A TRAP FOR THE UNWARY: DELINEATING PHYSICAL AND LEGAL PROTECTION UNDER FULL PROTECTION AND SECURITY CLAUSES

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Abstract

*This article considers the scope of protection accorded by the full protection and security ["**FPS**"] standard and the potentially inadvertent impact of the wording of certain FPS clauses on this scope. Based on a review of the FPS clauses in model bilateral investment treaties ["**BITs**"] issued by 45 countries around the world, this article identifies a growing trend towards limiting the scope of FPS clauses to providing physical protection and security and assesses the typical styles of drafting such FPS clauses. This article concludes, with the support of investment arbitration awards, that broadly-worded FPS clauses – even if expressly limited to physical protection and security – may enable claims related to the legal protection and security of investments to be successfully raised.*

I. Introduction

Customary international law requires a State to "*accord protection and security to foreigners and their property*".[1] Under international investment agreements, this obligation is typically set forth within an FPS clause. These clauses essentially record the host State's obligation to take active measures to protect the investment from adverse effects.[2]

Discussion and debate over FPS clauses typically relate to three different topics: (1) the standard of protection and security the host State is expected to provide a foreign investor or investment; (2) the responsibility of the host State for the actions of third parties; and (3) the scope of protection and security offered. This article is concerned with the third question: whether FPS clauses cover only *physical* protection and security or can also include *legal* protection and security.

The scope of the FPS clause and the question of its applicability to instances of non-physical harm have been, and continue to be, discussed and debated.[3] While there is no consensus yet on whether FPS clauses are intended to cover instances of physical and non-physical harm, it is understood that the specific language of an FPS clause can be very instructive in this exercise; while some clauses remain unqualified, others will expressly provide only for *physical* or, alternatively, for *legal* protection and security.

Globally, as will be set out in Part III of this article, States are increasingly disposed towards restricting the FPS clause to *physical* protection and security and, with this intention, expressly limit the scope of the FPS clauses in their model BITs and international investment agreements

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1 Jack Rankin v. Iran, Award No. 326-10913-2, 17 Iran-U.S. Cl. Trib. Rep. 135, ¶ 30 (1987).

2 Christoph Schreuer, *Full protection and security,* 1(2) J. INT'L DISP. SETTLEMENT 353 (2010).

3 *See* Thomas W. Wälde, *Energy charter treaty-based investment arbitration,* 5 J. WORLD INV. TRADE 373, 390–391 (2004); Schreuer, *supra* note 2; SEBASTIÁN MANTILLA BLANCO, FULL PROTECTION AND SECURITY IN INTERNATIONAL INVESTMENT LAW 278 (2019); MAXIMILIAN CLASMEIER, ARBITRAL AWARDS AS INVESTMENTS: TREATY INTERPRETATION AND THE DYNAMICS OF INTERNATIONAL INVESTMENT LAW 32 (2017).

to *physical* protection and security. Inadvertently, however, as a result of the vague wording of some of these clauses, it is possible that acts and/or omissions covered by the *legal* protection and security standard may also find themselves covered by an FPS clause that, on its face, articulates a *physical* protection and security standard.

This article assesses the possibility of such ingress by looking at the wording of FPS clauses. By way of background, in Part II, the article will first consider the types of acts and/or omissions that have been recognised by arbitral tribunals to fall under the *physical* or *legal* formulations of the FPS clause. Following this, in Part III, the article will set out and discuss the global trend towards restricting the FPS provisions to a purely *physical* interpretation. This part will also look at the common trends in terms of the wording of FPS clauses limited to *physical* protection and security. In Part IV, the article will consider the impact of a vaguely worded FPS clause on its intended restricted application. Finally, in Part V, the article will provide some concluding comments.

II. The scope of protection offered by FPS clauses

In the context of investor-State arbitrations, the FPS clause was first raised in *Asian Agricultural Products Ltd.* v. *Republic of Sri Lanka*[4] ["**AAPL**"] in 1987. In this case, the investor – a 48.2% shareholder in a Sri Lankan joint venture company established to cultivate and export shrimp – brought a claim against Sri Lanka under the Sri Lanka-United Kingdom BIT following the destruction of the joint venture's shrimp farm as a result of a counter-insurgency operation of the Sri Lankan Security Forces. The investor based its claim, among other things, on the FPS clause in the BIT.[5]

Although the scope of the protection afforded by the FPS clause was not in question in this case[6] – the investor only claimed that there had been a violation of Sri Lanka's responsibility to ensure the *physical* protection and security of the shrimp farm – AAPL is an important milestone because it heralded the invocation of these clauses to varied situations in the context of investor-State arbitrations.

The rest of this part will focus on how FPS clauses have been interpreted in investor-State arbitrations and the scope of the protection deemed to be provided by them.

A. Physical protection and security

The traditional understanding of the FPS standard is that it is limited to *physical* protection and security. As noted in *Saluka Investments B.V.* v. *Czech Republic* ["**Saluka**"], the FPS clause applies "*essentially when the foreign investment has been affected by civil strife and physical violence*".[7] In addition to

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4 Asian Agric. Prod. Ltd. v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 245 (1997) [*hereinafter* "AAPL"].

5 *Id.* ¶ 7.

6 The Tribunal's determination was limited to the standard of liability imposed by the FPS clause. The Tribunal ultimately determined that the FPS clause did not impose strict liability on the host State for losses suffered by a foreign investment protected under an investment treaty.

7 Saluka Inv. B.V. v. Czech Republic, Case No. 2001-04, Partial Award, ¶ 483 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010) [*hereinafter* "Saluka"].

application to situations of attacks on or destruction of an investment as set out in *AAPL*,[8] the FPS clause has been recognised to apply in the situations outlined below as well.

i. Looting of premises

In *American Manufacturing and Trading, Inc.* v. *Republic of Zaire*,[9] the FPS clause in the United States-Zaire BIT was invoked in the context of two separate occasions of destruction and looting of the premises of the investor by members of the Zairian armed forces. In this case, the Tribunal found in favour of the investor and determined that Zaire had violated the FPS clause because of its failure to take "*every measure necessary to protect and ensure the security of the investment*".[10] This award is noteworthy because it expanded the FPS provision to include instances of looting of property. Similarly, in *Cengiz İnşaat Sanayi ve Ticaret A.S* v. *Libya*, the Tribunal found that the pillaging and eventual take-over of the investor's worksites amounted to a violation of the FPS provision.[11]

In *Adel A Hamadi Al Tamimi* v. *Sultanate of Oman*,[12] the Tribunal introduced a restriction on the claims that may be brought in this regard. Here, the investor had, among other things, claimed that following the Royal Oman Police's ejection of the investor from the premises of his investment and the subsequent closure of the investment site,[13] Oman had permitted the theft of equipment and other property from the investor's worksite and that this constituted a breach of the FPS provision in the free trade agreement between the United States and Oman.[14] The Tribunal rejected this claim on the basis that the FPS protection could not be extended to 'abandoned investments' or investments over which the investor's property rights had been extinguished.[15]

ii. Seizure of premises

In *Wena Hotels Ltd.* v. *Arab Republic of Egypt*[16] ["**Wena Hotels**"], the investment in question – two hotels in Egypt that had been provided to the investor on long-term lease agreements by Egyptian Hotels Company ["**EHC**"], a wholly-owned subsidiary of Egypt – was forcibly seized by EHC. Consequently, the investor initiated arbitral proceedings against Egypt under the Egypt-United Kingdom BIT claiming, among other things, that Egypt had failed to accord full protection and security to the investment.[17] The Tribunal found that the act of seizure would fall within the scope of the FPS protection under the BIT.[18] Since *Wena Hotels*, the FPS clause has

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8 AAPL, ICSID Case No. ARB/87/3, Final Award (June 27, 1990), 4 ICSID Rep. 245 (1997). Apart from AAPL, this issue also arose and FPS protection was successfully claimed in the case of Ampal-Am. Isr. Corp. & Ors. v. Arab Republic of Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 283–291 (Feb. 21, 2017).

9 Am. Mfg. & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997), 5 ICSID Rep. 11 (2002).

10 *Id.* ¶ 6.11.

11 Cengiz Insaat Sanayi ve Ticaret A.S v. Libya, ICC Case No. 21537/ZF/AYZ, Award, ¶ 435 (Nov. 7, 2018) [*hereinafter* "Cengiz"].

12 Adel A Hamadi Al Tamimi v. Sultanate of Oman, ICSID Case No. ARB/11/33, Award, ¶ 171 (Nov. 3, 2015).

13 *Id.* ¶¶ 169–170.

14 *Id.* ¶ 394.

15 *Id.* ¶¶ 448–452.

16 Wena Hotels Ltd. v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award (Dec. 8, 2002), 6 ICSID Rep. 89 (2006).

17 *Id.* ¶ 80.

18 *Id.* ¶¶ 84–91, 95,131.

been invoked successfully in the context of seizure of foreign investments in other cases as well.[19]

iii. Forced removal of personnel from the premises of the investment and usurpation of control over the investment

In *Biwater Gauff (Tanzania) Ltd.* v. *United Republic of Tanzania*,[20] a dispute arose out of the termination of the investor's contract to develop Tanzania's water and sewage infrastructure and services by the Dar-es-Salaam Water and Sewerage Authority ["**DAWASA**"], a State agency. The investor claimed that there had been a violation of the FPS clause in the Tanzania-United Kingdom BIT on the basis that the DAWASA usurped the investor's management and control of its facilities, seized and occupied the premises, and forcibly removed and deported the investor's personnel.[21] The Tribunal found that all these actions constituted a violation of the FPS clause, noting, importantly, that these activities would constitute a violation of the FPS provision even without the use of force.[22]

iv. Occupation of premises and the failure to provide an adequate police response

In *Bernhard von Pezold and Others* v. *Republic of Zimbabwe*,[23] a claim under the FPS clauses of the Switzerland-Zimbabwe and Germany-Zimbabwe BITs was brought in relation to the State's land reform programs and the resultant incursion and occupation of the investors' properties by local war veterans. In this case, the Tribunal decided that Zimbabwe's failure to protect the investors' properties from occupation or to remove the settlers and the lack of response from the police to various violent incidents that subsequently occurred were all in violation of the FPS provisions under the BITs.[24] Similarly, in *MNSS B.V. and Recupero Credito Acciaio N.V* v. *Montenegro*, the Tribunal found Montenegro in breach of the FPS clause under the Montenegro-Netherlands BIT for the failure to provide police protection during two separate instances of occupation of the investors' premises.[25] In particular, the Tribunal noted that Montenegro should have had "*a more pro-active attitude to ensure the protection of persons and property*".[26]

In *Joseph Houben* v. *Republic of Burundi*, the Tribunal found Burundi responsible for failing to respond adequately to the invasion and illegal settlement of the investor's property.[27] In this case, parts of the investor's land had been sold to and occupied by the local population under the approval of the local administration.[28] Although the investor had repeatedly protested against this situation and requested police assistance, the local authorities had refused to take any action.[29]

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19 Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445–448 (June 1, 2009); Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanz., ICSID Case No. ARB/05/22, Award, ¶¶ 729–731 (July 24, 2008) [*hereinafter* "Biwater Gauff"].

20 Biwater Gauff, ICSID Case No. ARB/05/22, Award (July 24, 2008).

21 *Id.*, ¶¶ 714, 814(c).

22 *Id.* ¶¶ 729–731.

23 Bernhard von Pezold & Ors. v. Republic of Zim., ICSID Case No. ARB/10/15, Award (July 28, 2015).

24 *Id.* ¶¶ 593–599.

25 MNSS B.V. & Recupero Credito Acciaio N.V v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 348–356 (May 4, 2016).

26 *Id.* ¶ 356.

27 Sebastian Perry, *Burundi claim leads to Pyrrhic victory*, GLOB. ARB. REV. (Apr. 15, 2016), *available at* https://globalarbitrationreview.com/article/1035462/burundi-claim-leads-to-pyrrhic-victory.

28 Joseph Houben v. Republic of Burundi, ICSID Case No. ARB 13/7, Award, ¶ 93 (Jan. 12, 2016).

29 *Id.* ¶¶ 166–167.

However, in *Toto Costruzioni Generali S.p.A.* v. *Republic of Lebanon*, the Tribunal found that a temporary obstruction to the investment would not constitute a violation of the FPS provision.[30]

v. *Repeated and sustained harassment of personnel*

In *Eureko B.V.* v. *Republic of Poland*, although the Tribunal was not convinced that the alleged acts of harassment of the senior representatives of Eureko's management at issue in the case breached the FPS standard under the Netherlands-Poland BIT,[31] the Tribunal concluded that a breach of the FPS provision could have occurred had the acts been "*repeated and sustained*".[32]

vi. *Deployment of security forces at the site of the investment*

In *OI European Group B.V.* v. *Bolivarian Republic of Venezuela*, the Tribunal determined what would *not* constitute a breach of the FPS clause under the Netherlands-Venezuela BIT: measures taken by the State's security forces to protect the investment.[33] In this case, the investor had argued that the deployment of security personnel at its plants had "*caused an atmosphere in which the employees of the Plants were threatened and intimidated and had no other alternative than to obey the orders of [the] Respondent or face legal action*".[34] Nevertheless, the Tribunal ruled that the "*mere presence*" of security forces was only a precautionary measure that a "*government authority legitimately can and should take*".[35] It is unclear from the Tribunal's wording, however, if the Tribunal's decision was founded on a lack of sufficient evidence of the investor's allegations[36] or purely on the understanding that the measures taken by the security forces to "*protect*" an investment could not in themselves be found to be in violation of the FPS provision.

B. Unqualified protection and security

Following the award in *Ronald S. Lauder* v. *Czech Republic*[37] ["**Lauder**"] in 2001, there have also been numerous instances where the FPS provision has been accorded a more expansive interpretation in investor-State arbitrations to include *legal* protection and security. Broadly speaking, tribunals have done this by recognising two different types of protections: appropriate procedures that enable investors to vindicate their rights and substantive provisions to protect investments.[38]

i. *Procedural aspects of legal protection and security*

In *Lauder*, the investor had argued that changes to the State's legal framework and the administrative actions of the State's media council had adversely affected the investor's investment and that this constituted a breach of the FPS clause in the United States-Czech

30 Toto Costruzioni Generali S.p.A. v. Republic of Leb., ICSID Case No. ARB/07/12, Award, ¶¶ 226–230 (June 7, 2012).

31 Eureko B.V. v. Republic of Pol., Partial Award, ¶ 236 (Aug. 19, 2005), 12 ICSID Rep. 335 (2007).

32 *Id.* ¶ 237.

33 OI European Group B.V. v. Bolivarian Republic of Venez., ICSID Case No. ARB/11/25, Award, ¶ 580 (Mar. 10, 2015).

34 *Id.* ¶ 564.

35 *Id.* ¶ 580.

36 *Id.* ¶¶ 578–580 (the Tribunal's reasoning is limited to the "mere presence" of the security forces and is based on Venezuela's dismissal of the investor's allegations that the presence of the security forces created an intimidating atmosphere at its plants).

37 Ronald S. Lauder v. Czech Republic, Final Award (Sept. 3, 2001) [*hereinafter* "Lauder"].

38 Frontier Petro. Servs. Ltd. v. Czech Republic, Case No. 2008-09, Final Award, ¶ 263 (Nov. 12, 2010) (Perm. Ct. Arb. 2010).

Republic BIT.[39] Although the claims themselves were unsuccessful, the Tribunal noted that the FPS clause required the State "*to keep its judicial system available for the [investor] and any entities [the investor] controls to bring their claims, and for such claims to be properly examined and decided in accordance with domestic and international law*".[40] This decision thus established that a host State could be held liable under the FPS provision even for the lack of *judicial* security in a host State – a procedural element to ensure *legal* protection and security.

This approach has since been recognised in a number of other investor-State awards. For example, in *Marion Unglaube* v. *Republic of Costa Rica*,[41] although the Tribunal did not find that there had been a violation of the FPS clause in the Germany-Costa Rica BIT, the Tribunal noted that instances of "*impropriety, corruption or discrimination*" in the court proceedings could constitute a breach of the FPS clause.[42]

ii. Substantive aspects of legal protection and security

In *CME Czech Republic B.V.* v. *Czech Republic*[43] which arose out of the same facts and concerned the same issues of liability as *Lauder*, the Tribunal ruled that the changes to the State's legal framework and the administrative actions of the State's media council did in fact, breach the FPS provision. The Tribunal noted that as part of its FPS obligation, the host State "*is obligated to ensure that neither by amendment of its laws nor by actions of its administrative bodies, is the agreed and approved security and protection of the foreign investor's investment withdrawn or devalued*".[44]

Similarly, in *Siemens A.G.* v. *Argentine Republic*,[45] the FPS clause in the Argentina-Germany BIT itself provided for "*full protection as well as juridical security*".[46] Based on this language, the investor was able to successfully claim that the State's actions in relation to the renegotiation and termination of a contract that "*destroyed irreparably the legal framework for Siemens' investment*", constituted a breach of the FPS clause.[47] In determining that there had been a breach, the Tribunal found the lack of transparency in Argentina's handling of the investment to be decisive.[48] According to the Tribunal, *legal* security could be defined as "*the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application*".[49]

So too, in *National Grid P.L.C.* v. *Argentine Republic* ["**National Grid**"], the investor successfully claimed that the actions taken by Argentina to stem a financial crisis in 2001, which included the dismantling of the existing regulatory framework upon which the investor's investment relied,

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39 Lauder, Final Award, ¶ 305 (Sept. 3, 2001), 9 ICSID Rep. 62 (2001).
40 *Id.* ¶ 314.
41 Marion Unglaube v. Republic of Costa Rica, ICSID Case No. ARB/08/1, Award (May 16, 2012).
42 *Id.* ¶ 286.
43 CME Czech Republic B.V. v. Czech Republic, Partial Award (Sept. 13, 2001).
44 *Id.* ¶ 613.
45 Siemens A.G. v. Argentine Republic, ICSID Case No. ARB/02/8, Award (Jan. 17, 2007), 14 ICSID Rep. 513 (2009) [*hereinafter* "Siemens"].
46 Germany-Argentina BIT, art. 4(1), *available at* https://treaties.un.org/doc/Publication/UNTS/Volume%201910/v1910.pdf.
47 Siemens, ICSID Case No. ARB/02/8, Award, ¶ 276 (Jan. 17, 2007), 14 ICSID Rep. 513 (2009). An enumeration of the specific acts that the investor alleged violated the FPS clause is provided at ¶ 286.
48 *Id.* ¶ 308.
49 *Id.* ¶ 303.

and the resultant economic uncertainty that the investor suffered, constituted a breach of the FPS clause in the Argentina-United Kingdom BIT.[50]

Some tribunals have sought to justify this relatively expansive approach to defining FPS clauses by relying on the relationship between FPS and fair and equitable treatment ["**FET**"] clauses. For example, in *National Grid*, the Tribunal reasoned that the FPS clause in the BIT was not limited to granting protection and security of physical assets by referring to its inclusion in the "*same article of the Treaty as the language on fair and equitable treatment*".[51] The awards in *Occidental Exploration and Production Company* v. *Republic of Ecuador (I)* ["**Occidental**"] and *Azurix Corp.* v. *Argentine Republic (I)* ["**Azurix**"] are also good illustrations of this. In *Occidental*, the abrupt change of the State's tax law "*without providing any clarity about its meaning and extent and the practice and regulations*"[52] was deemed to have been a violation of the FPS clause under the Ecuador-United States BIT.[53] In *Azurix*, the State's harassment of the investor (by refusing to accept its notice of termination and repeated calls from State officials regarding the non-payment of bills)[54] and the politicisation of the tariff regime[55] was found to have constituted a violation of the FPS clause.[56] In both these cases, the tribunals determined that the FPS clause had been breached by assessing whether the FET clause under the BIT had been breached.[57] In the words of the Tribunal in *Occidental*, "*treatment that is not fair and equitable automatically entails an absence of full protection and security*".[58]

This is not to say, however, that the obligation to ensure substantive legal protection to a foreign investment is absolute. In *Mamidoil Jetoil Greek Petroleum Products Societe S.A.* v. *Republic of Albania*, the "*general business environment*" in a State was found to be an exception to this protection.[59] In this case, the investor alleged that Albania had deprived the investor's investment of the necessary protection and security owed under the Energy Charter Treaty by failing to enforce its legal framework, especially regarding fuel smuggling, tax evasion, and fuel adulteration.[60] The Tribunal rejected this claim on the basis that the conditions described by the investor constituted the "*general business environment and investment conditions*" in Albania;[61] while the investor might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Albania "*would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment*".[62]

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50 Nat'l Grid plc v. Argentine Republic, Award, ¶ 189 (Nov. 3, 2008).

51 *Id.*

52 Occidental Expl. & Prod. Co. v. Republic of Ecuador, LCIA Case No. UN3467, Final Award, ¶ 184 (July 1, 2004), 12 ICSID Rep. 59 (2007) [*hereinafter* "Occidental Exploration"].

53 *Id.* ¶ 187.

54 Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award, ¶ 376 (July 14, 2006), 14 ICSID Rep. 374 (2009).

55 *Id.* ¶ 375.

56 *Id.* ¶ 408.

57 *Id.*; Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 187 (July 1, 2004), 12 ICSID Rep. 59 (2007).

58 Occidental Exploration, LCIA Case No. UN3467, Final Award, ¶ 184 (July 1, 2004), 12 ICSID Rep. 59 (2007).

59 Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Republic of Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 823–829 (Mar. 30, 2015).

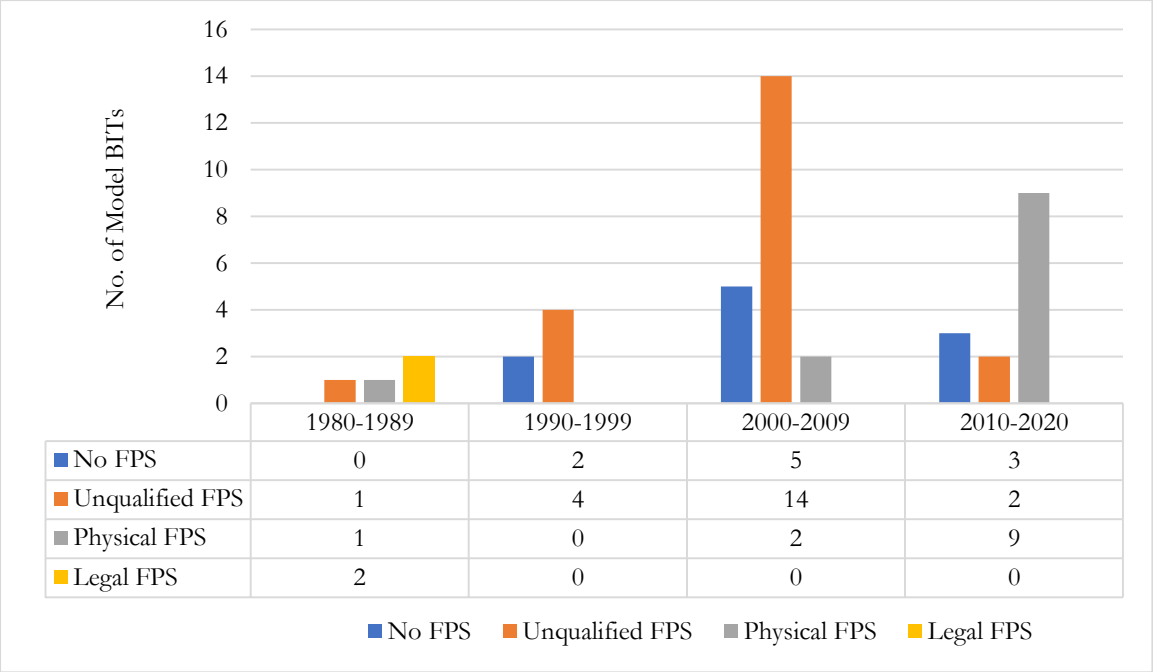
60 *Id.* ¶ 803.

61 *Id.* ¶ 823.

62 *Id.* ¶ 824.

III. The global position on FPS

The authors have conducted a survey of 45 model BITs that are publicly available for the period 1980-2020.[63] Based on the scope of the FPS clauses therein, the authors have classified them into four categories: (1) model BITs with no FPS provision; (2) model BITs with unqualified FPS provisions (i.e. simply providing for "full protection and security"); (3) model BITs expressly limited to a *physical* formulation of FPS ["***physical* FPS**"]; and (4) model BITs expressly limited to a *legal* formulation of FPS ["***legal* FPS**"]. The authors' findings are represented in the following chart:



From the above chart, a growing preference for a *physical* formulation of the FPS clause can be identified. From 1990-1999, when there were *no* model BITs with *physical* FPS clauses, to the last decade, where the majority of new model BITs that have been released provide for such a clause, it is evident that this restricted articulation of the FPS clause has been gaining traction. Model BITs with *physical* FPS clauses can further be classified, based on the degree of specificity of the clause, into three categories. The first category includes model BITs, which specifically limit the protection and security to the standard set by customary international law ["**Category 1 Model BIT**"]. For example, in the 2016 Azerbaijan Model BIT, the FPS clause states that "*[e]ach Contracting Party shall accord to investments of investors of the other Contracting Party in the territory of its [S]tate … full physical protection and security in accordance with international law minimum standard of*

63 All model BITs used for this purpose can be found here: *Model Agreements*, INVESTMENT POLICY HUB, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/model-agreements. For the avoidance of doubt, model BITs that have not been published on this website have not been considered; the authors have only considered those model BITs that are currently valid, accessible on the provided link, and available in English. The model BITs of the following countries have been considered: Austria, Azerbaijan, Belgium, Benin, Brazil, Burkina Faso, Burundi, Canada, Chile, Colombia, Croatia, Czech Republic, Denmark, Finland, France, Germany, Ghana, Greece, India, Indonesia, Iran, Israel, Italy, Jamaica, Kenya, Macedonia, Malaysia, Mauritius, Mexico, Mongolia, Morocco, Netherlands, Norway, Peru, Russia, Serbia, Slovakia, South Africa, Sri Lanka, Sweden, Switzerland, Thailand, Uganda, the United Kingdom, and the United States.

treatment of aliens … and 'full physical protection and security' do[es] not require treatment in addition to or beyond that which is required by that standard, and do[es] not create additional substantive rights".[64]

The second and third categories both include unqualified *physical* FPS clauses; the difference arises from the specificity lent to the clause by the surrounding words. The second category includes BITs with *physical* FPS clauses which, by their language, specifically limit the host State's obligation to ensuring the *physical* protection and security of a foreign investment but are otherwise unqualified ["**Category 2 Model BIT**"]. In contrast, BITs falling into the third category contain *physical* FPS clauses which, by their language, broaden the host State's obligation from ensuring *physical* protection and security to other obligations which are *related to* the *physical* protection and security of a foreign investment ["**Category 3 Model BIT**"].

The difference between Category 2 Model BITs and Category 3 Model BITs is best explained through illustration. Thus, for example, the 2019 Netherlands Model BIT simply provides that "*each Contracting Party shall accord to such investments full physical security and protection*".[65] In contrast, the 2016 Indian Model BIT provides that "*[e]ach Party shall accord in its territory to investments of the other Party and to investors with respect to their investments full protection and security. 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*".[66]

The Netherlands Model BIT – without an explanation of what constitutes *physical* protection and security – provides for a more specific and limited obligation. This is an example of a Category 2 Model BIT. The Indian Model BIT, on the other hand, provides for a broader obligation by including the words "*relating to*" in the definition: the obligation will accordingly extend to any action or omission that is proven to affect the *physical* protection and security of the investment even if it does so indirectly. Thus, the Indian Model BIT is a Category 3 Model BIT.

Of the 12 model BITs with *physical* FPS clauses that this article has considered, five were Category 1 Model BITs,[67] four were Category 2 Model BITs,[68] and the remaining three were Category 3 Model BITs.[69] The data also indicates that the Category 1 Model BITs are waning in popularity (the last one was issued in 2016).[70] In 2019, two Category 2 Model BITs and two Category 3 Model BITS were issued.[71] The following part will consider Category 3 Model BITs in more detail.

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64 Azerbaijan Model BIT 2016, art. 2(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4787/download.

65 Netherlands Model BIT 2019, art. 9(1), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download.

66 India Model BIT 2016, art. 3(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/3560/download.

67 These model BITs are the following: Canada Model BIT (2004), Ghana Model BIT (2008), Colombia Model BIT (2011), U.S. Model BIT (2012), and Azerbaijan Model BIT (2016).

68 These model BITs are the following: Indonesia Model BIT (pre-1984), Serbia Model BIT (2014), Morocco Model BIT (2019), and Netherlands Model BIT (2019).

69 These model BITs are the India Model BIT (2016), Belgium Model BIT (2019), and Slovak Model BIT (2019).

70 Azerbaijan Model BIT 2016, *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/4787/download.

71 The Category 2 Model BITs are the Morocco Model BIT (2019) and Netherlands Model BIT (2019). The Category 3 Model BITS are the Belgium Model BIT (2019) and Slovak Model BIT (2019).

IV. Analysis of FPS clauses in Category 3 Model BITs

When a claim is brought under an FPS clause, a tribunal is faced with determining whether the act or omission of which the host State is accused is something that would fall within the ambit of the FPS clause. As a first step, the tribunal will look to the language of the FPS clause itself; the tribunal will have to identify if the FPS clause is limited in its application to purely *physical* or purely *legal* threats to the investment or investor. Thus, for example, if a foreign investor brought a claim against the host State under the Brunei Darussalam-India BIT[72] for failing to protect its investment from an attack by the local community, the tribunal would, after considering the relevant clause in this BIT, which notes, in relation to FPS, that "*[i]nvestments and returns of investors of each Contracting Party shall at all times … enjoy full legal protection and security in the territory of the other Contracting Party,*" presumably be able to immediately dismiss this claim on this ground.[73]

If, on the other hand, the language of the FPS clause does not assist the tribunal, as a second step, the tribunal is left to make this decision for itself.

The tribunal's determinations at both of the above-mentioned steps are complicated by different factors. At the first step, even if the FPS clause suggests that it is limited in its application, the exact wording of the clause may allow the ingress of obligations that were not intended to be included within the scope of protection accorded by the FPS clause. At the second step, the tribunal's determination is made confusing by the lack of a clear and consistent approach in investment arbitrations to defining the scope of the FPS clause.

The remainder of this part will consider the difficulties faced at the first level through the lens of the FPS clauses in Category 3 Model BITs. Indeed, as will be evidenced below, the lack of definition in the FPS clauses found in these BITs may actually open the floodgates to acts or omissions that would be less likely to be covered by the *physical* protection and security standard, and more likely to fall within the ambit of the *legal* protection and security standard.

A. The potential overlap between physical and legal formulations of FPS

The interrelationship between *physical* and *legal* security has been touched upon, albeit sometimes inadvertently, in several investor-State awards. The Tribunal's findings in *Saluka* provides a good illustration. In this case, arising out of a failed attempt by the Czech Republic to privatise a State-owned bank, the investor (which had acquired shares in the State bank by a transfer from the investor's parent company) claimed that there had been a violation of the FPS clause because of the Czech Republic's suspension of trade in the bank's shares, a prohibition on transfers of the investor's shares in the bank, police searches of premises and employees of the investor's parent company, and seizure of its documents.[74] The Tribunal found that there had been no breach of the FPS clause on any of these grounds.[75]

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72 Brunei Darussalam-India BIT 2008, art. 3(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/517/download.

73 *Id.*

74 Saluka, Case No. 2001-04, Partial Award, ¶ 485 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

75 *Id.* ¶ 505.

Under the relevant BIT, the FPS clause obliged the Czech Republic to "*accord to such investments full security and protection*".[76] Despite the unqualified language of this clause, the Tribunal noted that an FPS clause generally "*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*".[77] This suggests that the Tribunal was inclined towards a purely *physical* interpretation of the FPS clause, though the Tribunal did note that "*it appears not to be necessary for the Tribunal to precisely define the scope of the 'full security and protection' clause in this case*".[78] In any event, several subsequent awards have quoted this sentence from the *Saluka* award to justify their own restricted interpretation of the FPS clause.[79]

Despite the *Saluka* Tribunal's initial nod towards a purely *physical* interpretation, the Tribunal's analysis and decision on each of the investor's grounds was based on a more holistic understanding of the FPS clause. With regards to the first ground raised by the investor – the Czech Republic's suspension of trade in the bank's shares – the Tribunal noted that there had been no breach of the FPS clause because the suspension was justifiable on regulatory grounds. In regards to a related amendment of Czech law that precluded the investor from appealing the suspension of trade, the Tribunal further noted that "*the elimination of shareholders' right of appeal does not per se transcend the limits of a legislator's discretion … The amendment of the [law] cannot be said to be totally unreasonable and unjustifiable by some rational legal policy*".[80]

The investor's claim under the second ground – the prohibition on transfers of the bank's shares – arose out of a sense of "*procedural denial of justice*".[81] According to the investor, apart from the initial order by which the investor's shareholding in the bank was frozen, the treatment of its appeals against this order to both police and prosecutorial authorities constituted a "*procedural denial of justice*".[82] In ruling that this did not constitute a breach of the FPS clause, the Tribunal concluded that none of these issues amounted to a "*manifest lack of due process*".[83] According to the Tribunal, only if there had been such a lack of due process, would the FPS clause be breached.[84]

The third ground on which the investor claimed a breach of the FPS provision – the search of the premises and employees of the investor's parent company and seizure of documents – was arguably the only action that could have qualified as a threat to the *physical* protection and security of the investor. In spite of this, in determining whether these actions amounted to a breach of the FPS clause, the Tribunal instead considered whether the investor had legal recourse against these measures. The Tribunal determined that there had been no violation of

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76 Netherlands-Czech Republic BIT 1991, art. 3(2), *available at* https://www.italaw.com/sites/default/files/laws/italaw6080%283%29.pdf.

77 Saluka, Case No. 2001-04, Partial Award, ¶ 484 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

78 *Id.*

79 Rumeli Telekom A.S. & Telsim Mobil Telekomunikasyon Hizmetleri A.S. v. Republic of Kaz., ICSID Case No. ARB/05/16, Award, ¶ 668 (July 29, 2008); Cengiz, ICC Case No. 21537/ZF/AYZ, Award, ¶ 403 (Nov. 7, 2018); Suez, Sociedad General de Aguas de Barcelona, S.A. & Vivendi Universal, S.A. v. Argentine Republic, ICSID Case No. ARB/03/19, Decision on Liability, ¶ 178 (July 30, 2010).

80 Saluka, Case No. 2001-04, Partial Award, ¶ 490 (Perm. Ct. Arb. Mar. 17, 2006), 15 ICSID Rep. 274 (2010).

81 *Id.* ¶ 492.

82 *Id.* ¶¶ 492–493.

83 *Id.* ¶ 493

84 *Id.*

the FPS clause because the investor had, in fact, filed a petition seeking relief in relation to this measure with the Czech Constitutional Court and the relief sought had been granted.[85]

Had the Tribunal truly believed that the FPS clause was limited to according *physical* protection and security, there would have been no need to go into such detailed analysis on any of the three grounds. Save for the search and seizure conducted by the police, all the other measures that the investor argued were in breach of the FPS clause did not directly impact the physical security or sanctity of the investment. Instead, the Tribunal chose to avoid commenting on whether any of these measures would fall within the scope of the FPS clause.[86] This suggests that the Tribunal did not actually intend to limit the FPS clause to *physical* protection and security alone; the *legal* protection and security of the investment was, seemingly, given equal importance in determining whether there had been a breach of the FPS clause.

In this case, the unqualified language of the FPS clause under the Netherlands-Czech BIT enabled the Tribunal to arrive at such a decision. However, this is not the only case in which *legal* protection and security could be read into an FPS clause. The language of the FPS clause in a Category 3 Model BIT lends itself to a similarly wide interpretation of *physical* protection and security and, indeed, an even wider interpretation. By prefixing the express reference to *physical* protection and security with "*relating to*" or other similar language, the provision provides an entrance for acts and/or omissions that would not align with the strict sense of *physical* protection and security. The only requirement would be that the investor would have to prove a causal relationship between the loss of *physical* protection and security of the investment and the act and/or omission by which the investor has been aggrieved.

B. Acts or omissions "relating to" physical protection and security

There have already been attempts to push the boundaries of what *physical* protection and security can cover. For example, in *Peter A. Allard* v. *Government of Barbados* ["**Allard**"], the investor sought to characterise environmental damages caused to an investment as a breach of the State's obligation to ensure the *physical* protection and security of the investment.[87] The environmental damage in question had been caused by the discharge of raw sewage into the investor's investment – a sanctuary spread over 240 acres in Barbados.[88] According to the investor, this damage could have been avoided if the State had taken reasonable care to protect the sanctuary (including through the regular repair and operation of the sluice gate on the property that controlled the flow of water between the sanctuary and the ocean)[89] and enforced its environmental laws (in particular, the Marine Pollution Control Act).[90] The investor claimed that there had been a violation of the FPS clause under the Barbados-Canada BIT, which contained an unqualified clause providing that "*[e]ach Contracting Party shall accord investments or returns of*

85 *Id.* ¶¶ 495–496.
86 *Id.* ¶¶ 490, 493.
87 Peter A. Allard v. Gov't of Barb., Case No. 2006-12, Award, ¶ 232 (Perm. Ct. Arb. June 27, 2016) [*hereinafter* "Allard"].
88 *Id.* ¶¶ 33–43.
89 *Id.* ¶¶ 232, 234.
90 *Id.* ¶¶ 232, 239.

investors of the other Contracting Party … full protection and security" on the basis of the above two grounds.[91]

Although the Tribunal rejected this claim on all three grounds, it was not on the basis that the alleged omissions on the part of Barbados fell outside the scope of the FPS clause. In the Tribunal's words, "*[e]ven accepting the [investor's] articulation of the FPS standard as including an obligation of the host State to protect foreign investments against environmental damage*,"[92] the investor had failed to prove that there had been a violation of the FPS clause.

Thus, this award is important because the alleged omissions of the State – recognised by the Tribunal as potential breaches of the FPS clause[93] – constituted instances outside the typical scope of *physical* protection and security. None of these omissions related to the use of physical force on the investment; they related to the environmental degradation caused by "*physical interference with property through the unlawful trespass of pollutants*".[94]

With regards to the investor's allegation that the State had failed to take reasonable care to protect the sanctuary, the Tribunal noted that "*it [was] quite implausible for the [investor] to attribute responsibility for the egress or ingress of [the] Sanctuary waters to the actions or inactions with respect to the operation of the Sluice Gate*".[95] In any event, there was sufficient evidence to show that Barbados had, based on knowledge of the environmental sensitivities of the investment, taken "*reasonable steps*" to protect it.[96] Thus, while the Tribunal could have denied this claim solely on the basis that the FPS clause would not extend to the alleged omissions of the State, it did not expressly do so. Instead, the Tribunal, as in *Saluka*, considered each allegation separately and determined on the basis of the evidence of the legislative and policy measures taken by the State that there had been no breach of the FPS clause.

The Tribunal's willingness to expand the ambit of protection accorded by the FPS clause is further emphasised in its treatment of the investor's allegation that the State had failed to enforce its environmental legislation. This allegation – clearly relating to the *legal* protection and security of the investment – was pleaded as an omission related to the *physical* protection and security of the investment. Instead of rejecting this claim solely on the basis that this measure did not constitute a breach of the *physical* protection and security of the investment, the Tribunal's decision to reject this allegation was on the basis of the investor's failure to evidence a breach under the legislation in question.[97]

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91 Barbados-Canada BIT 1996, art. II.2 (b), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/280/download.

92 Allard, Case No. 2006-12, Award, ¶ 252 (Perm. Ct. Arb. June 27, 2016).

93 *Id.*

94 *Id.* ¶ 231.

95 *Id.* ¶ 250.

96 *Id.* ¶¶ 242–246. The steps which the Tribunal referred to were all measures taken at the policy level. These steps included the setting up of a committee to investigate and coordinate government action in relation to the sanctuary and to address issues related to its effective management; the review of land development applications to ensure that they were consistent with the objective of environmental protection of the sanctuary and prevented the establishment of potential polluters in the vicinity of the sanctuary; and monitoring the interaction between the sanctuary and the sewage treatment plant.

97 *Id.* ¶ 251.

If this set of facts is analysed through the lens of a Category 3 Model BIT, then, as long as the act or omission in question affected the *physical* security of the investment (i.e. being "*related to*" to its *physical* protection and security), the claim likely would be successful as a legal matter regardless of whether the act or omission constituted an actual incursion on the investment in a physical sense. In *Allard*, given that the investment's value depended upon the ecosystem that it hosted, a failure to manage the sluice gate would have undoubtedly affected the physical security and viability of the investment. Thus, as an omission *related to* the physical protection and security of the investment, this claim would have succeeded under a broadly-worded clause for *physical* protection and security such as the FPS clause in a Category 3 Model BIT as well.

C. The scope for reading legal protection and security into physical fps clauses

In the same way, many acts or omissions that would be covered under what is understood as *legal* protection and security could be brought within the scope of *physical* FPS clauses that are couched in sufficiently broad terms similar to the language of FPS clauses in Category 3 Model BITs.

This is especially true in the context of claims related to substantive *legal* protection and security of an investment. As evidenced by the award in *Allard*, a State's failure to implement or enforce a law or regulation upon which a foreign investment's *physical* protection or security is predicated could lead to a breach of an FPS clause.

This is not to say that claims related to procedural *legal* protection and security would not be successful. If the investor is able to prove that its failure to obtain adequate judicial redress has adversely affected the *physical* protection and security of the investment, then the investor would likely have a successful claim under a *physical* FPS clause couched in language similar to a Category 3 Model BIT. While such instances are admittedly not as common, they are not altogether impossible. If, for example, the investor seeks judicial redress against the forced closure of its investment, there could arguably be a successful claim for the breach of a *physical* FPS clause worded similar to a Category 3 Model BIT.

Already, in relation to the COVID-19 pandemic, there has been discussion of invoking the FPS clause in relation to circumstances arising out of a host State's response to the pandemic.[98] A host State's failure to take effective measures to protect the health of employees of a foreign investment is just one way in which a widely-worded FPS clause (even if limited to *physical* protection and security) could be harnessed by an investor.

Thus, the types of claims that could be brought under a widely-worded *physical* FPS clause are broader in scope than what would typically be understood as direct physical damage. The success of such claims will depend on the ability of the investor to convince the tribunal of the causal relationship between the alleged breach and the *physical* protection and security of an investment.

[98] Massimo Benedetteli, Caterina Coroneo & Nicolò Minella, *Could COVID-19 emergency measures give rise to investment claims? First reflections from Italy*, GLOB. ARB. REV. (Apr. 15, 2020), *available at* https://globalarbitrationreview.com/article/1222354/could-covid-19-emergency-measures-give-rise-to-investment-claims-first-reflections-from-italy.

V. Conclusion

Although it appears that there is a global movement towards restricting FPS clauses to a *physical* formulation, the use of vague wording in these clauses could inadvertently open up the doors to claims related to *legal* protection and security as well. A good example of the type of wording that would enable such ingress is the "*relating to*" prefix used in Category 3 Model BITS as discussed above.

Admittedly, this conclusion is based on an analysis of model BITs. This is because the model BIT of a country is generally a more accurate representation of its policy (as opposed to BITs which can reflect the difference in the bargaining power of the Contracting States). Notwithstanding this, the issue of vague wording of *physical* FPS clauses is one that could plague BITs as well. For example, in line with the language of the 2016 Indian Model BIT (a Category 3 Model BIT), the 2018 Belarus-India BIT defines 'full protection and security' as "*relating to physical security of investors and to investments made by the investors*".[99]

While the authors are not aware of any investment arbitrations where investors have sought to claim a breach of a *physical* FPS clause on the basis of a violation of the procedural or substantive *legal* security of the investment, the authors believe that there is potential for such an argument to be made (and to potentially be made successfully) in cases of broadly-worded FPS clauses. Based on the above, it behoves States to pay greater attention when drafting FPS clauses to ensure that the outcome meets their intent.

[99] Belarus-India BIT 2018, art. 3(2), *available at* https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5724/download.