Key contacts

Adewale Atake, SAN
Partner and Head,
Dispute Resolution
adewale.atake
@templars-law.com

Orji Agwu Uka, MCIArb
Managing Counsel,
Dispute Resolution
orji.uka
@templars-law.com

TEMPLARS ThoughtLab – ISDS Series | Part II

Full Protection and Security

Introduction

This is the second instalment of the Templars ISDS Series, exploring recent trends in the Investor-State Dispute Settlement (ISDS) system. In the opening contribution, we introduced the ISDS system, examined its historical development and operational mechanics, the types of disputes it addresses, the challenges facing the ISDS system, and ongoing reform measures. This second instalment considers the Full Protection and Security (FPS) standard, one of the most important substantive protections available to foreign investors under international investment law.

The Full Protection and Security Standard – Definition and Scope

The FPS standard is a substantive protection found in virtually all bilateral investment treaties (BITs) and other international investment agreements (IIAs). Simply put, it imposes an obligation on host states to take active measures to protect foreign investments within their territory. The typical treaty formulation is illustrated by the France-Nigeria BIT 1990 which provides in Article 5(1) as follows:

"Investments made by investors of either Contracting Party, as well as the revenues derived therefrom and the reinvestments of such revenues, shall enjoy, in the territory and in the maritime zone of the other Contracting Party, full protection and security."[1]

Some treaties employ variant formulations such as "constant protection and security" or simply "protection and security." The significance of these textual variations is debated. Some commentators suggest that "full protection and security" imposes a higher standard than "constant protection and security", whilst others treat the phrases as functionally equivalent. The weight of arbitral authority inclines towards the latter view, treating the variations as having no material difference in content.[2]

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[1] Article 5(1), Agreement between the Government of the French Republic and the Government of the Federal Republic of Nigeria on the Encouragement and Reciprocal Protection of Investments, signed 27 February 1990, and which entered into force 19 August 1991. The original French text reads: "Les investissements effectués par des investisseurs de l'une ou l'autre des Parties contractantes, ainsi que les revenus qui en proviennent et les réinvestissements de tels revenus, bénéficient sur le territoire et dans la zone maritime de l'autre Partie contractante d'une protection et d'une sécurité pleines et entières."
[2] See, A. Newcombe and L. Paradell, Law and Practice of Investment Treaties: Standards of Treatment (Kluwer Law International, 2019), pp. 307–310.

Physical Security vs. Legal Security - The Interpretive Debate

The Traditional (Narrow) Interpretation

Under the traditional interpretation, FPS requires the host state to provide physical protection to the investor and its investment. This encompasses protection from violence, harassment, and destruction of investments, whether perpetrated by organs of the state itself or by third parties whose conduct the state failed to prevent or address.

The seminal case is ***Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka***,[3] which is incidentally the first modern investment treaty arbitration claim. Here, the tribunal found that Sri Lanka had breached the FPS standard when its armed forces destroyed the investor's shrimp farm during counter-insurgency operations against the rebel group, Tamil Tigers. The tribunal held that the host state bore responsibility for physical damage caused by its own military forces to the investor's property, establishing the principle that FPS creates an affirmative obligation on the state to protect investments from physical harm.

Similarly, in **AMT v. Republic of Zaire**,[4] Zaire was found to have breached FPS by failing to prevent looting and destruction of the investor's industrial property by its military personnel. Breach of FPS was also established in **Wena Hotels v. Egypt** where Egypt had prior knowledge of the threat by a state-owned entity to forcibly seize the investor's hotel properties but failed to prevent it.[5]

The Broader (Modern) Interpretation

More recent tribunals have extended the FPS standard beyond physical security to encompass legal and regulatory security, that is to say, host states have an obligation to maintain a stable legal framework in which the investment can operate. In ***Azurix Corp. v. Argentina***,[6] the tribunal stated that FPS is "not only a matter of physical security" but extends to the stability of the legal and business environment, finding that Argentina's interference with the investor's water concession engaged the standard beyond its traditional physical security dimension. The tribunal reasoned that the modern content of the standard should reflect the contemporary importance of legal certainty to foreign investors.

The traditional interpretation, however, remains the predominant interpretation. Thus, in ***Biwater Gauff (Tanzania) Ltd v. Tanzania***[7] the tribunal acknowledged the broader interpretation of the FPS standard but emphasised that the physical security dimension remained the traditional and core content of the FPS standard. Thus, the tribunal relied on physical acts in finding a breach of FPS arising from the seizure of the investor's assets and the deportation of its staff.

The Due Diligence Standard

A critical feature of the FPS standard is that it imposes an obligation of conduct, not an obligation of result. It is *jurisprudence constante* that the duty imposed upon host states by the FPS standard is not one of strict liability, but due diligence. What this means is that the host state is not an insurer of foreign investments. It is not liable for every loss or damage suffered by a foreign investor within its territory.[8] Rather, the standard requires the host state to exercise reasonable vigilance and to take such measures as are reasonably available to it to prevent harm to the investment.

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[3] *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka, ICSID Case No. ARB/87/3, Final Award of 27 June 1990.*
[4] *American Manufacturing & Trading, Inc. v. Republic of Zaire, ICSID Case No. ARB/93/1, Award of 21 February 1997.*
[5] *Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award of 8 December 2000.*
[6] *Azurix Corp. v. The Argentine Republic, ICSID Case No. ARB/01/12, Award of 14 July 2006, para. 408.*
[7] *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award of 24 July 2008, paras. 729–730.*
[8] In *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy) [1989] ICJ Rep 15, 54 para 108,* the ICJ held the FPS standard "cannot be construed as giving of a warranty that property shall never in any circumstances be occupied or disturbed."

What constitutes "reasonable" measures depends on the host state's resources and the circumstances prevailing at the relevant time. A breach occurs when the state fails to take measures that were reasonably available to it and not when harm occurs despite the state's best efforts. A developing state with limited resources is not held to the same standard of protective capacity as a wealthy industrialised state. ***Pantechniki SA Contractors & Engineers v. Albania***[9] represents a claim where the tribunal rejected an FPS claim because the investor failed to demonstrate that Albania had neglected to take measures reasonably within its power during a period of civil unrest. The sole arbitrator emphasised that FPS requires due diligence proportionate to the state's resources. The claim failed because the investor could not demonstrate that Albania had failed to take measures that were realistically within its power to adopt in the face of civil unrest.[10]

In summary, the common thread in successful FPS claims is the involvement of physical harm, the seizure of assets, or the state's demonstrable failure to exercise due diligence and act in the face of known threats to the investment.

Relationship with Other Standards of Protection

The FPS standard overlaps considerably with the Fair and Equitable Treatment (FET) standard, particularly under the broader interpretation of FPS that extends to legal security. The key distinction is that FET is generally concerned with the quality and propriety of treatment accorded to the investor whilst FPS is directed specifically at the host state's obligation to take active measures to protect the investor and its investment from harm.

Some tribunals have treated FPS claims as subsumed within FET when both are pleaded on the same facts, whilst others maintain the standards as distinct. The distinction is particularly important in cases involving physical harm, where FPS provides a more natural basis for the claim than FET.

FPS must also be distinguished from the prohibition against expropriation. Expropriation addresses the deliberate taking or deprivation of an investment by the state, whilst FPS addresses the state's failure to protect the investment from harm (whether inflicted by state organs or third parties). In ***Wena Hotels Ltd v. Egypt***[11] the tribunal found a breach of FPS when Egypt failed to prevent the seizure of the investor's hotels by a state entity (the Egyptian Hotel Company). The tribunal treated the FPS claim as distinct from the parallel expropriation claim, noting that the failure to protect (FPS) is conceptually different from the act of taking (expropriation).

FPS in the Nigerian Context

As highlighted in the introductory instalment of the TEMPLARS ISDS Series, Nigeria is a party to a total of 31 bilateral investment treaties, out of which 14 are currently in force.[12] Virtually all of Nigeria's BITs contain FPS provisions in one form or another.

As noted already, Nigeria's first ever BIT is the **France-Nigeria BIT** 1990, which provides in Article 5(1) that, "investments made by investors of either Contracting Party, as well as the revenues derived therefrom and the reinvestments of such revenues, shall enjoy, in the territory and in the maritime zone of the other Contracting Party, full protection and security." This was followed by the **UK-Nigeria BIT** signed in Abuja on 11 December 1990, and which entered into force on the same day. It provides in Article 2(2) that investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of

[9] *Pantechniki SA Contractors & Engineers v. Republic of Albania, ICSID Case No. ARB/07/21, Award of 30 July 2009, paras. 77–82.*
[10] See also *Electrabel SA v. Republic of Hungary, ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability of 30 November 2012.*
[11] *Wena Hotels Ltd v. Arab Republic of Egypt, ICSID Case No. ARB/98/4, Award of 8 December 2000.*
[12] UNCTAD Investment Policy Hub, https://investmentpolicy.unctad.org/international-investment-agreements/countries/153/nigeria

the other Contracting Party. Another representative BIT signed by Nigeria is the **South Africa-Nigeria BIT**, signed in Cape Town on 21 April 2000, and which entered into force on 27 July 2005. Article 4(1) of the BIT provides *inter alia* that investments and returns of investors of either Party at all times shall be accorded fair and equitable treatment and shall enjoy full protection in the territory of the other Party.[13]

Nigeria's security environment, characterised by insurgency in the North-East, herders-farmers conflict in the Middle Belt, episodic violence in oil-producing regions; to mention but a few, makes FPS claims an ongoing risk for the Nigerian state. Where foreign investors suffer physical harm to their investments as a result of security challenges that the state fails to address with reasonable diligence, the foundation for an FPS claim is laid.

Of the eight known ISDS cases against Nigeria, only two proceeded to the stage of award; four were settled[14] while two are still pending.[15] The two cases that ended up with an award are *Interocean Oil Development Company & Anor v. Federal Republic of Nigeria* which was decided in Nigeria's favour and *Zhongshan Fucheng Industrial Investment Co. Ltd. v. Nigeria*, which was decided against Nigeria.

In the ***Interocean*** case, it was argued by the Claimants that Nigeria had breached its FPS duty, relying principally on the alleged unlawful detention of their representative, Mr Rooks, in 1987 and the refusal of access to government instrumentalities. The tribunal found that the Claimants had not demonstrated any connection between the detention of Mr Rooks and the subsequent loss of their investment. The tribunal also found that the Claimants had not established the unlawfulness of the detention and had not shown that they were denied entry into Nigeria or refused access to government instrumentalities. Accordingly, the tribunal found no violation of the FPS standard.

In the ***Zhongshan Fucheng*** case, however, the Tribunal held that Nigeria had infringed its continuous protection obligation under Article 2(2) of the China-Nigeria BIT. This was because of the coordinated actions of Ogun State, NEPZA and the Nigerian police between April and August 2016, which included threats, intimidation, the arrest and physical mistreatment of Zhongfu's representative, Mr Zhao, and efforts to force Zhongfu's personnel out of the Zone. The lesson here is that Nigeria must ensure that its security apparatus is responsive to threats against foreign investments and should not be used as an instrument to infringe on the rights of investors.

Conversely, Nigerian investors operating abroad, should be cognisant of FPS as a substantive protection available to them under the treaties to which Nigeria is a party. In a world marked by varying conflicts such as social, political and economic crisis in South America; the Arab Spring of the 2010s; xenophobic attacks in South Africa; the ongoing US-Iran conflict, etc. Nigerian investors in such affected areas can invoke FPS protections under applicable BITs when their investments are subjected to physical harm or when host states fail to provide adequate protection. As Nigeria's outward investment footprint expands, awareness of FPS as a tool for protecting Nigerian investments abroad becomes increasingly important.

Defences Available to Host States

In ending, it is also worth noting that host states such as Nigeria are not without recourse when faced with FPS claims. Several defences[16] are available including:

[13] As noted above, the formulation, "full protection" under the South Africa-Nigeria BIT imposes no less a standard than the "full protection and security" adopted in other BITs.
[14]Guadalupe Gas Products Corporation v. Nigeria (ICSID Case No. ARB/78/1); Shell Nigeria Ultra Deep Limited v. Federal Republic of Nigeria (ICSID Case No. ARB/07/18); Eni International B.V. & Ors v. Federal Republic of Nigeria (ICSID Case No. ARB/20/41); and Shell Petroleum N.V. & Anor v. Federal Republic of Nigeria (ICSID Case No. ARB/21/7).
[15]*Korea National Oil Corporation & Ors v. Federal Republic of Nigeria (ICSID Case No. ARB/23/19); Jupiter Lithium Ltd & Ors v. Federal Republic of Nigeria (ICSID Case No. ARB/26/27), registered 11 June 2026.*
[16]These defences will be examined more fully in a dedicated future instalment of the Templars ISDS Series addressing host state defences in investment treaty arbitration.

Necessity and force majeure: A state may argue that circumstances beyond its control, such as armed conflict, natural disaster, or widespread civil disorder, prevented it from providing protection to the investment. Where the state can demonstrate that no reasonable measures were available in the circumstances, liability may be excluded.

Proportionality: The state's obligation under FPS is proportionate to its resources and the circumstances prevailing at the time. A developing state with limited security infrastructure is not held to the same standard as a state with extensive resources. This defence was central to the outcome in *Pantechniki v. Albania*.

Contributory fault: The fact that an investor failed to take reasonable precautions to protect its own investment, for example, by failing to engage private security, ignoring credible threats, or operating in a manifestly dangerous area without adequate safeguards, may be a factor that a tribunal would consider in determining liability or the quantum of damages to be awarded.

Conclusion

The Full Protection and Security standard is a fundamental but often misunderstood element of the international investment protection regime. Its core content remains anchored in the obligation of the host state to provide physical security to foreign investments, though the broader interpretation extending to legal and regulatory stability continues to evolve in arbitral jurisprudence.

For Nigeria, FPS presents both risks and opportunities. As a host state with significant security challenges, Nigeria faces exposure to FPS claims where its security apparatus fails to respond with reasonable diligence to threats against foreign investments. At the same time, Nigerian investors operating abroad, particularly across the African continent, can invoke FPS protections under applicable treaties to safeguard their investments.

The next instalment in the TEMPLARS ISDS Series will examine the Fair and Equitable Treatment standard, the most frequently invoked and contested standard of investment protection in international arbitration.

If you require any further information, do not hesitate to contact us.