-attack targets Australia’, available at: <http://www.physorg.com/news1905524906.htm>.

considered to be at its lowest ebb.¹⁰³⁷ On 12 May, 2017, a cyber attack that was nickname “operation Ransomware’ was launched from unknown destination by unknown persons hitting about 150 countries globally, causing a huge devastating and catastrophic effects to the UK’s NHS computer systems, and hence bringing the services of many UK hospitals to standstill. The Hackers demanded that some ransoms must be paid before they would unlock the computers that were infected with the virus. It was because of the weight of the devastation that it has caused that prompted the Europol and European Law enforcement Agency to state that; global computer attack is of an unprecedented scale’.¹⁰³⁸ ‘It was one of the swiftest-spreading and possible harmful cyber attacks acknowledged to date’.¹⁰³⁹ Furthermore, it was alleged by Financial Times Newspapers that ‘the arsenal that was used in the hacking was stolen from the United States National Security Agency (NSA)’.¹⁰⁴⁰ Nigeria is well known for using computers to scam companies both within and outside its borders with such illegal activity being nicknamed ‘419’. In fact according to reports, Nigeria is ranked third amongst all other States identified and associated with cyber-crime and fraud in the world.¹⁰⁴¹ Cyber attacks are not frequently associated with the stealing of data, but they could be merely aimed to destroy property, perhaps for so many reasons, such as governmental or dogmatically reasons, for example, like the alleged ‘cyber terrorism’.

As has been mentioned earlier, there were high profile published cyber attacks that were directed at Estonia in 2007 and against Georgia in 2008 respectively, from Russia, causing the internet to malfunction and crash, and bringing some neighbourhood of these two States to a halt. The success of these attacks was as a result of both the growing sophisticated nature of cyber insurgent methods and also due to the impromptu and unsettled position of the Georgian and Estonian regimes.¹⁰⁴² Politically inspired cyber attacks may as well be aimed against business or

¹⁰³⁷ S. Gorman, ‘Broad New Hacking Attack Detected’ Wall ST. JOURNAL (18 Feb. 2010).

¹⁰³⁸ Cyber Attacks on UK NHS Data, BBC News, 13 May, 2017, at 11:11 AM

¹⁰³⁹ See, Sam Jones, Sarah Nevile, Jim Pickard and Joshua Chaffin, ‘NHS Hackers Used Stolen Cyber Weapons from US Spy Agency’, Financial Times, FT Weekend, 13 May, 2017, available at , <.magazineelib.com/newspapers-2//financial-times-uk-13-may-2017/>

¹⁰⁴⁰ *id*

¹⁰⁴¹ See, Article on, ‘Nigeria Ranked Third in the World for Cyber Crimes, Says Survey’, *available at*: <http://www.balancingact-africa.com/news/en/issue-no-302/computing/nigeria-ranked-third/en/sthash.nBq6ius.dpuf>.

¹⁰⁴² E. MacAskill, ‘Countries Are Risking Cyber Terrorism: Security Expert Tells World Summit’. The Guardian (London) 5 May 2010, *See Further* S. Shackkelton, Estonia Three Years Later: A Progress Report on Combating Cyber Attacks’ 13:8 Journal of Internet Law 22 (2010).

many other investment organisations. Probably, the greatest renowned catastrophic computer network attack against a corporation as mentioned earlier was launched in the beginning of 2010 against Google in China from hacker criminals inside the State, supposedly aiming to incapacitate the Human Rights nonconformists e-mail accounts.¹⁰⁴³ This situation could best be described as physical destruction in the practice of the standard of FPS to commercial investments, particularly where the consequence is an epidemic one, intruding with the real operation of a significant element of the secular community.

Another clear risk created by a cyber attack on essential infrastructural systems is that this computer network attacks is highly exorbitant to individual parties, like alien investors who are based inside the contaminated region. If websites are interrupted it could cost providers to loose their contracts and also cause destruction to their reputations and that of the investors. For example, some Talk–Talk customers who were affected as a result of the cyber attack terminated their contracts with the telecommunication company. Intrusion to computer networks or machines could incapacitate manufacturing and at the same time can harm associated physical properties. Alien investors may be specifically endangered considering the magnitude of fund dedications comparative to dividend in the starting years of a foreign country investment scheme. A United States Congressional Research Service that was published in US learnt that cyber infiltration or attacks on computer networks caused a normal shareholder financial reduction for privately traded companies about US\$50 million to \$200 million.¹⁰⁴⁴ And this number excludes the damage imposed on a corporation name because of the internet attack that may be seriously and grossly harmful, for instance, in the banking department where the protection of consumer's identities or details is a vital element of the work. Without doubt, alien investors are potentially vulnerable to suffering huge financial deprivations from internet-based unlawful harm against digital investments such as websites and the computer sets itself.

It was as a consequence of the internet attacks infiltration against private entities and State classified information, which has also caused huge financial deprivation to companies, that has

¹⁰⁴³ A. Jones and M Helft, 'Google, Citing Attack, Threatens to Exit China' New York Times, 12 January 2010. Commercial surveillance was regarded to be an intention behind that hacking on Google's activities in China: A Eunjung Cha and E. Nakashima, 'Google China Attack Part of Vast Espionage Campaign' Washington Post, 14 January 2010.

¹⁰⁴⁴ B. Cashell, WD Jackson, M. Jickling, and B. Webel, 'the Economic Impact of Cyber-Attacks Congressional Research Service, the Library of Congress (U.S.) (1 April 2004).

led the U.S and China to propose for an extensive US-China BIT that will incorporate trade secret theft and enhance bilateral cyber protection so as to prevent any cyber threats against the private sector. This move seems to be a step in the right direction in order to assist host States to thwart cyber attacks that pose threat to digital assets of foreign investors inside their borders either caused by the host country itself or caused by private parties.

Accordingly, **Charles E. Schumer** stated concerning the proposed extensive US-China BIT that, “[t]o not confront matters like intellectual property theft [during brokering of a BIT between U.S.-China] . . . can be a significant error.”¹⁰⁴⁵ Also, previous leading government representatives in charge of international investment and trade affairs, in 2013 wrote that “most importantly, the complicated and governmentally alleged cracks over commercial cyber-espionage, if it is not tackled, jeopardise development on every front.”¹⁰⁴⁶ Furthermore, in July 2013, the United States and China, instantly after re-agreeing on the both governments’ aims to broker an expansive bilateral investment treaty, “China and the United States pledged to accord robust security and application of trade confidential, and to intensify policies and solutions by applying the law.”¹⁰⁴⁷ This United States and China proposal that will be announced for brokering an extensive BIT which will supposedly incorporate the problematic matter of intensifying bilateral cyber security¹⁰⁴⁸ can be a starting point of addressing this issue globally.

If China and the United States would accept the incorporation of cyber threats clause and not just trade secret theft clause in their proposed BIT for the purpose of the prevention of damage to digital assets, and will consider a matter such as this which affects foreign investors and investments perpetrated or deliberately disregarded by States corpuses through extra-legal governmental takings, and which falls under the ambit of full protection and security standard. Not just to insert the provision to BITs, if this provision can be applied by contracting State parties, then this problem of cyber attacks may at least start to ease. The advice also is that the

¹⁰⁴⁵ Ian Talley & William Mauldin, *U.S., China to Pursue Investment Treaty*, WALL ST. J. (July 11, 2013, 8:06 PM), <http://online.wsj.com/news/articles/SB10001424127887324425204578599913527965812>

¹⁰⁴⁶ Daniel M. Proce & Michael J. Smart, ‘BIT by BIT: A Path to Strengthening US-China Economic Relations’1 (2013), available at:

< http://www.paulsoninstitute.org/media/102532/bit_bit_pricesmart_english_final.pdf >

¹⁰⁴⁷ *U.S.-China Joint Fact Sheet on Strategic and Economic Dialogue*, U.S. DEP’T OF TREASURY (12 July 2013). < <http://iipdigital.usembassy.gov/st/english/texttrans/2013/07/20130712278568.html>.>

¹⁰⁴⁸ See, Annie Lowrey, *U.S. and China to Discuss investment Treaty, but Cyber security Is a Concern*, N.Y. Times 12 July, 2013, at A5.

proposed US/China BIT should include general cyber security protection and not just limit it to trade secrets theft. Other countries must now follow suit to include in their BITs provision that will enhance cyber security so as to thwart any cyber threat against private and foreign investments. More importantly, a perfect BIT would also warrant such matters to be settled by international arbitral tribunals, such as ICSID, which also would provide an important forum to settle these kinds of disputes.

7.5 Applying Investment Treaty Adjudication to Reduce Cyber Attacks

Expanding the application of mandatory permits necessitates a demand for a firmer regulation to tarpaulin trade secrets theft and all cyber attacks.¹⁰⁴⁹ The illegalisation of such operation and the intensification of legal proceedings against persons are significant tools against cyber threats by persons or commercial rivals. Nevertheless, legal proceedings will suffer a setback when the wrongdoer is the country itself. The general security of cyber attack will only happen when State participants are as well involved in the cyber protection. This matter is brought within intensive relation as the cyber attackers become stronger within the international cyber community. There is an anxiety among commercial amalgamation which is at the very heart of cyber security and BIT. **William Burns** who was Deputy Secretary of State for the United States highlighted on the US-China BIT the “necessity to get a shared comprehension of the principles about the road” in computer network.”¹⁰⁵⁰ The necessity to generate a principle about the road for cyber protection is big, if not a bigger concern, as various countries and commercial investors are confronted with cyber threats, encompassing industrial espionage and BITs could be a channel to galvanise such ideas. The employment of bilateral investment treaties in this way gives two major components that are frequently absent in other investment protective mechanism like TRIPS: claims that occur within the scope of a bilateral investment treaty can not only be initiated by a person but as well may be settled in an internationally agreed arbitration framework. The application of arbitration renders many benefits, like the employment of a neutral surrounding for determination of their claims, a well-established principle of adjudication

¹⁰⁴⁹ See, e.g., Jon Cavicchi, ‘Chamber Seeks Sanctions for Trade Secret Theft in Tpp, UNH LAW BLAWGS (Aug. 2013, 9:44 AM), < <http://blogs.law.unh.edu/tradesecretesblog/2013/08/>.>

¹⁰⁵⁰ See Paul Eckert & Anna Yukhananov, *U.S., China Agree to Restart Investment Treaty Talks*, REUTERS (12 July 2013, 12:28 AM), available at: <http://www.reuters.com/article/2013/07/12/us-usa-china-dialogue-trade-idUSBRE96A0ZD2013712>.

and implementation of award settlements,¹⁰⁵¹ and admission of and the application of firmly established investor-dispute concentrated arbitration bodies. Moreover, initiating a proceeding at ICSID within a BIT contract permits an alien investor to initiate a lawsuit against that particular host nation within investor-State adjudication without the necessity to request from its national government to lodge disagreement resolution proceedings.¹⁰⁵² Unlike its precursor FCN, BITs are established to be less complicated and more restrictedly concentrated. Transparency in the ICSID mechanism must be encouraged for it to be a successful framework in building a regulation of cyber security as this article has already addressed in chapter 6 above. The dearth of transparency and inconsistency of interpretation of claims by ICSID arbitral tribunals is an increasing concern within the world community because investor-State adjudication rates have amplified, however positive measures have been taken in this respect that ought to be strengthened in subsequent BITs.¹⁰⁵³ Nevertheless, some anonymity is necessary in these lawsuits, if that happens parties who are involved will be confident bringing disputes that could in other respects remain unsettled in that tribunal. It is better left for negotiators in the proposed China-United States BITs to endeavour to thread this needle-¹⁰⁵⁴ (to strike a balance between the conflicting forces).

Furthermore, multilateral mechanism may as well be used to fill the vacuum left by BITs. However, the TRIPS mechanism has its own flaws and has been condemned for numerous reasons, especially for having an ambiguous definition. In the same vein, although countries frequently observe WTO rulings, however, it has “no jailhouse, no bail bondsmen, no blue helmet, and no truncheons or tear gas.”¹⁰⁵⁵ This is so because the rules of the organisation are not being applied or followed properly, and the violators of its rules do not face stringent penalties.

¹⁰⁵¹ Certainly, this is an indicator of adjudication as settlements are absolute and irrevocable on the parties to the contract, in both trade and investment associated disputes, see ICSID Convention, Rules and Regulation, at 53(1 January 2003), available at: =RulesMain (follow “ICSID Convention, Regulations and Rules (January 2003) English PDF” hyperlink).

¹⁰⁵² See, Gaetan Verhoosel, ‘*The Use of Investor-State Arbitration Under Bilateral Investment Treaties to Seek Relief for Breaches of WTO Law*’, 6 J. INT’L ECON. L. (2003), at 493, 495

¹⁰⁵³ See, Report of the United Nations Commission on International Trade Law, Rep. On its 46th Sess, 8-26 July, 2013, Para 116, UN. Doc., A/68/17, GAOP, 66th Sess, Supp. No. 17 (2013), available at: <http://unctad.org/meetings/en/SessionalDocuments/a68d17_en.pdf. < (follow by accompanying text.).

¹⁰⁵⁴ In its 2013 annual investment report, UNCTAD outlined a series of perceived shortcomings in the ICSID arbitral process.

¹⁰⁵⁵ See, Judith Hipper Bello, Editorial Comment, *The WTO Dispute Settlement Understanding: Less Is More*, 90 Am. J. INT’L L. 416, 417 (1996).

And it could also perhaps be that the WTO has been overshadowed by other international protective investment conventions. Additionally, the WTO up until now has been unsuccessful as a corpus for promoting international cyber security because of State or national security exceptions. For the aforesaid reasons, BITs can be good faith principle catch on if they are made more resilient for cyber security enhancement, but only if it is without national security exceptions. MFN provisions within the WTO surrounding are as well a restricting factor, because they are included in BITs, however, there is greater ambit within BITs to successfully address this challenging problem. For instance, the MFN provisions under the third batch of Chinese bilateral investment treaties are more restricted in ambit than the second creation.¹⁰⁵⁶ The third batch of Chinese's BITs was aimed to "strike a better balance at the prerogatives of the host country and the foreign investor."¹⁰⁵⁷ In addition, more supplementary wording may be inserted in BITs, to include computer network security, and cyber security protections in general. Ideally, both bottom-up (progressing from small or subordinate units to larger or more important units, as an organisation or process), e.g., BITs and top-down (situation in which decisions are made by few people in authority rather by the people who are affected by the decisions), e.g., WTO mechanisms have strengths and weaknesses, requiring a polycentric mechanism to promoting cyber security protection and creating a regulation for cyber peace.

BITs may offer a successful path to increase international computer network protection or a general cyber protection, and the extending international investment agreements (IIAs) to a broader investment environment may need to persist to gather approval from major countries internationally. Such an extension of custom BIT security is not in a dearth of precedent since current negotiated IIAs made mention about trade law, including rights to intellectual property, even non-economic matters like environmental protections, and labour rights. The OECD in working paper in 2011 announced that more than one hundred protocols out of a specimen of

¹⁰⁵⁶ See generally, Ton Qui, *How Exactly Does China Consent to Investor-State Arbitration: On the First ICSID Case Against China*. 5 CONTEMP<ASIA ARB. J. 265 (2012) (emphasising on batches of China BITs and efforts to apply most-favoured nation (MFN) provisions to debate the prerogatives to transfer matters to international adjudication).

¹⁰⁵⁷ Axel Berger, *Investment Rules in Chinese Preferential Trade and Investment Agreements: Is China Following the Global Trend Towards Comprehensive Agreement?* 7 (German Dev. Inst., 2013), available at: http://www.die-gdi/uplots/media/DP_7.2013.pdf; Cai Congyan, *China-US BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT'L L.

about 1593 BITs that have been incorporated made reference to climate issues.¹⁰⁵⁸ Such references effectively were scarce prior to the middle of 1990s, increased rapidly to being a portion of over eighty per cent of currently negotiated treaties in 2008.¹⁰⁵⁹ Moreover, all preferential trade and investment agreements (PTIAs) under the OECD example enshrined environmental wording. For example, Japan, has constantly imputed anti-corruption principle in their recent BITs.¹⁰⁶⁰ The US and Canada have started to confront the issue of corporate social responsibility in many of their chapters of PTIA investment.¹⁰⁶¹ In line with recent BITs signed by Canada and United States, the Benin-Canada BIT incorporated a provision “calling on the two States to promote their investors to comply with international recognised standard of corporate responsibility.”¹⁰⁶² All of these examples help as a reminder that broader regulatory objectives, encompassing cyber security, can be faced up to and deal with the rules of investment protections, especially under the obligation of the standard of FPS in BITs of international investment law.

7.6 Few Leading Arbitral Decisions that May be Applied to Digital Assets

A few arbitral rulings can be greatly vital in the application of FPS to cyber security, especially digital assets, although the wording of any BIT can not be a determinant factor in comprehending the purview of applying the standard.¹⁰⁶³

In *ATM v Zaire*,¹⁰⁶⁴ a claim started under the US-Zaire BIT for the assertion of Zaire’s omission to shield a US corporation from sustaining harms to its investment as a consequence of

¹⁰⁵⁸ See, e.g., Kathryn Gordon & Joachim Pohl, *Environment Concerns in International Investment Agreements: A Survey 5* (OECD Working Papers on International Investment No. 2011/1, 2011), available at: <<http://dx.doi.org/10.1787/5kg9mq7srjh-en>>

¹⁰⁵⁹ *Id.* Other States like Germany including the UK still abstain from incorporating such issues into their protocols on a methodical basis.

¹⁰⁶⁰ See, e.g., Agreement between Japan and the Republic of Colombia for the Liberalisation, Promotion and Protection of Investment art. 8 (12 September 2011), available at:

http://www.unctad.org/sections/dite/ia/docs/BITs/Japan_colombia%20BIT.pdf; Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalisation of Investment article10 (21 Nov. 2008), available at: http://www.unctad.org/sections/dite/ia/docs/BITs/japan_Peru.pdf; See generally, Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy*, in *Anti-Corruption Policy: Can International Actors Play a Constructive Role?* 247 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013)

¹⁰⁶¹ See, UNCTAD, ‘World Investment Report 2011: Non-Equity Modes of International Production and Development’ 119-20 (2011), available at: <http://www.unctad-docs.org/UNCTAD-WIR2011-Full-en.pdf>.

¹⁰⁶² See, Lorenzo Cotula, *Is the Tiding Turning For The Africa’s Investment Treaties?* (8 March 2013) Available at: <http://www.iied.org/tide-turning-for-africa-s-investment-treaties>.

¹⁰⁶³ See, G. Cordero Moss, in A Refinish ed., *Standard of Investment Protection*’ (OUP, 2008) at 134-135.

operations of the Zairian military forces in the State. Zaire argued that it did not breach the FPS obligations since AMT was not given a less favourable treatment than it gave to other national investors, encompassing its own. The ICSID tribunal ruled that the State of Zaire had contravened the FPS clause since it did not take any steps at all to guarantee the security of AMT's investment and the reality that the Zaire as well was unable to safeguard the other investor was immaterial. What was of great significance to the arbitral tribunal was that the damages AMT incurred were as a consequence of the activities of the Zaire's military operating personally and without in their collective authorised position as Zairian forces, and for that reason, their activities failed to be classified under the battle activities exception of this principle of FPS obligation, enshrined under the BIT. Like in this case, FPS provisions under investment treaties could incorporate some in-built exceptions in the favour of the host country, like warfare or an announcement of an urgency circumstances due to national security attacks. Lack of internet control by a State could emerge at a time of severe computer network attacks against a State, which may possibly avert the host country from fulfilling its FPS duties.

Another FPS case that may be applied to digital assets is *AAPL v Sri Lanka*,¹⁰⁶⁵ where the arbitral tribunal assessed the principle of FPS provision under a UK-Sri Lanka BIT, and which concerned the damage sustained by the owner of shrimp farm at a time of clash between Tamil Tiger rebels and the Sri Lanka military Task Force. It was decided by the tribunal that the term full protection and security that was incorporated under a BIT supposed not to suggest that the principle is by any means greater than the international standard of minimum treatment necessitated under traditional international law. During the period of civil unrest, there was an obligation on the host country's side to accord proper security to alien investors' investments and that any omission to afford such security will attract the culpability of the country, specifically, to recompense the alien investor against any harm that the investor might have incurred. This duty that exists autonomously of the phrase FPS was breached by the Sri Lankan State. The standard of FPS clause in this matter was neither helpful nor beneficial to the claimant, since it was incorporated with a broad exception: there is no recompense that will be outstanding to be paid if the harm ensued from reasonable battle operation engaged by the military forces of the

¹⁰⁶⁴ *AMT v Democratic Republic of Congo*, ICSID Case No. ARB/93/1, Award, 21 February 1997, paras 6.05-6.06

¹⁰⁶⁵ *Asian Agricultural Products v Republic of Sri Lanka*, ICSID case No. ARB/87/3. Final Award, 27 June, Para. 771990.

host country, which encompassed the activity that was undertaken by the forces against the insurgents. To avoid such exception and exclusion of compensation for the obligation of an FPS clause in a BIT such as the one in the AAPL case, such clauses should be carefully drafted by respective States to a BIT so as to give contracting parties and their digital assets adequate protection where an operation has resulted in digital investment damage from an attack.

In *Noble Ventures v Romania*,¹⁰⁶⁶ the ICSID tribunal took almost the same approach that an FPS provision must not be perceived to be broader in ambit than the customary obligation to accord FPS to alien citizens found under traditional international law of foreigners. It was also stipulated by the tribunal that, for FPS to be claimed there is the need to show that the action that the host country has applied that attributed the harm was aimed particular against a specific investor because of its citizenship.¹⁰⁶⁷ To bring this particular case in the context of cyber security protection, therefore, if every investor is to sustain injury at the time of a prevalent attack against a particular State itself, then the obligation of FPS may not be an attractive option, because the attack affected other nationalities. To put it differently, that would mean that any cyber attack against a website and computer in the host State's territory would not be attributed to that host State so long as such an attack affected other nationalities.

However, there could be a glimmer of hope for investors on FPS obligation in this regard as it was in the *Wena Hotel v Egypt* case.¹⁰⁶⁸ The principle received some contemplation when a claim was initiated by a British corporation against Egypt Republic for the State's inability to thwart an attack against Wena Hotels. Visitors that were at the hotel at the time of the raid were forcefully ejected and properties were damaged because of civil disobedience. It does not matter to the tribunal whether the host country did not really take part in that attack against the hotel. However, it was still concluded by the tribunal that Egypt was responsible for the violation of the obligation of FPS standard since Egypt knew about the attack and yet it did nothing to avert it. In this regard therefore, where a host State is aware of an imminent cyber attack against investor's digital assets, for example computers and websites, and yet did nothing to prevent the attack from happening, such a State would be held liable for such failure.

¹⁰⁶⁶ *Noble Ventures Inc. v Romania*, ICSID Case No. ARB, Award, 12 October 2005.

¹⁰⁶⁷ *Ibid* at 111.

¹⁰⁶⁸ *Wena Hotels v Egypt*, ICSID Case No. ARB/98/4, Award, 8 December 2002, 41 I.L.M. 896

In *Azurix v Argentina*,¹⁰⁶⁹ there was a contravention of water and underground conduit drainage compromise agreements that was permitted by the State of Argentina district that benefitted a US firm. Nervousness erupted amid the populace when an eruption of an algae ensued, resulting the public to cancel there contract agreements that was entered with the water providing company. In finding a violation of the standard of FPS for Argentina's action in omission to finish labour on systems dangerous to algae eradication, also as worsening the citizens' reaction to the occurrences, the arbitral tribunal accounted that even though some arbitral tribunals explicitly had restricted the standard of FPS to a minimum degree of physical protection, it may well be expanded in the relevant BIT between US-Argentina. Above all, FPS concerned not merely physical security but as well incorporate an additional obligation that the host States warranty the 'stability of secure environment',¹⁰⁷⁰ notwithstanding that the exact characteristic of the particular BIT which gave rise to this interpretation was not examined. It is worth noting that the claim of Azurix occurred prior to the State of Argentina suffered economic emergency and thus had no bearing on any urgency action exercised by the country in respect of that. The interpretation seems to mean that if there is a cyber attack that has affected the digital assets, and which led to investors' contracts to be terminated based on the attack, for instance, where the investor failed to complete its work based on the host State's inaction to prevent the attack, the State would be held liable for it. This is so, because the host State is obligated to provide foreign investors 'stability for a secure investment environment both, politically, economically and socially for its investment'.¹⁰⁷¹

Lastly, in *Pantechniki v Albania*,¹⁰⁷² where riots were initiated by Albanian nationals owing to the breakdown of a State managed programme that destroyed the investor's road work scheme, demonstrates that there is a component of proportionality that is needed when evaluating breaches of the principle of FPS. Proportionality is required since, contrary to denials of justice that arise from a deliberate absence of due diligence in relation to administration, an omission to provide FPS is possibly to emerge from:

¹⁰⁶⁹ *Azurix and Argentina*, ICSID Case No. ARB/01/12, Award, 14 July, 2006

¹⁰⁷⁰ *Id.* Para. 408

¹⁰⁷¹ *Id.*

¹⁰⁷² *Pantechniki Contactor & Engineers v Albania*, ICSID Case No. ARB/07/21, Award, 30 July 2009.

An unforeseeable example of public disobedience that may have been easily contained by a strong nation but which overcomes the restricted capability of a country that is deprived and vulnerable. There is no concern of motivation and deterrent in respect to unpredictable disintegration of civil unrest. It appears hard to state that a regime suffers international obligation for omission to prepare for extraordinary disturbance of extraordinary scale in extraordinary places.¹⁰⁷³

It may be said that as a result of this decision a host country may have been issued with a ticket not to shoulder international obligation for its omission to react to an intense occurrence, a cyber attack that is wholly unprecedented in nature and scale since the connectivity and control of internet services is not in the hands of the host State. Therefore, under the standard of FPS the host country ought to apply due diligence measure required of a State in the same circumstances, a characteristic that would be applicable when employing the principle to less-developed countries below.

7.7 Host States' Duty to Prevent Cyber attacks on foreign Investor's Digital Investments

Focusing more on computers and websites, there may be a suggestion that the host state is obligated under full protection and security to avert attack imposed on digital investments or properties as the case may be, by rendering a secure online atmosphere, that is, one that weakens the capability of computer network perpetrators to initiate attacks effectively to investments. In a situation that the Server which provides an alien investor's website is situated inside the region and not outside the jurisdiction of the host State, it may be asserted that the State that host the server would be responsible to ascertain that the websites that are within its territory are protected from cyber attacks. With this type of reasoning, scholars have recommended that computer connections security must be comprehended as a commodity of the public¹⁰⁷⁴ which connotes that this is a useful and standard characteristic of workable community. This important feature is particularly relevant for the fact that host countries attempt to accord a stable, secure atmosphere to alien investors and their investments as a way of increasing the States' economic standing as stated by the tribunal in *Azurix v Argentina*¹⁰⁷⁵ case. Viewing it in this sense, computer network protection can be regarded as a method in which the strength of economic

¹⁰⁷³ *Id.* Para. 77.

¹⁰⁷⁴ J. Trachtman, 'Global Cyber terrorism, Jurisdiction and International Organisation' in M. Grady and Paris eds., *The Law and Economics of Cyber security* (Cambridge, 2006) at 271.

¹⁰⁷⁵ *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006 Para 408.

wealth mechanism of the country is reached, encompassing that framework's capability to entice foreign capitals flows into the host State. A stable, secure and friendly investment atmosphere is provided to foreign investors in a swap for the trade, industry, and the creation of wealth benefits that it attracts.

The maintenance of a reasonable degree of security against internet offences that would appear under international legal document such as BITs could be argued to be a suggestive of what an adequate protected digital atmosphere ought to be for the sole aim of creating the standard of full protection and security, or minimum standard of treatment of international law. That would be precisely what full protection and security would be taken to mean.

Aside from BITs, computer network security has also become a vital subject in regional and global trade negotiations. The 2002 OECD Guidelines concerning the Security of Information Systems and Networks proposed that countries must apply swift and successful collaboration to thwart any computer network offensive attacks that emerge from internet on-line atmosphere.¹⁰⁷⁶ The United Nations as well has promulgated propositions with the intention of reducing terrorist operations incited via the internet, the type that may harm the operation of computer systems.¹⁰⁷⁷ The United State and European Union business discussions have been modelled at least in the beginning by worries over NSA reconnaissance activities, including intellectual property (IP) security;¹⁰⁷⁸ the recommended Trans-Pacific Partnership (TPP) as well has general cyber security protection components;¹⁰⁷⁹ and the WTO uses implementation framework that may be pertinent to computer network attacks if national security perturbs could be defeated.¹⁰⁸⁰

¹⁰⁷⁶ OECD, 2002, Art. III.3 *available at:*

http://www.oecd.org/document/42/0,3343,en_2649_34255_15582250_1_1_1_1,00.html.

¹⁰⁷⁷ UN General Assembly Resolution 51/210 (16 January 1997); UN Security Council Resolution 1373 (2001) (28 September 2001).

¹⁰⁷⁸ See, e.g., Doug Palmer, *U.S. EU Launch Free Trade Talks Dispute Spying Concerns*, INS. J. (9 July 2013), <http://www.insurancejournal.com/news/international/2013/07/297817.htm>; but see James Fontanella-Khan, *Brussels Opposes German Data Protection Push*, FIN. TIMES, 5 November 2013, at 8

¹⁰⁷⁹ See, Kevin Collier, *Sen. Ron Wyden on the Problems with the Trans-Pacific Partnership*, DAILY DOT (19 September 2012) <http://www.dailydot.com/politics/ron-wyden-trans-pacific-partnership/>.

¹⁰⁸⁰ Allan A. Friedman, Brooking Inst., 'Cybersecurity and Trade: National Policies, Global and Local Consequences' 10-11 (2013) *available at:* <http://www.brookings.edu/media/research/files/papers/2013/09/19%20cybersecurity%20and%20trade%20global%20local%20friedman/brookingscybersecuritynew.pdf>; Mark L. Mossman, *Essay, Enforcement of WTO Rulings: An Interest Group Analysis*. 32 HOFSTRA L. REV. 1, 1-2 (2013); James A. Lewis, CTR. STRATEGIC & INT'L STUD., *Conflict and Negotiation in Cyberspace* 49-51 (2013), *available at:*

All in all, those investment and commercial schemes could give a support for the promotion of bilateral and territorial team-work to strengthen internal internet protection generally and improve the security of computer systems to be specific at a period of gradual development on national and multinational advancement on cyber security strategy making.¹⁰⁸¹ It is worthy of saying that applicability of those schemes to cyber security has failed to be valued sufficiently high in written works till today.¹⁰⁸² The international trade and investment community is still in a dearth of a consistent international framework for the security of alien investments and computer network protection, i.e. cyber security in general. Therefore, BITs may be influential in strengthening a legislation of this desperately required cyber peace relevant below the armed conflict maximum level.¹⁰⁸³ Taking into consideration of these mechanisms, the indication will be that in the acknowledgement of full protection and security duty in any BIT, those host countries have assumed the commitment to offer internet or cyber protection to a level acknowledged as required by the global community such as to avert harm against websites (a set of related web pages located under a single domain name) and the computers machines itself of alien investors which could emanate direct or indirect from consequences of a well organised computer aggression or attack. Assumption of such obligation by a State would fall below the standard of the traditional international law requirements since this would necessitate that countries have participated in this conduct because of their perception of legal responsibility and that is not obvious from the mechanisms stated.

Nevertheless, it seems improbable that a duty may be imposed on a host country's administration for the protection of private investors' websites against any designated cyber

http://csis.org/files/publication/130208_Lewis_ConflictCyberspace_Web.pdf (discussing the applicability of the WTO dispute resolution processes to help manage cyber espionage). This restriction in the World Trade Organisation composition emphasises the necessity for bilateral and territorial methods to promoting cyber security.

¹⁰⁸¹ See, e.g., Scott J. Shackelford, Essay, In Search of Cyber Peace: A Response to the Cyber security Act of 2012, 64 STAN. L. REV. ONLINE 106 (2012), available at: <http://www.stanfordlawreview.org/online/cyber-peace>; Tom Greaten, *Seeing the Internet as an "Information Weapon,"* NPR (23 September, 2010, 12:00 AM), <http://www.npr.org/templates/story/story.php?storyId=130052701> (emphasising the reality that UN-sponsored cyber reduction talks have been taking place from 1990s but have been futile since then).

¹⁰⁸² Cf. Steven E. Feldman & Sherry L. Rollo, *Extraterritorial Protection of Trade Secret Rights in China: Do Section 337 Actions at the ITC Really Prevent Trade Secret Theft Abroad?*, 11 J. Marshall REV. INTELL. PROP. L. 523, 525 (2012); Gerald O'Hara, *Cyber-Espionage: A Growing Threat to the American Economy*, 19 COMM. L. & TECH. L. REV. 416, 475-76 (2012); Peter Swire & Kenesa Ahmad, *Encryption and Globalisation*, 13 COLUM. SCI. & TECH. L. REV. 416, 475-76 (2012).

¹⁰⁸³ See, Scott J. Shackelford, *From Nuclear War to Net War: Analogising Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. (2009), at p. 192, 231

attacks. It is due to this fact that the provision of internet services is overseen by individual corporations. It is not in the tradition of most regimes of controlling or keeping servers that store websites. It is mostly the field of individual telecommunications firms, such as Internet Service Providers ('ISP's), especially in most developed countries where the governments have privatised such companies to provide these services. Permits may be given by host countries to ISPs who sell internet networks and those governments can render some level of supervision, but this supervision does not expand to practical management or control of the operation and protection of the internet network or personal web-pages that emerge on it. With this explanation, it is very challenging to recommend significant and serious State control or supervision of a website than it is likely to be in the issue of, for instance, a plant, where the law enforcement agents like the police may generally have entrance and interfere if there is a cyber attack occurrence. Accordingly, there is virtually the certainty for an inadequate measure of State supervision to ascribe any protection negligence or omission in respect of particular website to the countries on the ground of full protection and security obligation. Instead, individual groups like ISP suppliers could fit in as the major credible players with regards to avoiding subsequent damage.¹⁰⁸⁴ Ascribing liability to the country could be more easily created in non-market system economies where the government does keep first-hand control upon the internet.

It could be just to claim that an extensive degree of internet security problems, for instance the wholeness of a country's internet infrastructure generally, and the steadiness of transmission computer networks that trouble so many subscribers like those impacting on the provision of utilities, must remain under the control of the State¹⁰⁸⁵ as it is or used to be in most developed and developing countries before the surge of corporation privatisation. Internet construction and planning is progressively an essential element of workable society, and as such it must be regarded as under the domain of a State's obligation to its nationals, even where many crucial amenities like internet network, energy generation and water supplies, are directly distributed by an individual corporations. Although in some developing countries energy and water supplies is still being control and supervised by the government and is still left in the hands of the State for

¹⁰⁸⁴ See, D. Littman and E Posner, 'Holding Internet Service Providers Accountable' in M. Grady and F. Paris eds., *The Law and Economics of Cyber security* (OUP, 2006).

¹⁰⁸⁵ See, Trachtman, 'Global Cyber terrorism, Jurisdiction and International Organisation' in M. Grady and Paris eds., *The Law and Economics of Cyber security* (Cambridge, 2006) at 270.

distribution. Disruptions of internet infrastructure would place adverse effects to foreign investments upon which the full protection and security is based, and would equally amount to a violation of full protection and security standard. For this reason, culpability for property harmed, even if it comes as an indirect result of the chaos affecting the wider system, could possibly be the liability of the government. On this viewpoint, foreign corporations functioning inside the territory of a host State could have asked for compensation from the authority of that country for the breakdown in the network, especially if the internet disruption resulted from mistake or negligence on the side of the State, particularly where there are no governmental agencies that monitor the activities of the individual internet providers. This reasoning must be mitigated with possible impromptu or urgency situation justification which the State could claim, like the ones found in *AMT* case.¹⁰⁸⁶ FPS provisions in investment protocols may incorporate some exceptions that could favour the host country, like warfare. Likewise, an announcement of an urgency situation that threatens national security, which probably will emerge at a time of a severe attack against a State's network, could possibly preclude the host country from its duty of an FPS standard. As the internet structure is in the hands of the government, the more grave the attack on the government computer system, the more the likelihood that the country is capable of claiming that the actions it took was taken as a result of the emergency of the circumstances surrounding it. It must be said that, in a situation whereby the host country played a direct part in financing or organising the computer network attack on an alien investor's website that has investment or business existence in its territory, full protection and security obligation to prevent harm would clearly be breached.¹⁰⁸⁷

7.7.1 Investors' Due Diligence for the Protection of Cyber Attacks

With regards to any evaluation of the obligation to accord due diligence to a foreign investor that a State owe under the standard of FPS provision, this must be weighed against the adequate steps which the foreign investor ought to anticipated to enforce to safeguard their own investments, extent as the foreign investor would be anticipated to secure their business building with locks at night, especially in the location where the computer system is kept. Or better still,

¹⁰⁸⁶ *AMT v Democratic Republic of Congo*, ICSID Case No. ARB/93/1, Award, 21 February 1997.

¹⁰⁸⁷ See Scott J. Shackelford, *From Nuclear War to Net War: Analogising Cyber Attacks in International Law*, 27 BERKELEY J. INT'L L. 192, 235 (2009).

to employ security guards to watch the premises to avoid any unwanted intruders breaking in to their business premises. If the investor fails to abide by the necessary basic standard of protection concerning its individual on-line presence can very possibly reduce any host country of culpability and aggravate the investor's loss on this issue, or at minimum, minimise the amount of payment granted by an arbitral tribunal if the tribunal ruled in the claimant's favour. Like Trachtman asserted, corporations must be accountable for the rudimentary protection about their own gadgets, like firewalls protection against e-mail spam, including preserving their anti-virus computer software, since they are capable of preventing such damages at minimal cost.¹⁰⁸⁸ However, the above rudimentary level of security cannot be achieved in most developing States, for instance in some States where law and order is in disarray, where legislation, the law enforcement agencies and judiciary care relatively little about their own inhabitants.

7.7.2 Compensation for Cyber Attacks

If peradventure a contravention of an FPS provision is found in respect of a computer network attack against investors' digital asset, arbitral adjudication undoubtedly would be left with a challenging task of evaluating a suitable amount of payment due for such investor. Assessing compensation for damage for contravention of investment agreement standards of security can be famously a complex matter under international law.¹⁰⁸⁹ The "Hull Principle" necessitates "immediate, sufficient and successful" payment.¹⁰⁹⁰ In reality, when one contemplates about cyber attack damage, the concern becomes what will the full compensation be? This question is an especially hard one to provide an answer to taking into consideration of the protracted effect on the company's reputation, together with business disruption and interference, it might be hard to ascertain and quantify. Arbitral tribunal seems to be having problems with this notion in the area of FET. The case of *Chorzow Factory* assists to lay down the criterion: "Compensation must, to the extent that is possible, remove all the results of unlawful conduct and re-create the

¹⁰⁸⁸ See, Trachtman, 'Global Cyber terrorism, Jurisdiction and International Organisation' in M. Grady and Paris eds., *The Law and Economics of Cyber security* (Cambridge, 2006) at Para. 270.

¹⁰⁸⁹ See further, I. Marble, *The Calculation of Compensation and Damages in International Investment Law* (OUP, 2009)

¹⁰⁹⁰ See, Ronald Charles Wolf, 'Trade, Aid, and Arbitrate: The Globalisation of Western Law 26 (2004) (citing Cordell Hull, the United States' Secretary of State (quoting 3 Green Haywood Hachworth, 'Digest of International Law' 658-59 (1942) (and following text); UNCTAD, Taking of Property, 13-14 (2002), available at: <http://unctad.org/en/Docs/psiteiid15.en.pdf>. See World Bank Guidelines on the Treatment of Foreign Direct Investment s. IV (1999), available at: <http://italaw.com/documents/WorldBank.pdf>.

circumstances which may, in all possibility, have occurred if that action had not been perpetrated.”¹⁰⁹¹ In reference to cyber attack, especially on computers or websites, there seldom is the likelihood to place the foreign investor back in the level that he would have been had the conduct not been perpetrated, given that computers or websites are frequently at the central of the business. The expectation is that injuries for the omission to apply preventable computer network attack on investor’s investment would possibly comprise some mixture of lost of investment or financial lost at the time that the web-page or the computer system itself broke down in case of physical damage, the repairing expenses or the replacement cost of related harmed physical property, like the equipment including the computer hardware. The level of the harm available could depend on the measure Remoteness that involved with the loss and the related foreseeability of damage as a result of the government’s or State’s negligence to avert the action. On this note, contracting parties to a treaty must consent on the current fair and equitable compensation mechanism for cyber security protections, and may as well need to come to an agreement on a technique or principle to accord for adequate recompense when cyber attack occurs.

7.7.3 Availability of Functional Legal System to Control Cyber Threats

The use of the duty of FPS standard to cyber attacks would undoubtedly need the offering of a workable legal mechanism that can control and implement legislations against the execution or perpetration of damage on computers equipments and some other different digital properties belonging to alien investors. First off, the wholeness of the country’s legal framework in regards to the identification and bringing proceedings against cyber perpetrators may be seen as a collection of processes characteristic by the host country atmosphere and accordingly would be more properly grouped under the standard of FET. However, seeking the investigation under the standard of FPS, while the prompt instituting of a legal proceeding against the offenders based on actual results rather than predictions could provide an effective legal reaction to the cyber offences to placate affected investors and may prevent subsequent computer network attacks, and decrease the possibility that such offences will reoccur.¹⁰⁹² The offenders who committed the

¹⁰⁹¹ *Factory at Chorzow (Germany v Poland)*, Merits, 13 September 1928, P.C.I.J. (ser. A) No. 17, at Para. 47.

¹⁰⁹² See, W. McGauran, ‘*Intended Consequences: Regulating Cyber Attacks*’ 12 *Tulane Journal of Technical and Intellectual Property* 259 (2009).

cyber crimes could not probably have done so if they fright that they would be caught by the law and be punished accordingly for committing such a crime. Where a State did not succeed in preventing cyber attack, it must at least apprehend and punish those that perpetrated the act.¹⁰⁹³ This will serve as a deterrent to other future criminals to refrain from such act.

Yet, legislations that associate with the ultimate importance of digital assets or cyber investments might not be uniform in international investment law, but they are familiar under international law and therefore may fall under an appropriate degree of protection offered by the FPS standard. For instance, the World Trade Organisation in 1994 extended the area of business confidential (trade secrets) that can be covered for protection from business in commodities and business in other services to a description of rights of intellectual property also.¹⁰⁹⁴ Recognised as TRIPS, the multilateral treaty, under its Article 39, makes mention of trade secret as the security against any unjust competition under the Convention of Paris.¹⁰⁹⁵ Some Parties members to the World Trade Organisation are bound under the trade confidential measures obligated by TRIPS, for instance, China, unlike many States, where there are frequently no laws that are particularly focused on the security of trade confidential.¹⁰⁹⁶ Additionally, the WTO Trade Related Measures of Intellectual Property Agreement orders for a minimum degree of security for the rights of intellectual property to be accorded to the WTO party States' local legal mechanisms, that may help where trade useful digital properties, like client record data are duplicated and in other respect stolen at the time of a computer network attack. Article 5 of the Council of Europe Convention on Cybercrime necessitates that members must legally take lawful steps to create as an unlawful crime the hampering of computer system operation by

¹⁰⁹³ *Sergei v Government of Mongolia*, Award on Jurisdiction and Liability, 28 April 2011, Para. 323.

¹⁰⁹⁴ Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organisation, signed in Marrakesh, Morocco on 15 April 1994, *available at*: http://www.who.org/english/tratop_e/trips_e/t_agm0_e.htm.

¹⁰⁹⁵ *Id.* section 7, art. 39(1) (“during the period of undergoing lawful security from unfair competition like it is accorded under Article 10bis of the Convention of Paris . . . , Parties must protect confidential data . . .”). The Paris Convention necessitates Parties “to ensure to citizens of those States legal security from unfair competition.” Paris Convention for the protection of Industrial Property art. 10bis (1) (1979), *available at*: http://www.wipo.int/treaties/en/ip/paris/trtdocs_wo020.html#p213_35515. In addition, it reads unfair competition like “[a]ny conduct of competition against impartial applications in factory or business issues”. *Id.* Art. 10bis (2).

¹⁰⁹⁶ *See*, Shan Hailing, ‘The Protection of Trade Secrets in China’ 1 (2nd ed. 2012). At 27. (European States have often used a different type of laws and encompass trade confidential legislations in respect of their civil laws, business laws, and other different legislations, and they never have given a particular law or a one code for national trade confidential security

deliberately inserting and loading, transferring, destroying, removing, degenerating, changing or concealing of computer information.¹⁰⁹⁷ Various other domestic legitimate frameworks as well keep regulations which were promulgated to bring legal proceedings against cyber-attack offenders for offences against computer equipments, like attacks on business websites. For example, ‘Canada’s Criminal Code establishes an unlawful crime for damaging, changing or intruding with the utilisation of information’.¹⁰⁹⁸ Section 16 (3) of the Nigerian Cybercrimes (Prohibition, Prevention, Etc.), Act 2015, ‘necessitates as an unlawful crime the hampering of the operation of a computer sets by inserting or loading,, transferring, destroying, removing, degenerating, changing or concealing computer information or any kind of intrusion with the computer equipments’¹⁰⁹⁹. These aforementioned legislations are proof of country approach that support protection against attacks to computer connected businesses and assets,¹¹⁰⁰ and as a result should provide a comprehension surrounding the level of due diligence measures of legitimate security against computer network attacks that could be linked with the standard of FPS guarantee.

It would be challenging to assert if the host country was responsible to initiate legal proceedings against cyber perpetrators that had staged a cyber attack away from the country’s territory since the country is not suppose to have the legal right to rule on the case, except the offenders are citizens that come from the host country.¹¹⁰¹ The Council of Europe Convention that deals with computer network offences only stipulates that ‘jurisdiction can only be shown

¹⁰⁹⁷ Council of Europe Convention on Cybercrime, Budapest 23. XI.2001, *European Treaty – No. 185*, Art. 5. In 2006 the treaty got 28 signatory countries, and 15 out of the 28 had endorsed it. The Convention got accolade from scholars like M. Miquelon Weismann. See M. Miquelon Weismann: ‘the Convention on Cybercrime: A Harmonised Implementation of International Penal Law: What Prospect for Procedural Due Process’ in I Carr ed. *Computer Crime*, Second Series (Ashgate, UK, 2009).

¹⁰⁹⁸ See, Criminal Code of Canada s. 430(1.1). See also Title 18 ch 47 United States Code s. 1030, reporting the illegitimate crimes of deliberately gaining entrance to computer with lack of permission to access data or generate harm. In *Cyber Law and Security in Developing and Emerging Economies* (Edward Elgar, 2010), authors ZK Shalhoub and SL AI Qasimi stated that it just 26 States worldwide that have created some regulation that deals with cyber matters, at 224.

¹⁰⁹⁹ Section 16 (3) of the Nigerian Cybercrimes (Prohibition, Prevention, Etc.), Act 2015

¹¹⁰⁰ R. Garnet and P. Clarke, ‘Cyber terrorism: A New Challenge in International Law’ in A Bianchi ed., *Enforcing International Law Norms against Terrorism* (Hart, Oxford, 2004) at 477

¹¹⁰¹ *R v Graham Waddon*, 2000 WL 41456 (2 April 2000), in that regard as far as webs sites can be gain entrance to in the host country, they have jurisdiction over the case. Nonetheless, Appeal Court of the UK ruled that criminal regional jurisdiction can be created in the area that the websites material may be entered and copied

where the crime takes place, amongst other things, in the region of a country'¹¹⁰² providing no direction on how it will be interpreted. Traditionally, the principle of FPS is involved in a situation where harm is sustained inside the borders of a host country, a circumstance that has been mentioned earlier and would possibly be fulfilled when the server of the website or the computer device itself was situated inside its territory. However, it is never obvious that international tradition concerning computer offence implementation is conclusive enough to the extent that it might form a standard. Various scholars have condemned the dearth of international legislations for offences committed on the sphere of internet,¹¹⁰³ like those that can possibly harm the worth of a corporation's trade investments. It is particularly the situation in less-developed countries, where these kinds of commercially protective legislations do not exist, or are not implemented at all if such laws do exist, that will thus necessitate a contextual amendment of the standard of FPS. This will only happen if wording, to prevent cyber harms that will impact on foreign investors' investments, are inputted in Full protection and security clauses in BITs just as the United States and China BITs have proposed in their future BIT.

7.8 Less developed States and the Full Protection and Security Standard

It is well known that half of the overall global FDI presently goes to the less-developed world,¹¹⁰⁴ where the judicial and governmental situations are frequently and obviously more unstable compared to the countries from where the capital emanates from. Many scholars caveat that it is not all State governments that are able to provide for the capital that is required to manage operational computer connections, let alone avert harmful activities against them.¹¹⁰⁵ Additional to substandard degrees of internet connection system,¹¹⁰⁶ and related absence of technological

¹¹⁰² European Convention on Cybercrime (Budapest Convention 2001) Article 22.1(a), *available at*: http://www.europa.eu/meetdocs/2014_2019/documents/libe/dv/7_Con-budapest_/7_Con_budapest_en.pdf.

¹¹⁰³ U. Dractta, 'The Internet and Terrorist Activities' and R. Garnet and P. Clarke, 'Cyber terrorism: A New Challenge in International Law' in A Bianchi ed., *Enforcing International Law Norms against Terrorism* (Hart, Oxford, 2004); In *Cyber Law and Security in Developing and Emerging Economies* (Edward Elgar, 2010), authors ZK Shalhoub and SL AI Qasimi stated that it just 26 States worldwide that have created some regulation that deals with cyber matters, at 244; *See* W. McGauran, 'Intended Consequences: Regulating Cyber Attacks' 12 *Tulane Journal of Technical and Intellectual Property* 259 (2009).

¹¹⁰⁴ World Investment Report, UNCTAD, 2010. *Available at*: <http://www.unctad.org/templates/webflycr.asp?=1342&intItemII=2068&lang=1>.

¹¹⁰⁵ *See*, Trachtman, 'Global Cyber terrorism, Jurisdiction and International Organisation' in M. Grady and Paris eds., *The Law and Economics of Cyber security* (Cambridge, 2006) at 273.

¹¹⁰⁶ *See* further R. Kariyawasam, *International Economic Law and Digital Divide: A New Silk Road* (Edward Elgar, Publication, (2007)).

understanding or technical know-how to avert cyber attack, only a small number of less-developed countries have promulgated regulations to confront these pressing problems and have as a result been unable to bring legal proceedings against the offenders.¹¹⁰⁷ Even in few underdeveloped States where such legislations have been enacted, implementations of such regulation are far from the reality. Damaging cyber attacks can be more widespread in countries in which there is the existence of a general deficiency of trustworthiness in the administration and where a few number of individuals with restricted wealth can be emancipated by the use of anonymity and damaging capability of destroying the internet.¹¹⁰⁸ These States frequently have creaking infrastructure or are incapacitated to react to the protection of internet attacks matters when it arises. Those circumstances outline a handful number of those States that are capital-importing countries of the less-developed world that have finalised BITs just for the single intention of quelling the anger and winning over foreign investors. The action of taking up protective steps that are reasonable to avert cyber attack on computer machines in these States is described as occurring at irregular intervals and only in a few places, with innumerable less-developed States having shortcomings in the maintenance of adequate preventive actions.¹¹⁰⁹

There is no way a foreign investor ought to anticipate the same degree of internet protection from all countries where it invests, because protection against cyber offences can be exorbitant and definitely would necessitate a great degree of technological or occupational professionalism encompassing human capital wealth which most developing States are lacking at the moment.¹¹¹⁰ This is the expression of Jan Paulsson obiter dicta in *Pantechniki* case: ‘an unforeseeable exemplification of public disobedience that surpasses the restricted capability of a country that is in abject poverty and is susceptible.’¹¹¹¹ This maxim could arguably be far from universal especially in some of the more wealthy developing countries whose technical proficiency has been crippled due to endemic corruption and not because of poverty. Having said that, it is

¹¹⁰⁷ Shalhoub and Al Qasimi quote the instance concerning the Philippines that had proof of the people that are liable regarding the ‘Love Bug’ infection in 2000 that cost the State over \$10 billion in compensation, but was powerless to bring legal proceedings due to a defective legal mechanism.

¹¹⁰⁸ R. Crelinsten, ‘Terrorism and Counter-Terrorism in a Multi-Centric World: Challenges and Opportunities’ in M. Taylor and J. Hogan eds. *the Future of Terrorism* (Rutledge, London, 2006).

¹¹⁰⁹ S. Baker, S. Waterman and G. Ivanov, ‘In the Crossfire: Critical Infrastructure in the Age of Cyber War’ Centre For Strategic and International Studies (CSIS) and McAfee Inc. Australia, China, the UK, and the US have the excellent history of keeping protection of computer networks at 20.

¹¹¹⁰ *Ibid.*

¹¹¹¹ *Ibid* at 77

prudent to accept the ruling in this case that an extremely poor host country must not shoulder international obligation where it failed to act to threats of a cyber-attack which is beyond its control and is extraordinary in kind and magnitude. Therefore, under FPS a host country ought to take a reasonable measure of care of a State in a very much alike situations, a characteristic that is suitable at employing the FPS standard to the less-developed countries.

As for the expression of ‘due diligence’ in the standard of FPS as it is given by *APPL v Sri Lanka*, it as well implies that foreign investors ought to have a less anticipation in less developed countries. The duty of ‘due diligence signifies necessary steps of deterrence that a good-ruling and organised State might be anticipated to apply under the same situations.’¹¹¹² Whereas a proper standard of governance can be anticipated, this ought to be weighed against the situation by which the occurrences have happened. Sornarajah stated that, ‘this should comprise the strength of the contention and wealth which possibly could be redirected for the aim of security’.¹¹¹³ Additional to the intensity, likely referring in this context, to the several of persons injured, this balancing must encompass the kind of the adverse effects. David Collins stated that ‘countries which have a substandard internet connection will unavoidably get a poorer quality capacity to confront greatly technological disruptions like that of computer network attacks’¹¹¹⁴. This statement is correct, because the developing States’ lack of technological know-how will serve as an impediment in addressing such a problem. He further stated that, ‘this is because the wealth to confront the extent of such computer network contention in those countries is minimal’.¹¹¹⁵ The second viewpoint seems not to be completely correct because some of these developing States as stated before have enough resources to address such problems but failed to do so because of corruption that has eaten deep into the fabric of those nations. For instance, a country such as Nigeria with plentiful resources cannot be said to lack the financial resources needed to confront the volume of cyber threats in its territory. It would fail to do so because of the unquenchable thirst for siphoning the country’s wealth to private overseas bank accounts by

¹¹¹² See, J. Salacuse, *The Law of Investment Treaties*, (OUP, 2010) at 132. This phrase is itself a quote from AV Freeman, *Responsibility of States for Unlawful Acts of their Armed Forces* (1956) 88 *Recueil des Cours* 261.

¹¹¹³ *Id* at 135

¹¹¹⁴ David Collins, ‘Applying the Full Protection and Security Standard of International investment Law to Digital Assets’, available at <http://papers.ssrn.com/so/3/papers.cfm?abstractid=1572709>, at pg 242

¹¹¹⁵ *id*

its government officials. This factor has led to misappropriation of funds and misplacement of its priorities.

This adaptability including the danger it poses to foreign investors indicates the procedural benefit provided by less developed countries. A lack of enabling environment, such as creaking and frail infrastructures with feeble governance could be possibly the exact rationale behind why a foreign country can provide cheap manufacturing prices that are significantly tempting to alien investors. Developing States may offer lesser production rates to foreign investors which may be counterbalanced or be balanced in excessive charges for PRI – (Political Risk Insurance). Nevertheless, the World Bank’s Multilateral Investment Guarantee Agency’s Guidelines (MIGA) have not make reference of host country internet connection or interconnection, neither did it make mention of any legislations of cyber attacks in existence as at the time it was creating the levels of the indemnity charges for PRI candidates,¹¹¹⁶ connoting that the peril of cyber threats against foreign investors has still not entered into the procedural argumentation of development organisations. It ought to be made reference of that a few less developed countries, such as India and Peru for example, have indicated a significant preparedness to fight computer attack offences than many other developing countries¹¹¹⁷ and the enhancements in that respect are not merely a concern of technical prowess, but it as well comprises community and societal aspects, encompassing the necessity of higher internet connection and the inclusion of domestic satisfaction.¹¹¹⁸

7.9 Bilateral Investment Treaties and Polycentric Regime Mechanism

A new ideological mechanism is needed to examine the part that an international framework of bilateral investment treaties plays in enhancing cyber protection. One such possibility is polycentric regulation, which is a method that visualises “a communal of wholly and partly and

¹¹¹⁶ MIGA gives PRI to qualified alien investors who are investing in less developed countries. It is notable that although MIGA does issue warranty against conflict and public unrest, it only protect losses sustained from tangible properties or where the business had been interrupted completely, It could be the same case when an important computer system becomes non operational. See, <http://www.miga.org/documents/IGGenglish.pdf>.

¹¹¹⁷ T. Tripathy, ‘India Restricts Telecom Suppliers, carriers’ *The National Post* (Canada) 29 July 2010; Shahoub and Al Qasimi, In ‘*Cyber Law and Security in Developing and Emerging Economies*’, Edward Elgar publishing, (2010) at 227.

¹¹¹⁸ Shalhoub and Al Qasimi, *id* at 217-217

ungraded systems” that differ in scale and motive.¹¹¹⁹ Academics from a different branch of knowledge have devised the idea of polycentric regime, which could be contemplated as a regulatory regime, something that is regarded and called “regime complex”,¹¹²⁰ i.e., “identified by various ruling powers at diverge degrees instead of a monocentric component,” as stated by Professor **Elinor Ostrom**.¹¹²¹ As time goes by, this multistage, multifaceted, “, multifunction, and multi-industrial”¹¹²² framework indicates the advantages of self-organisation, networking governances “at multiple levels,”¹¹²³ and the extent to which citizens and individual management can sometimes exist together with collective governance. Rather than top down - (a system of regulation or supervision that actions and policies are initiated at the highest level) State-imposed laws, analysts discovered that small sets of people across an arrangement of subjects do actually collaborate and can create the correct motivation and atmosphere for the best and most favourable communal work.¹¹²⁴ An obstinate, comprehensive government then can truly suppress transformation by changing small-scale endeavours.¹¹²⁵ This is partly why **Professor Ostrom** has argued that polycentric regulation is “the foremost method to confront across-border issues ... for the reason that the perplexity of these difficulties contributes to itself better to various little,

¹¹¹⁹ Kal Raustiala & David G. Victor, *The Regime Complex for Plant Genetic Resources*, 58 INT’L. ORG. 277, 277 (2004)

¹¹²⁰ See, e.g., Daniel H. Cole, *From Global to Polycentric Climate Governance*, 2 CLIMATE L. 395, 412 (2011) (debating system composite from the viewpoint of environmental Change). For more argument on employing polycentric governance to present-day cyber protection and computer connection governance difficulties, see Scott J. Shackelford, *Towards Cyber Peace: Managing Cyber Attacks through Polycentric Governance*, 63 AM. U.L. REV. 1273 (2013) (employing polycentric control to the cyber protection surroundings), and Scot J. Shackelford, ‘Managing Cyber Attacks in International Law, Business and Relations: In Search of Cyber Peace’, (2014).

¹¹²¹ Elinor Ostrom, *Polycentric Systems for Coping with Collective Action and Global Environmental Change*, 20 GLOBAL ENVIL. CHANGE 550, 552 (2010)

¹¹²² The “fundamental notion” of polycentric control or rule “is that whatever set of persons confronting few collective challenges must be capable of tackling such difficulties in any way they best deem fit.” Michael D. McGinnis, ‘Costs and Challenged of Polycentric Governance: An Equilibrium Concepts and Examples from U.S. Health Care 1, available at: <http://ssrn.com/abstract=2206980>. This may encompass the employment of existing governance arrangement, or crafting of a brand new framework, at 171-72

¹¹²³ Vicente and Elinor Ostrom Workshop in Political Theory and Policy Analysis, Working Paper No. W11-3, 2011, available at: <http://ssrn.com/abstract=2206980>. At 1, 3

¹¹²⁴ See, Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 8-10 (World Bank, Policy Research Working Paper No. 5095, 2009). Available at: <http://www.iadb.org/intal/inalcdi/pe/2009/04268.pdf>; Elinor Ostrom, *Public Entrepreneurship: A case Study in Ground Water Basin Management* (1965) (unpublished Ph.D. dissertation, Univ. Of Calif., Los Angeles); Elinor Ostrom & Harini Nagendra, *Insights on Linking Forests, Trees, and People from the Air, on the Ground, and in the Laboratory*, 103 PROC. NAT’L. ACAD. SCL, 19224, 19224-25 (2006)

¹¹²⁵ See, e.g., Elinor Ostrom, *Beyond Markets and States: Polycentric Governance of Complex Economic System*, 100 AM. ECON. REV. 641, 656 (2010)

specific issue units working independently partly of a system that is confronting communal action issues. It is a use of the adage, ‘think internationally, but act domestically.’”¹¹²⁶

Nonetheless, polycentric systems are far from flawless. They are, for instance, likely to be influenced or harmed by organisational breakdowns and deadlock, that developed from partly or wholly coinciding of control which, as stated by Professors **Robert Keohane** and **David Victor**, must nevertheless still meet the principle of consistency, successfulness and maintainability.¹¹²⁷ In other words, for the fact that no particular corpus or corpuses is in charge of this system, hesitation and procrastination may be the order of the day,¹¹²⁸ which is in the area of cyber security can have notable and consequential adverse network results. There are as well ethical and diplomatic difficulties to consider. First, polycentric regime may ensue in what Professor **Garrett Hardin** named “lifeboat ethics,” which supports the theory that in circumstances where it is hard and unfeasible to conserve access to the commoners, the poor are frequently abandoned.¹¹²⁹ In the context of cyber-attacks, this may take the shape of developing State corporations being powerless to safeguard their websites or investments because of a dearth of beneficial BITs absent of a multilateral investment mechanism, as well as some cyber super-power nations being reluctant to broker a deal on cyber security matters in a small assembly due to their present unequal advantages, like the United States and China. That is the reason it is crucial to combine multilateral advancement with bottom-up - (proceeding from the bottom or beginning of a hierarchy or process upwards; non-hierarchical) schemes to successfully control international collective-action difficulties such as cyber threats.

Yet, many of the BITs signed around the world contain a changeable system of investor security which is in some manner could be regarded as comparable to, or even illustrative of, polycentric regime, particularly when combined with local, territorial, and multilateral laws.

¹¹²⁶ Interview with Elinor Ostrom, Distinguished Professor, Indiana University-Bloomington, in Bloomington, Ind. (13 October 2010).

¹¹²⁷ See, Robert O. Keohane & David G. Victor, *The Regime Complex for Climate Change*, 9 *PERSP. ON POL.* 7. 19 (2011)

¹¹²⁸ See Elinor Ostrom, *A Polycentric Approach for Coping with Climate Change* 8-10 (World Bank, Policy Research Working Paper No. 5095, 2009), at 554-55 (reassessing few of the purposes to depending on polycentric rule to tackle international environmental change, encompassing “leakage, unstable strategies, improper certification, gaming the mechanism, including free riding”).

¹¹²⁹ See, Garrett Hardin, *Lifeboat Ethics: The Case Against Helping the Poor*, *PSYCHOL. TODAY*, SEPT. (1974), at 38

Instead of a reincarnation of the Hull Rule or creation of a new multilateral treaty on investor security that may congest the original and new bottom-up most excellent practices, bilateral investment treaties may well offer a helpful channel for promoting cyber protection that protects websites and computers by assisting to discovering and applying domestic most excellent methods resulting to useful network effects¹¹³⁰ like beefing up cyber-attack protection. As time goes by, this kind of polycentric process may even accelerate to the birth of a brand new traditional international law that offers foreign investors rights that contains resilient cyber security and protection if it is continuously practiced and adopted.

7.10 Cyber Security and Traditional International Law of Investment Disagreement

BITs depict a reliable commitment due to the scope of actual result costs that they produce, encompassing political, independent, adjudication, and reputational harms associated in their performance and breach. Has the accumulative effect of many thousands of BITs now established a brand new rule of traditional international law to replace the disused Hull Rule? Taking into account the enormous number of BITs now in operation in the world, one would ask, how connected and general is BIT membership? Do investors at the present days fail to appreciate the value of these principles of BITs to such an extent too, as they failed to appreciate during the time of Hull Rule?

Few have claimed that this link has accelerated to the development of a traditional international law in investment. For instance, Professor **Bernard Kishoiyan**, has argued that “every bilateral investment treaty is nothing less but a *lex specialis*” - (law governing a specific subject matter) “among parties fashioned to establish a reciprocal system of investment security.”¹¹³¹ On the other hand, in the viewpoint held by Professor **Asoka Gunawardana**, he states that, “despite the fact that the clauses of bilateral investment promotion and security treaties might not have reached the position of traditional international law, undoubtedly they have a role to play in this aspect.”¹¹³² This leads to the posing of a question drawn from a ruling

¹¹³⁰ Cf. Neal K. Kayal, *the Dark Side of Private Ordering: The Network/Community Harm of Crime*, in the Law and Economics of Cybersecurity 193, 193-94 (Mark F> Grady & Francesco Paris eds., 2006).

¹¹³¹ Bernard Kishoiyan, *the Utility of Bilateral Investment Treaties in the Formulation of Customary International Law*, 14 Nw. J. INT’L L. & BUS, 327, 329 (1994)

¹¹³² Asoka de Z. Gunawardana, *The Inception and Growth of Bilateral Investment Promotion and Protection Treaties*, 86 AM. Soc’v INT’L L. PROC. 544, 550 (1992)

in one particular ICJ decision. Can there be any sense at present of legitimate duty, and practice, suggestive of such a duty? In answering this question, the ICJ stated in *North Sea Case*, as follows:

Not only should the conducts concerned constitute a settled custom, but they should as well be the type, or be commissioned in the type of manner, as to be evidence of a conviction that this practice is provided mandatorily through the existence by a particular principle of law necessitating it... The countries affected should accordingly perceive that they really are complying with what constitutes to a legal duty.¹¹³³

The regularity or even customary nature of the conducts is not by itself sufficient.¹¹³⁴ As this has been indicated previously, the content of Bilateral Investment Treaties can differ broadly, particularly in respect to the insertion of cyber security protection, making it improbable that there is yet enough State custom to point to a developing traditional international concept of cyber security protection. However, the signed BITs that are already in existence may be a starting point to start making a law regarding cyber attacks and cyber security protection generally, for example, the proposed BIT between the United States and China should endeavour to incorporate it.

7.11 Advantages and Disadvantages of Employing International Investment law to making law of Cyber security protection

The need to promote cyber security to the global community can never be downplayed or underrated. Actually, in 2013, associates of the Wassenaar Arrangement - a union of forty one Western countries (encompassing the US) that was formed to limit the escalation of possibly perilous goods and technology - recommended “a treaty that was supposed to put delicate cyber security scientific knowledge on equal footing with regular weaponry”¹¹³⁵ The requirement for cross-border extraterritorial collaboration in enhancing cyber security turns even more

¹¹³³ *North Sea Continental Shelf (Federal Republic of Germany v Denmark; F.R.G. V Netherlands)*, 20 February, (1969) I.C.J. 3, 44

¹¹³⁴ Oscar Schachter, Editorial Comment, *Compensation for Expropriation*, 78 AM. J. INT'L L. 121, 126 (1984) (“As a common principle, the tautology of general provisions in BITs does not establish or promote an inference which those provisions express traditional law. . . . To continue with such an assertion of practice one ought to demonstrate that aside from the convention itself, the principles in the provisions are contemplated mandatory.”).

¹¹³⁵ Sam Jones, *Cyber security Exports to Face Same Controls as Weapon Sale*, FIN. TIMES. 5 December. 2013, at 1 (“Cyber protection software and hardware can be one of the most rapidly growing fields of the protection industry however the transactional disposal and employment of various individually-developed scientific knowledge has till today merely been supervised on an *ad hoc* position by respective States.”).

importance considering the international amalgamation of economic projects joined with the swift development of scientific transformation. In a nutshell, the function of data management appears growingly bigger in the commercial growth of respective States. “If it may be stated that during the 19th century the general nationwide power of a State depended on the gold it reserves, it means during the 21st century the general nationwide power of a State depends on the scale by which intellectual property prerogatives”-cum general cyber security-“rights are benefitted by its populace and its companies.”¹¹³⁶

Investment law creates an important basis for the necessitated legislation of cyber peace appropriate beneath the limit, which is the armed threat margin. Whilst a lot of work seems to have been carried out to explain the meaning of international law operating in the department of armed conflict law, relatively scanty work has been carried out to influence or pressurise international law into supervising the increasing regularity of global cyber attacks, encompassing websites and computers. This is a shocking exclusion or unfilled gap considering the proliferation of helpful comparable schemes which may be applied to promote cyber protection. Bilateral investment treaties and international law indicates a possible untapped means to start the exercise of building a regulation of cyber security in generality.

Generally, “Bilateral investment treaty-making pursuit skyrocketed within 1990s”¹¹³⁷ and “reached the lowest bottom in 2012.”¹¹³⁸ In spite of the dwindling number of fresh BITs, the amount of investor cum State arbitrary litigation has risen. For example, in 2012, fifty eight of these types of claims were lodged representing “the biggest digit of familiar ... application ever lodged in a single year and reaffirming alien investors’ heightened tendency to use investor-State

¹¹³⁶ Shan Hailing, *The Protection of Trade Secrets in China* 1 (2nd ed., 2012), at 13. After three former employees of a U.S. corporation, Eli Lily, were charged on a federal inducement of dispatching trade confidential owned by the medicinal drug corporation to a rival Chinese firm, the United States lawyer dealing with the lawsuit “assert the stealing as an offence against the country.” *Indictment: Ex-Lily Workers Sold Company Secrete to China*, BLOOMINGTON HERALD-TIMES, Oct. 10, 2013, at A3.

¹¹³⁷ See UNCTAD, *World Investment Report 2013: Global Value Chains: Investment and Trade for Development* 108 (2013), available at:

http://unctad.org/en/publicationsLibrary/wir2013_en.pdf.

¹¹³⁸ See Reuters, *US Charges Chinese Wind Company with Stealing Trade Secrets*, CNBC (27 June, 2012, 9:05PM), < <http://www.cnbc.com/id/100851053>> (Just 20 bilateral investment treaties were finalised in 2012, that was the least figure within the last quarter century)

adjudication”¹¹³⁹ The growing number of arbitrary petitions shows the significance of an incessant use of BITs as a component of the polycentric legal method to enhance cyber security and encourage investor-State adjudication as a medium to resolving disagreement and delivering

7.12 Conclusion

This chapter has analysed the development of BITs which has emerged out of the need to accord multilateral investment protection to cyber security in general and digital assets in particular. It seems that interpreting a responsibility on the host countries side to afford cyber protection to foreign investors in respect of digital assets, especially website and computer systems, by applying the standard of FPS standard into a bilateral investment treaty will be hard to achieve considering the explained factors above. Whilst the State may have some obligations to control the stability of fundamental cyber security mechanisms within its territory, it is arguable that this could be expanded to protection for specific servers and websites that are being monitored by private or individual service providers (non-governmental) or which is being controlled by investors, and sudden crisis peculiarities could invalidate State culpability for such big magnitude cyber attacks. A nation’s duty to initiate proceedings against cyber offenders can arguably be said to be more probable, nevertheless legislation of this kind is not common, and even non-uniform, and as a result it is going to be extremely hard to match this duty in the environmental sphere of the principle of FPS that has appeared under international law with remedial recompense, that kind of an omission is likely to be challenging. Even in a situation where the FPS principle would be used to accord digital investment security upon cyber-threats, modern day tribunal rulings have suggested that the obligations of FPS is associated with the scale of advancement or development existing in the host country, and also the type of attacks that happens. Since it is only a small number of less developed countries that have an improved standard of global computer network connection systems, it is unlikely that foreign investors would anticipate an intensive degree of cyber protection in these countries.

¹¹³⁹ See Andrew T. Guzman, *Why LDCs Sign Treaties That Hurt Them: Explaining the Popularity of Bilateral Investment Treaties*, 38 VA. J. INT’L L. (1998) , at 639, 649-50, (“By the last quarter of 2012, entire figure of renowned cases (finalised, awaiting or withdrawn) amount to 514, including the entire number of States which have answered to a single or more than one Investment-State Dispute Settlement (ISDS) allegations skyrocketed to 95. The huge bulk of cases persisted to accumulate within the ICSID Protocol including the ICSID Additional Facility Rules (314 claims) and within UNCITRAL Rules (131).

Explicitly, FPS provision ambit will base its exact phraseology on the BIT legal document where it emerges. A particular reference to computer and websites networks in the definition of covered investment in a BIT where the provision relates to it, or reference to cyber security in general would help a arbitral tribunal in upholding whether the host nation had contravened its FPS responsibilities in a situation where digital assets have been stolen or harmed because of an organised cyber operation. Again, it would be sensible for domestic countries of where the foreign investors hail to impute a clear mention to protection against cybercrime or threats on data networks in their BITs. Considering the growing threat of cyber based attacks on computers and websites against companies and governments, terminology of this kind is reasonable and should appear more conspicuously in future BITs, especially in the proposed US-China BIT if it is to succeed. It should also be included in BITs with developing States, if not foreign investors would be left with no judicial remedy and host States attracting investors will bear the large brunt of the risk. Essentially, proving States' accountability in this way must be seen in the guise of optimism in the technological development of less developed countries which presently experience a low intensity of global computer network connection systems and an equally low scale of internet protection and cyber protection in general. There is also some discussion concerning whether BITs protection has attained the level of customary international law. Notwithstanding though, the confluence of these two forces indicate the necessity to attain a new agreement on investor cyber security protection from the bottom-up, which may be comprehended within a polycentric mechanism. To achieve this there is the need to move towards a greater transparency of interpretation that spotlights the possibility of using BITs to protect all bytes and cyber security in general, most especially digital assets in the form of computer systems and websites.

CHAPTER EIGHT

BALANCING UP INVESTORS' RIGHTS AND OBLIGATIONS

8.1 Introduction

The analysis of the structure and the ambit of the standard of FPS now lead to some burning questions concerning the reciprocity of the BITs. In this case, this chapter focuses on posing some interesting questions and making reflections about the other side of the equation. This paper has constantly discussed the duty of the host State to accord protective protection to investors and their investments, but the question concerning the obligation of the investor to the State, particularly in the territory where the investment is located, remains unanswered. In this vein, the aim of this section is to outline the mechanisms to actualise this balance in order to assist in solving investment disputes and gives a better chance to conclude, with analysis of the difficulties that both the host States and investors face nowadays, especially in countries with various conflicts and challenges in the domain of environmental protection, human rights, promotion of anti-corruption laws, and obligation of corporate social responsibility. Finally, this section will be concluded with an evaluation of how the deference and the contemplation of the aforementioned areas are desirable methods of preventing investment disagreements. But before proceeding to narrate all these elements, it would be appropriate to proceed firstly by finding out who an investor is, who is entitled to bring an arbitral claim against a host State for failure to comply with the obligation of FPS under international investment law, and also who in this thesis is expected to reciprocate the obligation of FPS requirement mandated to the host State under international law.

8.2 Foreign Investors

International investment protection is limited to foreign investors and their investments. It is often the case that the investment foreignness will often be determined in accordance with the nationality of the investor and not by the genesis of the invested capital of the investment. The nationality of an investor would determine from which treaties it may gain advantage from.

Rarely, the standing position of an alien investor in a foreign State can be lengthened to indefinite leaves to remain (Art. 201 NAFTA;¹¹⁴⁰ Art. 1 (7) (a) (i) ECT).¹¹⁴¹

International investment law is aimed to encourage and provide security to the investments of individual alien investors. It also includes the protection of government managed ventures as far as they are established for commercial purposes rather than in a governmental capacity.¹¹⁴² Investors can be individuals, but in most cases, investors are companies.

8.3 Nationality of Investors

The nationality of an individual is commonly considered by the nation's law whose citizenship he or she declared. Acquisition of a certification of citizenship by an individual given to the person by the authority of that country is a powerful testament of the reality of citizenship of that particular country, though this would not be a definitive evidence for nationality qualification. For a foreign investor to qualify to bring a claim against the State the tribunal must under the Draft Article on Diplomatic Protection consider the rule of continuous nationality in the matter of a personal claim and priority must only be accorded to the time that the claim was presented. In the case of *Soufraki v United Arab Emirates*,¹¹⁴³ the claimant showed various Italian documents of citizenship. The arbitral panel investigated and concluded that the applicant was no longer entitled to that citizenship because he had obtained a Canadian citizenship, which he did not bring to the knowledge of Italian government. As a citizen of Canada, he cannot be protected under Italy-UAE BIT. Additionally, the claimant cannot rely under ICSID jurisdiction for the fact that State of Canada has not signed up as a member of the Convention of ICSID. In this regard the tribunal stated as follows:

It has been acknowledged by international law that citizenship is in the domestic legal authority of the country, which determines, by the State's own law, the principle concerning the acquirement (and forfeiture) of its citizenship... However, it is not less of acceptance that during the time that, in international arbitration or juridical litigations, the citizenship of an individual is disputed, the tribunal of

¹¹⁴⁰ Art. 201 NAFTA (1992).

¹¹⁴¹ Art. (7) (a) (i) ECT (1998).

¹¹⁴² *CSOB v Slovakia*, Decision on Jurisdiction, 24 May 1999, 5 ICSID Reports 335, at paras. 16-27. See A. Brooches, 'The Convention on the Settlement Disputes between States and nationals of Other States' (1971-11) 136 *Recoil ds Cours* 331 at 354-355.

¹¹⁴³ *Soufraki v United Arab Emirates* (Award of July 2004) ICSID Case No. ARB/02/7 (2007) 12 ICSID Rep 156, at Para. 55

international arbitration is capable to rule and decide on that dispute... In a situation which, like in the example case, the international tribunal legal authority turns on a matter of citizenship, the international arbitral tribunal is authorised, truly bound, to rule on that matter.¹¹⁴⁴

The tribunal in this matter did not deem it reasonable to address the defendant's argument that without an authentic connection this citizenship would possibly have been unsuccessful having come to its knowledge that the applicant did not possess Italian citizenship as an issue of international law.¹¹⁴⁵

8.4 Nationality of Corporations

The nationality of a corporation is usually determined by where the company is formed or legally constituted; or where the main seat of the company is situated. In order to look at the nationality of an owner of a company an arbitral tribunal does not usually pierce the veil of corporation, i.e., the tribunals do not set aside limited liability and hold a company's directors personally culpable for the company's actions or debts. In *Tokios Tokeles v Ukraine*,¹¹⁴⁶ the applicant was a trading enterprise that was incorporated using the law of State of Lithuania. But ninety-nine percent of the shares belonged to Ukraine citizens. Lithuania/Ukraine BITs in Article 1(2) (b) gives the definition of the term 'investor', in regards to Lithuania, with the phrase, 'any company incorporated in the jurisdiction of State of Lithuania in compliance with its regulations and rules. The defendant asserted that the applicant was not an authentic company of State of Lithuania since it is possessed and managed by Ukrainian citizens. Nevertheless, the tribunal concluded that the applicant was really an 'investor' as sameness to Lithuania as was provided by the BIT, and also a 'citizen of other Contracting Country' as provided by ICSID Convention at Article 25.¹¹⁴⁷

This principle helps investors to employ nationality planning by setting up corporations in States with beneficial treaties, and simultaneously, tribunals have shown that there is a ceiling to citizenship planning.¹¹⁴⁸ In order to thwart such practices, some treaties go above legal

¹¹⁴⁴ *Id.* At Para 12

¹¹⁴⁵ *Id.* paras 42-46

¹¹⁴⁶ *Tokios Tokeles v Ukraine*, Decision on Jurisdiction, 29 April 2004, 11 ICSID Reports 313, paras 27-71

¹¹⁴⁷ *Id.* paras 21-71

¹¹⁴⁸ *Saluka v Czech Republic*, Partial Award of 17 March 2006, UNCITRAL paras 239-42; *Aguas del Tunari v Bolivia*, Decision on Jurisdiction, ICSID Case No. ARB/02/3, (21 October 2005) paras 330-2). Simultaneously,

requirements and will demand for a commitment of commercial substances linking the group investor with the country that the investor is claiming nationality of. Other treaties have in them a BIT which is known as a ‘denial of benefit clause’. Under such provision the State has the prerogative to refuse to provide the benefits of the treaty to a corporation which can not prove a commercial link with the country on whose citizenship it depends.¹¹⁴⁹

Under the ICSID Convention, host States’ nationals are exempted from international security regardless if they possess the citizenship of another country.¹¹⁵⁰ To put it differently, host countries most of the time demand that investments should be made through domestically constituted corporations. For them to accord a protective shield to investments which established through subdivisions within the host countries, Art.25 (2) (b) of ICSID Convention,¹¹⁵¹ stipulates that companies domestically constituted but foreign managed could be regarded as foreign citizens based on the footing or rationale of a treaty.

Investments frequently transpired by the purchasing of shares in a corporation that has a citizenship that differs from the citizenship of the investors. In the *Barcelona Traction Case*,¹¹⁵² ICJ was of the opinion that, on the ground of traditional international law, that the country of the nationality of shareholders supervising an organisation that is legally constituted in the other State could not be able to use diplomatic protection upon harms that has been done to the corporation.¹¹⁵³ However, the greatest numbers of investment treaties provide an answer that gives autonomous status to company shareholders: the treaties encompass shareholding or involvement in one company or another in their meanings of ‘investment’. This would mean that involvement in the corporation will become the investment and the alien shareholder in the

tribunals have shown that there are outward ceiling to citizenship planning as in the case of (*Banro American Resources Inc. v Democratic Republic of Congo*, Award, (1 September 2000) ICSID Case No. ARB/98/7 (2002) Rev/FILJ 382 (excerpts); *Phoenix Action Ltd v Czech Republic*, 15 April 2009, ICSID Case No. ARB/06/5, paras 135-45.

¹¹⁴⁹ Art. 17 (1) of Energy Charter Treaty signed 17 December (1994), entered into force 16 April (1998) OJ L380/24; *Plama v Bulgaria* Decision on Jurisdiction, ICSOD Case No. ARB/03/24 (8 February 2005), 13 ICSOD Rep 272, paras 143-78).

¹¹⁵⁰ *Champion Trading v Egypt*, Decision on Jurisdiction (21 October 2003) ICSID Case No. ARB/02/9, (2006) 282.

¹¹⁵¹ Art. 25(2) (b) of International Convention on Settlement of Investment Dispute (1965, ratified 14 October 1966) UNTS 159.

¹¹⁵² *Barcelona Traction (Belgium v Spain)* (second Phase) (1970) ICJ Rep 3.

¹¹⁵³ *Ahmadou Siado Diallo ([Republic of Guinea v Democratic Republic of Congo])* (2007) ICJ Rep 20.

corporation then will become the investor. It can bring arbitral proceedings for adverse conduct which the host country has perpetrated against the corporation which has caused negative effects on its values and profitability, or caused damage to the investment. By so doing, even alien minority shareholders benefit from the security of the treaty.¹¹⁵⁴ With this analysis, it becomes crystal clear that individuals and companies that fulfil the aforementioned criteria may be regarded as investors, and may be allowed to bring a claim against a State where such State fails to protect its investment as required by international law. These investors at the same are expected to give back in return some form of compromise to the host States by respecting the laws of the States and that of the international laws that States are obligated to observe.

Having explained who an investor is, or who an investor can be, it is appropriate to go back and continue the discussion of balancing up the investor's right and investor's obligations.

8.5 Lawful Requirements and Restrictive Actions to Safeguard Environment, Promote Human Rights, Stimulate Anti-Corruption Practices, and Encourage Corporate Social Responsibility.

Not only are there few academic literatures discussing the ambit of the full protection and security standard,¹¹⁵⁵ there have also been few questions recently about what the investor is expected to give back in return in the form of compromise and contribution to the host State. Truly, the full protection and security standard obligation provisions under BITs have important implications in the way investors conduct their investments in the host States. It is relatively easy for a foreign investor to situate its investment in a State without security challenges instead of in a region that has several of existing fighting that threaten its investment.

A typical example would be how investors deal with the security of their investments in such a State. It could be for example that the protective military forces of a particular State are incapable of providing security for the alien investors thereby amounting to a contravention of

¹¹⁵⁴ *CMS Gas Transmission Company v The Republic of Argentina* (Decision of the Tribunal on Objections to jurisdiction, ICSID Case No. ARB/01/8 17 July 2003) 42 ILM 788, paras 43-65.

¹¹⁵⁵ See, George K Foster, *Recovering "Protection and Security": The Standard's Obscure Origins, Forgotten Meaning, and Key Current Significance*, 1102 (2012), available at: <http://www.vanderbilt.edu/jot/amanage/wp-content/uploads/Foster-Camera-Ready-Final-1.pdf>; Giuditta Cordero Moss, *Full Protection and Security*, in *Standard of Investment Protection* 131, 131) August Refinish ed., 2008).

the FPS provision of the BIT and as such, the investors will have no option but to get protection from else where. By doing so the investor might incur the danger of crossing the line of legality or violating state policies.

Bilateral investment treaties are presently the greatest renowned method to encourage investment from underdeveloped States, especially, to underdeveloped and developed States. They render a mechanism for protection and stability for the enterprises and as well accord the warranty that if anything is amiss, the foreign investor can seek for legal international remedy. BITs matter for development because it encourages investments, arguably, including Foreign Direct Investment, and portfolio capital. It can be an important push for economic development and reduces poverty through many avenues. These include; providing money, technical, and human capital; bringing current scientific knowledge and administration trainings; promoting domestic enterprises providers; curtailing reliability on foreign aid and international debt in order to promote development-related projects; providing funds for domestic enterprise activity and extension by debt and equity documents; and lastly, expanding the state's tax base.¹¹⁵⁶ Unfortunately, most BITs do not have in them provisions drafted to impose any obligations on foreign investors towards the host countries to balance up investor rights and obligations. With the exception of a few recent BITs, for example, the Benin-Canada BIT, which enshrines a provision calling on the two States to encourage their investors to comply with internationally recognised standards of corporate social responsibility, most BITs are quiet concerning environmental conservation, protection of human rights,¹¹⁵⁷ or compliance with internationally recognised standards of corporate social responsibility (CSR) by multinational foreign investors in the countries where they engage in their businesses.

As it has been already stated in chapter 3 of this paper, in the interpretation of BITs, arbitral tribunals have recognised and ruled that the international law ought to be applied not just on the basis of traditional practice but as well on the basis of the VCLT of 1969, which stipulates in Article 31(3) (c) that, an account must be considered, simultaneously with the circumstances, to

¹¹⁵⁶ Benjamin Leo, 'Where are the BITs? How U.S. Bilateral Investment Treaties with Africa Can Promote Development', (August 2010), in Theodore Moran, Edward Graham, and Magnus Blomstrom, *Does Foreign Direct Investment Promote Development?* Washington, DC: Centre for Global Development and Institute for International Economics, 2005), available at <http://www.cgdev.org/content/publications/details/1424333>.

¹¹⁵⁷ Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* 113 (2008).

any appropriate rule by international law relevant in connections between the parties.¹¹⁵⁸ Having mentioned that, “clauses like this will need international tribunals to pay heed to the duties prescribed to host State in many other treaties, encompassing the ones international agreements regarding corporate social responsibility, human rights protection, anti-corruption laws, and environmental protection, when applying or interpreting provisions of a BIT or FTA”¹¹⁵⁹

Truly and wholly, it is difficult to say any more whether tribunal’s deal entirely with private business. It is of a reality that the public domain is often crossed when assigning disputes. Some States, for example, the Benin-Canada treaty includes a provision calling on the two governments to encourage their investors to comply with internationally recognised standards of corporate social responsibility.¹¹⁶⁰ More so, growing NGO scrutiny has also increased pressure on governments to take a fuller account of sustainable development consideration in investment treaties. It is presently an issue of public approach, both nationally and globally.

8.5.1 The Right for Host States to Legislate

It is undoubtedly the case that in respect of the involvement by arbitral tribunals in issues concerning public practices, it is salient to look attentively at the reality that host countries can alter legislation and the reality of the situation could have been altered after the investment and the investor were first enticed. In this regard, there seems to remain a settled situation by which modifications are indispensable and inevitable, and regulatory steps could be contemplated, in as much as the country does not defeat the legal, fair and sensible expectations of the foreign investors and the investments. This was observed in the case of *EAS Summit v Hungary*, where the tribunal held that the obligation of the States on FPS “can not protect against a country’s prerogatives to enact law or regulate in a such a way which may have adverse effect on a claimant’s investment, provided that the country behaves properly in the situations and with a viewpoint to obtaining objectively rational populace policy aims”.¹¹⁶¹ This means that a host

¹¹⁵⁸ Vienna Convention on the Law of Treaties, 1968, Art. 31(3) (c).

¹¹⁵⁹ Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* 113. Hart Publishing, (2008) at 153.

¹¹⁶⁰ See, Article 16 of the Benin/Canada BIT for the Promotion and Reciprocal Protection of Investment, entered into force on 12 March 2014.

¹¹⁶¹ *AES Summit v Argentina*, ICSID Case No. ARB/07/22, Award, (23 September 2010) para13.3.2.

State also has an obligation upon itself to prevent polluters of its environment and other illegal activities by the enactment of laws.

8.5.2 Environmental Restrictive Actions

In this vein, it is normal to see regulatory actions in the territory of a host State that were not in place when the foreign investor first came, but which were later enforced by international agreement or traditional global environmental law. As this paper has mentioned earlier, there is an international outcry mostly emanating from NGOs demanding responsible conduct from mega companies when investing, especially in countries with slack environmental law, including developed countries where pollution emissions are high. An example of irresponsible behaviour from a multinational company is Shell BP's oil spillage that occurred off the U.S. coastline in the Gulf of Mexico in 2010, and President Obama forced the company to clean up their mess and equally forced them to pay a gigantic sum of compensation to United States. Another irresponsible conduct by Shell BP is in Nigeria, in Niger Delta region, where Shell BP's oil spillages has caused a lot of damages and mayhem to the environment in that part of the country and no single effort has been made so far to clean up the area for ages.

In *Feldman v Mexico*, the tribunal said that, "States should be permitted to react in the wider populace interests by protecting the environment, reasonable legislation of this kind cannot be reached if some investments that are disadvantageously impacted may seek recompense, therefore it is certain that traditional international law acknowledges this".¹¹⁶² NAFTA critics of Chapter 11 have asserted that the reality of some compensation being awarded to alien investors over States' laws has resulted in "regulatory chill".¹¹⁶³ This seems to have dissuaded many host countries from taking the reasonable steps of enacting environmental legislations for the fear that alien investors might bring proceedings and claim compensation. A 2011 OECD working document disclosed that over one hundred treaties out of a representative of 1593 bilateral

¹¹⁶² *Marvin Feldman v Mexico*, ICSID Case No. ARB (AF)/99/1, 16 December 2002.

¹¹⁶³ See, Julie Soloway, 'NAFTA's Chapter 11: Investor Protection. Integration and the Public Interest', (pg. 19, footnote 92) available at: http://www.policy.ca/policy-directory/Detail/NAFTA_s-Chapter-11_-_Investor-Protection_-_Integration-ans-the-Public-Interest-902.html; See also, S.W. Schill, 'Do Investment Treaties Chill Unilateral State Regulation to Mitigate Climate Change', 24 *Journal of International Arbitration* 5 (2007) 5, 469, 477.

investment treaties enshrine the reference of environmental issues.¹¹⁶⁴ These reference, almost non-existent prior to the middle of 1990s, increased rapidly to being partly higher than eighty per cent of current finalised bilateral investment treaties by 2008.¹¹⁶⁵

8.5.3 The Importance of General Principles of Law of Human Rights to FPS' Due Diligence

The following detail examination pointed at explaining more solidly the due diligence principles used in the jurisprudence of investment law will reappear to traditional principle in public law as acknowledged in other legal mandates. The notion of positive duties to ensure prerogatives is one mostly familiar under the treaty of international human rights, like the ECHR.¹¹⁶⁶ Yet, it has been evolved likewise in the definition of rudimentary prerogatives of the Treaty of EC by the ECJ, and also in the reading of domestic laws, including their civic prerogatives Chapters.¹¹⁶⁷ Similarities to civic and various legal mandates have been often applied by arbitrators in previous times,¹¹⁶⁸ while the mentioning of human rights verdicts are seldom found in investment arbitral awards.¹¹⁶⁹ The evolvement of basic prerogatives from 1920s has employed as a debate for a wider reading of the standard of FPS provision than it had been applied during that period in the judgement of courts under the Claims Commission of bilateral arbitrations.¹¹⁷⁰

¹¹⁶⁴ See, e.g., Kathryn Gordon & Joachim Pohl, *Environmental Concerns in International Investment Agreements: A Survey 5* (OECD Working Papers on Investment No. 2011/1, 2011), available at: <http://dx.doi.org/10.1787/5kg9mq7srjh-en>.

¹¹⁶⁵ *Id.* Other countries such as Germany and the United Kingdom still refrain from including such concerns into their treaties on a systematic basis.

¹¹⁶⁶ A. Mowbray, 'The Development of Positive Obligations under the European Court on Human Rights by the European Court of Human Rights' (2004); and C Droge, 'Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention' (2003)

¹¹⁶⁷ German Constitutional Court on the right to free assembly, BVerfGE 69, 315, 355

¹¹⁶⁸ See the overview in Ian Brownlie, *Principles of Public International Law* 4th ed., Oxford University Press (2009) 420-41

¹¹⁶⁹ *Mondev v US* ICSID Case No. ARB (AF)/99/2 (NAFTA). Award, 11 October 2002, Para. 138, referring to Jurisprudence of the ECHR, even if it reaches the conclusion that an analogy from the underlying criminal law cases to the civil law case in question could, if at all, only be a faint one; in the context of expropriation, references have been also made in *Tecnicas Medioambientales TECMED SA v United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (29 May, 2003) paras. 166-122; *Ronald S. Lauder v Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para200-202; *Azurix Corp v Argentine Republic*, ICSID Case No. ARB/01/12, Final Award, 14 July 2006, 311-312. On the link between investment law and human rights in general, see UNCTAD, 'Selected Recent Developments in IIA Arbitration and Human Rights', IIA Monitor NO 2 (2009), available at: http://www.UNCTAD.org/en/docs/webdiaeia20097_en.pdf

¹¹⁷⁰ *Mondev v US* ICSID Case No. ARB (AF)/99/2 (NAFTA). Award, 11 October 2002, Para. 116

Today, a lot of human rights agreements contents may be regarded as a collection of principles general to developed countries,¹¹⁷¹ although one can assert that the treaties on human rights are rudimentarily separate from general investment treaties as a whole in respect to their intention of the security of persons in contrast to the encouragement of cordial economic relationships among two countries.¹¹⁷² It should not escape one's memory that a basic investor's prerogative in international investment treaties is the prerogative to property rights, which is regarded as a human right, acknowledged in various international conventions of human rights internationally.¹¹⁷³ Making references to jurisprudence of human rights in arbitral investment awards are accordingly most often in the circumstances of the security of investment.¹¹⁷⁴

Protective obligations that are particularly not owed to foreigners rather to any individual available in the jurisdiction of countries have been acknowledged especially in the key treaty of human rights mechanisms from the 1980s.¹¹⁷⁵ The level of security that is expected from the country is as well frequently shown by duty of 'due diligence, and an instance of this fact can be found in Human Rights in the Inter-American Court.¹¹⁷⁶ The treaties of Human rights incline to embody a clear necessity to 'choose such regulations and some other steps as could be appropriate to provide result to the prerogatives acknowledged'.¹¹⁷⁷ Accordingly, insufficient law has been contemplated as breach of those agreements.¹¹⁷⁸ The European Court of Human rights (ECtHR) has demonstrated an equivalent comprehension in the ECHR. In Article 1 under the ECHR, all the contracting countries 'must acquire to all individuals...the prerogatives and

¹¹⁷¹ C. McLachlan, 'Investment Treaties and General International Law' (2008) 57 ICLQ 396. Critical about the citation to CIL in the interpretation of carefully negotiated compromised treaties against their role in developing CIL.

¹¹⁷² KS Gurdgeon, 'United States Bilateral Investment Treaties: Comments on their Origin, Purposes and General Standards' (1986) 4 International Tax & Business Law 110, with further references.

¹¹⁷³ See M. Sornarajah, 'The International Law on Foreign Investment'. (2004) 152-6

¹¹⁷⁴ See, *Toto Construzioni v Republic of Lebanon*, ICSID, Case No. ARB/07/12, Award, 7 June 2012.

¹¹⁷⁵ A. Mowbray, 'The Development of Positive Obligations under the European Court on Human Rights by the European Court of Human Rights' (2004); and C Droge, 'Positive Verpflichtungen der Staaten in der Europäischen Menschenrechtskonvention' (2003).

¹¹⁷⁶ See *Velasquez Rodriguez v Honduras*, Judgement, 29 July 1988, IACHR Series C. No 4, Para 79, in which the judicial held a common duty of countries to 'take necessary measures to thwart human rights contraventions and to apply the mechanism that is in its reach so as to commission a compelling enquiries obligated in its territories to find those accountable, force the necessary penalty and to make sure that the sufferers get proper recompensation', Para 174; see also the Special Representative of the Secretary-General' account John Ruggie, 'Promotion and Protection of all Human Rights', 7 April 2008, UN Doc A/HRC/8/5.

¹¹⁷⁷ See, the international Covenant on Civil and Political Rights, Art. 2.2 and the Inter-American Convention on Human Rights, Art 2.

¹¹⁷⁸ See, *LCB v UK* Judgement, 9 June 1998, 27 EHRR 212.

freedoms' promised in that document. Accordingly, the judicial has ruled that a contravention of the duty to accept the required law can be reposed in excessive permissive law which does not embody stringent enough regulations to thwart damageable individual conduct.¹¹⁷⁹ But a close connection' of a first-hand and conclusive source' between the omission to make or enact laws and the damaging occurrence is obligated.¹¹⁸⁰

8.5.4 Actions Providing Protection for Human Rights

In line with the level of security that is anticipated from the State shown by the duty of due diligence that can be found in human rights, there is also an existing debate concerning the duty of companies investing overseas to encourage and respect human rights. And it is globally acknowledged at the moment that the understanding is, to an extent, not to impede human rights while doing business in foreign countries. "The UN Global Compact Programme.... has map out two different duties of companies concerning the issue of human rights. First, is to accord respect to human rights in their area of influence; and secondly, to keep away from being involved with others in an unlawful activity in human rights abuses".¹¹⁸¹ That suggests that a minimum level has been set up for the obligation of companies in respect of human rights at the time of investing in alien countries.

8.5.5 Stimulus for Anti-Corruption Laws

Another increasing entity of international law which is drawing the awareness of arbitration is anti-corruption legislations, like the UN Anti-Corruption Convention (UNCAC) and the OECD's anti-bribery convention, and 'it is arguable that those types of anti-corruption legislations are at presently gradually growing to be part of the entity of alien international investment law".¹¹⁸² One could see this as a secondary challenge. Nonetheless, a lot of the prevailing challenges in underdeveloped States have their sources in social inequality and the endemic corruption of government officials. For that reason, providing for advancement of those States will suggest an affirmative measures in respect of anti-corruption practices.

¹¹⁷⁹ *Young, James and Webster v UK* Judgement, 13 August 1981, 4 EHRR 38; see also *A. v UK* Judgement, 23 September 1998, 27 EHRR 61 (regarding the prevention of inhuman or degrading treatment).

¹¹⁸⁰ *Tugar v Italy* European Commission for Human Rights, Decision, 18 October 1995, ECHR app No 2869/93.

¹¹⁸¹ Surya P. Subedi, 'International Investment Law: Reconciling Policy and Principle 170 (2008)

¹¹⁸² *Id.* 184.

In its resolution 55/61 of 4 December, 2000, the U.N. General Assembly recognised that an effective international legal instrument against corruption, independent of the United Nations Convention against Transnational Organised Crime (resolution 55/25, annex I) was desirable and it decided to establish an ad-hoc committee for the negotiation of such an instrument in Vienna at the headquarters of the United Nations Office on Drugs and Crime.¹¹⁸³ The negotiation of the Convention against anti-corruption was held between 21 January 2002 and 1 October 2003. And it was entered into force on 14 December 2005. The intention of the anti-corruption Convention is to: thwart criminalisation, collaboration, and to reclaim assets.¹¹⁸⁴

The OECD's anti-Bribery Convention is official in International Business Transactions, adopted in 1997, and addresses bribery of foreign government representatives. Its main aim is to create a level playing field among OECD States by subjecting States to the same unlawful standards. It centres on criminalisation and forbidding of bribery of alien representatives: to implement and bring legal proceedings against corporation accused of bribing government representatives overseas; to cooperate, promote and enhance collaboration between the law enforcement agencies of signatory countries; and banning of tax deductibility of bribes to foreign representatives. Before the OECD Convention, the US was the only OECD country that prohibited its companies from bribing foreign officials. Japan, for example, has constantly incorporated anti-corruption measures in its current BITs.¹¹⁸⁵

¹¹⁸³ See, 'The United Nations Office on Drugs and Crime: The United Nations Convention against Corruption', available at: <http://www.undoc.org/en/treaties/CAC/>

¹¹⁸⁴ *Id.*

¹¹⁸⁵ See, e.g., Agreement between Japan and the Republic of Colombia for the Liberalization, Promotion and Protection of Investment art. 8 (12 September 2011)

Available at: http://www.unctad.org/sections/dite/ia/docs/BITs/Japan_colombia%20BIT.pdf. Agreement between the Government of Japan and the Government of the Independent State of Papua New Guinea for the Promotion and Protection of Investment art. 9 (26 April, 2011), available at:

<http://www.unctad.org/sections/dite/ia/docs/BITs/Japan-PNG%20BIT%2026042011.Pdf>. Agreement between Japan and the Republic of Peru for the Promotion, Protection and Liberalization of Investment art. 10 (21 November, 2008), available at: http://www.unctad.org/sections/dite/ia/docs/BITs/japan_peru.pdf; Agreement between Japan and the Republic of Uzbekistan for the Liberalization, Promotion and Protection of Investment art. 9 (15 August, 2008), available at: http://www.unctad.org/sections/dite/ia/docs/BITs/Japan_uzbekistan.pdf; Agreement between Japan and the Lao People's Democratic Republic for the Liberalization, Promotion and Protection of Investment art. 10 (16 January, 2008), available at:

http://www.unctad.org/sections/dite/ia/docs/BITs/Japan_Laos.pdf. See, genially Joost Pauwelyn, *Different Means, Same End: The Contribution of Trade and Investment Treaties to Anti-Corruption Policy*, in *Anti-Corruption Policy: Can international Actors Play a Constructive Role?* 247 (Susan Rose-Ackerman & Paul D. Carrington eds., 2013) (surveying anticorruption policies in international trade and investment regimes).

The violators of anti-corruption laws, whether it is companies or officials, should not just face the possibility of significant financial sanctions, but also the potential for crippling reputational damage. When such a company is caught, it should not enjoy anonymity; in fact its story should become a cautionary tale for all to hear, and should therefore make both a breaking news and front page news – naming and shaming. Multinational corporations of all sizes must also comply with international anti-corruption law as there are similar legislations in the territories where their businesses are established. Where any foreign investor or company is found wanting in cooperating with the international anti-corruption law in the host country where its business is operated, the company and the investor should be penalised heavily by the State.

8.5.6 Encouragement for Corporate Social Responsibility

There is as well a global demand for the encouragement of foreign investors to pay heed to internationally recognised standards of corporate social responsibility. As Gerry Boyle has stated that, ‘to make certain of prevalent heeding to the very significant international recognised rules and recommendations it is necessary to make the CSR under the United Nations Guideline Principles on Business and Human Rights legally binding and enforceable’.¹¹⁸⁶ Again, Canada and the US in many of their PTA investment chapters have started to confront corporate social responsibility.¹¹⁸⁷

In this regard, the ability of an investor to bring claim under FPS might be impacted by the investor’s adherence to its CRS obligations. If the investor has generated local resentment through its horrible exploitation of workers and its pollution of the area, the State should reconsider its ways of obligation to offer enhanced security for foreign investors. The obligation of the State under FPS would only be extended to the level of protection necessary for an investor operating in a reasonable way.

The specific situations that are linked to the standard of FPS cannot be clearer than in protection of environmental restrictive actions, human rights, anti-corruption procedures, and a

¹¹⁸⁶ See, Department for Business Innovation & Skills: CORPORATE RESPONSIBILITY: Good for Business & Society, government response to call for views on corporate responsibility. (2015) available at: <http://www.gov.uk/government/.../bis-14-651-good-for-business-and-80>.

¹¹⁸⁷ Cai Congyan, *China-U.S. BIT Negotiations and the Future of Investment Treaty Regime: A Grand Bilateral Bargain with Multilateral Implications*, 12 J. INT’L ECON. L. 461-62 (2009); Karen Halverson Cross, *Converging Trends in Investment Treaty Practice*, 38 N.C. J. INT’L & COM. REG. 151, 211 (2012).

corporate social responsibility obligation. In spite of the situations of the host country and its capability or incapability in providing FPS, the conclusion is that the expressed international standards concerning environmental restrictive actions, human rights and prevention of child labour, corporate social responsibility, and anti-corruption must be recognised and respected. The fact truly is that, even in circumstances where the host country lacks the ability to warrantee for full protection and security to an investor, which they should not, this will never be a tangible justification for the foreign investor to undertake illegitimate actions which contravene human rights or to conduct illegal activities in the terrain where such investments are situated. The duties for foreign investors should comprise an inspiration of minimums within the international standards. Concerning the environment issue, foreign investors ought to stimulate the investment policy framework for sustainable development elaborated on by the United Nations Conference on Trade Development and the Model International Agreement on Investment for Sustainable Development prepared by the International Institute of Sustainable Development. In respect of human rights of protection, investors should accord deference to human rights in their domain of influence and stop involving themselves directly or indirectly in human rights abuses. In regards to anti-corruption issues, investors should endeavour to refrain themselves from encouraging measures that would be construed as encouraging illegitimate deportment. Finally, and equally, in relation to corporate social responsibility, investors should acknowledge their public responsibility and maximise the creation of share value for their shareholders and for their other stakeholders and the society at large.

8.6 Proposition for the States and Foreign Investors

Having raised the issues concerning the expected obligations and conduct of the investors in the host States in respect to environmental issues, human rights, war against corrupt practices, and corporate social responsibility obligation, it is appropriate to propose an action plan that comprises protection and security for foreign investors and their investments and also to simultaneously look at a reasonable degree of assurance for the host countries and any positive impact that the investment is to have on a longer time basis in its region.

For the issue of environmental issues, the United States Model BIT of 2004¹¹⁸⁸ and the BIT between Peru and Canada, indicate that considerable progress has taken place since the BITs incorporate a provision to encourage sustainable advancement.¹¹⁸⁹ Again, a Draft Code of Conduct on Transnational Corporations has been arranged by the United Nation's Commission on Transnational Corporations and has in it many delightful recommendations concerning environmental security for companies.¹¹⁹⁰ As mentioned earlier, incorporating these components as a provision in the bilateral investment treaties or as a compulsory reference guidelines for foreign investors is going to constitute a greater binding of multinational and transnational companies, guaranteeing the host country that its environmental levels are being obeyed and accordingly, that the investors are fulfilling their international obligations.

In the area of human rights, the protection of rights of work and prohibition of child labour fall under International Human Rights Act, 1953.¹¹⁹¹ It encompasses, amongst other things, the right of freedom of association,¹¹⁹² prohibition of discrimination¹¹⁹³ and adequate wages, etc. This specific human rights field that made reference to the protection of rights of workers and prohibition of child labour can be inserted into bilateral investment treaties. But unfortunately the number of BITs that incorporate human rights is very scanty. In many situations the mentions of public ethics has been employed to include the direct security of human rights. However, public ethics has not been sufficient and the incorporation of provisions to the protection of human rights is obligatory. The inclination for the abandonment of human rights to benefit alien investment has been the common policy of elites of neo-liberalism (a modified form of liberalism inclining to favour free-market capitalism) but this has to be discouraged.

¹¹⁸⁸ Article 12

¹¹⁸⁹ See, Foreign Affairs and International Trade Canada, Initial Environmental Assessment (EA) of the Canada-Peru Foreign Investment Protection and Promotion Agreement (FIPA), *available at*: <http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/peru-perou/index.asp>.

¹¹⁹⁰ Article 41: Transnational corporations must execute their schemes according to domestic regulations, rules, established regulatory policies and procedures in connection with the conservation of the environment of the States to which they function and with complete consideration to appropriate international standards.

¹¹⁹¹ International Human Rights (1953)

¹¹⁹² Article 11

¹¹⁹³ Article 14

8.6.1 New OECD Guidelines for Multinational Enterprises to Protect Human Rights and Social Development

The newest version of the OECD Guidelines was endorsed on the 25 May, 2011, in a meeting held by Ministers from 34 OECD States and other developing economies, such as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania, to agree on guidelines to promote more rational investment behaviour by multinational companies so that this can be proposed to companies functioning within or from their jurisdictions its acknowledgement, as its primary objective.¹¹⁹⁴ The updated Guidelines is not just for the acknowledgement by the heeding partners that global investment adds to the progress of their societies, but also that multinational companies play a determinant role in the commercial, social, economic and environmental advancement of the States. The guidelines also encompassed new proposals on human rights abuses and company responsibility for their chain supply, making them the first among governmental consensus in this area. The Guidelines also encourage the constructive inclusion that companies investing in alien States can do to the environmental, social, and commercial advancement of those societies, and have appropriate due diligence processes in place to ensure this happens. The Guidelines acknowledged the increment of alien investments in developed and underdeveloped States:

The swift development in the system of multinational businesses is also demonstrated in their functions in the less developed countries, where FDI has increased swiftly. In underdeveloped States, multinational businesses have expanded extensively from ordinary manufacturing and industrial extraction of mineral resources into inventing, construction, local market advancement and services. The other main progress is the rising of multinational businesses based in less developed States as principal international investors.¹¹⁹⁵

The Preamble of the Guidelines provides that although few international companies have attempted to conform to various laws and series of practices in the States where their enterprises are actively operating, some of the investors have determined to “ignore necessary rules and practices of behaviour in an effort to obtain an excessive competitive benefit”.¹¹⁹⁶

¹¹⁹⁴ New OECD Guidelines to Protect Human rights and Social Development, *available at*: <http://www.oecd.org/daf/newoecdguidelinstoprotecthumanrightsandsocialdevelopment.hmt>.

¹¹⁹⁵ OECD Guidelines for Multinational Enterprises, Recommendation for Responsible Business Conduct in a Global Context, 25 May, 2011, pg 3 of the Preface.

¹¹⁹⁶ *Id.* at 6 of the Preface

Again, the Guidelines play an important part of clarifying and compiling a special series of principles as to what is required from the companies conducting business in the adhering countries, as well to give the business owners a document that permits them to supervise the conducts of their companies in alien States.

8.6.2 Working towards the Binding of the new OECD Guidelines

The observance of the Guidelines is not legally binding since they are just ordinary suggestions. For the fact that they are mere ordinary suggestions has activated a lot of pessimistic reactions within the global forum:”as a non-binding ‘gentleman agreement’, this has been regarded as completely futile – as previously indicated from the onset of its inception and adoption since 1976.”¹¹⁹⁷ The non-mandatory observance of the Guidelines by its members could draw one’s attention to a statement made by one commentator that, “building a great reputation is not about words and fancy value statements communicated via glossy brochures which languished on coffee tables in reception lounges and in the department of corporate affairs. Reputation with stakeholders is gained by the systematic application of values into normal everyday operation”.¹¹⁹⁸

There are many case laws that have come out to the public domain brought by the media which indicate the unsuccessfulness of these Guidelines. Instances of such cases include the *Chiquita Brands case*,¹¹⁹⁹ in involvement with the illegitimate armed forces in Republic of Colombia. In 2007, Chiquita accepted of making payment from 1997 through 2004 to military forces of Colombia called acronym in Spanish, AUC a paramilitary unit that had been classified by the United States regime as a terrorist organisation. Trade unionists, banana labourers, political arrangers, activists fighting for changes in the society and many more others were selected and murdered in Colombia by the forces between 1990 through 2004. The corporation was complicit in torture, extrajudicial execution (without the sanction of any judicial proceeding or legal process), military personnel deaths, crime against humanity, including war crimes perpetrated by

¹¹⁹⁷ See, Keith Fisher, The OECD’s Crocodile Tears, FlyingFish, available at : <http://www.flyingfish.org.uk/articles/oecd/tears.htm>, (Sept. 2000).

¹¹⁹⁸ See, Glend Peter, ‘Reputation; the Search Engine of the Future. In Visions of Ethical Business, No. 1, Oct. 1998, London: Financial Times Management, 1998, p. 38.

¹¹⁹⁹ *Chiquita Brands International v. US*, case 0:08-md-011916-KAM Document 134 Entered on FLSD Docket 9 November (2008)

Chiquita in the company's banana growing area in Colombia.¹²⁰⁰ Several other persons whose relative were murdered by the terrorist organisation also accused Chiquita of paying funds worth about \$1.6 million to the AUC group that enabled them carried out these horrendous crimes. It was alleged that there were shipment of arms and drugs via Chiquita gates on the company's vessels. Five gospel evangelists were also killed by another fighting group in Colombia called the Revolutionary Armed Forces of Colombia (FARC) whom Chiquita made payment to. It was alleged that the money the company paid to FARC, plus the material assistance given by Chiquita encouraged the conduct of insurgency that subsequently led to the killings of the five priests. For many years Chiquita had tried to cover up their involvement in this atrocity which was very glaring to people, but later the company admitted its complicity in the crime. In 2007, the EarthRights International (ERI) lodge a court proceeding against the company in the interest of the victim's families of many of the inhabitants, labour heads and community arrangers killed by the Autodefensas Unidas de Colombia (AUC). But after several years of court proceedings, sufferers of Colombia killing gang financed by Chiquita Brand seem to be going ahead in a Florida federal court proceeding against the banana company. In 2007, Chiquita admitted to the court of profiting from its connection with the AUC by financing an appointed insurgency group and was fined for \$25 million for the complicity which the company paid to the US department of Justice.¹²⁰¹

Another case is the case involving the scandal of the British construction company *Balfour Beatty's* when they were granted permission to construct a barrier to hold back water and raise its level as a dam or reservoir on the Tigris River in the Kurdish area of (Turkish Kurdistan Iisu). The British company refused to adopt a clear ethical and environmental standard. The scheme was bad for human rights and environmental protection, and there was no clear ethical precedent that has been set. The environmental campaigners and human rights set a yardstick that needed to

¹²⁰⁰ See, Alex Picket, 'Families Blame Banana Execs for Killings,' 15 March, (2017), available at: www.courthousenews.com/families-blame-former-banana-execs-paramilitary-killings. see also, Chiquita Lawsuits (re Colombia, Business & Human Rights Resources Centre, available at: <https://business-humanrights.org/en/chiquita-lawsuits-re-colombia>)

¹²⁰¹ See, EarthRights International, available at: <https://www.earthrights.org/media/human-rights-claims-against-chiquita-funding-colombian-paramilitaries-will-proceed-us-court> (Human Rights court proceeding against investment company (Chiquita) for financing Colombian paramilitaries goes ahead in court in the United States)

be satisfied first before the construction commence but Balfour Beatty blatantly refused to bulge. The British builder did not meet commercial, moral and environmental yardstick.¹²⁰²

The next case is the *Premier Oil's* case, involvement in human rights and environmental mistreatments in Burma from 1996 in collaboration with Burma's military government and other groups for using Burmese nationals as forced labour in Yetagun gas pipeline project. Premier Oil was aware that human abuses were happening in its organisation in Burma but failed to do something to stop it. The citizens of Burma had suffered human abuses such as rape and torture, killing and forced labour (including child labour) at the hands of the Myanmar military at the time of the building of a gas pipeline, an American oil company known as Unocal and Total Oil Company of France were also complicit in this mistreatments. After the regime change Burma now known as Myanmar by an annulations of election won by Nobel Peace Laureates Aung San Suu Kyi, Premier Oil won a contract from Burma's military government for oil exploration of the Yetagun offshore gas field in 1990. Yetagun pipeline is connected down the route for the Yadana pipeline constructed in 1990s by Americas Unocal and Total of France. The construction of the pipeline resulted to a very big militarisation of the region. At the time of the building of the Yadana pipeline methodical displacement of the inhabitants, human rights abuses and forced labour, encompassing child labour occurred in the region.

In 1996 the campaigner group Earth Rights International (ERI) release a publication narrating how military personnel suffered local villagers and many of the villagers who refused to run away to refugee camps in Thailand were compelled to work in forced labour, including women and children and frequently under hard conditions. Men were asked to work as porter for soldiers and forced to clear forest on the pipeline which link from Yetagun to Yadana. During the time of these occurrences Texaco and Premier Oil were in combine association in the Yetagun Scheme. But later Texaco pulled out of the investment and Premier Oil purchase part of Texaco share. In 2000, the UK government compelled Premier Oil to leave Burma for the reason of Human rights

¹²⁰² See, Saeed Shah and Paul Waugh, *Balfour Beatty Pulls out of Turkish Dam Project*, INDEPENDENT NEWSPAPER, Wednesday 14 November, (2001)

abuses.¹²⁰³ Premier Oil were not just encouraging the military regime monetarily but it was as well doing a huge harmful action to the principle of democracy, said Aung Sun Suu Kyi.¹²⁰⁴

Amnesty International in 2001 also published a report describing significant human Rights mistreatment perpetrated by the troops who render pipeline protection'.¹²⁰⁵ This was indeed corporate crimes.

Campaigners claim that the inclusion existence of the Procedural Guidance into the OECD Guidelines as well as establishment of the National Contact Points (NCP) is an adequate enforceable policy. The NCP are organisations that are in control of engaging in promotional campaigns, and also in charge of investigations and assist to the settlement of matters that emerges in relation to the enforcement of the Guidelines.¹²⁰⁶ However, on the other hand, it asserted here, that the NCP existence, presumably, is only a rhetoric defence for the States that are signatory to it but it does not constitute an actual and successful document to provide acceptance. The causes are many, but in a nutshell, it is feasible to state in reality that decisions reached by this NCP are not obligatory and the reality that this very Guideline provides a considerable liberty on application to the countries in respect to the manner NCP may be coordinated, makes this document formless and unsuccessful.

Without wasting more time on the unsuccessfulness of the Guidelines, and without spending more time in condemning its ambit, it would be more beneficial to look for a proposition of steps that guarantees the companies' adherence. There is now the quest for a workable binding of the new OECD Guidelines to occur.

8.6.3 The Inclusion of the Guidelines to BITs

If there are no repercussions or penalties for failure to comply with the guidelines or to adhere to any type of systematic redress in the event of any contravention, there can be no motivation to

¹²⁰³ 'UK Urges oil firm to quit Burma', Financial Time, 12 April, 2000

¹²⁰⁴ John Jackson, 'Destructive engagement: Premier Oils Social Report And Burma', The Burma Campaign UK, 13 June (2005) p. 6 available at: <<https://corporatewatch.org/company-profiles/premier-oil-plc-corporate-crimes>>

¹²⁰⁵ See, Myanmar, Ethnic Minorities: 'Targets of Repression', June (2001), available at: <<http://web.amnesty.org/ai.nsf/Index/ASA160142001?OpenDocument&of=COUNTRIESMYANMAR>>

¹²⁰⁶ OECD Guidelines for Multinational Enterprises, Recommendations for Responsible Business Conduct in a Global Context, 25 May, 2011, at 66.

act in accordance with them and reckless companies will persist to act on an insufficient and unsatisfactory bad behaviour with impunity and continue to go scot-free.

Since the National Contact Points Guidelines are not as effective as they should be to secure adherence considering the aforementioned above, it is crucial and compulsory to look for an avenue so as to ascertain to the Guidelines' legitimate importance and influence that would permit them to achieve a proper and successful global form of practices. It is accordingly compulsory to connect the guidelines to an actual and most vital enforceable policy. The suggested master plan will be to incorporate in the BITs a provision urging foreign investors to conform to the guidelines. Such provisions can be read as follows, that the guidelines:

1. Would infer to accord a step in altering the Guidelines from an unsuccessful set of rules to a compulsory international framework.
2. Would not demand for the alteration of the original design of the Guidelines which might be a colossal job and would constitute to an extensive endeavour since it is actually a multinational announcement.
3. On that respect, this recommendation would be tantamount to implied master plan for the binding of the stated Guidelines.
4. Similarly, the adherence to this proposition would bring a real input into economic, social, commercial, ethical, and environmental development within the framework of sustainable advancement and the observance and deference of international human rights laws, corporate social responsibility, anti-corruption laws, and environmental laws.
5. Bilateral investment treaties are the ideal setting to begin this procedure of compelling the multinational businesses Guidelines to be binding, for the reason that they previously incorporated a standard policy for dispute resolution.

Those who are in support of this proposition would like to make certain ... that the country must have a justification to any proceedings brought by alien investors on the premises of the security of its investment and that such country must as well have the

method of option to the selfsame disagreement resolution framework included in the BIT in the eventuality of the contravention of its concerns and benefits.¹²⁰⁷

This will have the impact of bringing to equal footing within the obligations of the member States who are parties to the BITs. As it has been suggested and demonstrated earlier, the placement of obligation to both the country and the foreign investors appears a just and a reasonable move that leads to the path of a well corporate governance and accepts with an advantageous business atmosphere that brings input to the, human rights, economic matters, commercial, anti-corruption restrictive action, corporate social responsibility, social and environmental development in the host States.

Another suggestion by Professor Subedi is that “in the dearth of international legally enforceable treaty, a broad deference model treaty may be embraced as a soft regulation document”.¹²⁰⁸ He as well stated that the first efforts have been ineffective and abortive, for example, the IISD Model International Agreement on the Investment for sustainable Development. It has also been recommended that a UN corpus in the likes of CSD, UNCTAD or even the World Bank could create and recommend to the host States a kind of investment Model Treaty that will include these reciprocal obligations for both the States and the investors to comprehend. All in all, the incorporation of a reference to the proposed Guidelines as an obligatory clause in Bilateral Investment Treaties can go a long way in the desired aim and purpose.¹²⁰⁹

8.7 General Option for the States and Recommendations on FPS

No doubt, there are some identifiable challenges that are facing certain States like the ones this thesis have analysed in the case law held by arbitral tribunals. Also, there are some States where the investors are facing investment jeopardy in connection to political or social stability concerning existing BITs, especially in those States that are battling with insurgencies and other

¹²⁰⁷ M. Sornarajah, *The International Law on Foreign Investment*. 2nd ed., Published by Cambridge University Press, (2004) 214

¹²⁰⁸ Surya P. Subedi, *International Investment Law: Reconciling Policy and Principle* 113. Hart Publishing, (2008).

¹²⁰⁹ Desiderius Erasmus Roterodamus. ‘The Full Protection and Security Standard and Reciprocal Obligations in BITs, available at: < www.latinlayer.com/cdn/files/11/news/Rogelio_Submission.pdf >

consistence civil disturbances. These problems that have been mentioned and many others that are not mentioned here are the challenges that any State that wants to broker its future BIT must take into consideration before ratifying them. This section lay down some proposals that States may need to apply in solving those jeopardise and obstacles, and to probably find a more reliable model provision to be incorporated in the future for investment treaties, especially States who do not want to be caught up with the contravention of the obligation of FPS.

From the historical background of the evolution of the standard of FPS to modern arbitral tribunal rulings on the principle of FPS, it is easy to pinpoint the perils that States may go through in contravention of its duty under this principle. This jeopardise can emanate from existing BITs that are presently in force ratified by those States, or from incautious and inadequate terminology of the FPS provision in their future BITs, or another types of investment legal documents which may come back to haunt them when claims arise concerning the validity of such treaties.

Where a State wants to keep the original FPS standard clause in their investment treaties would mean that the State is guaranteeing an obligation to behave in a way that will protect the investment according to international standards, and not simply in accordance with the national treatment standard, notwithstanding the resources they have available. In consideration of the new rulings on FPS standard, States may think of adopting the following choices.

8.7.1 The Inclusion of a No-Strict Liability Clause Interpretation into BITs

There is the understanding that the duty of FPS standard does not provide for strict liability as it has been mention severally in many case law in this thesis in chapter five above, therefore future tribunals should understand the peril that is involved. Thus, the only proper and viable standard to respect this duty is to provide total security for the foreign investments and the investors, which may not be feasible considering the nowadays political and security situation in many States. In that regard, the suggestive measure to be taken in order to avert culpability for strict liability, (though there is non presently in existence anyway), in relation to this point would be for States to add in the BITs that the duty of FPS is a moderate duty which is not equal to strict liability. This would be prudent in case arbitral tribunals decide to change their minds in the future and think that the breach of FPS obligation now attracts or amounts to strict liability.

8.7.2 Host States' Due Diligence and Proportionality of Resources

It is well known that the duty of FPS is a duty of the State to provide due diligence. And the duty of due diligence is for the country to exercise a reasonable steps of action so as to provide security to the alien investment that can be contemplated adequate under such situation. However, it is necessary to acknowledge that States are different in all ramifications and their differences may lie on the standard of security that is expected from one individual host State to another, as well as their financial capability. Since the duty of due diligence comprises the contemplation of what is happening in the country, and the compliance of due diligence would include the evaluation of the resources that the host country has available as has been stated in a particular *pantehniki* case, which should not be. It is improbable to think that a country will go beyond its own mean of providing protection and security.

Furthermore, the duty of due diligence suggests that the level of diligence that a country is obligated to employ is identified by the standard of care the host country exhibits in providing protection and security to the investor and their investments. The result of this method is that any countries that failed to apply adequate measures to providing investors' investment with protection against harms that either emanate from the State or from the third party because such failure occurred as result of State's financial constraint, or generally as the State's lack of resources, the country will not be answerable for such omission to act. These reasoning include the consideration by arbitral tribunals to refuse foreign investors their investment protective rights for the obligation of FPS provided under international investment law. Arguing that investor financing business in a region which is particularly known for civil contention and defective government cannot expect to receive the same level of protection as an investor investing in stable areas such as London, New York or Tokyo, according to Paulson's dictum.

¹²¹⁰ This is so, especially when such State is seen by arbitral tribunal as wallowing in poverty.

A properly worded clause is needed in BITs that would definitely prevent the danger of a method by which these particular conditions of the country are not considered while deciding a

¹²¹⁰ See, A. Newcombe and L. Paradell, *Law and Practice of Investment Treaties Standards of Treatment* (Kluwer Alphen ann Rijn 2009) at p. 310; see also *Pantehniki S.A Contracts & Engineers v Republic of Albania*, ICSID Case No. ARB/07/21, Award, 30 July (2009), Para 76

claim on the standard of FPS by tribunals. The duty of the country under the standard of FPS provision should be structured in the State actuality of each country, encompassing the funds available to every Country the time the harm was carried out against the investors and their investments. If the aforementioned approach is considered, a provision incorporating State consideration for determination of investment dispute would allow greater successful defences if a claim arises under the disagreement resolution mechanism created in the legal document of investment. This procedure is significant because the current arbitral claims show that the principle may sometimes be a challenging one for countries to respect, especially countries which do not have sufficient wealth. Notwithstanding, countries in various ways have the choice to take charge and measures to curtail their fragility of this treaty duty if they know that they are not capable of keeping up with the mandatory responsibility of the FPS obligation.

8.7.3 Avoidance of FPS in Treaties Entirely

States may rule out the option of incorporating a duty to accord obligation of FPS in their BITs completely instead of voluntarily breaching this obligation as we have seen in many case laws in the course of this research. This method has been employed not too long ago in the Common Market for Eastern and Southern Africa (COMESA, 2007)¹²¹¹ and South African Development Community investment treaties (SADC, 2006).¹²¹² In a situation to which countries may want to incorporate an FPS obligation in a BIT, then it would be paramount to read the principle with caution, particularly, expressing vividly if it is to be used for physical security only, which should not be the case anyway, for instance, as the 2004 United States Model BIT, has done in respect to police security. Allowing or causing it to remain wide and unspecified can make the tribunals to expand it to legal, business and regulatory protection, as it has already been found in the new awards. A better workable approach for the States is either the concept is not to be qualified with a word or to qualify it with a word that leads to the notion of a restricted obligation with regards to the duty of due diligence. Moreover, incorporating the reference of the word ‘full’ suggests the peril that the duty can be interpreted as expanded more than physical

¹²¹¹ See, *Common Market for Eastern and Southern Africa* (COMESA, 2007). Investment Agreements for the COMESA Common Investment Area, retrieved from http://programmes.comesa.int/attachments/104_Investment%20agreement%20for%20the%20CCIA%20FINAL%20_English_pdf

¹²¹² See, Southern African Development Community (SADC, 2006), Finance and Investment Protocol. Available at: http://pdf.usaid.gov/pdf_doc/PNADC688.pdf

protection encompassing commercial, legal, and even other security (which is what the obligation of FPS has traditionally been anyway from the beginning), allowing for the challenges of overlapping together with other investment protective standards. On this note, it would be accordingly preferable to incorporate a reference of a narrow security into the provision of the standard of FPS in their respective BITs that would potentially limit the ambit of the principle.

8.7.4 Inclusion of FPS Definition in BITs

It is also desirable to insert into all treaties a phrase and definition that expresses ‘full protection and security’, as this is not generally found in BITs, as demonstrated in chapter 3 of this paper on VCLT interpretation of FPS and in chapter 6. Doing so will constitute to simplicity and clarity, and would do away with vagueness for the two parties and even assist tribunals for a better interpretation of the standard in any case where a dispute arises. Following this very approach of inserting slimmer defined provision will not just amount to cautiousness, but it would as well ensure that legal certainty is achieved by the contracting parties in the future should any dispute arises. The recommended phrase for a standard of FPS provision to be inserted in treaties in future to be ratified with States parties with security connected dangers and in some other types of protective investment treatment standards documents can be for instance as follows:

All Parties to this document must afford physical security and protection to investors and their investment of the other State Parties within its jurisdiction. The implicit security and protection obligated to be afforded to alien investors by host States must not be favourably lower than that afford to the domestic investors or citizens of its own State. This duty must be an average duty, not tantamount to any absolute liability and comprises the contemplation of the resources at the availability of the host State at the time of the event.

Also, States could opt to restrict the ambit of the standard of FPS to national or most-favoured - nation treatment. By doing so, it will be pegged to the level of duty to the treatment accorded to citizens or other alien investors. However, phrasing the FPS definition in these manners would undoubtedly defeat the extensive protection scope of this standard and would deprive investors and their investments the protection and security it required and deserved.

8.7.5 The Ambit of FPS Provision in Treaties Compared with Traditional International Standards

Furthermore, if countries desire to accord security and protection in accordance with an international level of standard, inserting a reference to the standard of traditional international law for the treatment of foreigners will provide some clarity. Nonetheless, the traditional international law of minimum standard interpretation itself in relation to FPS is at loggerheads as has been expressed in chapter 3 of this paper, and it is also one that is still gradually developing in people's minds despite the fact that it has been around for ages considering the origin of FPS. For this reason an arbitral tribunal can decide to say that the present-day meaning of this duty is higher in level more than the countries may have anticipated it was in the matter in its traditional form, which the thesis is sure it is, and is also what this paper is arguing for.

Depending on the tribunal viewpoint, the interpretation of a treaty provision can lead to the comprehension of traditional international law as the floor, moderate or ceiling to the duties acquired from the principle of FPS. The tribunal may decide to draw comparisons from the actions applied by the regimes of these States with security problems and with conducts employed in underdeveloped States, or States with greater beneficial or advantageous conditions. Therefore, the correct phrase of a BIT provision could not necessitate supplementary treatment, or any other treatment which extends more than those of international practices. A classical example will be the Free Trade Agreement which was ratified among Chile and the U.S, and among Columbia and U.S which opted for a definitive and selective wording different from the type envisioned by the tribunal in the *Vivendi* case, where the tribunal in that case dismissed a claim that a FPS clause was limited to physical protection.¹²¹³ The US/Columbia agreement clause limits the FPS obligation in Article 10.5 of the BITs in respects to minimum standard of treatment as follows:

Every Party member must afford to protected investments treatment in conformity with traditional international law, encompassing FET and FPS. For bigger assurance, this stipulates minimum standard of treatment of traditional international law to aliens at a minimum level of treatment to be accorded to investors and their investments of the other party. The standards of FET and FPS require not treatment additionally to or above that necessitated by that principle, and create no additional substantive

¹²¹³ *Vivendi v Argentina*, ICSID Case No. ARB/97? 3, Award, 20 August 2007.

prerogatives. The duty of paragraph 1 to accord the obligation of FPS necessitates all Parties to afford the standard of police/physical security necessitated under traditional international law.¹²¹⁴

However, phraseology of this kind will wrongly limit the scope of FPS protection to investors' investments thereby depriving them their rights and the real meaning of this standard.

8.7.6 Termination of Existing BITs

Since taking the above mentioned measures by host States as options to avoid culpability, in regards to the current investment treaties, countries have the choice to delete this standard or interpret its meaning narrowly by an alteration of the agreement. The alteration would necessitate the permission and endorsement of two parties or all the parties in the treaty in a situation where they are more than two parties that had signed the treaty. Where it is impossible to make an alteration, countries may as well provide an explanatory declaration, like the kind the NAFTA party member issued in 2001. So many States have terminated and given notice for cancellation of its bilateral investments treaties rather than to breach this FPS obligation intentionally, such as Spain, the Netherlands, Germany, and South Africa. Some South American countries, such as Bolivia, Ecuador and Venezuela, have all gone as far as withdrawing from ICSID.¹²¹⁵

If it happens that the other party to the treaty is reluctant to have a collective statement, countries can choose to issue a unilateral explanatory declaration, which may have impact concerning tribunals interpreting future investment disputes. Failure for the States to take such restraint, then tribunals would perhaps have no choice than to interpret this standard according to what they think the standard implies for them, or according to the way they may understand it. If this happens, it may allow to disagreeable and exorbitantly shocks in awards of treaty investment, in the kind of substantial or excessive compensation.

8.8 Conclusion

This section has addressed the necessity for the rights of alien investors to be balanced with the duty of the host countries to protect investment prerogatives in their regions. The ways this

¹²¹⁴ See, The United States-Colombia Trade Promotion Agreement (US-Colombia) (15 May 2012) art 10.5

¹²¹⁵ See, South African Development Community (SADC). (2006). Finance Investment Protocol, *available at*: http://pdf.usaid.gov/pdf_docs/PNADC688.pdf. See also, Lang, J., 'Bilateral Investment Treaties: A sword or a Shield', Bowman Gilfillan, *available at* <http://www.bowman.co.za>.

article hopes that this could be achieved is for alien investors investing in those jurisdictions to pay heed to environmental regulative actions adopted by the host country; by corporations investing in these countries to encourage and obey human rights legislations; by wagging war against anti-bribery corruption involving foreign public officials in host States countries and subjecting the course to criminal standard; and by encouraging foreign investors to pay heed to internationally recognised standards of corporate social responsibility. All these could be achieved by following the guidelines designed by the UN in the UN Global Compact Programme, the UN Anti-Corruption Convention (UNCAC) and the OECD's Anti-Bribery Convention, the UN Guideline Principles on Business and Human Rights, and the new OECD Guidelines for Multination Enterprises to Protect Human Rights and Social Development.

There should also be repercussions for failure to adhere to these guidelines or any form of methodical redress in the event of any contravention. This section has addressed the options and steps that a host State/s who are not willing or incapable of respecting the FPS obligation might take into account while brokering FPS deals with other States in BITs in order to avoid regrettable dangers and culpability. For example, the States can prevent culpability by stating that the duty of the standard of FPS is an average duty, not tantamount to any absolute liability which does not amount to strict liability. The duty of due diligence by the host country under the FPS provision may be designed to match the country actuality, encompassing of the availability of the resources that every countries has at the time of any eventuality of harm against the investors and their investments. For a host state to escape breach of the standard it should avoid FPS in their treaties completely. And lastly, a State should include the definition of FPS for clarity purposes in its BITs not a language that is obscure and vague.

CHAPTER NINE

9.1 General Conclusion

This thesis has elucidated a thorough application of the principles of the standard of FPS in international investment law. On this note, there are several main concluding points that must be highlighted. Therefore, the result of the thesis goes as follows:

Firstly, the thesis has applied a wider exploration of the ancient origin of the standard of FPS in traditional international law, including many other bilateral investment treaties practices starting from the middle of 18th century found in descriptive statement in the books of two scholars Wolff and Vattel, to the present modern BITs in international investment law. The thesis has found that it was in respect of the influence and significance of what was provided by Vattel's writings in the late 18th century in the developing United States that then kick-started the incorporation of investment agreements for the interest of its nationals in foreign trading, these agreements implicitly included the duties of protection and security which safeguards the international investment law. There were several other attempts that were made to achieve bilateral and multilateral investment treaties that protect the standard of FPS but were met with some hurdles which led to a collapse of those efforts. Examples of those failed attempts are: the legitimate codification of the standard of FPS with traditional international law in the League of Nation; the Havana Charter and the international Chamber of Commerce Code of Fair Treatment; Abs-Shawcross and the Organisation for Economic Co-operation and Development Draft Convention and many others that this thesis has highlighted.

However, despite the hurdles which were faced in the early days in achieving this goal, the standard of FPS has continued to wax stronger and has reached a significant stage. But still, more needs to be done in order to reach a full and acceptable height of protective investment protection of FPS that foreign investments deserve. Nevertheless, the standard of FPS has continued to experience more improvement through the First World War to the present day, and investment agreements have progressed in a proportionate manner and this has led to the development of FPS in traditional international law. It has been established that the standard of FPS from the outset, by looking at the evolution of the concept, goes beyond physical security of

alien investors and their investments to legal security and other necessary protective factors, such as economic and commercial protections. But unfortunately some States and many arbitral tribunals have refused to acknowledge this fact and their non-acceptance have created a gap in the protection of investments in the territories of host States to the disadvantages of foreign investors.

Secondly, the thesis has used the VCLT interpretive mechanism to reconcile the disputes surrounding not only predominantly, but the confusing definition of the standard of FPS inserted in most investment treaties. The VCLT has highlighted the general instruction on how investment treaties should be interpreted. It encourages arbitral tribunals to interpret the treaty meaning in honesty and sincerity of intention in the context to the common interpretation to be accorded to the wording of the treaty in respect of and taking into consideration of its aim and intention. Since there are different terminologies that are used to incorporate BITS, it is very important for arbitral tribunals to adhere to the VCLT guidelines of interpretation in order to achieve consistency. Again, because there is disagreement surrounding the common definition of the FPS phrase in many BITS, the most proper and reasonable method of defining the meaning of the FPS provision in BITS between the claimant and the defendant is to heed to this recommendation attentively and strongly, but sadly this is not happening. From the findings of this research arbitral tribunals have failed to apply this guideline correctly in many occasions as to meet the standard requirement expected from host States under international law in achieving the object and purpose meant for the FPS. Those shortcomings has created huge controversy and gap around this principle of protection which sometimes has put its real meaning in disarray, thereby dashing the hopes of the investors who try to benefit from the real objective and purpose of this great obligation. The only way to avoid the controversy surrounding the meaning of FPS clauses and the divergence that comes with it so as to achieve its main objective which is to safeguard investments is for the tribunals to completely adhere to VCLT guidelines of interpretation as provided under the Treaty. Arbitral tribunals must do more and follow accordingly the interpretation of the FPS clause in BITS consistently and accurately, depending though on what the drafter of the instrument meant in a respective BIT. Also, the inadequacy in the investigation of some awards as to what extent of protection the parties proposed or expected with the particular treaties beyond physical protection establishes the truthfulness and correctness of the danger of different interpretation of FPS by arbitral tribunals.

Surprisingly, even as little as the elementary question as to whether the standard of FPS provision is also supposed to include harms perpetrated by the host country itself is not regarded as uniform in every arbitral tribunal award not to mention of the debate surrounding the extent of duties of legal, economic, and commercial security. In numerous cases, the conclusive result could not vary strongly, as a lot of tribunals may assess in the FET provision precisely what other tribunals may regard as being under a FPS provision. But the dearth of uniformity of FPS's interpretation nonetheless risks sabotaging the legality of investment agreement adjudication.¹²¹⁶ If the aforementioned definitions of these principles were to be coherently and uniformly adopted by arbitral tribunals going forward without inconsistency, and were to find phraseology in the interpretation segments of recently finalised treaties, this may outstandingly heighten the conformity and legality of international investment law, encompassing investment treaty adjudication itself. Also, this would not only render necessary consistency to the interpretation of the case laws, but it would as well ensure that host countries would be liable for the contravention of the standard of FPS when it ensued, as a result of that, providing substantial foreseeability to foreign investors similarly. This is because foreign investors supposed to be the ones who have the rights of treatment prescribed accordingly with their legitimate expectations and an adequacy stability and foreseeability of legal mechanism.

Furthermore, from the analysis of this research, it has been discovered that there is a debate as to whether the concept of FPS principle is an illustration of the principles of traditional international law, or whether it is intended as independent standard that goes further than the international law. Having looked at various case laws and some literatures in the course of this research, it had been noted that some arbitral tribunals and some host States have restricted the standards of FPS obligation to the traditional international law of minimum standards of treatment particular where treaty restricts or caps the duty using references of traditional international law and this have created a gap in the protection of investment under FPS in BITs. This is so despite the ongoing debate about the equating approach and additive approach surrounding it. Many investment agreements are also of the opinion that the standard of FPS should not be in any way lower than that which international law require. For example, the

¹²¹⁶ See, on the issue, SD Frank, 'The Legitimacy Crisis in International Investment Treaty Arbitration: Privatising Public International Law through Inconsistent Decisions', (2005) 73 Ford LR 1521, 1566.

Article 1105(1) of the NAFTA 2001 in its explanatory declaration stated that the concept of FPS does not need treatment that is in addition to, or be extended beyond that which is required by traditional international law. And this have created a gap in the protection of investors investments by host States in their territories. However, in spite of the fact that NAFTA tribunals have maintained that the standard is restricted to customary international law of minimal standard of treatment, (i.e., physical protection), other non-NAFTA tribunals have held that the standard should be extended above minimum level of security. This is a step in the right direction if it is to be followed by all States for the protection of investments. The approach that the principle ought to be extended above minimum standard of treatment of traditional international law is beneficial so as to complete the potential lacunae that have be found in this area of investment protection, and also to be sure of the real meaning of those undefined phraseologies in its narratives, or more generally, to help the definitions and the application of its provisions.

Moreover, the thesis thinks that it is high time that both NAFTA Tribunals and other non-NAFTA tribunals get their acts together and come up with a reliable approach that will be less complicated for both the State and the investors for the comprehension of customary international law. And by so doing, it will also help to prevent the intensive inconsistency of the definition of the standard of FPS by various tribunals which we have seen been applied by arbitral tribunals during the course of this research, and which have deprived investors the full and adequate protection and security for their investments in the standard of FPS in BITs. Taking into account of this debate, some tribunals and other scholarly commentators, including this article have the presumption that a wider definition that is not restricted to the traditional international law, but establishes an autonomous treaty standard and places a greater level of due diligence is what is needed from the host country. However, it has been recommended in Juan Paulsson's obiter dicta in *Pantechniki* case that the host country situations must be taken into contemplation when employing this principle to the situations that encompass civil disobedience, but not in the circumstances where denial of justice is claimed. For the interest of the investors relying on FPS standard protection this thesis hopes that this type of ruling in *Pantechniki* case will not become a norm.

In the milieu of the argument over whether the FPS is restricted to physical protection, which many States and tribunal have advocated for and which has also created a gap in the protection of investments, this research has shown that the standard of FPS is not limited to physical protection as many have believes. It has never been, and it will never ever be. This is the true position and may be a hard fact to swallow for those that think it should be. If we cast our minds back to when the FPS standard first originated in the 17th century, and also followed by how the standard has been designed in BITs in the past to the inclusiveness of both physical and legal security, one would agree without doubt that this is the true position. Although tribunals have not been consistent in making up their minds collectively in treaty on why the standard should be extended beyond physical security, it is rather for them to do so hastily and now before more harm will be done to foreign investments more than it has already been done by both the States and some arbitral tribunals over the debate on what the concept covers. Tribunals and host States have different opinions concerning the extent this standard covers and this has been indicated in various case laws and jurisprudence in this thesis in which the arbitral tribunals presided and panelised in recent times. There is every need to extend the principle of FPS to cover beyond physical security since investments are not only threatened by physical attacks but by other forms of infringements. If the principle of FPS is stagnated and confined to only physical security as has been argued by host States and some tribunals, host States will definitely continue to deprive foreign investors of their investments protective rights since investments are not solely threatened by physical destruction as this thesis has revealed in many situations, but also by other means of destructive acts that demands for legal and other forms of security. Especially, by threats of the technological environment of the modern era, and therefore it is not feasible to believe that physical protection only can suffice, neither can it be guaranteed nor be ensured of investment protection. A typical example is the modern day cyber attacks that have proliferated into many private investment companies, including that of the government establishments.

Additionally, FPS standard should be seen as universally an overlapping principle that requires the host countries to possess a framework effective of ensuring the protection and security of investments both physically and legally, which is frequently more detailed through other additional separate treaty clauses similarly intended at increasing the security of investment. This has not been appropriately applied either by States and arbitral tribunals. These may encompass, amongst other things, provisions demanding successful ways of upholding claims and

implementing rights and payment for FPS and expropriation to foreign investors in the territories of the host States.

Again, concerning what the standard of liability owed by the host countries to a foreign investor is obligated, the research has found that so far arbitral tribunals have turned a blind eye and a deaf ear to the imposition of an absolute liability upon the host countries. Although in a few case laws that have been examined in the course of this research there are suggestive and conflicting statements that this might be possible in the near future. What is required of a host state is the application of due diligence for the security of alien investment that is reasonable in all circumstances within the jurisdiction of host country, and both the host States and tribunals have not demonstrated this fact in numerous cases that deal with FPS of investors and their investments and this has as well created a gap in the standard of FPS. Again, although the phrase due diligence is scarcely applied in relation within Article of State Responsibility, however, the subject of fault draws an important awareness in the Articles of State Responsibility development as the main rules of behaviour, instead of lesser approach of commitments to be envisaged in order to decide the appropriate standard of conduct by the States. The minimum standard of diligence and care that the international law requires is made of a duty to deter, and an obligation of keeping things in check. However, there are some loopholes in some of the case laws in the determination of what due diligence stands for. For example, it is worrisome to observe in the course of the research that a renowned commentator like Professor Ian Brownlie had stated that, “clearly there is no specific or opinionated definition of due diligence that would be proper, since what is required as a standard would be different depending on particular circumstances”.¹²¹⁷ If there is no actual particular definition for due diligence that properly fit the circumstances of due diligence how can an investor really be sure that the host State has violated the standard of FPS based on the country’s omission to respect the concept of due diligence to protect the investor’s investment? Therefore, this thesis is advocating for a proper definition of due diligence that would be generally acceptable and reliable by every academic scholar, commentator and arbitral tribunals. The only way to achieve this is to incorporate such reliable due diligence definition in the relevant future BITs so as to mandate the host States to comply with it so as to provide foreign investors with expect result for the security of their investments.

¹²¹⁷ I. Brownlie, *Principles of Public International Law* (1990)454

It has been observed in this research and in case law that, where the host State does not succeed in averting the wrongful acts through due diligence, the State must at least take action to bring those that perpetrated the wrongful act to book. The punishment could be by a way of incarceration or fine. This punishment will serve as a deterrent to other would be offenders. However, there should be a presumption of innocence until proven guilty. Looking at those case laws, it can scarcely be seen of any piece of concrete evidence throughout the course of this research which indicates that host States have engaged themselves so strongly to bringing the perpetrators of wrongful acts done to investment and their investment into book by incarceration whenever it has failed in its obligation to properly apply due diligence to prevent harm as required by international law. Therefore, more needs to be done by respective host States in order to achieve this aim, and this in turn will help to avoid prompting some people, most especially foreign investors to doubt the legality of arbitration including the prudence of endorsing investment treaties. But having said that, the shying away from imposition of absolute liability on States by tribunals is arguably commendable and plausible since allowing it could lead to the opening up of floodgates to aggrieved investors thereby wasting the resources of the host States. But the question to be asked is that, shall there be a time in the future when the obligation of FPS under BITs will attract the placement of strict liability to host States? We shall only wait and see considering some of those statements made by arbitral tribunals in a few cases concerning this issue which indicate there might be.

In respect of the argument concerning the link between FPS and FET such debate has also created a gap in the protection and security of foreign investments in the standard of FPS in BITs. The research has discovered that the relationship between FPS and FET has been adduced by some tribunals as two sides of the same coin – closely related, while of a truth the two principles are not the same. Although in some BITs, the standards of FPS and FET most frequently appear in the same phrase or in the same heading. And also, although some arbitral tribunals have ruled that the two standards are identical, but the overall approach of this paper is to keep the two principles separate. Undoubtedly, there are some conducts that breach the two principles, like: denying investors justice; the country's unfairness of the legislation; the State molestation and coercion, yet the evaluation of these factors differ from each other. In the standard of FPS the act can be wrong if it depicts dearth of an adequate legitimate process of an inability to act with due diligence. The standard of FPS mandates the country to apply due

diligence by taking proper measures to provide security to foreign investors and their investments, and also, to make ready an acceptable legal framework, presenting such protections like proper solution mechanisms, due process, and an entitlement to payment for expropriation (government taking) which the thesis have found that the host States have failed to provide and it is lacking in many case laws. While, in the opposite, FET is all about the way that the country deals with the investment that it engages with, demanding that such country comports itself reasonable and also with honesty or sincerity of intention (good faith).

In order to avoid the prevalence confusion that comes with putting the two standards together in one particular Article in a BIT, as it is in most treaties presently in various BITs, it will be wise and better to incorporate each of the standard separately so that they can stand on their own in a different Article in their respective BITs. If this is done in this manner, the tribunals will have no reason conflating the meaning of the two different concepts together as they do in trying to interpret their meanings thereby denying foreign investors their investment protective right required under international law as is often the case today. Argument of this sort will assist in preventing divergence of opinions among arbitral tribunals as the thesis has found various arbitral tribunals do in many claim awards. For the avoidance of divergence while interpreting the principle of FPS, this thesis is advocating for a mechanism to obtain the logical and consistency which is considered to be outstandingly effective which is to permit for preparatory verdicts whilst the actual or the original lawsuits are still waiting for a decision¹²¹⁸ as the best option. In this type of mechanism an arbitral tribunal would adjourn the case and would demand for a judgement on an issue of legislation from a corpus which has been created for that particular intention. This system has been effectively employed within the European Community scheme to obtain the consistency of implementation of the treaty of European Community legislation by national courts.¹²¹⁹ The accomplishment of this mechanism if it is to be implemented by all tribunals would avoid the protracted schism amongst diverse arbitral tribunal's interpretation of FPS principle, and it would also bring back any loss of confidence in foreign investors reposed in BITs between the host country, arbitral tribunals and the aggrieved foreign investors where a breach of FPS arises.

¹²¹⁸ See G. Kaufmann-Kohler, 'Annulment of ICSID Awards in Contract and Treaty Arbitration: 'Are There Differences?' in E. Gaillard and Y. Banifatemi (eds.), *Annulment of ICSID Awards* (2004) 289

¹²¹⁹ See Article 234 (formerly art. 177) of the Treaty establishing the European Community.

Ideally, the research has found that there is every need to advance the concept of FPS to cover the epidemic of cyber attacks that besiege investments nowadays due to the threats imposed by advancing technology. The interpretation of FPS standard needs to be amended in order to face up with the challenges that go with the existence of attacks that foreign investors have to confront with in the twenty-first century, especially the unity of digital businesses like computer systems including websites against threats imposed upon the internet connections, also otherwise known as cyber security. Since a digital asset is classified as an investment therefore it should be covered under the protective umbrella of FPS. Again, as been depicted by case law, that customary international law is not stagnant in time and minimum international law does develop. For this reason, it is imperative to apply the standard of FPS to provide protection to investment that goes beyond physical protection to providing protection to digital security and cyber threats in generality.

As the thesis has often stated, the extent of digital offence is great and has been statistically put at the approximate loss of a trillion US dollars. However, having surveyed the threat of cyber security, and especially on how digital assets is managed and controlled generally, imposing FPS obligation on host country for the security of foreign investors' cyber protection, especially in the field of digital asset protection, will be very hard to achieve. This is so because, although government may have some part to play in maintaining the solidarity of hidden internet infrastructure within its domain, it is not feasible that this could be broadened to protection for a particular server or to a websites as these are left in the hands of private service providers and governments do not have power or control over its management. Unless the infrastructure like internet servers are left in the hands of the States for them to have control over their management. Even at that, an emergency exception could exonerate country liability for any big scale attack on foreign investors' digital investments. Also, a host country's duty to initiate proceedings against cyber perpetrators will be very little because the legislation in this environment is universally scarce in international law and as a result it will be hard to attach this duty within the purview nature of FPS principle, unless the obligation is inserted in FPS standard in BITs.

This thesis has laid down some ground rules on how to tackle cyber criminality on digital investment and cyber security in general. One of the ways to provide security to digital assets

under the clause of FPS in BITs is the expansion of the application of mandatory permits that necessitates stronger regulation to tarpaulin cyber threats. The criminalisation of this type of conduct and the heightening of lawsuits against persons are all important apparatus against computer attacks by private persons or business opponents that engage themselves in cyber threats. However, this method will suffer a hiccup when the perpetrator is the country itself. For this reason, the solution to solving this problem will be to engage in a commercial and economic integration which is at the heart of cyber protection and BITs in the relevant of FPS which will channel and galvanise such a concept. The employment of BITs in this manner enables claims of cyber attacks not only be initiated by foreign investors but also can be settled in international arbitration bodies. The employment of adjudication offers advantages, like the use of an impartial setting for rulings of cases, well-established rules of arbitration and implementation of awards, and access to and application of well-created investor-dispute focused arbitration organisations. Additionally, initiating the claim at ICSID under a BIT agreement permits a foreign investor to start an arbitral claim upon the host country within investor-State adjudication without the need to appeal to its State government to start dispute settlement proceedings. Moreover, a more addictive phrase could be inserted in the standard of FPS obligation under BITs, to cover computer attacks security protections necessitating a polycentric principle to enhancing cyber protection and building a legislation of international cyber protection.

The pertinent of general principles of human rights to FPS has been pinpointed in the thesis as an assertion for a wider definition of the FPS provision. Although one can claim that human rights treaties are rudimentarily distinctive from investment treaties in terms of their objective of the security of persons related to the encouragement of friendly commercial and economic relationships between States. As a whole, taking a look at ordinary rules of law, particularly in the department of human rights, one would be convinced that it promotes the respect mechanism that pays homage to the independence of a State. It has also been shown in this thesis, both with the consideration of traditional international law and the law of treaties that, it is beneficial and important to return to some general rules of law so as to elucidate the exact content of protection duty of the principle of FPS. Such doctrines can be predominantly gathered from human rights legislation and domestic statutory practice owing to their procedural equivalence to investment security principles. The procedure employed by judiciary and tribunals in a variation of divergent legal orders demonstrates a wide overlap in the definition of what precisely due diligence

necessitates, and returning to such common rules will help in establishing a more parallel and foreseeable investment legislation order.

Having made reference to the issue of human rights protection above leads the thesis to the issue concerning the investor's reciprocation to the host State. Every BIT that has incorporated the obligation of FPS concept keeps talking about what the host States are obligated to do in order to protect the investors and their investments and this is the main focus of this thesis. However, it is only few of such BITs that have made reference to what the investor should contribute or give back to the host State where the investment is invested by foreign investors. This research has analysed the FPS standard and reciprocal obligations in BITs. Since the obligation of the States on FPS does not protect against a State's right to legislate, provided that the State comports itself properly in the situations and with intention of achieving objectively reasonable or logical communal policy aim. But while the States are trying the enact laws to curb illegality activities by foreign investors in their territories, States must ensure that they apply the duty of due diligence, proportionality, and reasonableness in achieving these measures so that they will not breach the duty of the standard of FPS repose on them by international law. States must equally be conscious so as to avoid human right abuses against foreign investors in their territories while enacting laws for regulatory measures purposes in order to achieve these aims and in protecting investments. Therefore, in order to balance up these investors' rights with that of the host States obligations, this thesis has recommended that it is vital to incorporate such reciprocate compromise and contribution that foreign investors are expected to give back to the host States into FPS standard in BITs. These recommendations are necessary following the upsurge of international inclination and demand by NGOs and other international bodies. That means, there must be some kind of deference of the security of environmental supervisory steps that demands responsible conduct from transnational and multinational companies and business magnates when doing business in host States with slack environmental legislations, especially in the countries where emissions are high; and actions offering security for the guarantee and respect of human rights by companies investing overseas; encouragement for anti-corruption legislations to the avoidance of corruption by corrupt foreign investors and country's representatives in the region of the host country; and incorporating the obligation of corporate social responsibility so as to encourage foreign investors to pay heed to international recognised standards of corporate

social responsibility. Due to all these facts, it is feasible to balance investors' rights with obligations that foreign investors must adhere to while investing in host States' territories.

In a situation where the investor fails to comply with these above mentioned measures, the research recommends that such an investor may be denied the opportunity to initiate a proceeding to ICSID or UNCITRAL against the host State until such investor is penalised and possibly compensation is paid by the investor. Even in a situation where the investor is allowed to bring a claim against the State, some percentages of the compensation payable to the investor in an award should the investor win have to be reduced as a penalty for in compliance of these measures, since this will be regarded that the investor had deliberately refused to fulfil his own part of the bargain obey those laws. The thesis has also expressed the inclusion of the OECD Guidelines for multinational establishments in international investment law, especially, on the obligation of FPS standard in future as a provision, or in an investment blueprint, or as a compulsory reference for investors. This would indicate a heightened unalterable of transnational businesses, convincing the host country that vital benefits linked to those four issues namely; environmental matters, protection of human rights, anti-corruption schemes, and corporate social responsibility obligation, are also reciprocated, protected and obeyed by the foreign investors and that host countries may fall back to the arbitral blueprint embedded in the treaty in case of a contravention of any of these measures by investors

As for the States that are not capable or unwilling to provide full protection and security to foreign investors and their investments in their territories as mandated by international law. And also, as for the possible dangers that the countries could face in contravening of the guarantee of the standard of FPS which emanated from the bilateral investment treaty that are currently in force endorsed by countries, and those derived from insufficient wordings of the BIT clause in future BITs, or any other type of investment treatment. It would be better for a country in drafting its BIT to insert in the treaty that the duty of FPS is an average duty which does not oblige any strict liability, as a broader phrase of the provision will tend to have a wider meaning of this responsibility which States are required to fulfil.

As for a duty of due diligence, a properly written clause in a bilateral investment would certainly avoid the danger of a principle by which the particular situations are not taken into consideration. The duty of the host country under the standard of FPS clause must be worded in State actuality

of every State in the resources at hand at the time that the harm was done to the investment. A host country might as well avoid completely the choice of including a duty to accord the obligation of FPS in their agreement wholly, in this way no investor or tribunal will hold such States accountable for its inaction to oblige to such duty. For a host country to be certain of the commitment it is undertaking under FPS duty it may be advisable for the State to insert a definition of the wording of this FPS in BITs since this is not always the case in every BIT. Doing so will constitute exactness and will constantly help to remind both contracting parties what the concept stands for, even to the tribunals, that means, the provision of full protection and security to foreign investors and their investments by host States. As it stands today, from FPS case laws that the thesis has evaluated it seems many host countries do not fully comprehend what the duty is all about and the tribunal is inclusive. Both the States and arbitral tribunals have failed to fully and adequately accord FPS protection in BITs to foreign investments as required by international law.

As for the minimum standard of treatment of traditional international law, the research has found that the definition of FPS depending on method of the tribunal's viewpoint can point to the understanding of the traditional international law as being a floor, average or ceiling to the duties that were emanated from the standard of FPS. Therefore, the correct phraseology of a bilateral investment treaty provision might not necessitate an additionally treatment to or more than that which international tradition as has adopted if a host State has incorporated in such a manner in a BIT from the onset. A restrictive phraseology that is variable from the one envisioned by arbitral tribunal where they rejected that the standard provision was limited to physical security is a better one for parties that do not appreciate the principle of FPS to be interpreted expansively by arbitral tribunals. However, this type of phraseology will undermine the aim and objective of the standard of FPS to investors in the protection of their investments which this thesis is up and against. Finally, in respect of repudiation of the existing investment treaties, the State has the right to cancel, delete this standard or limit its meaning by alteration of the treaty rather than to intentionally breaching this obligation to harm investments. However, the changes will need an authorisation of both parties by explanatory pronouncement. Where the other party refuses to oblige with the collective country, such State may decide to issue unilateral explanatory declaration.

As for the research question as to whether foreign investors can fully rely on the standard of full protection and security in BITs in host State for the protection of their investments. It has been proven by case law in this research that host States have not fully and adequately accorded respective rights to investors for the protection of their investments in the host country territories to a certain extent which international investment treaties have provided to foreign investors and their investments. Most of the awards that the thesis has investigated have not really given hope to foreign investors to convince investors that they can really rely on the standard of FPS for the protection of their investment in the territories of the host States. The extent of these rights of protection is not completely known to foreign investors as things are unfolding accordingly so far, since it is the host States and arbitral tribunals who are the ones to decide the ambit of those rights most of the time and both the host States and arbitral tribunals have severally failed to deliver to the advantage of the investors. However, there may be glimmers of hope and the need for foreign investor to rely on the standard of FPS in the host States territories despite some odd that has been found by the thesis in relation to the failures by host States to have fully provided for protection of investments under the obligation of FPS, and also by the divergence opinions of interpretation of the concept by various tribunals which the thesis have made mention of. But this glimmer of hope will only be fulfilled if host States and tribunals change their ways and begin to apply investment laws and the obligation of FPS properly. Considering the mixed messages that arbitral tribunals have been sending out while reaching decisions on investment awards one would definitely argue that it not possible to accept that foreign investors can really rely on the standard of FPS for the protection of their investments in the territories of host States. However, while the wide wordings of the treaties has the advantage of opening up a broad floodgate field for legal actions to settle a dispute for investors, foreseeability as to the extent of those duties is a benefit for investors, and this advantage is not to be underrated or undervalued.

Finally, one can see generally from this research that there are various reasons why investment scholars should endeavour to address these prevailing problems that have befallen and eaten deep into the fabric of this investment protection which has been caused by host States' systematic failures and misinterpretation of the meaning of this standard by arbitral tribunals. These failures have created huge lacunae in the standard of FPS for the protection of investments and these gaps must be filled in order to completely realise and achieve the main purpose of the standard of FPS which is to provide full and protection and security to foreign

investments by host States. As it is today, foreign investors are not getting what they rightly deserve that will convince them to rely on this doctrine. And to achieve this purpose, all cogs in the progress wheel of full protection and security of international investment law must be jettisoned, and the time to set the wheel in motion is now. For the cogs in wheel of the obligation of FPS to providing full protection and security to foreign investments that has caused great disadvantages to foreign investors to be jettisoned, investment law scholars must write more on the topic of the standard of FPS to express their honest and disappointing opinions concerning these shortcomings that have been perpetrated by host States and the gaps that exist which this thesis has exposed and made reference of. Doing so will assist in a greater height and length and can persuade host States to do the right things and straight thing up things in this aspect of the law. As the research has discovered, the literatures in this subject matter are very scarce. Likewise, tribunals must also try and achieve consistency in their interpretations by being focused and thorough whilst dealing with FPS disputes both in national and international platform.

If only the host countries, arbitral tribunals, and other scholarly commentators will partake in solving these issues and are to play their rightful parts well in persuading the host States to do the right thing, obviously foreign investors would not have a dashed hope in relying on the concept of FPS for the protection of their investments as they seem to have presently. As doing the right things would mean that host States will now endeavour to accord full protected security to investors' investments against any form of infringements and interference. In order to achieve the successfulness of upholding the obligation of FPS standard to international level of expectation by the host States, and to accord complete protection and security designed for foreign investors and their investments in foreign territories, all hands must be on deck. Undoubtedly, this is the time to start getting rid of any impediment towards making this goal a reality because as we know, procrastination is the thief of time. And a stitch in time saves nine. To fall short of providing the obligation of FPS to foreign investors in the territories of the host States by the Contracting States will be completely illegal, unconstitutional, invalid and Ultra Vires under international investment law.

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