

Do Not Let the “Full” Fool You: Are Foreign Investments and Investors Awarded “Full Protection and Security” in Times of Hostilities?

International Law of Foreign Investment (ILFI) is a field of Public International Law largely regulated by bilateral treaties (BITs), concerned with the regulation of investments of one State’s nationals in the territory of another State. Interestingly enough, many States utilizing these investment instruments are simultaneously involved in hostilities. Reality has it that none of these States’ BITs were terminated or suspended due to the outburst of hostilities in their territories. Nevertheless, it is clear that foreign investments and investors may be, and are, affected by hostilities’ outbreak.

From a legal stand-point, under the governing postulation, hostilities’ outbreak does not terminate or suspend BITs’ application, especially where BITs contains specific provisions regulating their operation during hostilities (“Dual Applicability”). Undeniably, it is challenging nowadays to find a BIT that does not include such provisions, one paradigmatic example being the “Full Protection and Security” clause (FPS). Indeed, since 1776 when the US Continental Congress appointed John Adams and other distinguished diplomats to draft a Plan Treaty for the establishment of international commercial relations with other powers, through the gradual replacement of Treaties of Amity with BITs, until today – nearly all international trade and investment treaties have included a FPS provision. Nevertheless, unlike other common ILFI standards, FPS was discussed in a relatively small number of arbitral decisions, which were (and remain), fragmented in their interpretation and application of the FPS standard.

This dual applicability of the instruments, creates a fertile ground for a conflict between ILFI on the one hand, and the *lex specialis* governing the conduct of hostilities – International Humanitarian Law (IHL), on the other. The resolution of this conflict remains unclear in practice, and so do the legal effects of conflicts’ physical ramifications on investments and investors. This issue is of particular practical relevance today, given the arbitral tribunals recently constituted to adjudicate investors’ claims against Russia concerning the damage and destruction inflicted to them and their investments during the Crimean annexation and subsequent regional hostilities. Pointedly, Claimants (also) base their claims on FPS provisions.

This Paper focuses on the FPS standard and the obligation it actually imposes on States, arguing that contrary to what the clause’s appellation suggests, the FPS standard does not require “full” protection or security, nor should it. The argument is made in three main steps. First, the origins and development of the FPS provision will be described starting from 1776 and ending with 2015 concluded treaties. The historic background serves to establish what FPS originally sought to guarantee, and what it arguably offers today. Second, the interpretation and application of FPS is discussed. Here, the arbitral jurisprudence is thoroughly analysed to identify the actual obligation it denotes from States in times of hostilities. Third, the FPS standard is “confronted” with customary IHL principles, and it is argued that compared to IHL principles regulating the protection of individuals and/or property, the FPS standard is either too high, thus limiting an otherwise permissible military operation, or not high enough thus leaving investment unprotected in hostilities.