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Same Concept, Different Interpretation: The Full Protection and Security Standard in Practice

Omar Moussly · Sunday, October 27th, 2019

The numerous interpretations of the Full Protection and Security Standard ("FPSS") have complicated the findings of tribunals for many years. A number of tribunals have found that this standard applies only to physical protection. Meanwhile, other tribunals have extended this standard to cover all types of protection from physical to legal and commercial. Also, more recently tribunals have considered the stability of the host state when construing the FPSS.

There is a growing body of arbitral case law on the FPS standard since the first investment treaty award on the full protection and security in *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka*, as discussed here.

The FPSS can be found under various formulations in the promotion and protection of investment section in BITs. However, different BITs use different wording to express the same concept. For example, Article 4.1 of the Argentine Republic – Japan BIT expresses the concept as "full protection and security". Another example, Article 1 of the European BIT template, the Abs-Shawcross Draft Convention (1960) states the notion as "the most constant protection and security". Similar wording is included in Article 10 of the Energy Charter Treaty ("ECT"). Another example can be found in Article 1. 2 of the Arab Republic of Egypt and the Belgium-Luxembourg Economic Union BIT (1977) which expresses the concept as "continuous protection and security".

Accordingly, the FPSS may be referred to as "*constant protection and security*", "*continuous protection and security*", or "*full protection and security" standard*. However, the meaning of these clauses suggests that the host State is under obligation to take active measures to protect the investment from harmful effects. The harmful effects may stem from non-government actors such as demonstrators, employees or business partners or even from actions of the host State and its organs.

Investment tribunals are generally consistent in their findings that the obligation to accord FPSS can impose an onerous level of liability on states with scarce resources.[1)]

Does FPSS apply only in the case of physical security?

The question of whether the FPSS is only applicable to physical security has divided arbitral

tribunals for years.

Some tribunals held that the State's duty was only to protect the investor from violence caused by State or non-government (*i.e*. private) actors. These tribunals decided that the FPSS applied only to physical security.

For example, in *Saluka v. Czech Republic (2006)*, the tribunal observed that FPSS applies only to physical protection and stated that:

> *"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"*.

Further, the tribunal in *Wena Hotels v. Egypt (2002)* held Egypt liable for violating the FPS standard for its failure to prevent the seizures and subsequent failure to protect Wena's investment which gave rise to the liability of the State.

Also, in *BG Group v. Argentine (2007)*, the tribunal found that protection and security was restricted to physical violence and damage. The tribunal relied on *Wena Hotels v. Egypt* tribunal interpretation of the FPSS and held it was: "*inappropriate to depart from the originally understood standard of protection and constant security"*.

It is notable that the tribunals in subsequent arbitral awards have extended this standard to cover all types of protection, including legal and physical security. For example, the tribunal in *Biwater v. Tanzania (2008)* stated that the FPPS "implies a State's guarantee of stability in a secure environment, both physical, commercial and legal". The tribunal in *Siemens v. Argentina* (*2007*) found that the FPSS goes beyond physical security from the fact that the applicable BIT's definition of investment also applied to intangible assets:

> *"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"*.

Should arbitral tribunals take into considerations the stability of the host State?

FPSS creates a special regime of liability for the acts of the host State and for third parties that compromise the physical security of the assets of the investors, as discussed here. However, it remains subject to debate whether the FPSS imposes an obligation of due diligence which must be tailored to the resources available to the host State.

For example, the claimant in *Pantechniki v. Albania (30/Jul/2009)* argued that the Albanian authorities did not protect the claimant's construction project and failed to provide full protection

and security. The tribunal held that the Albanian authorities were powerless and the police "were simply unable to prevent the losses under the circumstances of the case". Furthermore, the tribunal held that the arbitrators must consider the circumstances and resources at the disposal of the relevant State, and thereby consider the State's level of development and stability.

In a more recent case, *Ampal v. Egypt (21/Feb/2017),* and after an ICC tribunal rejected Egypt's *force majeure* defence in arbitration case and held it liable for the contractual breach arising of attacks on the pipeline, Ampal shareholders filed an ICSID case against Egypt claiming, *inter alia,* the violation of the FPSS obligations under the US-Egypt BIT.

Irrespective of the unstable and exceptional situation Egypt was facing and the nation's limited resources, the tribunal found Egypt liable for its failure to protect the pipeline of the investor against the attacks and, as discussed here, "*the tribunal only considered the security of the investor's pipeline, neglecting the overall state of the country. The tribunal unconsciously transformed the due diligence standard from a duty of care to a duty to achieve".*

The tribunal in *Cengiz v. Libya (07/Nov/2018)* reached a similar decision to that of *Ampal v. Egypt*. The tribunal in *Cengiz v. Libya* acknowledged the border challenges Libya was facing at that time and the country's lack of sufficient resources to offer "dynamic protection" to protect the investors. However, the tribunal held Libya responsible for its total failure to provide the necessary security measures to protect the investor's project and equipment. Although the tribunal acknowledged that the evidence was scarce, it was nevertheless confident that the Libyan armed forces and/or militia controlled by the government had pillaged the investor's camps and did not prevent any attack from third parties during the civil war.

In doing so, the tribunal departed from the narrow reading taken by *WAY2B v. Libya* tribunal that held that "an FPSS provision demanded due diligence on the part of a state to ensure adequate protection and security risks of physical damage caused by third parties", and that the burden of proof lies with a claimant so that a tribunal can determine if the host State has acted with "due diligence in light of its development/situational capabilities". Furthermore, the tribunal noted that the claimant had failed to assert even a *prima facie* case that the State had not met its protective duties.

Conclusion

It is clear that there is a considerable divergence in the interpretation of the FPSS. Some tribunals have only applied this standard to physical protection, whereas subsequently the majority of the tribunals have disagreed with this interpretation and have gone further to apply this standard to legal and commercial protection.

More recently, some tribunals have decided to take into consideration the stability of the host State, whereas others did not give sufficient consideration for the limited resources, the exceptional circumstances and the stability of the host State.

Arbitral tribunals should apply greater weight to the circumstances being faced by the host State before interpreting the FPSS and deciding whether it should apply to physical protection only or whether its coverage should be extended further. It is not easy for arbitral tribunals to reach a satisfactory decision in an unstable political area because of the lack of evidence in many cases,

which the investor needs to proof. Ultimately – and as commented upon by the *Pantechniki v. Albania* tribunal – an investor investing in an area with endemic civil strife and poor governance "cannot have the same expectation of physical security as one investing in London, New York or Tokyo".

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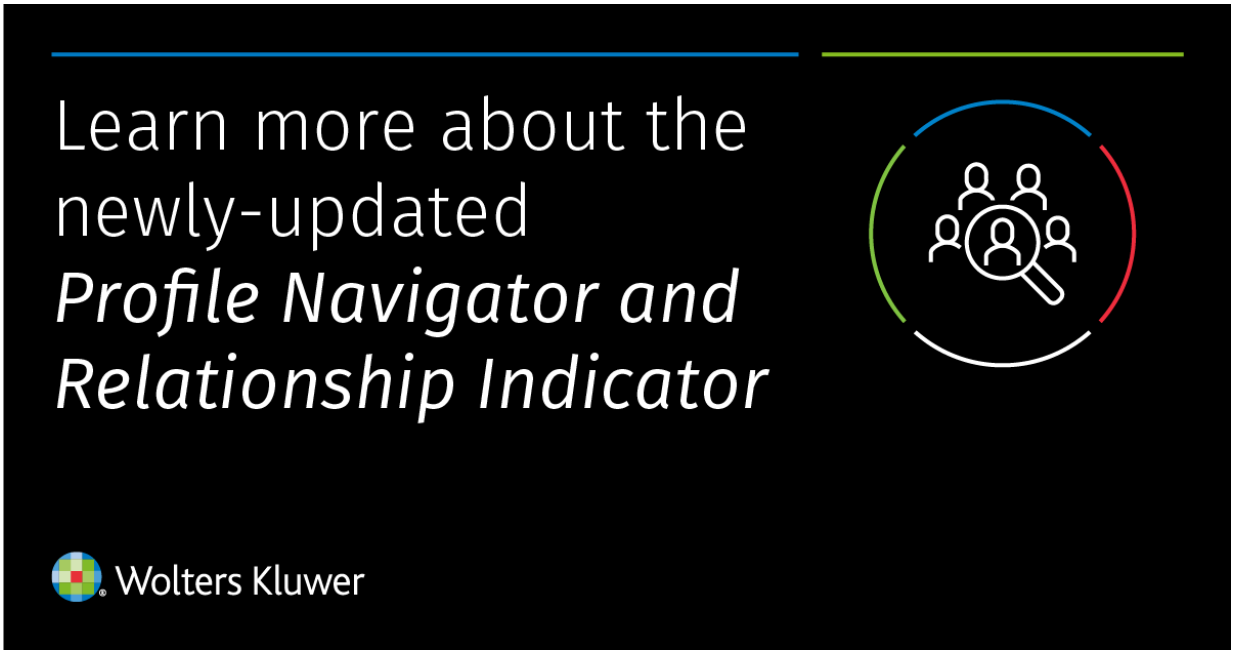

References

?1 Mahnaz Malik "*The Full Protection and Security Standard Comes of Age: Yet another challenge for states in investment treaty arbitration?*" iisd.org, November 2011.

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