



Full Protection and Security and Its Overlap with Fair and Equitable Treatment

Romesh Weeramantry

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Keywords

Full protection and security · Protection of investors and investments from physical harm · Legal security of investors and investments · Protection from acts of third parties · Overlaps with fair and equitable treatment · Treaty interpretation · *Effet utile* · Minimum standard of treatment

Introduction

1. The full protection and security (FPS) standard is one of the most common substantive provisions contained in investment treaties. Complexity arises in this area of investment law because the language used to express the FPS standard varies from treaty to treaty and the separation point between the fair and equitable treatment standard (FET) and FPS is difficult to identify. Consequently, a

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R. Weeramantry (✉)
Clifford Chance, Singapore, Singapore
e-mail: Romesh.Weeramantry@CliffordChance.com

divergent body of arbitral decisions has grown around the FPS standard. The aim of this Chapter is to examine the overlap between FET and FPS. It seeks to determine – through a survey of the different formulations of FET provisions and the wide-ranging interpretations given to them by investment tribunals – whether and to what extent FPS may be equated with FET.¹

Diverse Formulations of FPS

2. A review of the different formulations of FPS provisions in investment treaties is a necessary starting point in any analysis of the FPS standard.
3. Early expressions of FPS provisions were contained in treaties of friendship, commerce, and navigation (**FCN**). For example, Article V(1) of the 1949 FCN treaty between the United States and Italy provides that nationals of each contracting State shall receive “*the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection and security required by international law.*”² Notable invocations of FPS provisions in FCN treaties were made before the International Court of Justice (**ICJ**) in the *Tehran Hostages* case³ and the *ELSI* case.⁴
4. The inclusion of an FPS clause in Article 3 of the 1959 Germany-Pakistan BIT, the first ever bilateral investment treaty (**BIT**), was therefore not a novel development. A common modern treaty formulation refers to both FET and FPS in the same sentence but as separate standards. For example, Article 3(1) of the Bangladesh-Thailand BIT provides that “*Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security.*”⁵ The two standards may also be located in different articles within a BIT.⁶

¹Significant analyses of FPS provisions and case law are found in Cordero-Moss G (2008) Full protection and security. In: Reinisch A (ed) Standards of investment protection. Oxford University Press, pp 131–150; Schreuer C (2010) Full protection and security. *J Int Dispute Settl* 1–17; Miljenić O (2019) Full protection and security standard in international investment law. *Pravni Vjesnik* 35(3–4):35–62; and Reinisch A & Schreuer C (2020) International protection of investments: the substantive standards. Cambridge University Press, pp. 358–362, 536–586.

²Treaty of friendship, commerce and navigation between the United States of America and the Italian Republic, 2 February 1948, 63 Stat. 2255, T.I.A.S. No. 1965, 79 U.N.T.S. 171 (entered into force 26 July 1949). Article I, Abs-Shawcross Convention, and Article 1, 1967 Draft OECD Convention, also provide that property is to receive the “*the most constant protection and security.*”

³*United States Diplomatic and Consular Staff in Tehran*, Judgment, I.C.J. Reports 1980, p. 3.

⁴*Elettronica Sicula S.P.A. (ELSI)*, Judgment, I.C.J. Reports 1989, p. 15.

⁵See also Art 2(2)(i) Czech Republic-Slovak Republic BIT, Art 2(2) UK-Egypt BIT, Art II(2)(a) UK-Sri Lanka BIT.

⁶In the Bangladesh-Denmark BIT, for example, the FPS and FET provisions are located, respectively, in Arts 2 and 3.

5. A variation in FPS language uses the qualifier “*legal*” to modify “*security*.” For instance, Article 4(1) of the Germany-Argentina BIT provides that “*Investments shall enjoy full protection and **legal** security*” (emphasis added). This language difference has been relied on by some tribunals to extend FPS protection beyond physical assets to intangible property.
6. Other textual variations that have influenced tribunal interpretations involve FPS provisions that indicate that the standard forms a part of or is species of FET:
 - a. *Investments [...] shall be accorded full and complete protection and security [...] in accordance with the principle of fair and equitable treatment* (emphasis added).⁷
 - b. *[...] Each Contracting Party shall ensure fair and equitable treatment to the investments of investors of the other Contracting Party and shall not impair, by unreasonable or discriminatory measures, the operation, management, maintenance, use, enjoyment or disposal thereof by those investors.*
[...]
More particularly, each Contracting Party shall accord to such investments full security and protection [...] (emphases added).⁸
7. Certain treaties offer FPS not as an independent treaty standard but package it as forming a part of international law: “*Each Party shall accord to a covered investment treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.*”⁹
8. Treaty language may also specify that international law is a floor that a State’s FPS obligations cannot fall below: “*Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less favorable than required by international law.*”¹⁰
9. Alternatively, some treaties narrow FPS by providing that international law is a ceiling and the obligation to provide FPS does not require protection more than that required by international law: “*The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by [the customary international law minimum standard of treatment of aliens], and do not create additional substantive rights.*”¹¹
10. Adjectival qualifiers (or their absence) in FPS provisions may also lead to different interpretations and applications. For example, there may be an

⁷Art 5(1) France-Argentina BIT.

⁸Art 3(1) and 3(2) Netherlands/Czech and Slovak Republic BIT, and Art 3(1) and 3(2) Netherlands-Poland BIT.

⁹Art 6(1) Canada-Hong Kong BIT.

¹⁰Art II(3)(a) Lithuania-United States BIT.

¹¹Chapter 9, Art 9.6(2) Comprehensive and Progressive Agreement for Trans-Pacific Partnership.

absence of the term “full.”¹² In this context, the tribunal in *Biwater Gauff* held that when the terms “*protection and security*” are qualified by “full,” the content of the standard may extend to matters other than physical security.¹³ In contrast, the *Parkerings v. Lithuania* tribunal held that “*it is generally accepted that the variation of language between the formulation ‘protection’ and ‘full protection and security’ does not make a difference in the level of protection a State is to provide.*”¹⁴

11. Aside from “full,” other qualifiers may also be included, such as “*full legal protection and security*” (emphasis added), as mentioned above, or “*full and adequate protection and security*”¹⁵ or “*full and complete protection and security.*”¹⁶ Article 10(1) of the Energy Charter Treaty speaks of “*most constant protection and security*” (emphasis added).
12. To complete this survey, it should be noted that a handful of treaties do not contain an FPS provision, as is the case with the India-Bangladesh BIT.¹⁷
13. Given the various formulations of FPS provisions, it is not altogether surprising that a divergent line of case law (as noted in paragraph 10 above and discussed in more detail later) has developed as to the scope and effect of FPS provisions. Before discussing the circumstances that have led to this divergence, the next section will examine an area of FPS case law that is relatively uniform and free from controversy: a State’s FPS obligation to exercise due diligence to prevent physical harm to investors and their investment, even if that harm (or threat thereof) emanates from third parties.

Physical Protection

14. FPS has its origins in international law as an obligation on States to protect the physical safety of aliens and prevent damage to their property. This traditional role of the FPS standard is well settled. Indeed, a recent trend in treaty drafting has been to specify explicitly that FPS relates only to physical damage: Article 8.10(5) of the Comprehensive Trade and Economic Agreement between Canada and the European Union, for example, qualifies its FPS provision by providing

¹²See, for example, Art 2(2) Argentina-United Kingdom BIT and Art II Zaire-United States BIT.

¹³*Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, para 729. See also *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, Award, 30 July 2010, ICSID Case No. ARB/03/19, para 175.

¹⁴*Parkerings-Compagniet AS v. Republic of Lithuania*, Award, 11 September 2007, ICSID Case No. ARB/05/8, para 354. See also *Al Warraq v. Republic of Indonesia*, UNCITRAL, Final Award, 15 December 2014, para 630 (‘full protection and security is not a higher standard than adequate protection and security’).

¹⁵Art 3(2) Singapore-Bangladesh BIT (emphasis added).

¹⁶Art 5(1) France-Argentina BIT (emphasis added).

¹⁷See also Newcombe A, Paradell L (2009) *Law and practice of investment treaties: standards of treatment*. Kluwer, p 309.

that it “refers to the Party’s obligations relating to the **physical** security of investors and covered investments.”¹⁸

15. Even in cases where the FPS provision does not contain such explicit limiting language, a number of tribunals have emphasized that FPS should be confined to physical security. The *Saluka* tribunal, for example, made a special note that the FPS standard was “not meant to cover just any kind of impairment of an investor’s investment, but to protect more specifically the physical integrity of an investment against interference by use of force.”¹⁹
16. It is also uncontroversial that a major role of FPS is to protect investors and their assets from third party violence. As the tribunal in *Eastern Sugar v. Czech Republic* observed in relation to the FPS provision in the Czech-Netherlands BIT:

*the criterion [...] concerns the obligation of the host state to protect the investor from third parties, in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent.*²⁰

17. In addition to the protection from acts by private third parties enumerated in the *Eastern Sugar* case, the FPS standard “also extends to actions by organs and representatives of the State itself.”²¹ Nonetheless, this responsibility to prevent physical harm resulting from a State’s own acts and those of third parties is limited to an obligation of due diligence and does not place a State under any form of strict liability for any harm caused.²² The *El Paso v Argentina* tribunal

¹⁸Emphasis added. Similarly see Article 3.2 of the new Indian Model BIT: “For greater certainty, ‘full protection and security’ only refers to a Party’s obligations relating to **physical security** of investors and to investments made by the investors of the other Party and not to any other obligation whatsoever” (emphasis added). Contrast this to Article 7 of the ASEAN-China Investment Agreement, which provides that FPS relates to “full protection and security requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the investment of investors of another Party.” This provision arguably does not limit the protection mandated to physical security and may apply to legal security as well. The extension of FPS to legal security is discussed below.

¹⁹*Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, para 484. See also *Spyridon Roussalis v. Romania*, Award, 7 December 2011, ICSID Case No. ARB/06/1 and *Rumeli v. Kazakhstan*, Award, 29 July 2008, ICSID Case No. ARB/05/16, para 668.

²⁰*Eastern Sugar v. Czech Republic*, Partial Award, March 27, 2007, SCC Case No. 088/2004, para 203.

²¹*Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 23 July 2008, para 730.

²²*Asian Agricultural Products Ltd. v. Sri Lanka*, Award, 21 June 1990, ICSID Case No. ARB/87/3, paras 46–53; and Cordero-Moss G (2008) Full protection and security. In: Reinisch A (ed) Standards of investment protection. Oxford University Press, p 139.

provided an insightful exposition on this unique FPS obligation (albeit in relation to injuries caused only by third parties):

The BIT requires that Argentina provide 'full protection and security' to El Paso's investment. The Tribunal considers that the full protection and security standard is no more than the traditional obligation to protect aliens under international customary law and that it is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party. The case-law and commentators generally agree that this standard imposes an obligation of vigilance and due diligence upon the government. [. . .]

The minimum standard of vigilance and care set by international law comprises a duty of prevention and a duty of repression. A well-established aspect of the international standard of treatment is that States must use 'due diligence' to prevent wrongful injuries to the person or property of aliens caused by third parties within their territory, and, if they did not succeed, exercise at least 'due diligence' to punish such injuries. If a State fails to exercise due diligence to prevent or punish such injuries, it is responsible for this omission and is liable for the ensuing damage. It should be emphasised that the obligation to show 'due diligence' does not mean that the State has to prevent each and every injury. Rather, the obligation is generally understood as requiring that the State take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury. The precise degree of care, of what is 'reasonable' or 'due,' depends in part on the circumstances.²³

18. The discussion in this section covered uncontentious aspects of FPS and its role in requiring States to exercise due diligence *to prevent* physical harm to investors and their assets (resulting from its own acts or those of third parties). After harm to an investment has occurred, the obligation to diligently prosecute those who are responsible relates more to the subject matter of the next section, which addresses how FPS extends beyond physical protection to legal security.

Legal Security

19. The above cases that have applied the FPS standard to oblige a State to exercise due diligence to prevent acts of its organs or private third parties from harming covered investors and damaging their property is relatively straightforward. More complex issues are associated with a line of cases holding that FPS also requires a State to provide an investor with legal security.
20. A logical basis for extending FPS beyond physical protection was provided by the tribunal in *Siemens v. Argentina* when it held that its interpretation was also derived from the BIT's definition of a covered investment, which included both tangible and intangible assets.²⁴

²³*El Paso Energy International Company v. The Argentine Republic*, Award, 31 October 2011, ICSID Case No. ARB/03/15, paras 522–523.

²⁴Award, 6 February 2007, para 303.

21. Where a BIT such as the Germany-Argentina BIT expressly provides for “*full protection and legal security*” (Article 4(1), emphasis added), the conclusion that FPS in this context reaches beyond physical protection should not raise much controversy. This FPS provision was at issue in *Siemens v Argentina*. Given the inclusion of the qualifier “*legal*,” the tribunal in that case had a special basis for holding that FPS extended beyond physical security to legal security.²⁵
22. But in many other cases, the absence of a reference to “*legal*” security in the applicable FPS still has not prevented tribunals from holding that the FPS standard requires the provision of nonphysical security. These cases may be categorized into two groups.
23. The first group has interpreted FPS provisions as requiring the State to make available a judicial and administrative system that enables an investor to protect its interests through, for example, prosecution of those responsible for the harm caused. This is based on the more traditional line of reasoning endorsed in the *ELSI* case, where the Chamber of the ICJ saw the availability to an alien of a legal mechanism to verify the lawfulness of the requisition made in that case as an element of the FPS standard.²⁶
24. In *Lauder*, the tribunal affirmed an FPS duty to keep the judicial system available to the investor²⁷ and in *Saluka*, that duty was interpreted to include the obligation to make available appeal mechanisms.²⁸ However, in both these cases, the tribunals found that the FPS standards had not been violated, which draws attention to the difficulties in proving a breach of an FPS obligation to provide legal security. In *Frontier Petroleum Services*, even though the FPS provision’s wording was standard, i.e., “*full protection and security*”,²⁹ the tribunal held that “*the duty of protection and security extends to providing a legal framework that offers legal protection to investors – including both substantive provisions to protect investments and appropriate procedures that enable investors to vindicate their rights.*”³⁰ Often, FPS requirements also impose a positive obligation on a State to diligently prosecute those who have wrongfully injured an investor or its investments, as is evident from the quotation at paragraph 17 above by the *El Paso* tribunal.³¹

²⁵*Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, 17 January 2007, para 303.

²⁶*ELSI* case, para 111.

²⁷*Ronald S. Lauder v. The Czech Republic*, UNCITRAL, Final Award, 3 September 2001, para 314.

²⁸*Saluka Investments B.V. v. The Czech Republic*, UNCITRAL, Partial Award, 17 March 2006, paras 493, 496.

²⁹Art 3(1) Canada-Czech Republic BIT (1990).

³⁰*Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para 263.

³¹See also *Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, ICSID Case No. ARB/98/4, paras 82, 84, 94, 95 (holding that Egypt’s failure to impose sanctions on responsible third parties who had seized an investment constituted a breach of an FPS obligation).

25. The second group of cases sees FPS as requiring the State to provide stability for investments and certainty in the legal system.³² For example, in *Azurix v. Argentina*, the tribunal held that

*full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as important from an investor's point of view.*³³

26. Similarly, the *Biwater Gauff* tribunal emphasized the need for a stable investment environment when it observed that FPS:

*implies a State's guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal's view be unduly artificial to confine the notion of 'full security' only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments.*³⁴

27. In contrast to this approach, the tribunal in *Eureko v. Poland* held that the obligation to provide a stable investment climate forms part of the FET standard, and did not enter into a discussion as to whether this obligation was a part of the FPS standard.³⁵ As the following passage by Newcombe and Paradell illustrates, stability of the legal framework may form an essential part of the FET standard:

*Tribunals have found that the stability and predictability of the legal framework is an essential element of fair and equitable treatment. When investors acquire rights under domestic law, the fair and equitable treatment standard will protect legitimate expectations about the use and enjoyment of these rights. This requires a basic level of stability and predictability in the legal framework. Fundamental changes in the legal framework that eviscerate legitimately acquired rights are likely to violate fair and equitable treatment.*³⁶

28. However, this description of FET may be distinguishable from FPS as the former relates not to *providing* a stable environment but to a State *refraining*

³²Cordero-Moss G (2008) Full protection and security. In: Reinisch A (ed) Standards of investment protection. Oxford University Press, p 145.

³³*Azurix Corp. v. The Argentine Republic*, Award, 14 July 2006, ICSID Case No. ARB/01/12, para 408.

³⁴*Biwater Gauff Ltd. v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, 23 July 2008, para 729.

³⁵*Eureko B.V. v. Republic of Poland*, Partial Award, 19 August 2005, paras 240, 248, 250, 251, 253.

³⁶Newcombe A, Paradell L (2009) Law and practice of investment treaties: standards of treatment. Kluwer, p 286.

from making changes that will undermine the legal framework that the investor depended on and expected to continue.

29. As is discussed below, cases extending FPS beyond physical protection and into legal security raise complex issues as to the boundary between FET and FPS and when it is appropriate to invoke FPS when arguably FET may provide the relevant protection, or vice versa.

Differences Between FPS and FET

30. In the early days of investment arbitration, the issue as to whether an overlap existed between FPS and FET was not the subject of much debate. Two of the most prominent cases that were forerunners in applying the FPS standard were *Asian Agricultural Products Ltd. v. Sri Lanka*³⁷ and *American Manufacturing & Trading, Inc. v. Zaire*.³⁸ These cases related to physical destruction caused by the respondent State's armed forces. Liability under FPS in these cases was therefore relatively straightforward, with no real need to engage FET.
31. Another notable early case is *Wena Hotels v. Egypt*. That case has been viewed as an instance of a tribunal equating FPS and FET.³⁹ However, a closer examination of this case does not show this to be correct. A problematic issue associated with the *Wena Hotels* award is that it refers to the two standards without identifying any difference between them. For example, the award frequently makes reference Egypt's failure to "accord *Wena's* investments 'fair and equitable treatment' and 'full protection and security'" in a way that may indicate they were combined into a unified standard. But the absence of any explanation as to what the tribunal considered to be the difference between FET and FPS does not necessarily mean that the tribunal actually conflated the two standards and treated them as the same.
32. The wrongful acts in *Wena Hotels* related not only to physical damage and failure to prevent physical damage but also concerned wrongful conduct in issuing hotel licences.⁴⁰ The latter relates to conduct that would more appropriately classify as an FET violation. Accordingly, it is not accurate to say that *Wena Hotels* solely concerned physical damage and that the tribunal deployed both FET and FPS in respect of that damage when only FPS should have been applied. The factual matrix also concerned regulatory abuse, an independent BIT violation that more logically fits within the contours of FET rather than

³⁷*Asian Agricultural Products Ltd. v. Sri Lanka*, Award, 21 June 1990, ICSID Case No. ARB/87/3.

³⁸*American Manufacturing & Trading, Inc. v. Zaire*, Award, 21 February 1997, ICSID Case No. ARB/93/1.

³⁹Schreuer C (2010) Full protection and security. J Int Dispute Settl 13.

⁴⁰*Wena Hotels Ltd. v. Arab Republic of Egypt*, Award, 8 December 2000, ICSID Case No. ARB/98/4, para 92.

FPS.⁴¹ It may be concluded therefore that a specific role existed for both FET and FPS in *Wena Hotels* and the tribunal did not equate the two.

33. The passing of time saw more complex disputes tease out FPS issues that were not present in the earlier cases. Claimants started to assert that a breach of the FET standard *ipso jure* resulted in a failure to accord FPS, an argument which had varying degrees of success. The tribunals that rejected this type of argument and held that the two standards were separate and independent (i.e., a breach of one does not automatically lead to a breach of another) have offered different reasons for this view.
34. Some tribunals have emphasized the different location of the two standards in the body of the BIT. In *Arif v. Moldova*,⁴² for example, the tribunal held that it

*is not persuaded by Claimant's argument that if a State breaches the FET standard, it is ipso facto also in breach of the FPS standard. The standard of FPS is clearly addressed in a separate article in the BIT. The Tribunal therefore finds that FPS is a separate and independent standard to that of FET.*⁴³

35. Other tribunals, such as *Mamidoil v. Albania*, have reasoned through deployment of the treaty interpretation rules in Article 31 of the Vienna Convention on the Law of Treaties (**Vienna Convention**) that FPS and FET are distinguishable:

[...] The Tribunal first notes that the obligation to provide constant protection and security must not be confounded with the obligation to provide fair and equitable treatment. The distinction between the standards in treaties such as the ECT is of relevance. It would violate the principles of treaty interpretation under the Vienna Convention on the Law of Treaties to confuse the meaning of protection and security with that of a fair and equitable treatment.

*[...] The Tribunal concludes therefore that both claims have to be examined separately. The fact that the Tribunal rejected the FET claim does not imply the rejection of the claim for a violation of protection and security.*⁴⁴

36. In *Electrabel v. Hungary*, the tribunal relied on the principles of treaty interpretation, but more particularly on the principle of effectiveness (which is not specified in the Article 31 of the Vienna Convention). The tribunal took the

⁴¹See Cordero-Moss G (2008) Full protection and security. In: Reinisch A (ed) Standards of investment protection. Oxford University Press, p 147.

⁴²*Franck Charles Arif v. Moldova*, Award, 8 April 2013.

⁴³*Franck Charles Arif v. Moldova*, Award, 8 April 2013, para 505. Likewise, in *Jan de Nul N.V. v. Arab Republic of Egypt*, Award, 6 November 2008, ICSID Case No. ARB/04/13, para 269 the tribunal held that “The notion of continuous protection and security is to be distinguished here from the fair and equitable standard since they are placed in two different provisions of the BIT, even if the two guarantees can overlap.”

⁴⁴*Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Republic of Albania*, Award, 30 March 2015, ICSID Case No. ARB/11/24, para 819–820.

view that FET and FPS are two distinct standards and “*must have, by application of the legal principle of ‘effet utile’, a different scope and role.*”⁴⁵

37. Substantive differences have also been raised to accentuate the independence of the two standards, for example, the ability under the FPS standard (but not under FET) to hold a State responsible for failing to prevent damage caused by third parties.
38. In this context, the *Oxus Gold v. Uzbekistan* tribunal distinguished FPS from FET by stressing that FPS serves to complement FET by providing investor protection in relation to acts by third parties (which protection FET was not able to provide), with the caveat that FPS did not go as far as to oblige the State to require that third parties treat the investor fairly and equitably:

*the general FPS standard complements the FET standard by providing protection towards acts of third parties, i.e. non-state parties, which are not covered by the FET standard. Thus, where an incriminated act is done by a State-organ, the applicable standard is the FET standard, whereas where such act is done by a non-state entity, the applicable standard becomes the FPS standard. [...] The question thus arises whether the ‘obligation of vigilance and due diligence’ of the FPS standard is of the same nature and scope as the obligations arising out of the FET standard, i.e. whether the FPS standard prescribes to ensure investors ‘fair and equitable’ treatment by non-state entities. It seems obvious that a State is not in a position to ensure the level of commitment with regard to the conduct of non-state entities, including commercial entities which are State-owned but operated independently according to commercial law and practice, compared with the conduct of its own organs. As such, under the FPS standard, an investor may not expect a State to ensure that the investor be treated ‘fairly and equitably’ by any third party, but instead the investor has the right to expect that the State takes reasonable measures within its power to prevent wrongful injuries by third parties, and where such injuries have already happened, to punish them.*⁴⁶

39. Tribunals have also held that FPS is different to FET because the former requires the taking of positive action to protect and also covers action by private persons, which the FET obligation does not. For example, in *Frontier Petroleum v. Czech Republic* the tribunal observed that

*full protection and security obliges the host state to provide a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs, whereas fair and equitable treatment consists mainly of an obligation on the host state’s part to desist from behaviour that is unfair and inequitable.*⁴⁷

⁴⁵*Electrabel S.A. v. Republic of Hungary*, Award, 25 November 2015, ICSID Case No. ARB/07/19, para 7.83.

⁴⁶*Oxus Gold v. Uzbekistan*, UNCITRAL, Award, 17 December 2015, para 353.

⁴⁷*Frontier Petroleum Services Ltd v. Czech Republic*, UNCITRAL, Final Award, 12 November 2010, para 296 (emphasis added).

Overlaps Between FET and FPS

40. As seen above, the deployment of FPS to provide remedies for damage to physical property generally does not overlap with the FET standard when that damage is caused by third parties. However, the distinction between FPS and FET often begins to erode when the FPS standard is interpreted as obliging States to provide legal (and not physical) security. Newcombe and Paradell take the view that generally the concept of legal security under FPS is absorbed by the FET standard:

*In practice, since most [investment treaties] already accord fair and equitable treatment, whether protection and security obligations extend to legal security and the stability and predictability of the regulatory framework is unlikely to affect the outcome of a case. Further, since fair and equitable treatment includes treatment in accordance with the minimum standard, it would appear that a general fair and equitable treatment clause includes the protection and security obligation.*⁴⁸

41. An authority frequently cited by commentators as an example of a tribunal equating the FET and FPS standards is *Occidental v. Ecuador*.⁴⁹ The tribunal in that case held that Ecuador had breached its obligations to accord FET under the USA-Ecuador BIT. Immediately thereafter, the tribunal continued:

*In the context of this finding the question of whether in addition there has been a breach of full protection and security under this Article becomes moot as a treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment.*⁵⁰

42. *Occidental* is therefore a case in which the tribunal considered that FET overlaps with the FPS standard to such an extent that the breach of the former automatically constitutes a breach of the latter. But note must be made that the FET issue in *Occidental* concerned Ecuador's failure to provide "stability of the legal and business framework."⁵¹ So it was not the FPS standard in general that was moot in *Occidental*. The FPS element that was considered by the tribunal to have no practical relevance was limited to legal security.
43. A number of other tribunals have likewise held that their determination of an FET claim is also dispositive of a separate FPS claim. These cases typically are associated more with legal security rather than physical protection. For

⁴⁸Newcombe A, Paradell L (2009) Law and practice of investment treaties: standards of treatment. Kluwer, p 314.

⁴⁹*Occidental Exploration and Production Company v. Ecuador*, Final Award, LCIA Case No. UN3467, 1 July 2004.

⁵⁰para 187.

⁵¹para 183.

example, in *Achmea BV v. Slovak Republic* the FET breach concerned the impact of government policy on an insurance company. The tribunal considered that there was no need to deal with the “*claim under [the FPS provision] separately from the claim under [the FET provision]. It regards its decision in respect of the claim under [the FET provision] as disposing of both claims.*”⁵² Similarly, in *Impregilo SpA v. Argentina*, Argentina’s conduct in relation to the claimant’s contractual rights was held to be in breach of its FET obligations. Consequently, the tribunal found that “*where, as in the present case, there has been a failure to give an investment fair and equitable treatment, it is not necessary to examine whether there has also been a failure to ensure full protection and security.*”⁵³

44. A more cautious position was taken by the *PESG v. Turkey* tribunal, which noted that FPS:

*has developed in the context of the physical safety of persons and installations, and only exceptionally will it be related to the broader ambit noted in CME [i.e. legal security]. To the extent that there is such an exceptional situation, the connection with fair and equitable treatment becomes a very close one.*⁵⁴

45. In contrast to the approaches taken in the *Occidental*, *Achmea* and *Impreglio* cases, the position of the *PESG* tribunal displays more fidelity to the independent nature of an FPS provision despite its close interrelationship with FET.

Concluding Remarks

46. The review of the FPS standard in this Chapter shows that its expression in treaties lacks uniformity and its application by tribunals varies widely. The case law discussed above indicates little (if any) controversy in the notion that FPS is a distinct and separate standard to FET when it obliges States to act with due diligence to prevent physical damage to investors and their property, even as a result of acts of private parties. However, arbitral tribunals have struggled to develop a consistent approach when a claimant seeks to extend FPS beyond physical protection to legal security.
47. As discussed, a number of tribunals have considered this wider role of FPS as overlapping with FET and have absorbed FPS into FET or effectively rendered

⁵²*Achmea B.V. v. Slovak Republic*, UNCITRAL Final Award, 7 December 2012, para 284.

⁵³*Impregilo S.p.A. v. Argentina*, Award, 21 June 2011, ICSID Case No. ARB/07/17, para 334. See also *Azurix Corp. v. Argentina*, Award, 14 July 2006, ICSID Case No. ARB/01/12, para 408; and *Spyridon Roussalis v. Romania*, Award, 7 December 2011, ICSID Case No. ARB/06/1, para 321.

⁵⁴*PSEG Global, Inc., The North American Coal Corporation, and Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, Award, 19 January 2007, ICSID Case No. ARB/02/5, para 258.

FPS's role in relation to legal security redundant. Nonetheless, despite the close interrelationship between FET and FPS, the two are still distinguishable. The continued inclusion by States of both FPS and FET standards in treaties suggests that these standards are intended to give rise to different substantive obligations. Otherwise, FPS would find no place a treaty that contains a FET provision.

48. Due recognition and fidelity must be given to a treaty's text. That is a bedrock principle of treaty interpretation that must be applied to FPS and FET provisions. Moreover, any approach that treats – without proper justification – FPS and FET as one and the same is subject to the criticism that it ignores the important principle of *effet utile*. That well-settled principle requires meaning to be given to every treaty provision and prevents the interpretation of FET provisions in an manner that renders FPS provisions in the same treaty superfluous.
49. Problems also arise in tribunal decisions that simply conclude that a breach of either FPS or FET also *ipso jure* amounts to a breach of the other. Whether or not this is a pragmatic method of judicial economy in award writing, it is important for the legitimacy of the decision-making process that dedicated reasons are provided for each standard that is claimed to have been breached.
50. One technique that appears to be underused but may serve to solve some of the problems encountered in the application of both FPS and FET is to consider FPS as the *lex specialis* where the claim alleges that the respondent State should have taken positive steps to protect either tangible or intangible property (especially where harm has been caused by private parties), whereas FET is the *lex specialis* where the claim alleges that the State caused harm by wrongfully changing its prior conduct or assurances.
51. From the perspective of a State's FPS or FET obligations, some factors that may assist in prioritizing or distinguishing one or the other standard are set out in the table below.

State's FPS obligations	State's FET obligations
1. A positive obligation to take reasonable steps to protect investors or their investments (either tangible or intangible) from wrongful harm by a State's organs or agencies	1. An obligation to refrain from changing a State's own conduct or assurances on which an investor's decision to invest or legitimate expectations is based
2. A positive obligation to provide a legal or administrative system that grants legal security to the investor (e.g., by enabling the investor to make claims or appeals in respect of domestic law violations before impartial and effective courts or tribunals)	2. An obligation to desist from fundamentally changing the legal framework in which an investor legitimately acquired rights or expectations
3. A positive obligation to exercise due diligence to protect investors and investments from wrongful physical harm by private persons	3. There appears to be no FET obligation to take positive steps to ensure a private person treats an investor fairly or equitably
4. If physical harm has resulted from a wrongful act, a positive obligation to diligently prosecute or sanction a State representative or private person responsible for the harm	4. There appears to be no FET obligation to prosecute or sanction a private person who has - through unfair or inequitable treatment - caused harm to an investor

52. The final remark to be made in this examination of the FPS standard's interrelationship with FET concerns two statistics that are derived from data-mining relevant arbitral awards. First, FPS is invoked far less frequently by investors than FET in investment treaty cases. An UNCTAD study indicates that FET-based claims are made in 50 per cent more cases when compared to claims based on FPS.⁵⁵ Second, the rate of success of FET claims is far higher than FPS claims. The same UNCTAD study found that out of 401 cases in which FET claims were alleged, the investor succeeded in 103 cases. A very different result was found in relation to FPS allegations, which were made in 206 cases. The investor prevailed in only 20 of these cases. In other words, the chances of success of FET claims are approximately one in four, whereas for FPS, it is only one in ten.
53. This difference in FET and FPS success rates may be explained by the difficulty in establishing that a State had a positive obligation to provide a stable or secure legal system or that it failed to exercise due diligence to prevent third parties from causing harm. This appears to be a more onerous task than proving that a respondent State changed its behavior in a way that produced unfairness or inequity. In the latter, the change can be measured against conduct that in fact occurred at a prior point in time. In the former, it is difficult to assess what precisely had to be provided, and also to establish a lack of diligence in complex or chaotic situations that lead to property damage.
54. This disparity in the frequency of use and the success rates of FPS and FET will likely continue. But while FET stands to be the more popular basis on which to make a claim, this should not mean that FPS should lose its relevance or importance, especially because – as this Chapter has shown – FPS has distinct characteristics and roles, which should not be equated with FET.

⁵⁵This UNCTAD study examined approximately 550 investment treaty arbitrations and found that FET, indirect expropriation and FPS were alleged in 401, 359, and 206 cases, respectively. IIA Issues Note, Issue 3, November 2017, Special Update on Investor-State Dispute Settlement: Facts and Figures, p. 6.