

Full Protection and Security

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Most investment treaties contain provisions granting full protection and security for investments. The wording of these clauses suggests that the host State is under an obligation to take active measures to protect the investment from adverse effects. The adverse effects may stem from private parties or from actions of the host State and its organs. More recently tribunals have found that provisions of this kind also guaranteed legal security enabling the investor to pursue its rights effectively. Tribunals have disagreed on whether full protection and security merely reflects the broader, fair and equitable treatment standard and customary international law or offers an independent and additional standard. Arbitral practice is generally agreed that this standard of protection merely requires due diligence and does not create absolute liability.

1. Introduction

Most investment treaties contain provisions granting protection and security for investments. Many of these treaties, including the North American Free Trade Agreement (NAFTA),¹ refer to ‘full protection and security’.² Others, including the Energy Charter Treaty (ECT),³ refer to ‘most constant protection and security’. Some put ‘security’ before ‘protection’. These variations in language do not appear to carry any substantive significance.⁴

The wording of these clauses suggests that the host State is under an obligation to take active measures to protect the investment from adverse effects. The adverse effects may stem from private parties such as demonstrators, employees or business partners or from actions of the host State and its organs including its armed forces. In some cases tribunals found that provisions of this kind guaranteed *legal* security enabling the investor to pursue its rights effectively.

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¹ Article 1105(1).

² For the historical origin of the concept, see A Newcombe and L Paradell, *Law and Practice of Investment Treaties Standards of Treatment* 307–8 (Kluwer Alphen aan den Rijn 2009); JD Salacuse, *The Law of Investment Treaties* 208–10 (OUP, Oxford 2010).

³ Article 10(1).

⁴ For a detailed discussion of this point, see G Cordero Moss, ‘Full Protection and Security’ in A Reinisch (ed) *Standards of Investment Protection* 133–6 (OUP, Oxford 2008). See also *Parkerings v Lithuania*, Award, 11 September 2007, para 354.

A recurrent theme is the relationship of the standard of full protection and security to the standard of fair and equitable treatment and to the international minimum standard in customary international law. Tribunals have disagreed on whether full protection and security merely reflects the broader fair and equitable treatment (FET) standard and customary international law or offers an independent and additional standard.

Arbitral practice is generally agreed on the standard of liability in case of violations of full protection and security. It merely requires due diligence and does not create absolute liability.

2. *Physical Security*

It is beyond doubt that the standard of full protection and security relates to the physical protection of the investor and its assets. In fact, in a number of cases tribunals seem to have assumed that this standard applies exclusively or preponderantly to physical security and to the host State's duty to protect the investor against violence directed at persons and property stemming from State organs or private parties.⁵ Thus in *Rumeli v Kazakhstan* the Tribunal said:

The Arbitral Tribunal agrees with Respondent that the full protection and security standard... obliges the State to provide a certain level of protection to foreign investment from physical damage.⁶

In *Saluka v Czech Republic* the Tribunal said:

The 'full protection and security' standard applies essentially when the foreign investment has been affected by civil strife and physical violence... the 'full security and protection' clause is not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force.⁷

In *Eastern Sugar v Czech Republic* the Tribunal suggested that the standard protected investors against violence stemming from third parties. It said:

As the Tribunal understands it, the criterion in Art. 3(2) of the [Czech-Netherlands] BIT concerns the obligation of the host state to protect the investor from *third* parties, in the cases cited by the Parties, 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.⁸

⁵ *PSEG v Turkey*, Award, 19 January 2007, at paras 257–9; *Emon v Argentina*, Award, 22 May 2007, paras 284–7; *BG Group v Argentina*, Award, 24 December 2007, paras 323–8; *Sempre v Argentina*, Award, 28 September 2007, paras 321–4; *Plama v Bulgaria*, Award, 27 August 2008, para 180.

⁶ *Rumeli v Kazakhstan*, Award, 29 July 2008, para 668.

⁷ *Saluka Investments BV (The Netherlands) v The Czech Republic*, Partial Award, 17 March 2006, paras 483, 484.

⁸ *Eastern Sugar v Czech Republic*, Partial Award, 27 March 2007, para 203. Italics original.

As it turns out, the adverse effects of physical violence may stem from private parties⁹ or from actions of the host State and its organs.¹⁰

A. Protection against Private Violence

In the *ELSI* case¹¹ a Chamber of the International Court of Justice (ICJ) applied a provision in an FCN Treaty that granted ‘the most constant protection and security’ to the nationals and their property of the respective States. One charge by the Claimants was that the Italian authorities had allowed workers to occupy the factory. The Court’s Chamber found that, under the circumstances, the response of the Italian authorities had been adequate.¹² The Court said:

The reference in Article V to the provision of ‘constant protection and security’ cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.¹³

Therefore, *ELSI* demonstrates that under a treaty provision of this type, the host State is under an obligation to take measures to provide protection. In light of the specific factual circumstances of the case, the ICJ found that Italy had responded adequately.

Wena Hotels v Egypt,¹⁴ involved the forcible seizure of two hotels by employees of a State entity (EHC) with whom the investor had contractual relations. The treaty applicable in that case provided that investments ‘shall enjoy full protection and security’. Government officials did not participate in the forcible seizure but the police and other authorities took no effective measures to prevent or redress the seizure. The Tribunal had no doubt that Egypt violated its obligation to accord Full Protection and Security.¹⁵ This result was based on the finding that Egypt was aware of the intentions to seize the hotels and took no action to prevent EHC from doing so. In addition, the police and the competent ministry took no immediate action to restore the hotels to the investor. Also, no substantial sanctions had ever been imposed on the perpetrators. The Tribunal said:

84. The Tribunal agrees with Wena that Egypt violated its obligation under Article 2(2) of the IPPA to accord Wena’s investment ‘fair and equitable treatment’ and ‘full protection and security-’. Although it is not clear that Egyptian officials other than officials of EHC directly participated in the April 1, 1991 seizures, there is substantial evidence that Egypt was aware of EHC’s intentions to seize the hotels and took no

⁹ For a discussion see HE Zeitler, ‘The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harm Caused by Private Actors’ (2005) 3 *Stockholm Intl Arbitration Rev* 1.

¹⁰ *Parkerings v Lithuania*, n 4, para 355.

¹¹ *Eletronica Sicula SpA (ELSI) (United States of America v Italy)* [1989] ICJ Rep 15.

¹² Paras 105–8.

¹³ Para 108.

¹⁴ *Wena Hotels v Egypt*, Award, 8 December 2000 (2002) 41 *ILM* 896.

¹⁵ Para 84.

actions to prevent EHC from doing so. Moreover, once the seizures occurred, both the police and the Ministry of Tourism took no immediate action to restore the hotels promptly to Wena's control. Finally, Egypt never imposed substantial sanctions on EHC or its senior officials, suggesting Egypt's approval of EHC's actions.

In *Tecmed v Mexico*,¹⁶ the Claimant alleged that the Mexican authorities did not act efficiently against 'social demonstrations' and disturbances at the site of the landfill under dispute. The Tribunal applied a treaty provision providing for 'full protection and security to the investments... in accordance with International Law'. The Tribunal found that there was not sufficient evidence to prove that the Mexican authorities had encouraged, fostered or contributed to the actions in question. Nor was there evidence that the authorities had not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements. The Tribunal specifically mentioned that its finding also applied to the judicial system.¹⁷

Noble Ventures v Romania,¹⁸ involved demonstrations and protests by employees. The relevant treaty provision stipulated that the 'Investment shall... enjoy full protection and security'. The Tribunal relied on the *ELSI* case, holding that the Respondent's conduct in the case before it was no more harmful than that of Italy in the earlier case. The Tribunal rejected the claim finding that it was difficult to identify any specific failure on the part of Romania to exercise due diligence in protecting the Claimant. In addition, it had not been established that any non-compliance with the obligation had prejudiced the Claimant to a material degree.¹⁹

In *Pantechniki v Albania*²⁰ the Claimant alleged that the Respondent was under an obligation not only actively to protect the Claimant's investment against riots and looting but also to take precautionary measures to prevent these events from occurring. The applicable treaty provision provided for 'full protection and security in the other Contracting Party'. The Tribunal held that the extent of the State's duty under this provision depended to some extent on the resources available to the State.²¹ The Tribunal concluded that the Albanian authorities were powerless in the face of social unrest of the magnitude in the case before it. It followed that the Claimant had not shown that Albania had failed to comply with its duty to extend full protection and security.

The above cases concerned adverse action not by State organs but by private persons or groups. The overall picture emerging from these cases is that a forcible seizure of or interference with the investment, even by a private party, may find its sanction in the standard of protection and security. In these

¹⁶ *Técnicas Medioambientales Tecmed S. A. v The United Mexican States*, Award, 29 May 2003 (2004) 43 ILM 133.

¹⁷ Paras 175–7.

¹⁸ *Noble Ventures Inc. v Romania*, Award, 12 October 2005.

¹⁹ Paras 164–6.

²⁰ *Pantechniki v Albania*, Award, 30 July 2009, paras 71–84.

²¹ Para 77.

situations the tribunals found that the host State's only duty was to exercise due diligence in protecting the investors from forcible interference. Significantly, the only case in which a breach of the protection and security standard was found (*Wena*) involved a State controlled entity as perpetrator of the violence.

B. Protection Against Violence by State Organs

In other cases the adverse action was directly perpetrated by State organs. The host State's duty is not restricted to preventing damaging acts by private actors. The State's responsibility extends to actions perpetrated by its organs.²² The applicability of a treaty provision on protection and security to direct attacks on the investor's person and property by organs of the host State is beyond doubt. In *Biwater Gauff v Tanzania* the Tribunal said:

The Arbitral Tribunal also does not consider that the 'full security' standard is limited to a State's failure to prevent actions by third parties, but also extends to actions by organs and representatives of the State itself.²³

In *AAPL v Sri Lanka*,²⁴ the Sri Lankan Security Forces had destroyed the investment in the course of a counter insurgency operation. The applicable treaty provided that foreign investments 'shall enjoy full protection and security'. The Tribunal rejected a suggestion that this provision created a strict liability on the part of the host State but held that the traditional rule of due diligence had to apply.²⁵ On that basis it found that the force deployed by the armed forces was excessive and unwarranted by the circumstances and found the Respondent responsible.²⁶

In *AMT v Zaire*,²⁷ the investment had been subject to looting by elements of Zaire's armed forces. The applicable treaty provided that '... protection and security of investment shall be in accordance with applicable national laws, and may not be less than that recognized by international law...'. The Tribunal found that the treaty provision imposed upon Zaire a duty of vigilance which would not be inferior to the minimum standard of international law. Zaire had

²² See the International Law Commission's Articles on State Responsibility:

Article 4: Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

²³ *Biwater Gauff v Tanzania*, Award, 24 July 2008, para 730.

²⁴ *AAPL v Sri Lanka*, Award, 21 June 1990, 4 ICSID Rep 246.

²⁵ Paras 45–53.

²⁶ Paras 78–86.

²⁷ *AMT v Zaire*, Award, 21 February 1997, 5 ICSID Rep 11.

breached this obligation by taking no measure that would ensure the protection and security of the investment. It followed that Zaire was in breach of the treaty's obligation.²⁸ The Tribunal said:

... Zaire has breached its obligation by taking no measure whatever that would serve to ensure the protection and security of the investment in question... Zaire is responsible for its inability to prevent the disastrous consequences of these events adversely affecting the investments of AMT which Zaire had the obligation to protect.²⁹

... Zaire has manifestly failed to respect the minimum standard required of it by international law.³⁰

...

The responsibility of the State of Zaire is incontestably engaged by the very fact of an omission by Zaire to take every measure necessary to protect and ensure the security of the investment made by AMT in its territory.³¹

In *Eureko v Poland*,³² the discussion of protection and security was somewhat hypothetical. The Claimant alleged harassment by Polish authorities of the investor's senior representatives.³³ It invoked a treaty provision under which the host State was to 'accord to such investments full security and protection'. The Tribunal found that there was no clear evidence that Poland was the author or instigator of the actions in question. Although the Tribunal was not convinced that the harassment breached the standard of full security and protection, certain of the acts were disturbing and came close to the line of treaty breach. The Tribunal added that if such actions were to be repeated and sustained, it may be that the responsibility of the government would be incurred.³⁴

The cases summarized above indicate that unjustified coercive measures taken by organs of the host State against the investor and his property constitute violations of the 'protection and security' standard if they prejudice the investor to a material degree.

3. Legal Protection

There is also authority indicating that the principle of full protection and security reaches beyond safeguard from physical violence and requires legal protection for the investor.³⁵ Some treaties actually refer to 'legal security'.³⁶

²⁸ Paras 6.02–6.11.

²⁹ Para 6.08.

³⁰ Para 6.10.

³¹ Para 6.11.

³² *Eureko B.V. v Poland*, Partial Award, 19 August 2005.

³³ Unfortunately the Award does not describe the harassment.

³⁴ Paras 236, 237.

³⁵ See also *Saluka Investments BV (The Netherlands) v The Czech Republic*, n 7, paras 483, 484, where the Tribunal after stating that the standard applies essentially to physical integrity, proceeds to apply it to the investment's legal protection.

³⁶ *Siemens v Argentina*, Award, 6 February 2007, paras 286, 303.

Writing about the Energy Charter Treaty, which promises ‘most constant protection and security’³⁷ *Wälde* describes the standard as going beyond ‘police protection’ in a physical sense of security. Rather, this standard would include economic regulatory powers. He writes:

This obligation would not only be breached by active and abusive exercise of State powers but also by the omission of the State to intervene where it had the power and duty to do so to protect the normal ability of the investor’s business to function... a duty, enforceable by investment arbitration, to use the powers of government to ensure the foreign investment can function properly on a level playing field, unhindered and not harassed by the political and economic domestic powers that be.³⁸

In the *ELSI* case³⁹ before the ICJ, the guarantee of ‘the most constant protection and security’ in an FCN Treaty was relied upon in two contexts. One concerned the factory’s occupation by workers. The second complaint based on this treaty provision concerned the time taken (16 months) for a decision on an appeal against an order requisitioning the factory. The ICJ’s Chamber examined this argument and found that the time taken, though undoubtedly long, did not violate the treaty standard in view of other procedural safeguards under Italian law.⁴⁰ Although the Chamber rejected the argument on factual grounds, it follows from this decision that *ELSI* may be quoted in support of the argument that the ‘protection and security standard’ is not restricted to physical protection but extends to legal protection through domestic courts.

In *CME v Czech Republic*⁴¹ a regulatory authority had created a legal situation that enabled the investor’s local partner to terminate the contract on which the investment depended. The Tribunal applied the following provision in the bilateral investment treaty (BIT) between the Czech Republic and the Netherlands:

...each Contracting Party shall accord to such investments full security and protection...

The Tribunal said:

613. The Media Council’s actions in 1996 and its actions and inactions in 1999 were targeted to remove the security and legal protection of the Claimant’s investment in the Czech Republic... The host State is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies is the agreed and approved security and protection of the foreign investor’s investment withdrawn or

³⁷ ECT, art 10(1).

³⁸ TW Wälde, ‘Energy Charter Treaty-based Investment Arbitration’ (2004) 5 J World Invest Trade 390–1.

³⁹ See n 11, above.

⁴⁰ Para 109.

⁴¹ *CME v The Czech Republic*, Partial Award, 13 September 2001, 9 ICSID Rep 121.

devalued. This is not the case. The Respondent therefore is in breach of this obligation.⁴²

*Lauder v The Czech Republic*⁴³ concerned the same set of facts. The BIT between the Czech Republic and the United States provides that

... [i]nvestments... shall enjoy full protection and security.

The Tribunal found that this provision had not been violated since none of the actions or inactions of the Media Council had caused direct or indirect damage to the Claimant's investment and the termination of the contract by the investor's local business partner was not attributable to the host State. The Tribunal said:

314. The investment treaty created no duty of due diligence on the part of the Czech Republic to intervene in the dispute between the two companies over the nature of their legal relationships. The Respondent's only duty under the Treaty was to keep its judicial system available for the Claimant and any entities he controls to bring their claims...⁴⁴

Although *CME* and *Lauder* reached different conclusions, the differences are the consequence of diverse assessments of the facts. Both decisions indicate that the principle of protection and security is relevant to the protection of legal rights including the availability of a judicial system that protects the investor's interests.

In *CSOB v Slovakia*⁴⁵ the investor had extended a loan to a Slovak collection company (SI) whose losses were to be covered by Slovakia. The Tribunal had no doubts that the investor's rights arising from this arrangement were covered by the BIT's clause on full protection and security. The Tribunal said:

The Slovak Republic's denial of CSOB's title to request from the Slovak Republic that SI's losses are covered would deprive CSOB from any meaningful protection for its loan and thus breach the Slovak Republic's commitment to let CSOB 'enjoy full protection and security' as stated in Article 2(2) BIT...⁴⁶

In *Azurix v Argentina*⁴⁷ the Tribunal confirmed that 'full protection and security may be breached even if no physical violence or damage occurs'.⁴⁸ The Tribunal said:

The cases referred to above show that full protection and security was understood to go beyond protection and security ensured by the police. It is not only a matter of physical security; the stability afforded by a secure investment environment is as

⁴² Para 613.

⁴³ *Ronald S. Lauder v The Czech Republic*, Award, 3 September 2001, 9 ICSID Rep 66.

⁴⁴ Para 314.

⁴⁵ *Československá Obchodní Banka A.S. v The Slovak Republic*, Award, 29 December 2004.

⁴⁶ Para 170.

⁴⁷ *Azurix Corp. v The Argentine Republic*, Award, 14 July 2006.

⁴⁸ Para 406.

important from an investor's point of view. The Tribunal is aware that in recent free trade agreements signed by the United States, for instance, with Uruguay, full protection and security is understood to be limited to the level of police protection required under customary international law. However, when the terms 'protection and security' are qualified by 'full' and no other adjective or explanation, they extend, in their ordinary meaning, the content of this standard beyond physical security.⁴⁹

In *Siemens v Argentina*⁵⁰ the Tribunal derived additional authority for the proposition that 'full protection and security' goes beyond physical security from the fact that the applicable BIT's definition of investment applied also to intangible assets:

As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the obligation to provide full protection and security is wider than 'physical' protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.⁵¹

The Tribunal concluded that the initiation of renegotiations for the sole purpose of reducing costs for the host State, unsupported by any declaration of public interest, affected the legal security of Siemens' investment.⁵²

In *Vivendi v Argentina*, the respondent had argued that the standard of protection and full security was limited in its applicability to physical interference.⁵³ The Tribunal rejected this contention and said:

If the parties to the BIT had intended to limit the obligation to 'physical interferences', they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor's investment of protection and full security, providing, in accordance with the Treaty's specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment.⁵⁴

Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized.⁵⁵

The Award in *Bivwater Gauff v Tanzania* confirms this trend. The Tribunal said:

The Arbitral Tribunal adheres to the *Azurix* holding that when the terms 'protection' and 'security' are qualified by 'full', the content of the standard may extend to

⁴⁹ Para 408.

⁵⁰ *Siemens v Argentina*, n 36.

⁵¹ Para 303.

⁵² Para 308.

⁵³ *Compañía de Aguas del Aconquija S.A. and Vivendi Universal v Argentina*, Award 20 August 2007, para 7.4.14.

⁵⁴ Para 7.4.15.

⁵⁵ Para 7.4.17.

matters other than physical security. It 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.⁵⁶

In *National Grid v Argentina*, the Tribunal stated categorically:

The Tribunal concludes that the phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets.⁵⁷

In *Siag v Egypt*,⁵⁸ the claim based on the guarantee of 'full protection in the territory of the other Contracting Party' concerned legal as well as police protection. The Claimant's investment had been expropriated by force on the basis of executive resolutions that were contrary to several court decisions. The claimants had made several unsuccessful requests to the police that their investment be protected. The Tribunal said:

The Tribunal is of the view that the conduct of Egypt fell well below the standard of protection that the Claimants could reasonably have expected, both in allowing the expropriation to occur and in subsequently failing to take steps to return the investment to Claimants following repeated rulings of Egypt's own courts that the expropriation was illegal.⁵⁹

These authorities suggest that the duty of protection and security extends to providing a legal framework that offers legal protection to investors.⁶⁰ This includes substantive provisions protecting investments but also appropriate procedures that enable investors to vindicate their rights.

4. *The Relationship of Full Protection and Security to Customary International Law*

The question whether provisions referring to 'full protection and security' and to 'FET' create independent treaty standards or are merely references to the international minimum standard under customary international law has been the object of some debate. Article 1105(1) of the NAFTA refers to both FET and to full protection and security⁶¹ and is widely treated as reflecting the traditional international minimum standard. But this provision has certain peculiarities that are absent from most other treaty provisions dealing with full

⁵⁶ *Bivater Gauff v Tanzania*, n 23, para 729. Emphases in original.

⁵⁷ *National Grid v Argentina*, Award, 3 November 2008, para 189.

⁵⁸ *Siag v Egypt*, Award, 1 June 2009, paras 445–8.

⁵⁹ Para 448.

⁶⁰ For a different view see: Salacuse (n 2) 213–16.

⁶¹ Article 1105: Minimum Standard of Treatment: 1. Each Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.

protection and security: the provision refers to the ‘Minimum Standard of Treatment’ in the heading—an evident reference to general international law. In addition the provision refers to FET and to full protection and security as part of international law: ‘international law, including FET and full protection and security’. Both features suggest that under this provision full protection and security, as well as FET are indeed part of international law.

Article 1105(1) of the NAFTA has been the subject of an official interpretation by the NAFTA Free Trade Commission. The interpretation states that Article 1105(1) reflects the customary international law minimum standard and does not require treatment beyond what is required by customary international law. The relevant part of the Note of Interpretation of 31 July 2001 is as follows:

Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.

2. 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.⁶²

...

NAFTA tribunals have accepted the official interpretation.⁶³ The subsequent BIT practice of the United States⁶⁴ and of Canada⁶⁵ has also followed this interpretation. However, the relevance of this interpretation is limited to Article 1105(1) of the NAFTA and cannot be transposed to other treaties.

In *ELSI*⁶⁶ the FCN treaty supplemented the ‘most constant protection and security’ standard by adding ‘and shall enjoy in this respect the full protection and security required by international law’. The Chamber of the ICJ took this to mean that while the ‘protection and security’ must conform to the minimum international standard, this treaty provision sets standards which may go further in their protection than general international law requires.⁶⁷ In other

⁶² FTC Note of Interpretation of 31 July 2001 <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/NAFTA-Interpr.aspx?lang=en>>, accessed 4 June 2010.

⁶³ *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; *ADF Group Inc v United States of America*, Award, 9 January 2003, 6 ICSID Rep 470, paras 175–8; *Loewen Group, Inc and Raymond L. Loewen v United States of America*, Award, 26 June 2003, 7 ICSID Rep 442, paras 124–8; *Waste Management, Inc. v United Mexican States*, Award, 30 April 2004 (2004) 43 ILM 967, paras 90–1; *Methanex v United States*, Award, 3 August 2005, Part IV, Chapter C, paras 17–24; *Thunderbird v Mexico*, Award, 26 January 2006, paras 192, 193. See also *United Mexican States v Metalclad Corp.*, Judgment, Supreme Court of British Columbia, 2 May 2001, 5 ICSID Rep 236, paras 61–5.

⁶⁴ See Chile–United States FTA of 2003, art 10.4; United States–Uruguay BIT of 2004, art 5; US Model BIT of 2004, art 5(2).

⁶⁵ Canada Model BIT, art 5.

⁶⁶ See n 11, above.

⁶⁷ Para 111.

words, the Chamber interpreted the reference to international law not as a limitation of the standard to the international minimum standard but found that general international law provided a residual standard below which the treaty standard may not fall.

On the other hand, the Tribunal in *Noble Ventures v Romania*,⁶⁸ said:

With regard to the Claimant's argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the '*Investment shall... enjoy full protection and security*', the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens.⁶⁹

The view that full protection and security, just like FET, represents an autonomous treaty standard that is independent of the international minimum standard under customary international law is clearly preferable. In terms of the ordinary meaning of the term, it is hard to see why the drafters of a treaty would use 'full protection and security' where they mean the 'minimum standard under customary international law'. This is particularly so if the treaty in question, as is often the case, contains separate reference to general international law. A number of authors have argued in favour of an autonomous concept of FET that is independent of and additional to customary international law.⁷⁰

Even without the benefit of a treaty provision guaranteeing full protection and security, an investor may find some comfort customary international law. The international minimum standard does contain certain duties to protect foreign investors against adverse action.

*Amco v Indonesia*⁷¹ was not decided on the basis of a BIT but in the framework of customary international law. In that case the investor's local partner (PT Wisma) in a lease and management contract took over the hotel that was the investment by force with the assistance of members of the Indonesian armed forces. The Tribunal held that the forcible takeover was not attributable to the Government of Indonesia. However, it found that Indonesia was in breach of international law since it had failed to protect the investor against the takeover of the hotel by its citizens. The Tribunal said:

It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty

⁶⁸ See n 18, above.

⁶⁹ Para 164. Italics original.

⁷⁰ FA Mann, 'British Treaties for the Promotion and Protection of Investments' (1981) 52 *British Year Book Int'l L* 241, 244; R Dolzer and M Stevens, *Bilateral Investment Treaties* (Nijhoff, The Hague 1995) 60; PT Muchlinski, *Multinational Enterprises and the Law* (1999) 626; UNCTAD Series on issues in international investment agreements, Fair and Equitable Treatment (1999) 13, 17, 23, 37–40, 53, 61; S Vasciannie, 'The Fair and Equitable Treatment Standard in International Investment Law and Practice' (1999) 70 *British Year Book Int'l L* 104–5, 139–44; C Schreuer, 'Fair and Equitable Treatment in Arbitral Practice' (2005) 6 *J World Invest Trade* 357, 359–64; Newcombe and Paradell (n 2) 264–75; Salacuse (n 2) 226–8.

⁷¹ *Amco Asia Corporation and Others v The Republic of Indonesia*, Award, 20 November 1984, 1 ICSID Rep 413.

to protect aliens and their investment against unlawful acts committed by some of its citizens (. . .). If such acts are committed with the active assistance of state-organs a breach of international law occurs.⁷²

5. *The Relationship of Full Protection and Security to FET*

Some tribunals have equated the standards of full protection and security with FET.⁷³ In *Wena Hotels v Egypt*⁷⁴ the Tribunal dealt with the two standards jointly without drawing any distinction between them.⁷⁵ In *Occidental v Ecuador*⁷⁶ the Tribunal seemed to regard the two standards as largely equivalent. After finding that the Respondent had violated the standard of FET, it said:

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.⁷⁷

Similarly, in *PSEG v Turkey* the Tribunal found that full protection and security would only exceptionally go beyond physical safety in which case the connection with FET would become very close. The situation did not qualify under full protection and security as a separate heading of liability since the anomalies were all included under the standard of FET.⁷⁸

By contrast, in *Azurix v Argentina*⁷⁹ the Tribunal found that the two standards were separate:

407. In some bilateral investment treaties, fair and equitable treatment and full protection and security appear as a single standard, in others as separate protections. The BIT falls in the last category; the two phrases describing the protection of investments appear sequentially as different obligations in Article II.2(a): ‘Investment shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and . . .’⁸⁰

The view that the two standards are to be seen as different obligations appears to be the better one. As a matter of interpretation, it appears unconvincing to assume that two standards listed separately in the same document have the same meaning. An interpretation that deprives a

⁷² Para 172.

⁷³ See also *National Grid v Argentina*, Award, 3 November 2008, paras 187, 189.

⁷⁴ *Wena Hotels Ltd v Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Rep 89.

⁷⁵ Paras 84–95.

⁷⁶ *Occidental Exploration and Production Co. v Ecuador*, Award, 1 July 2004.

⁷⁷ Para 187.

⁷⁸ *PSEG v Turkey*, n 5, paras 257–9.

⁷⁹ *Azurix Corp. v The Argentine Republic*, n 47.

⁸⁰ Para 407.

treaty provision of meaning is implausible. The Tribunal in *Jan de Nul v Egypt* said:

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. As put forward by the Claimants, this concept relates to the exercise of due diligence by the State.⁸¹

As a matter of substance, the content of the two standards is distinguishable.⁸² The FET standard consists mainly of an obligation on the host State's part to desist from behaviour that is unfair and inequitable. By contrast, by assuming the obligation of full protection and security the host State promises to provide a factual and legal framework that grants security and to take the measures necessary to protect the investment against adverse action by private persons as well as State organs. In particular, this requires the creation of legal remedies against adverse action affecting the investment and the creation of mechanisms for the effective vindication of investors' rights.

6. *The Standard of Liability*

There is broad agreement that the obligation to provide protection and security does not create absolute liability. Rather, the standard is one of 'due diligence', ie a reasonable degree of vigilance. *Dolzer* and *Stevens* have said with respect to the standard of full protection and security:

...the standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating 'strict liability' which would render a host State liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State.⁸³

In the *ELSI* case,⁸⁴ a Chamber of the ICJ said:

The reference... to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed.⁸⁵

In *AAPL v Sri Lanka*⁸⁶ the claimant had argued that the provision granting 'full protection and security' created a strict or absolute

⁸¹ *Jan de Nul v Egypt*, Award, 6 November 2008, para 269. Footnote omitted. See also *Siemens v Argentina*, Award, 6 February 2007, para 302.

⁸² See also Moss (n 4) 146–9, 150. For a different view, see Newcombe and Paradell (n 2) 314.

⁸³ Dolzer and Stevens (n 70) 61. See also R Dolzer and C Schreuer, *Principles of International Investment Law* (OUP, Oxford 2008) 149, 150.

⁸⁴ See n 11, above.

⁸⁵ Para 108.

⁸⁶ See n 24, above, paras 45–53.

liability. The Tribunal went through a detailed analysis of this provision and concluded:

... the Tribunal declares unfounded the Claimant's main plea aiming to consider the Government of Sri Lanka assuming strict liability under Article 2.(2) of the Bilateral Investment Treaty, without any need to prove that the damages suffered were attributable to the State or its agents, and to establish the State's responsibility for not acting with 'due diligence'.⁸⁷

The Tribunal in *Tecmed v Mexico*⁸⁸ said:

177. The Arbitral Tribunal agrees with the Respondent, and with the case law quoted by it, in that the guarantee of full protection and security is not absolute and does not impose strict liability upon the State that grants it.⁸⁹

Similarly, the Tribunal in *Noble Ventures v Romania*,⁹⁰ after referring to the standard of full protection and security, said:

The latter is not a strict standard, but one requiring due diligence to be exercised by the State.⁹¹

Other tribunals have expressed similar views.⁹²

It is an open question whether the level of due diligence should depend on the host State's development and stability. The availability of resources may have a decisive impact on a State's ability to provide protection and security.⁹³ In *Pantechniki v Albania*,⁹⁴ the Tribunal distinguished between situations involving physical violence and situations akin to a denial of justice. The Tribunal found that no proportionality factor taking into account a country's resources was to be applied with respect to denial of justice. Judicial protection is not subject to a relativistic standard. To take a country's state of development into account would remove any incentive for improvement.⁹⁵

By contrast, the Tribunal applied a modified objective standard of due diligence in a situation of public violence. It found that liability in a situation involving civil strife depended on the host State's resources. The Tribunal said:

A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civil disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and

⁸⁷ Para 53.

⁸⁸ See n 16, above.

⁸⁹ Para 177.

⁹⁰ See n 18, above.

⁹¹ Para 164.

⁹² *Wena Hotels Ltd. v Arab Republic of Egypt*, Award, 8 December 2000, 6 ICSID Rep 68, para 84; *Saluka Investments BV (The Netherlands) v The Czech Republic*, n 35, para 484; *MCI v Ecuador*, Award, 31 July 2007, paras 245–6; *Plama v Bulgaria*, n 5, para 181; *Briwater Gauff v Tanzania*, n 23, paras 725, 726; *Rumeli v Kazakhstan*, n 6, para 668; *Siag v Egypt*, n 58, para 447.

⁹³ Newcombe and Paradell (n 2) 310.

⁹⁴ *Pantechniki v Albania*, Award, n 20, paras 71–84.

⁹⁵ Para 76.

fragile. There is no issue of incentives or disincentives with regard to unforeseen breakdowns of public order; it seems difficult to maintain that a government incurs international responsibility for failure to plan for unprecedented trouble of unprecedented magnitude in unprecedented places. The case for an element of proportionality in applying the international standard is stronger than with respect to claims of denial of justice.⁹⁶

Where acts of the host State's judiciary are at stake this means that the State is under an obligation to make a functioning system of courts and legal remedies available to the investor. This does not mean that every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is 'wrong' would not automatically lead to responsibility as long as the courts have acted in good faith and have reached decisions that are tenable.

The Tribunal in *Parkerings v Lithuania* analysed the host State's duty under the full protection and security standard to make its judicial system available in the following terms:

360. The Respondent's duty under the Treaty was, first, to keep its judicial system available for the Claimant to bring its contractual claims and, 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.

361. The Claimant had the opportunity to raise the violation of the Agreement 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.⁹⁷

7. Conclusion

Despite its presence in the large majority of treaties for the protection of foreign investments, the standard of full protection and security has been used sparingly by investment tribunals.

The concept of full protection and security has its origin in a guarantee of physical security for investors and investments. The host State is under an obligation to provide some measure of protection against forcible interference by private persons such as employees, business partners or demonstrators. In addition, the standard of full protection and security is also directed against forcible interference by State organs such as police and the armed forces.

More recently tribunals have extended the protection afforded by this standard beyond physical interference to legal safeguards for the investment.

⁹⁶ Para 77.

⁹⁷ *Parkerings v Lithuania*, n 4, paras 360, 361.

Under this interpretation the host State is under an obligation to provide a legal framework that enables the investor to take effective steps to protect its investment.

Some treaties, especially the NAFTA, restrict the meaning of the standard of full protection and security to the international minimum standard required by customary international law. In the absence of an explicit restriction to the international minimum standard, the preferable view is to treat this treaty standard as autonomous and additional to customary international law.

In a number of cases full protection and security has lingered in the shadow of another treaty standard, FET. Some tribunals have even doubted whether the former standard had an existence independent of the latter one. Other tribunals have accepted the independent existence of both standards. As a matter of substance the two standards are distinguishable: FET requires the host State to desist from behaviour that appears unfair and inequitable. By contrast, full protection and security requires the State actively to provide a framework that protects the investment from adverse interference.

The obligation to provide full protection and security is not unlimited and does not create absolute liability. Tribunals have consistently held that what is required is due diligence on the part of the host State. Whether the degree of diligence required of a host State depends on its state of development and on the resources at its disposal is still a matter of discussion.