

HOST STATES' DUE DILIGENCE OBLIGATIONS IN INTERNATIONAL INVESTMENT LAW

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ABSTRACT¹

Due diligence is present in a variety of aspects of the protection of foreign investors in international investment law and plays an important role in several aspects of the protection of foreign investors. In particular, certain standards of investment protection, notably “full protection and security” (“FPS”) include an obligation for the State to act with due diligence.

This articles seeks to establish an explanatory framework for past and future decisions of arbitral tribunals which have applied or will be confronted to applications of the due diligence standard in international investment law, by providing a typology of the different possible applications of the standard in relation to the obligations of the host State. It addresses the role of due diligence in the law governing State responsibility, and the application of due diligence in the customary norms relating to the protection of aliens. Based on these two sections, it next discusses the principle in contemporary investment law, focusing on the application of due diligence in the FPS, the international minimum standard (“IMS”) and the fair and equitable treatment (“FET”) standards of treatment. It then addresses the question of whether applying due diligence allows for the possibility of taking into account the relative capacities of host States, and the consequences the application of the due diligence standard has on the compensation for damages.

INTRODUCTION

Due diligence is present in a variety of aspects of the protection of foreign investors in international investment law and plays an important role in several aspects of the protection of foreign investors. In particular, certain standards of investment protection, notably “full protection and security” (“FPS”) include an obligation for the State to act with due diligence.

Due diligence has been considered to be a general principle of

¹ Keywords: Investment law, due diligence, protection and security, fair and equitable treatment, minimum standard, state responsibility, protection of aliens

law.² Its role in international law however is limited and concise, in that due diligence applies in certain specific situations only. In contemporary international law, due diligence requires States to exercise due diligence only in relation to certain specific conduct that is required from States under a set rule of international law. If a State is found in breach of its obligation to exercise due diligence, State responsibility may then ensue if the act in question is attributable to the State. For several reasons, the current regime governing international State responsibility indeed has departed from generalizing the application of the due diligence standard as a secondary norm for establishing State responsibility, but due diligence has taken a prominent place in certain specific areas of international law, as part of primary norms, notably in international environmental law,³ the law relating to diplomatic and consular relations,⁴ and international investment law. The due diligence standard has essentially been considered in relation to FPS, the international minimum standard (“IMS”), and fair and equitable treatment (“FET”).

This article seeks to establish an explanatory framework for the application of the due diligence standard to host State's obligations in international investment law, by providing a typology of the different possible applications of the standard in that respect. In doing so, this article will draw on the historical origins of the standard to understand the present relevance of due diligence and to map the contemporary use of due diligence in international investment law. This article will translate the historical uses of due diligence into modern investment treaty standards, notably the FPS and FET standards. This article does not, therefore, aim at providing a general account of or categorizing all references to due diligence in awards of arbitral tribunals. This article focuses on the obligations of States to act in due diligence, and does not address foreign investors' due diligence obligations.⁵

2. Timo Koivurova, *Due Diligence*, in 11 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW para. 2 (Rüdiger Wolfrum ed., Oxford U. Press, 2012), available at <http://www.articentre.org/loader.aspx?id=78182718-d0c9-4833-97b3-b69299e2f127> (last visited Mar. 30, 2015).

3. *Id.* para. 3.

4. See Vienna Convention on Diplomatic Relations art. 22(2), Apr. 18, 1961, 23 U.S.T. 3237, 500 U.N.T.S. 95.

5. See Peter Muchlinski, *'Caveat Investor'? The Relevance of the Conduct of the Investor Under the Fair and Equitable Treatment Standard*, 55 INT'L & COMP. L. Q. 527 (2006); IOANA TUDOR, *THE FAIR AND EQUITABLE TREATMENT STANDARD IN THE INTERNATIONAL LAW OF FOREIGN INVESTMENT* 216 (Oxford U. Press, 2008); MARTINS PAPANISKIS, *THE INTERNATIONAL MINIMUM STANDARD AND FAIR AND EQUITABLE TREATMENT* 256 (Oxford U. Press, 2013); *Parkerings-Compagniet AS v. Republic of*

I will first address the role of due diligence in the law governing State responsibility, before addressing the application of due diligence in the customary norms relating to the protection of aliens. Based on these two sections, I will discuss the principle in contemporary investment law, focusing on the application of due diligence in the IMS, the FPS and FET standards of treatment. I will then address the contents of the standard, and the question of whether applying due diligence allows for the possibility of taking into account the relative capacities of host States, and the consequences the application of the due diligence standard has on the compensation for damages.

I. DUE DILIGENCE AND STATE RESPONSIBILITY

The work of the International Law Commission (“ILC”) on the topic of State responsibility originally focused on the responsibility of States for injuries caused to aliens,⁶ despite the more general mandate given to the ILC by the United Nations General Assembly.⁷ Much attention in the first years of the work of the ILC was thus devoted to classifying the various categories of injury caused to aliens, and the ensuing obligation to provide reparation. In doing so, the ILC at that time had included in certain of its draft articles substantive rules in relation to the treatment of aliens, such as the “duty of protection” of States and rules relating to expropriation and nationalization.⁸ In view of the double focus on the responsibility of States for injuries caused to

Lithuania, ICSID Case No. ARB/05/8, Award, para. 333 (Sept. 11, 2007); Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award, para. 602 (Jul. 24, 2008); Eudoro Armando Olguín v. Republic of Paraguay, ICSID Case No. ARB/98/5, Award, para. 75 (Jul. 26 2001); Iurii Bogdanov, Agurdino-Invest Ltd. & Agurdino-Chimia JSC v. Republic of Moldova, Arbitral Award, 19 (Sept. 22, 2005); Alasdair Ross Anderson et al v. Republic of Costa Rica, ICSID Case No. ARB(AF)/07/3, Award, para. 58 (May 19 2010).

6. See Special Rapporteur on State Responsibility, *Second Rep. on the Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens. Part I: Acts and Omission*, Int'l Law Comm'n, U.N. Doc. A/CN.4/106 (Feb. 15, 1957) (by F. V. Garcia Amador) [hereinafter *Second Report*]; *State Responsibility*, INT'L LAW COMM'N, available at http://legal.un.org/ilc/guide/9_6.htm (last visited Apr. 1, 2015) (all documents relating to the work of the ILC on the topic State responsibility is located here unless mentioned otherwise).

7. See G.A. Res. 799 (VIII), U.N. GAOR, 4th Sess., Supp. No. 10, U.N. Doc. A/2589, at 52 (Dec. 7, 1953).

8. See Special Rapporteur on State Responsibility, *Responsibility of the State for Injuries Caused in its Territory to the Person or Property of Aliens – Reparation of the Injury*, arts. 7 & 9, Int'l Law Comm'n, U.N. Doc. A/CN.4/134 (Jan. 26, 1961) (by F. V. Garcia Amador).

aliens and on the primary norms in this respect, it is not surprising that one finds numerous references to the obligations for States to exercise due diligence in the protection of aliens for acts of third parties in the early work of the ILC on this topic.⁹

The 2001 Articles on State Responsibility on the contrary focus on the secondary norms governing State responsibility and do not seek to define the contents of the primary obligations of States.¹⁰ As a consequence, whether or not the conduct of the State involves "some degree of fault, culpability, negligence or want of due diligence . . . vary from one context to the another for reasons which essentially relate to the object and purpose of the treaty provision or other rule giving rise to the primary obligation."¹¹ The possible failure to exercise due diligence is not constitutive of State responsibility, *unless* the primary obligation contains such an obligation. Then, the failure to act in due diligence or not will determine whether or not there is a breach of the primary obligation. This in essence is the consequence of the ILC abandoning attempts to codify and progressively developing the primary obligations of States in relation to injuries caused to aliens following the designation of Roberto Ago as Special Rapporteur on the topic.¹² However, under Ago, much attention still was given to the classification of different forms of responsibility, in terms of whether the obligation at stake required for the State to adopt a specific course of conduct, or required the State to achieve a particular result.¹³ This distinction was finally abandoned by James Crawford in the 2001 final version of the Articles, essentially because the ILC considered that the distinction "does not seem to bear specific or direct consequences."¹⁴

9. See *Second Report*, *supra* note 6, at 122-23; Special Rapporteur on State Responsibility, *Fourth Rep. on The Internationally Wrongful Act of the State, Source of International Responsibility (continued)*, Int'l Law Comm'n, U.N. Doc. A/CN.4/264 (Jun. 30, 1972) (by Roberto Ago) [hereinafter *Fourth Report*].

10. Rep. of the Int'l Law Comm'n, 53d Sess., April 23-June 1, July 2-August 10, 2001, U.N. Doc. A/56/10; GAOR, 56th Sess., Supp. No. 10 (2001) [hereinafter ILC Articles on State Responsibility].

11. *Id.* art. 2 (commentary, para. 3).

12. *Fourth Report*, *supra* note 9, at 99-100; see also Pierre-Marie Dupuy, *Reviewing the Difficulties of Codification: On Ago's Classification of Obligations of Means and Obligations of Result in Relation to State Responsibility*, 10 EUR. J. INT'L L. 371 (1999); Pierre-Marie Dupuy, *Dionisio Anzilotti and the Law of International Responsibility of States*, 3 EUR. J. INT'L L. 139 (1992); Koivurova, *supra* note 2; Robert P. Barnidge, *The Due Diligence Principle under International Law*, 8 INT'L COMMUNITY L. REV. 81 (2006).

13. See Special Rapporteur, *Sixth Rep. on the Internationally Wrongful Act of the State, Source of International Responsibility (continued)*, U.N. Doc. A/CN.4/302 and Add. 1, 2 & 3 (1977) (by Robert Ago) [hereinafter *Sixth Report*]; see also Dupuy, *supra* note 12.

14. ILC Articles on State Responsibility, *supra* note 10, art. 12 (commentary).

As a consequence, whether or not the obligation of a State is one to obtain a certain result or an obligation of conduct, such as an obligation to exercise due diligence, is a matter to be determined by the primary norm only, and the distinction has little or no consequence for the rules on State responsibility. I say "little" because there are some implications in respect of the obligation of reparation ensuing from responsibility, in function of whether the obligation is one to exercise due diligence or any other obligation of result, but this is again a consequence of the type of obligation breached, and does not derive from any specific secondary norm on state responsibility to this effect. I will turn back to this at a later stage. That being said, the use of the principle of due diligence as part of a primary norm, does bear some resemblance with subjective responsibility, which tends to be applicable in cases where States fail to act or in cases of omissions.¹⁵ The current approach to State responsibility however, is to view the subjective aspect of responsibility as part of the primary norm rather than the secondary norms governing State responsibility.

II. DUE DILIGENCE AND THE PROTECTION OF ALIENS

Many cases dated from the late 19th Century and early 20th Century have applied the customary norms relating to the duty of States and State organs not only to abstain themselves from taking measures that would infringe on the security of aliens and their property, but also the duty of States to protect the security of aliens and their property from acts of third parties in their territory. While the first obligation – the duty for States and State organs to abstain themselves- was not assessed through the due diligence standard, the second obligation – the duty to protect against acts of individuals – has been tested through that standard.¹⁶ I will therefore focus here essentially on the latter obligation, although I will refer to the former in order to make clear the distinction between both.

The duty to protect the security of aliens and their property from acts of third parties in their territory has been accepted since long in international law. This obligation can be decomposed into three sub-

15 James Crawford & Simon Olleson, *The Nature and Forms of International Responsibility*, in MALCOLM D. EVANS, *INTERNATIONAL LAW* 441, 454-58 (Oxford U. Press, 2010).

16. See Riccardo Pisillo-Mazzeschi, *The Due Diligence Rule and the Nature of the International Responsibility of States*, 35 GER. Y.B. INT'L L. 9 (1992).

components¹⁷:

- 1) the obligation of States to prevent acts of individuals that may harm the security of aliens and their property, by making use of their administrative and judicial apparatus to that effect;
- 2) the obligation of States to apprehend and bring to justice those responsible for injuries caused to aliens by making use of their administrative and judicial apparatus to that effect, and
- 3) the obligation for States to possess and make available to aliens a judicial and administrative system capable of preventing¹⁸ acts, and of punishing and apprehending those responsible for the acts.

This distinction between these three obligations is important, since practice shows that the third obligation – States' obligation *to possess and make available a judicial and administrative system* – is tested not by reference to the due diligence standard,¹⁹ while States' other obligations have been assessed by reference to the due diligence standard.²⁰

These principles have been confirmed in many cases, notably in the decisions of several Claims Commissions established in the late 19th Century and early 20th Century. These obligations have been found to be applicable in cases of occasional acts of third parties, in situations of public disorder, revolts and violence, and in case of civil war or international armed conflict.²¹

In relation to *isolated acts of individuals*, in *Venable v. Mexico*,²² the Commissioner considered that the acts complained of (essentially allowing theft of parts of locomotives that had been seized – the obligation for States to prevent- and not prosecuting those responsible

17. *Id.* at 25.

18. The obligation too possess a judicial and administrative system capable of *preventing* acts however is very close to the obligation of States to act with due diligence to prevent acts of individuals. The difference however lies, not only in that due diligence applies to the latter only, but in that the first covers States' obligations in a specific situation, while the second concerns States' general obligations to maintain public order and prevent crimes. See Pisillo-Mazzeschi, *supra* note 16, at 26-29; Noyes (U.S. v. Panama), 6 R.I.A.A., 308, 311 (U.S.-Panama Gen. Cl. Comm'n 1933).

19. See *Second Report*, *supra* note 6, at 110-11.

20. See *id.* at 120; Pisillo-Mazzeschi, *supra* note 16, at 26-29.

21. See Pisillo-Mazzeschi, *supra* note 16, at 27-29 (discussing the general overview of the various case-law to this effect).

22. See H. G. Venable (U.S. v. Mexico), 4 R.I.A.A. 219-261 (Mex.-U.S. Gen. Cl. Comm'n 1927).

for the crime –the obligation for States to apprehend and punish-) amounted to “an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency.”²³ In several other cases, the specific obligation to apprehend or punish those responsible for the acts was also confirmed. In *Janes v. Mexico*²⁴ for instance, the Commissioner decided, that “there was clearly such a failure on the part of the Mexican authorities to take prompt and efficient action to apprehend the slayer,” and therefore the Mexican authorities were held responsible for not having taken “proper steps to apprehend and punish the slayer of Janes.”²⁵ In *Kennedy v. Mexico*,²⁶ in which the person responsible for the injuries caused had been convicted to a sentence disproportionate to the crime committed and the injuries inflicted, the Commission decided that “it seems that there was negligence in a serious degree, and that such negligence constitutes a denial of justice.”²⁷ Since this obligation related to the obligation for States to possess and make available to aliens a judicial system capable of punishing those responsible for the acts, the Commission made no reference to the due diligence standard.²⁸

In respect of *mob violence, riots or civil unrest*, several decisions applied the same principles. Arbitrator Max Huber in the *British Property in Spanish Morocco* case²⁹ confirmed the principle that in the events of riots (“banditry, which results in a state of general insecurity, but without the situation amounting, strictly speaking, to a state of rebellion”)³⁰ States have a duty of vigilance towards aliens. In *Youmans v. Mexico*, the Commissioner also held that in case of “mob violence”, States incur responsibility if “a lack of diligence in the punishment of the persons implicated in the crime” is shown.³¹

23. *Id.* para. 23.

24. Laura M. B. Janes et al. (U.S. v. Mexico), 4 R.I.A.A. 82-98 (Mex.-U.S. Gen. Cl. Comm'n 1925).

25. *Id.* at 85-86, paras. 10, 17.

26. Kennedy (U.S. v. Mexico), 4 R.I.A.A.194-203 (Mex.-U.S. Gen. Cl. Comm'n 1927) (concurring opinion by American Commissioner).

27. *Id.* para. 5.

28. See Pisillo-Mazzeschi, *supra* note 16, at 30.

29. British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 615, 642, 645 (U.K.-Spain 1925); see also Great-Britain United States Mixed Commission, 9 R.I.A.A. 144 (1920).

30. Original in French ('actes de brigandage, dont résulte un état d'insécurité générale, sans toutefois qu'il y'ait, à proprement parler un état de rébellion' - translation by the author). British Claims in the Spanish Zone of Morocco, 2 R.I.A.A. 644 (U.K.-Spain 1925).

31. Youmans (U.S. v. Mexico), Gen. Claims Comm'n, 110-17 (1926).

Finally, in relation to *insurrectional movements*, one can refer to the *Sambiaggio* case, decided in the context of the Italy-Venezuela Mixed Claims Commission, in which the Commission held that Venezuela would be responsible for acts occurred during the revolution, if "Venezuelan authorities failed to exercise due diligence to prevent damages from being inflicted by revolutionists."³²

Despite the occasional use of terms such as "indirect responsibility"³³ in early cases, which was in essence the consequence of the ambiguity that existed at that time on the question of whether the State was responsible for the injury caused to the alien, or rather was responsible only for the failure to exercise due diligence in preventing the injury or apprehending and punishing the responsible individuals,³⁴ which of course had important consequences in respect of the compensation awarded, the responsibility of States for breaching their obligations in relation to the protection of aliens is not an "indirect responsibility" of the State for the act committed; the act which has caused harm in itself cannot be attributed to the State.³⁵ This does not imply, however, that the reparation awarded may not take account of the damages caused by the act, but this will depend on the circumstances of each case. Indeed, in principle, the reparation should first of all remedy the obligation breached, which is not the act of the individual, but the obligation of the State to act in due diligence to prevent an injury caused to an alien or the failure to exercise due diligence in apprehending and punishing the individual responsible for that injury. This was famously posited by Max Huber in the mentioned *British Property in Morocco* case, which not only confirmed the application of the due diligence standards, but also confirmed the absence of any direct responsibility of the State for the commission of the act itself³⁶:

It seems indisputable that the State is not responsible for a riot, rebellion, civil war or international war nor for the fact that these events cause damage on its territory.

.....

This principle of absence of responsibility does not exclude the duty to

32. *Sambiaggio* (Italy v. Venezuela), 10 R.I.A.A. 499, 524 (Mixed Claims Commission 1903).

33. See H. G. Venable (U.S v. Mexico), 4 R.I.A.A. 229, para. 23. (Mex.-U.S. Gen. Cl. Comm'n 1927).

34. *Second Report*, *supra* note 6, at 34; *Sixth Report*, *supra*, note 13, at 99.

35. *Sixth Report*, *supra* note 13, at 100.

36. *British Claims in the Spanish Zone of Morocco*, 2 R.I.A.A. 709-10 (U.K.-Spain 1925).

exercise certain vigilance. While the State is not responsible for the revolutionary events themselves, it may nevertheless be responsible for what the authorities are doing or not doing to avert, to the extent possible, the consequences. Responsibility for the action or inaction of public power is completely different from responsibility for acts attributable to individuals who are beyond the influence of the authorities or who are openly hostile to the authorities.³⁷

In *Janes*, the Commissioner also pointed out that "in cases of improper governmental action of this type [denial of justice], a nation is never held to be liable for anything else than the damage caused by what the executive or the legislative committed or omitted itself."³⁸ As a consequence, "the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal."³⁹ These principles still stand today.⁴⁰

This early practice has been particularly relevant for the recent application of due diligence in the context of international investment law. Considering that the current investment regime is partly rooted in the general customary norms governing the treatment of aliens in international law, this is not surprising. Indeed, full protection and security ("FPS"), the international minimum standard ("IMS"), and fair and equitable treatment ("FET") share many features with that customary norm.

III. DUE DILIGENCE IN CONTEMPORARY INTERNATIONAL INVESTMENT LAW

Although it is not the purpose here to engage in an all-inclusive discussion of the exact contents of these standards of treatment, it is

37. Original in French ('Il paraît incontestable que l'État n'est pas responsable pour le fait d'une émeute, révolte, guerre civile ou guerre internationale, ni pour le fait que ces événements provoquent des dommages sur son territoire. [...] Le principe de la non-responsabilité n'exclut point le devoir d'exercer une certaine vigilance. Si l'État n'est pas responsable des événements révolutionnaires eux-mêmes, il peut être néanmoins responsable de ce que les autorités font ou ne font pas, pour parer, dans la mesure possible, aux suites. La responsabilité pour l'action ou l'inaction de la puissance publique est tout autre chose que la responsabilité pour des actes imputables à des personnes échappant à l'influence des autorités ou leur étant ouvertement hostiles.' - translation by the author). *Id.* at 642.

38. Laura M. B. Janes et al. (U.S. v. Mexico), 4 R.I.A.A. 88, para 22. (Mex.-U.S. Gen. Cl. Comm'n 1925).

39. *Id.* at 89, para 25.

40. See Crawford & Olleson, *supra* note 15, at 454-55.

necessary to briefly sketch their main characteristics and their interconnectedness in order to better grasp the role of due diligence in assessing breaches of these standards.

FPS, IMS, and FET are generally referred to as non-contingent, absolute or objective standards of treatment as opposed to contingent, relative or subjective standards, such as national treatment (“NT”) or the most favored nation treatment (“MFN”).⁴¹ The latter category of standards of treatment impose on the host State the obligation to act in a certain way by reference to how *other* investors or investments are treated, e.g. national investors or investments in case of NT, or investors or investments from third States in case of MFN treatment. The objective of such standards is that States may not discriminate between investors and investments; whether or not the State has exercised due diligence in this respect is irrelevant. Objective standards, on the other hand, require from the State to act in a certain “objective” way, as required under international law (either custom or treaty law) irrespective of how other investors or investments are treated. There is, in other words, no comparison with the treatment of other investors or investments.

This categorization partially explains the presence of due diligence in those standards of treatment. Indeed, when the acts of States are tested against how other investors or investments are treated, there is neither room nor need to apply a due diligence standard. The standard to be applied when dealing with relative standards is a comparative standard: how *other* investors or investments have been treated. Whether the State was diligent or not is irrelevant. Conversely, when the acts of States are tested against absolute standards under FPS, IMS and FET, how other investors or investments are treated is irrelevant; the conduct and acts of States are tested against requirements for such conduct or acts under international law. The assessment standard of a breach of the latter category of standards then requires a comparison with an objective assessment standard: how investors and investments should be treated under international law. This comparator/objective assessment in certain interpretations of FPS, and partly also in the IMS and FET as will be explained, is the due diligence standard – the conduct of a diligent State.

However, the “objectivity” of the absolute treatment standards will

41. See CAMPBELL MCLACHLAN QC, LAURENCE SHORE & MATTHEW WEINIGER, *INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES* 207, para 7.19 (Oxford U. Press, 2008); Nicolas Angelet, *Fair and Equitable Treatment*, in 3 MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 1094 (Rüdiger Wolfrum ed., 2012).

vary by operation of the due diligence standard if one considers that the circumstances and resources of the host State should be taken into account when applying the due diligence requirement, which I will discuss below. In that sense even absolute standards of treatment carry a subjective element, although the latter should not be understood as implying a comparison with how other investors or investments are or have been treated.

A. *Due Diligence and the International Minimum Standard*

The exact relation between FPS, the IMS and FET is still subject to much debate. It has been contended that FPS forms part of the IMS,⁴² or that FET and FPS are included in the IMS.⁴³ Others have contended to the contrary that all three standards or treatment are independent treaty standards.⁴⁴ Despite these controversies, which I do not intend to settle here, it is beyond doubt that all three-treatment standards have certain commonalities, and thus overlap in certain aspects.⁴⁵ The overlap is particularly noticeable in context of the State's duty to protect foreign investors and investments from acts of third parties, and thus, as will be shown in the application of the due diligence standard to such obligation. The overlap, in essence, is a consequence of the fact that these standards, whether one views them as autonomous standards or not, are rooted in the general rule relating to States' obligations in respect of the protection of aliens discussed above. The obligations to which the due diligence standard applies, and thus those that I will consider here, are part of the FPS or FET, and whether one views these standards as embodied in the IMS is irrelevant for our purposes.

42. See Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISPUTE SETTLEMENT 353, 354 (2010). The decision of the Tribunal in *Noble Ventures* argued that "[w]ith 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." *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, para. 164 (Oct 12, 2005).

43. See *Notes of Interpretation of Certain Chapter 11 Provisions*, NAFTA FREE TRADE COMM'N (July 31, 2001), available at http://www.sice.oas.org/tpd/nafta/Commission/CHI1understanding_e.asp (last visited Apr. 7, 2015).

44. Schreuer, *supra* note 42, at 362.

45. *Jan de Nul N.V. & Dredging Int'l N.V. v. Arab Republic of Egypt*, ICSID Case No. ARB/04/13, Award, para. 269 (Nov. 6, 2008) (stating that "[t]he 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"); see also *PSEG Global Inc. & Konya Hgin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey*, ICSID Case No. ARB/02/5, Award, para. 258 (Jan. 19, 2007).

Situations covered by the FPS indeed will require conduct in accordance to the IMS.

To give one example, in the *Neer* case, often quoted as representing the IMS, although not without controversy in respect of the application of that decision to modern investment law,⁴⁶ the US/Mexico General Claims Commission described the IMS as follows:

[T]he propriety of governmental acts should be put to the test of international standards, and (second) that the treatment of an alien, in order to constitute an international delinquency, should amount to an outrage, to bad faith, to wilful neglect of duty, or to an insufficiency of governmental action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency. Whether the insufficiency proceeds from deficient execution of an intelligent law or from the fact that the laws of the country do not empower the authorities to measure up to international standards is immaterial.⁴⁷

This statement in actual fact related to a situation typically covered by a contemporary FPS provision, as understood in physical protection from acts of third parties, as it related to the obligation of Mexico to apprehend and punish those responsible for the acts.⁴⁸ The scenario of that case, although seen as defining the IMS, is applicable to FPS as well. To that extent, it is beyond doubt that the IMS can be seen as embodied in contemporary treaty obligations relating to the obligation to provide (full) protection and security.⁴⁹ FPS, understood as providing an obligation for the State to protect against physical violence, is indeed analogous to the IMS standard represented in the classical theory on the protection of aliens discussed above,⁵⁰ and it is consequently unnecessary to distinguish both standards in respect of physical protection from acts of third parties. It is moreover unnecessary since contemporary investment treaties generally do not refer to the minimum standard at all, or in isolation of other treaty standards namely without linking FPS and FET to the IMS.

46. See ROLAND KLÄGER, 'FAIR AND EQUITABLE TREATMENT' IN INTERNATIONAL INVESTMENT LAW 51-55 (James Crawford SC FBA & John S. Bell FBA, 2013).

47. L. F. H. Neer & Paulene Neer (U.S. v. Mexico), 4 R.I.A.A. 60, 61-62 (Gen. Claims Comm'n 1926).

48. *Id.* at 62.

49. See *Elettronica Sicula SpA (U.S. v. Italy)*, 1989 I.C.J. 15, para. 111 (July 20) ("The primary standard laid down by Article V is 'the full protection and security required by international law', in short the 'protection and security' must conform to the minimum international standard.") [hereinafter ELSI].

50. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 522 (Oct. 31, 2011); see KLÄGER, *supra* note 46, at 292.

Whether or not FPS entails more than the IMS is a question I will not settle here, although specific consideration will be given to broader interpretations of FPS, without taking any position on the correctness of such a view, in order to verify the possible application in such context of the due diligence standard. As a consequence, the discussion below on FPS, understood as the duty to protect foreign investors and investments from physical violence by third parties, is *mutatis mutandis* applicable to the IMS.

B. Due Diligence and Full Protection and Security

Provisions granting protection and security to investments and investors vary in nature. Some treaties refer to “full protection and security,” while others provide for “protection and security” or “constant protection and security.”⁵¹ It is not the purpose here to engage in a discussion of these variances, and the standard will be referred to here as FPS despite the existing differences in wording. Indeed, the current conception of the FPS standard of treatment – however phrased – comprises the obligation for States to provide physical or police protection to foreign investments/investors from harm caused by the State itself or by third parties, which includes the obligations to prevent, to punish and apprehend, and possess and make available a functioning administrative and legal system to that effect.⁵² Some tribunals moreover have argued that the difference in wording do “not make a significant difference.”⁵³ Therefore, the addition of terms such as “constant” or “full” do not change the application of the due diligence standard rather than a strict liability standard for assessing breaches of that provision⁵⁴ nor does the use of “protection” rather than “protection and security” change the level of police protection a host State is required to provide.⁵⁵

51. See Schreuer, *supra* note 42, at 353-69.

52. See U.N. Conf. on Trade & Dev., *Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking*, U.N. Doc. UNCTAD/ITE/IIT/2006/5, 132 (2007), available at http://unctad.org/en/Docs/iteiia20065_en.pdf (last visited Apr. 1, 2015); see also JESWALD W. SALACUSE, *THE LAW OF INVESTMENT TREATIES* 132, 209-10 (2010); George K. Foster, *Recovering “Protection and Security”: The Treaty Standard’s Obscure Origins, Forgotten Meaning, and Key Current Significance*, 45 VAND. J. TRANSNAT’L L. 1095, 1095-156 (2012).

53. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 354 (Sept. 11, 2007).

54. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, para. 50 (June 27, 1990).

55. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 354 (Sept. 11, 2007).

As said earlier in relation to the customary norm on the protection of aliens, the obligation to provide FPS applies to acts both of the State and of third parties under its jurisdiction.⁵⁶ Although I will essentially focus on the latter type of obligation, since I argue that the standard of due diligence applies primarily to those type of cases, it is nevertheless necessary to briefly discuss whether or not the due diligence standard plays a role when the acts of the State itself, or when any of its organs or other entities the acts of which are attributable to the State, have physically impaired the investor or investment, are involved. This is important also to explain investment law cases which have discussed the due diligence standard in that context.

I. The State's Duty to Abstain

Traditionally, as was explained above, the State's duty to abstain from infringing the *physical* protection and security of aliens, which applies to all State organs and entities the acts of which are attributable to the State, is not tested by reference to the due diligence standard.⁵⁷ This is supported by several cases, such as the *Sambiaggio* case mentioned above, in which Umpire Ralston distinguished between the acts of the State and the acts of revolutionaries, and applied to the former acts the principle that a State is responsible for the acts of its organs, while in the latter case, responsibility only was considered possible in the event of a lack of due diligence.⁵⁸ It has also been confirmed in many other cases, which related to the unlawful killing of individuals by police officers or the military.⁵⁹ The act itself – the unlawful killing – was considered a breach of an international obligation of the State, which was attributable to the latter because of the involvement of State organs. No reference then was made to the principle of due diligence – the State basically is responsible for the acts of its organs. If, for example, police officers or the military have caused harm to a foreigner, whether or not the State has acted with due diligence to prevent the act is unconnected. The act itself is attributable to the State. This of course presupposes that the act in question, which

56. See Schreuer, *supra* note 42, at 355-62; see also *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 730 (Jul. 24, 2008).

57. Pisillo-Mazzeschi, *supra* note 16, at 23.

58. See *Sambiaggio (Italy v. Venezuela)*, 10 R.I.A.A. 499, 520-24 (Mixed Claims Commission 1903).

59. See *J. W. & N. L. Swinney (U.S. v. Mexico)*, 4 R.I.A.A. 98-101 (Mex-U.S. Gen. Cl. Comm'n Nov. 16, 1926); *D. Guerrero vda. De Falcón (Mexico v. U.S.)*, 4 R.I.A.A. 104-106 (Gen. Cl. Comm'n Mex-U.S. Nov. 16, 1926).

has caused harm, is in itself wrongful. It is interesting to note in this respect that certain tribunals, such as the Tribunal in *El Paso*, have implied that in case of acts of the State or State organs, the FPS standard does not apply, being limited to acts of third parties only.⁶⁰ Other tribunals have however, correctly, posited that the FPS standard applies both to State and third party acts.⁶¹

In this case, contrary to the responsibility of States for acts of third parties other than State organs, the wrongful act is *the act that has caused harm*. In case of acts of third parties other than State organs, the internationally wrongful act is *the failure to prevent* the occurrence of the act or the failure to apprehend or punish those responsible for the act, assessed through the due diligence standard. This explains why due diligence is of no relevance in the first case, but is in the latter.

There is some case law from investment tribunals, which discusses this distinction. In line with the early case law mentioned above, it is correct to state that the acts of State organs which result in an impairment of the protection and security to be guaranteed to aliens generally, and thus foreign investors and their investments, are wrongful as such, without the need to enquire whether the State organ in question was diligent or not. Tribunals have refrained from applying the due diligence standard to the conduct of States and State organs, although they have on several occasions explicitly referred to the due diligence standard in general terms when discussing the contents of the FPS standard. This may cause certain confusion as to the relevance of due diligence when the duty of the State to abstain is concerned, but the principle remains that due diligence is irrelevant in relation to the duty of the State to abstain.

AAPL v. Sri Lanka and *AMT v. Zaire* are sometimes invoked in the

60. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 524 (Oct. 31, 2011). "El Paso did not specify or determine the duty to act against a third party that has allegedly been breached by Argentina under the BIT: all the impugned acts that allegedly violate the FPS standard are directly attributable to the GOA and not to any third party. In the present case, none of the measures challenged by El Paso were taken by a third party; they all emanated from the State itself. Consequently, these measures should only be assessed in the light of the other BIT standards and cannot be examined from the angle of full protection and security." *Id.*

61. *See Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 355 (Sept. 11, 2007). "A violation of the standard of full protection and security could arise in case of failure of the State to prevent the damage, to restore the previous situation or to punish the author of the injury. The injury could be committed either by the host State, or by its agencies or by an individual." *Id.* (internal footnotes omitted).

context of violence caused by State organs,⁶² but as I will point out, both cases did not relate to such acts. In *AAPL v. Sri Lanka*,⁶³ the Tribunal indeed did not apply the due diligence standard to the acts of State organs which had caused harm.⁶⁴ In that case, which concerned the destruction of a shrimp farm and the killing of several staff members of that farm during a military operation between the Sri Lankan Security Forces and Tamil rebels, the Tribunal considered that Sri Lanka, by failing to take precautionary measures to remove suspected staff members from the farm through peaceful means before launching the attack, "violated its due diligence obligation which requires undertaking all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destruction."⁶⁵ This finding was not applied to the acts of the State organ which had caused the killings and destruction of property, since the Tribunal had found that there was no conclusive evidence that the Sri Lankan security forces had in fact killed the staff members and destroyed the farm, nor that the acts had been caused by rebels.⁶⁶ Faced with the impossibility of establishing who was directly responsible for the acts, the Tribunal thus engaged in an analysis of whether the governmental forces were capable of providing protection to prevent the destruction of the farm, which indeed was assessed through application of the due diligence standard. This assessment thus was alien to the application of the due diligence standard to the acts of the destruction of the property itself by the Government forces.

In *AMT v. Zaire*,⁶⁷ the claimant had sought compensation for the destruction of property of one of its subsidiaries, and the looting in 1991 by certain member of the Zairian forces, which had resulted in the destruction, damage and loss of finished goods and raw materials. The Tribunal considered the host State in breach of its obligations to provide FPS to AMT by having failed to take any measure whatsoever, but here again, the Tribunal did not consider the acts in question to be those of a

62. See Gleider I. Hernandez, *The Interaction Between Investment Law and the Law of Armed Conflict in the Interpretation of Full Protection and Security Clauses*, in *INVESTMENT LAW WITHIN INTERNATIONAL LAW: INTEGRATIONIST PERSPECTIVES* 21, 35-38 (Freya Baetens ed., 2013).

63. See generally *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award (June 27, 1990).

64. *But see* Schreuer, *supra* note 42, at 5.

65. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 562. (June 27, 1990).

66. *Id.* at 563.

67. *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award (Feb. 21, 1997).

State organ, since they were perpetrated by “separate individuals and not the [Zairian] forces.”⁶⁸

In more recent cases, Tribunals have explicitly referred to the due diligence standard in general terms, but have refrained from applying that standard to alleged acts of States, which had caused damage. In *Saluka v. Czech Republic*, the acts in question were acts of the State organs. The acts complained of consisted of the suspension of trading of shares Saluka held in IPB, the prohibition of transfers of Saluka’s IPB shares, and police searches and seizure of documents.⁶⁹ After setting out the contents of the FPS standard, which includes a brief mention of due diligence, and limiting FPS to physical protection only, the Tribunal rejected all claims in this respect, by arguing, without taking the position that all acts complained of fell within the ambit of the FPS clause, that the measures taken were not “totally unreasonable and unjustifiable.”⁷⁰ The Tribunal refrained from applying the due diligence standard to those acts, which moreover did not involve the use of force, and in essence boiled down to claims of denials of justice and lack of due process.⁷¹ In that respect, I will refer back to this case at a later stage.

In *Biwater Gauff v. Tanzania*, the Tribunal considered that the removal of the management from the offices or the seizure of the City Water’s premises, “even if no force was used [were] unnecessary and abusive and amount[ed] to a violation by the Republic of its obligation to ensure full protection and security.”⁷² Rightly, no reference was made to the “due diligence” standard in applying the law to the facts of the case since the complaints related to the acts of Tanzania itself, although ample reference was made to the standard in the preceding paragraphs.⁷³

Another case at point is *Tecmed v. Mexico*, in which the Tribunal briefly touched upon the issue.⁷⁴ In that case, the Claimant had alleged that Mexican authorities had not only encouraged protests against the landfill it sought to operate through its subsidiary Cytrar, but also that

68. *Id.*

69. *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award, para. 485 (Perm. Ct. Arb. 2006).

70. *Id.*

71. *Id.* para. 486.

72. *Biwater Gauff_(Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 731 (Jul. 24, 2008).

73. *Id.*

74. *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award (May 29, 2003).

police and judicial authorities

did not act as quickly, efficiently and thoroughly as they should have to avoid, prevent or put an end to the adverse social demonstrations expressed through disturbances in the operation of the Landfill or access thereto, or the personal security or freedom to move about of the members of Cytrar's staff related to the Landfill.⁷⁵

The Tribunal in *Tecmed* differentiated the rules applicable to acts of the State or State organs, or other acts which are otherwise attributable to the State, but concluded that no evidence was furnished to prove, first, the involvement of the authorities in the demonstrations, and, secondly, in relation to acts of third parties, that Mexican authorities "have not reacted reasonably, in accordance with the parameters inherent in a democratic state, to the direct action movements conducted by those who were against the Landfill," the latter criterion being an application of the due diligence standard.⁷⁶

More recently in *Tulip v. Turkey*, the Tribunal mentioned the distinction explicitly in an *obiter dictum*, and applied due diligence only the conduct of State organs in relation to acts of third parties:

There is, therefore, no basis to conclude, that the State (assuming, *arguendo*, that Emlak were an emanation of the State) planned to engage in an unlawful seizure of land belonging to a foreign investor or, alternatively, that State organs failed to exercise due diligence and to prevent planned unlawful action by a private party.⁷⁷

Recent practice of investment tribunals thus shows that the principles established by early case-law, namely that when the State's acts impair the physical protection and security of foreigner investors and investments, the due diligence standard should not apply, applies equally in investment law. Based on the discussed cases, and since the FPS standard without doubt is similar to or emerges from the IMS, at least when understood as requiring physical protection and security, there is no reason to depart from the principles applied in the past.

2. *The State's Duty to Protect Foreign Investments from Acts of Third Parties*

In line with the distinction made above, States' obligations in respect of acts of third parties under the FPS standard of treatment

75. *Id.* para. 175.

76. *Id.* at para. 177.

77. *Tulip Real Estate Investment and Development Netherlands B.V. v. Republic of Turkey*, ICSID Case No. ARB/11/28, Award, para. 433 (Mar. 10, 2014) (an application for annulment of the tribunal's award was filed in July 2014).

comprise several distinct obligations: first, the obligation to act with due diligence to prevent such acts, secondly, the obligation for States to act with due diligence to apprehend and punish those responsible for the act, and thirdly, the obligation to possess and make available to foreign investors a judicial and administrative system capable of preventing acts, and of punishing and apprehending those responsible for the act.

i. States' Obligation to Act with Due Diligence to Prevent Acts of Third Parties

Although FPS is often not further defined in investment treaties, it is the general understanding of the contents of the standard that it requires the State to exercise due diligence in providing physical protection and security to foreign investments and/or investors to prevent acts of individuals that would cause damage. To that extent it represents the classical understanding of the customary norm relating to the protection of aliens described above, and represented in cases such as *Venable v. Mexico*. This is the most common use that is made of the provision in contemporary investment law and arbitration.

Such obligation does not entail any form of strict liability for the host State. In *Lauder v. Czech Republic*, the Tribunal noted in respect of an FPS provision:

The Arbitral Tribunal is of the opinion that the Treaty obliges the Parties to exercise such due diligence in the protection of foreign investment as reasonable under the circumstances. However, the Treaty does not oblige the Parties to protect foreign investment against any possible loss of value caused by persons whose acts could not be attributed to the State. Such protection would indeed amount to strict liability, which cannot be imposed to a State absent any specific provision in the Treaty.⁷⁸

This understanding of the FPS standard of treatment is shared by many tribunals.⁷⁹ Investment law cases over the past decade confirm not only the existence of the due diligence standard to test State's

78. *Lauder v. Czech Republic*, UNCITRAL Arb., Final Award, para. 310 (Sept. 3, 2001).

79. See *Noble Ventures, Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, para. 164 (Oct. 12, 2005); *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL Arb., Partial Award, para. 483 (Mar. 17, 2006); *Biwater Gauff, Ltd. v. Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 725 (July 24, 2008); *Rumeli Telekom A.S. v. Republic of Kazakhstan*, ICSID Case No. ARB/05/16, Award, para. 668 (July 29, 2008); *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, para. 229 (June 7, 2012); *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, para. 161 (July 30, 2010).

behavior, but also the principle mentioned above, that the State is not responsible for the acts of individuals as such, but only for having failed to exercise due diligence in preventing harm caused by the act in question. Such obligations also apply, and perhaps primarily, in cases of armed conflict, civil strife or revolution,⁸⁰ in line with early case law mentioned above which has applied this principles as part of customary law. In the event of an armed conflict, a State indeed should use "the police and military forces to protect the interests of the alien to the extent feasible and practicable under the circumstances, both before the event and while it unfolds."⁸¹ Certain tribunals have used tests similar to "due diligence," without however referring explicitly to a duty of "due diligence." They have rather referred to a duty of "vigilance."⁸² In practice, the applied standard essentially is the same.

It is clear from arbitral practice that the State holds no strict liability for harm caused by third parties.⁸³ Although not explicitly referring to "due diligence," the International Court of Justice ("ICJ") in the *ELSI* case followed the same approach.⁸⁴ The ICJ in *ELSI* posited that "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."⁸⁵ Considering the very close relation between FPS and the customary rules governing the protection of aliens, this rule is not surprising, and indeed conforms to the main principles mentioned above. An FPS treaty provision understood as requiring the State to exercise due diligence to prevent acts of third parties that would cause harm to

80. ANDREW NEWCOMBE & LLUÍS PARADELL, *LAW AND PRACTICE OF INVESTMENT TREATIES: STANDARDS OF TREATMENT* 315 (2009).

81. RUDOLF DOLZER & CHRISTOPH SCHREUER, *PRINCIPLES OF INTERNATIONAL INVESTMENT LAW* 166 (2008).

82. See, for instance, the statement by the Tribunal in *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, Award, para. 6.05 (Feb. 21, 1997) ("The obligation incumbent on Zaire is an obligation of vigilance, in the sense that Zaire as the receiving State of investments made by AMT, an American Company, shall take all measures necessary to ensure the full enjoyment of protection and security of its investment and should not be permitted to invoke its own legislation to detract from any such obligation."); see also *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, para. 84 (Dec. 8, 2000) (citing and endorsing this statement).

83. See SALACUSE, *supra* note 52, at 132, 209-10; *Asian Agric. Prods. Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, para. 77 (June 27, 1990); *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, para. 177 (May 29, 2003).

84. *Elettronica Sicula S.P.A.*, Judgement (U.S. v. Italy), 1989 I.C.J. 15, para. 108. (July 20).

85. *Id.*

foreign investments and/or investors essentially is the same requirement as the customary standard mentioned above. The same is true in respect of the obligation for States in apprehending and punishing those responsible for the harm.

ii. *States' Obligation to Act with Due Diligence to Apprehend and Punish those Responsible for the Acts*

The principle that a State is under an obligation, in case of harm caused by acts of third parties to apprehend and punish those responsible for the acts also is part of the FPS standard.⁸⁶ Besides the preventive obligation mentioned in the previous section, States thus have also a remedial obligation,⁸⁷ or in the words of the Tribunal in *El Paso v. Argentina*, "a duty of prevention and a duty of repression."⁸⁸ This "existence of a duty of repression" again is very much in line with the obligations under customary international law described above,⁸⁹ in particular in relation to the conduct of investigations into the events that have caused damage. Again, the principle of due diligence applies: States should take all reasonable measures a diligent State would take to apprehend and punish those responsible. As the Claims Commission in *Janes* explained "[t]he culprit is liable for having killed or murdered an American national; the Government is liable for not having measured up to its duty of diligently prosecuting and properly punishing the offender."⁹⁰ At the outset I should note that this obligation does not comprise the obligation for the State to act in due diligence in respect of the conduct of a potential trial or the access given to foreign investors to their judicial system. Such obligations are covered in States' general obligation to possess and make available to foreign investors a judicial and administrative system capable of preventing acts, and of punishing and apprehending those responsible for the act.

Some investment tribunals have dealt with this question, and in doing so have confirmed these main principles. One of the few examples is *Wena Hotels v. Egypt*, in which the Tribunal explicitly

86. MCLACHLAN QC, SHORE & WEINIGER, *supra* note 41, at 262, para. 7.190; NEWCOMBE & PARADELL, *supra* note 80, at 246, para 6.8.

87. See, e.g., *Toto Costruzioni Generali S.p.A. v. Republic of Lebanon*, ICSID Case No. ARB/07/12, Award, para. 229 (June 7, 2012).

88. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 523 (Oct. 31, 2011).

89. See U.N. General Claims Comm'n, Reports of Arbitral, *Lina Balderas de Diaz (United Mexican States) v. United States of America*, Decision, 106-108 (Nov. 16, 1926).

90. *Laura M. B. Janes et al. (U.S. v. Mexico)*, 4 R.I.A.A. 87 (Mex.-U.S. Gen. Cl. Comm'n 1925).

argued that the failure by the State to take action against those responsible for the forceful seizure of Wena's property constituted a breach of FPS.⁹¹ No specific mention was made of due diligence however, but this is understandable considering the complete absence of any action taken by the host State. Another example is *Parkerings v. Lithuania* in which the claimant had alleged the police did not find the authors responsible for damages to its materials.⁹² The Tribunal however considered that there had been an investigation and that there was no evidence that the process of investigation was in breach of the applicable BIT. In *Frontier v. Czech Republic*, the claimant *inter alia* alleged that Czech officials charged with investigating the criminal complaints, which had been lodged against certain individuals, "were negligent and did not proceed in an even-handed manner."⁹³ The Tribunal, after confirming the application of due diligence to such claims, dismissed the claim having concluded that there was no evidence that the police authorities had been negligent or acted in bad faith.⁹⁴

This State obligation of course is closely related to the general obligation of States to possess a judicial and administrative system capable of preventing acts, and of apprehending and punishing those responsible for the acts. Indeed, the obligation to apprehend and punish those responsible for the acts will in the majority of the cases rest upon an assessment whether the foreign investors had adequate access to the legal system to seek redress for the acts, which have caused harm. Several cases, such as *Parkerings* or *Frontier*, have thus applied both obligations.

iii. *States' Obligation to Possess and Make Available to Foreign Investors a Judicial and Administrative System Capable of Preventing Acts, and of Punishing and Apprehending Those Responsible for the Act*

It is accepted that, under customary international law, States have an obligation of due diligence in the administration of justice, very often

91. *Wena Hotels Ltd. v. Arab Republic of Egypt*, ICSID Case No. ARB/98/4, Award, paras. 82, 84, 94 (Dec. 8, 2000).

92. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 326 (Sept. 11, 2007).

93. *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award, para. 423 (Perm. Ct. Arb. Nov. 12, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf> (last visited Apr. 1, 2015).

94. *Id.* paras. 261, 436.

also in relation to criminal acts towards the foreign investor.⁹⁵ This is embodied in the FPS obligation to act with due diligence in apprehending and punishing those responsible for the harm, but States' obligations in this respect go beyond such understanding FPS standard. States indeed more broadly have an obligation to *possess*, and *make available to foreign investors* an adequate administrative and judicial system capable of preventing acts, and of apprehending and punishing those responsible for the acts.⁹⁶ I will focus here on the obligation to possess, and make available to foreign investors an adequate administrative and judicial system capable of apprehending and punishing those responsible for the acts, and not on the obligation in relation to the prevention of acts. The latter obligation, although nothing would hinder its application in contemporary investment law being part of customary law, has not been addressed by investment tribunals.

This obligation has also been considered as part of the FPS standard,⁹⁷ especially when it relates to acts of third parties that impair the protection and security of foreign investors. As noted by the Tribunal in *Frontier*: "In this Tribunal's view, where the acts of the host state's judiciary are at stake, 'full protection and security' means that the state is under an obligation to make a functioning system of courts and legal remedies available to the investor."⁹⁸ The obligation however has also been considered more broadly to form part of the IMS or the FET standard, especially when seen in relation to the obligations relating to due process and the prohibition of a denial of justice, which have been considered part of customary law.⁹⁹

This obligation, which indeed is close to the prohibition of denial of justice, does not entail any due diligence obligation. The "due diligence" standard here is inapplicable, and thus, one should not generalize the application of the standard to the obligation to possess and make available a judicial and administrative system capable of

95. NEWCOMBE & PARADELL, *supra* note 80, at 246.

96. See generally JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 57 (Cambridge University Press 2005).

97. See Giuditta Cordero Moss, *Full Protection and Security*, in STANDARDS OF INVESTMENT PROTECTION 131, 144 (August Reinisch ed., 2008).

98. *Frontier Petroleum Services LTD. v. Czech Republic*, UNCITRAL, Final Award, para. 273 (Nov. 12, 2010).

99. Katia Yannaca Small, *Fair and Equitable Treatment Standard: Recent Developments*, in STANDARDS OF INVESTMENT PROTECTION 111, 144 (August Reinisch ed., 2008); see also *Larwen Grp., Inc. v. United States*, ICSID Case No. ARB (AF)/98/3, Award, para. 129 (June 26, 2003).

preventing acts and punish and apprehend those responsible for the injuries caused.¹⁰⁰ The obligation to *possess and make available a functioning administrative and legal system* is not tested against the due diligence standard; due diligence applies only to the *use* by the State of that system, not to the *existence and availability* of the system to a foreign investor.

This is confirmed by several decisions of investment tribunals, but these cases, although applying these principles, did not concern acts of third parties which had caused physical damage to the investor/investment. Rather, these cases concern the need for host States to make available to foreign investors a functioning judicial system for disputes with third parties more generally. While this may seem surprising, it may at the same time simply be the application of the customary principles to modern investment relations, where the State's obligation to provide FPS not only covers protection from physical harm, but also other types of harm caused by third parties. Whether this is correct or not, will not be discussed here, and in any event, the same principles apply, namely that due diligence is of no relevance to test that State's obligation.

For instance, the Tribunal in *Lauder* considered in relation to the FPS standard that,

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, and for such claims to be properly examined and decided in accordance with domestic and international law.¹⁰¹

Because the Czech Republic had made a functioning system of courts and legal remedies available to the claimant, who in fact had made use of these possibilities, the Tribunal considered that there was no breach of the FPS standard.¹⁰²

In *Saluka*, the Tribunal also considered that Saluka had been given adequate access to justice to appeal certain decisions of Czech Republic and that "nothing therefore emerges from the facts before the Tribunal that would amount to a manifest lack of due process leading to a breach of international justice and to a failure of the Czech Republic to provide

100. See discussion *supra* Section II.

101. *Lauder v. Czech Republic*, UNCITRAL, Final Award, para. 314 (Sept. 3, 2001) (emphasis added).

102. *Id.*

'full protection and security' to Saluka's investment."¹⁰³ Again, the due diligence standard was not mentioned.

In similar wording as the Tribunal in *Lauder*, the Tribunal in *Parkerings* considered that,

The Claimant also criticized the Respondent for its passivity when the City of Vilnius breached the Agreement. However, the Arbitral Tribunal considers that the investment Treaty created no duty of due diligence on the part of the Respondent to intervene in the dispute between the Claimant and the City of Vilnius over the nature of their legal relationships.

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.¹⁰⁴

In *Frontier*, also mentioned above in relation to the obligation to apprehend and punish, the claimant had alleged breaches of an FPS clause because of the failure for certain state agencies "to 'exert pressure' on the bankruptcy trustees to properly protect the interests of Claimant," and the refusal by Czech courts to recognize and enforce an arbitral award related to the bankruptcy of two companies in which the claimant had invested.¹⁰⁵ The Tribunal, after citing *Parkerings*, considered that the obligation to make a functioning system of courts and legal remedies available to the investor implies that the Tribunal may verify whether "the courts have acted in good faith and have reached decisions that are reasonably tenable,"¹⁰⁶ which is reminiscent of the due diligence standard, but it is not clear where the Tribunal derived this from. The Tribunal finally found that a judicial system was available to the claimant, and that although Claimant had availed itself of that system only with limited success, there was no breach of the principle of full protection and security.¹⁰⁷ No mention was made of due diligence, despite extensive references to the principle in the Tribunal's general comment on the standard,¹⁰⁸ and similar wording. It

103. *Saluka Investments B.V. v. Czech Republic*, UNCITRAL, Partial Award, para. 485 (Perm. Ct. Arb. 2006).

104. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para. 333 (Sept. 11, 2007).

105. *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award, para. 454 (Perm. Ct. Arb. Nov. 12, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf> (last visited Apr. 1, 2015).

106. *Id.* para. 273.

107. *Id.* para. 467.

108. *Id.* para. 270.

is, however, unclear whether the Tribunal intended to convey the idea that due diligence applies in this context as well. In relation to the recognition of the arbitral awards, the Tribunal engaged in a rather extensive review of the decision of Czech courts, but found that there was no evidence that the court had “acted arbitrarily, discriminatorily, or in bad faith.”¹⁰⁹

3. FPS and Legal Protection and Security

Besides the requirement of providing physical protection and security, certain tribunals have, in particular when the word “full” precedes “protection and security,” also extended the application of the standard to “legal protection and security,” making this understanding of the standard in fact relatively similar to the FET protection standard.¹¹⁰ This understanding of the standard is different from the idea that States should prevent acts of third parties and apprehend and punish those responsible for harm caused to foreign investors, and the obligation of States to possess and make available a functioning judicial and administrative system, which are derived from the classic customary norms on the protection of aliens.

Legal protection and security, in certain interpretations, in essence would require States to refrain from taking legal or governmental acts or measures that would hinder the proper functioning of the investment or would contravene investor’s rights.¹¹¹ It is thus an interpretation of the standard that targets acts of the State itself, not of third parties. Certain case law suggests that FPS requires host States to provide to foreign investors a legal framework that guarantees legal protection to investors.¹¹² As explained by the Tribunal in *CME* for example:

109. *Id.* para. 529.

110. *CME Czech Republic B.V. v. Czech Republic, UNCITRAL, Partial Award*, para. 613 (Sept. 13, 2001); *Ceskoslovenska Obchodni Banka, A.S. v. Slovak Republic, ICSID Case No. ARB/97/4, Award*, para. 170 (Dec. 29, 2004); *Azurix Corp. v. Argentine Republic, ICSID Case No. ARB/01/12, Award*, para. 408 (July 14, 2006); *PSEG Global, Inc., North Am. Coal Corp., & Konya Ingin Elektrik Üretim ve Ticaret Limited Sirketi v. Republic of Turkey, ICSID Case No. ARB/02/5, Award*, para. 258 (Jan. 19, 2007); *Enron Corp. & Ponderosa Assets, L.P. v. Argentine Republic, ICSID Case No. ARB/01/3, Award*, para. 323 (May 22, 2007); *Compañía de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic, ICSID Case No. ARB/97/3, Award*, para. 7.4.15 (Aug. 20, 2007); *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania, ICSID Case No. ARB/05/22, Award*, para. 729 (Jul. 24, 2008); *National Grid v. Argentine Republic, UNCITRAL, Award*, para. 189 (Nov. 3, 2008).

111. See Schreuer, *supra* note 42, at 6-8; see also NEWCOMBE & PARADELL, *supra* note 80, at 311.

112. Schreuer, *supra* note 42, at 10.

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.¹¹³

This goes further than the obligations explained above, but seems to add little to the protection offered by FET. Moreover, tribunals are not clear on the precise scope of such protection because these issues often are discussed in conjunction with FET.¹¹⁴ Although it has been suggested that this in fact had already been accepted, although not explicitly, by the ICJ in the *ELSI* case,¹¹⁵ such reference only is partially correct. The question in the *ELSI* case in that respect revolved around the question of the length of judicial proceedings in relation to the administrative requisition of the *ELSI* plant, a situation covered by the obligation of States to possess and make available a functioning judicial and administrative system. It did not concern the "amendment of laws," to use the *CME* terminology. Therefore, the question discussed by *ELSI* related to the more customary norms relating to the obligation for States to make available a functioning judicial system than to an FPS clause, which would include a stable legal framework as part of *legal* protection and security.

In any event, when deciding claims in relation to failures to provide legal protection and security, arbitral awards contain little references to due diligence.¹¹⁶ This is understandable and logical, since the obligation is one that relates to the acts of the State itself or a State organ which would breach the FPS standard, not the responsibility of the State to act in relation to acts of third parties which have caused harm to the investor or investment. Such obligation, in terms of the standard applied, thus is similar to the obligation to make available a functioning court system, which is not tested against to the due diligence standard. This is also why due diligence in relation to FET, to which the notion of *legal* protection and security bears much resemblance is limitedly applicable.

C. Due Diligence and Fair and Equitable Treatment

Due diligence is also occasionally referred to when assessing alleged breaches of the fair and equitable treatment standard ("FET").

113. *CME Czech Republic B.V., UNCITRAL, Partial Award*, at para 613.

114. See *NEWCOMBE & PARADELLI, supra* note 80, at 312.

115. *Elettronica Sicula S.P.A. (ELSI) (U.S. v. Italy)*, 1989 I.C.J. 15, para. 109 (July 20).

116. See generally *Pisillo-Mazzeschi, supra* note 16.

The fair and equitable treatment standard is a flexible and rather vague concept. However, it is generally accepted that the legitimate expectations of the foreign investor forms a key element of fair and equitable treatment,¹¹⁷ as are obligations of due process, transparency, freedom from coercion and harassment, stability, predictability and a general duty of due diligence.¹¹⁸ Fair and equitable treatment also includes the prohibition against denial of justice.¹¹⁹

Because FET requires at least treatment in accordance with the IMS as understood in general international law,¹²⁰ there is here again a certain overlap between the two standards, notably in relation to the due diligence obligations of States in relation to FPS. As the Tribunal in *Lauder* explained: "fair and equitable treatment is related to the traditional standard of due diligence."¹²¹ Also, there is a certain overlap between FET and *legal* protection and security.¹²² This explains why in several cases, Tribunals have held that if a State breaches the fair and equitable treatment standard, this automatically entails a breach of FPS, when the latter is interpreted as *legal* protection and security,¹²³ or have dealt with both standards at the same time.¹²⁴ In such cases, Tribunals

117. NEWCOMBE & PARADELL, *supra* note 80, at 279.

118. *Id.* at 277; see TUDOR, *supra* note 5, at 157, 186; see also Katia Yannaca Small, *Fair and Equitable Treatment Standard: Recent Development*, in STANDARDS OF INVESTMENT PROTECTION 111, 118 (August Reinisch ed., 2008).

119. See *Swisslion DOO Skopje v. Former Yugoslav Republic of Macedonia*, ICSID Case No. ARB/09/16, para. 262 (July 6, 2012); see also DOLZER & SCHREUER, *supra* note 81, at 163.

120. NEWCOMBE & PARADELL, *supra* note 80, at 277.

121. *Lauder v. Czech Republic*, UNCITRAL Arb., Final Award, para. 292 (Sept. 3, 2001).

122. TUDOR, *supra* note 5, at 157.

123. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, para. 408 (July 14, 2006). Note that Argentina filed a claim in annulment of the award, including on the equation made by the tribunal between the two standards, and the lack of reasoning in support of this. This was rejected by the Ad Hoc Committee on the ground that, even though this finding may constitute an error in law, annulment of an award is not possible on such a ground only. *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Decision on the Application for Annulment of the Argentine Republic, paras. 183-84 (Sept. 1, 2009). See also *Occidental Exploration and Prod. Co. v. Republic of Ecuador*, UNCITRAL Arb., LCIA Case No. UN3467, Final Award, para. 187 (July 1, 2004) ("The Tribunal accordingly holds that the Respondent has breached its obligations to accord fair and equitable treatment under Article II (3) (a) of the Treaty. 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").

124. See *Siemens A.G. v. Argentine Republic*, ICSID Case No. ARB/02/8, Award, paras. 303-403 (Jan. 17, 2007) (stating that the Tribunal deals with both standards of treatment jointly, without distinguishing or identifying a specific standard necessary to

have not identified a specific standard necessary to violate the FPS standard of treatment, which may be explained by the fact that if the tribunal has already found a breach of the FET standard, a finding that the State has also breached its obligation to provide the investor or the investment with *legal* protection and security is unlikely to affect the outcome of the decision.¹²⁵

More generally, references to due diligence in Tribunal's discussion of the FET standard are rather sparse, such references being only made when the FET standard is jointly discussed with the FPS standard. Indeed, Tribunals refer most often to the "legitimate expectation" part of the FET standard, rather than due diligence. It is therefore difficult to understand how the general duty of due diligence would operate under FET, besides situations which are also covered by the FPS standard of treatment. There is however one case in which this was discussed. In *Suez*, the Tribunal defended relying on the concept of "legitimate expectations" rather than "due diligence" in applying the FET standard, but did not rule out that "due diligence" forms part of FET as well, as had been argued by Arbitrator Pedro Nikken in a separate opinion:

A State may violate an investment treaty's fair and equitable treatment standard in many ways and with many differing consequences. The majority's finding in the present cases that Argentina's various actions violated the fair and equitable treatment standard by frustrating the Claimants' legitimate and reasonable expectations is by no means a rejection of the conclusions of our esteemed colleague Professor Nikken in his separate opinion to the effect that Argentina failed to exercise due diligence in certain elements of its treatment of the Claimants' investments. The majority agrees that Argentina failed to exercise due diligence, as that concept is generally understood, and that such failure resulted in a violation of the treaties' fair and equitable treatment standard. As discussed earlier in this Decision, the majority of the Tribunal finds that Argentina's actions also frustrated the Claimants' legitimate expectations and it has concluded that it is more appropriate to base its decision on that rationale.¹²⁶

In a separate opinion, Arbitrator Pedro Nikken, criticizing the use

violate that the FPS standard of treatment); *Compañía de Aguas del Aconquija S.A. v. Argentine Republic*, ICSID Case No. ARB/97/3, Award, paras. 7.4.15-17, 11.1 (Aug. 20, 2007). For a discussion, see OECD, Fair and Equitable Treatment Standard in International Investment Law 24 (OECD Working Papers on Int'l Inv., 2004/03), available at http://www.oecd.org/daf/inv/investment-policy/WP-2004_3.pdf (last visited Apr. 1, 2015).

125. NEWCOMBE & PARADELL, *supra* note 80, at 277.

126. *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, para. 248 (July 30, 2010).

of the “legitimate expectations” of foreign investors as a standard in relation to FET, argued that generally, FET represents a standard of conduct for States, which should be tested against a due diligence standard:

However, even as a current minimum standard, and even within the concept that has prevailed in recent doctrine and in decided cases in the sense that fair and equitable treatment is different from and independent of the customary minimum standard, it could never lose its essence as a standard of conduct or conduct of the State with respect to foreign investments, which should not automatically translate into a source of subjective rights for investors. The BITs contain a list of the States' obligations regarding their respective investments, not a declaration of rights for investors. Regardless of what is considered the autonomy of fair and equitable treatment with respect to the minimum standard, *fair and equitable treatment represents the degree of due diligence that the States Parties to the BIT mutually pledged to observe with respect to the investments from nationals of both States.* The language used in the French Treaty reinforces this interpretation, since the reference to the principles of international law can only be understood, at least, by prescribing an obligation of due diligence.¹²⁷

Nikken argued further that the due diligence standard should be assessed by reference to “the canons of good governance” and “the propriety of the government ‘of a reasonably well-organized modern State.’”¹²⁸

The idea developed by Nikken essentially is to return to the customary norms on the treatment of aliens, which I have discussed above, in order to define the content of FET. In doing so, Nikken extracts the application of the due diligence standard in customary norms, and transposes its application more generally to FET, which he considers to be a norm, which applies only to the conduct of States, and could not attract any obligation of result. If one considers FET to have its roots in the customary norms relating to the treatment of aliens and the IMS, the due diligence standard indeed would be applicable, at least in certain situations, which are similar to those discussed in relation to FPS. The problem however is that several tribunals, including the Tribunal in *Suez*, – rightly or wrongly – have interpreted FET as going beyond the IMS, in which case the due diligence becomes of little or

127. *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Separate Opinion of Arbitrator Pedro Nikken, para. 19 (July 30, 2010).

128. *Id.* para. 20 (internal footnotes omitted).

subsidiary relevance, as is implicit in the reasoning of the *Suez* Tribunal cited above. That is why there is little explicit reference to the standard of due diligence in this context in arbitral decisions. Despite the occasional references to due diligence standard in relation to FET in the arguments raised by the parties,¹²⁹ discussions of the link between FET and due diligence are uncommon in arbitral awards, which tend to limit the use of the due diligence standard in relation to FET only to those situations where there is an obvious overlap with FPS.

IV. THE CONTENTS OF THE DUE DILIGENCE STANDARD

How the due diligence standard is applied is still subject to much debate and tribunals are often sparse in giving explanations in this respect. In general, one could describe it as an obligation for the State to take all measures it could reasonably be expected to take in order to prevent the occurrence of damages to the foreign investor and its investment.¹³⁰ In case law, what would be required from a 'diligent' State is not explained in detail and sometimes even absent.¹³¹ This is not surprising since it is difficult to define the standard in abstract terms, as was moreover acknowledged by the Seabed Disputes Chamber in its Advisory Opinion on the *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*:

The content of "due diligence" obligations may not easily be described in precise terms. Among the factors that make such a description difficult is the fact that "due diligence" is a variable concept. It may change over time¹³²

129. See for example the statement by the Claimant, that [the FET] standard requires the government to exercise "vigilance and use due diligence within its political and legal system to protect investments." *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, para. 404 (July 14, 2006). Also, the argument raised by the Claimant in *Biwater Gauff* that "[t]his series of public statements, according to BGT, was designed to destroy, rather than maintain, confidence in City Water and inevitably undermined the investment. This failure to manage the public expectations, and the actions taken to undermine the public's confidence in City Water, together constitute a breach of the fair and equitable treatment standard, in as much as they represent a failure to use due diligence in the protection of BGT's investment, and the departure from BGT's legitimate expectation that the government would at the very least maintain a neutral position and not tarnish City Water's image in the eyes of the public." *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para. 552 (Jul. 24, 2008).

130. SALACUSE, *supra* note 52, at 217.

131. *National Grid v. Argentine Republic*, UNCITRAL Arb., Award, para. 189 (Nov. 3, 2008).

132. *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Case No. 17, Advisory Opinion of Feb. 1, 2011, ITLOS

When the due diligence standard is applied by investment tribunals, references are made to whether the State has “reacted reasonably, in accordance with the parameters inherent in a democratic state,”¹³³ whether the State had “adopt[ed] all reasonable measures to protect assets and property from threats or attacks which may target particularly foreigners or certain groups of foreigners,”¹³⁴ the obligation for the State to “take all measures necessary to ensure the full enjoyment of protection and security of its investments,”¹³⁵ whether acts lead to a “manifest lack of due process leading to a breach of international justice,”¹³⁶ the requirement for the State to “undertak[e] all possible measures that could be reasonably expected to prevent the eventual occurrence of killings and property destructions,”¹³⁷ whether certain conduct “fell well below the standard of protection that the Claimants could reasonably have expected,”¹³⁸ the requirement for a State to “take reasonable actions within its power to avoid injury when it is, or should be, aware that there is a risk of injury,”¹³⁹ or the rather circularly formulated need for States “to act to prevent actions by third parties that it is required to prevent.”¹⁴⁰

Although difficult to define in abstract terms, a couple of elements can be derived from the mentioned case law, in order to provide contents to the notion of due diligence. First, reasonableness is a common thread in determining which measures States should take.¹⁴¹ The term however is, as is the due diligence standard itself, difficult to

Rep. 2011, para. 117.

133. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, para. 177 (May 29, 2003).

134. *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award, para. 484 (Perm. Ct. Arb. 2006).

135. *Am. Mfg. & Trading, Inc. v. Republic of Zaire*, ICSID Case No. ARB/93/1, para. 6.08 (1997).

136. *Saluka Invs. B.V. v. Czech Republic*, UNCITRAL, Partial Award, para. 493 (Perm. Ct. Arb. 2006).

137. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, Final Award, ICSID Case No. ARB/87/3, para. 85 (1990).

138. *Waguih Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, para. 448 (June 1, 2009).

139. *El Paso Energy Int'l Co. v. Argentine Republic*, ICSID Case No. ARB/03/15, Award, para. 523 (Oct. 31, 2011).

140. *E. Sugar B.V. (Neth.) v. Czech*, SCC Case No. 088/2004, Partial Award, para. 203 (Mar. 27, 2007).

141. See IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW*, 526 (7th ed. 2008); see generally Heide E. Zeitler, *The Guarantee of “Full Protection and Security” in Investment Treaties Regarding Harm Caused by Private Actors*, 3 STOCKHOLM INT'L ARB. REV. 1 (2005).

determine *in abstracto*. Reasonableness indeed implies an evaluation of the measure taken by reference to what could be *expected* from a State. And this precisely is problematic to define, since what could be *expected* from a State cannot be described in general terms, and depends more on the question of whether this can be objectively defined (cf. Section 5). This is why the application of the standard requires a case-by-case analysis. In this respect some indication of the contents of "reasonableness" may be found in the national treatment standard, in the sense that treatment may be considered unreasonable if it is less than is normally provided to nationals.¹⁴² Some tribunals have also posited the need for States to act "in accordance with the parameters inherent in a *democratic state*,"¹⁴³ in order to further delimit what could reasonably be expected from a State.

Secondly, such an obligation only applies when the State has knowledge of the situation, or should be aware of the risk of injury. A certain conduct of a State can, quite logically, only be expected if the State has knowledge of the situation, and the burden of proof in this respect lies with the claimant.¹⁴⁴ A specific request for protection therefore is not necessary, but it will of course not only establish proof of the knowledge, but it will also more easily serve as proof of the bad faith conduct of the State in the absence of any measure taken by the State. This was the case, for example, in *Wena* discussed above. This idea moreover is very much in line with due diligence as understood in international environmental law, to the extent that a State has to act diligently in the event of foreseeable harm.¹⁴⁵

Thirdly, a State cannot be considered to have acted diligently when the State has acted in bad faith or has knowingly refused to take any measures whatsoever. In that case, indeed, a State will not be able to claim that, being aware of the situation, it has taken reasonable measures to prevent the act or apprehend and punish those responsible for the acts.

142. Zeitler, *supra* note 141, at 16.

143. *Tecnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, para. 177 (May 29, 2003).

144. Zeitler, *supra* note 141, at 14.

145. See Duncan French & Tim Stephens, *ILA Study Group on Due Diligence in International Law, First Report*, INT'L L. ASSOC. (Mar. 7, 2014), available at <http://www.ila-hq.org/en/study-groups/index.cfm/cid/1045> (last visited Mar. 30, 2015).

V. THE OBJECTIVITY OR SUBJECTIVITY OF THE STANDARD

A debate exists as to the assessment of due diligence in this context, namely whether it should be subjectively or objectively assessed. Is “all necessary means” objectively definable or should the specific situation of the state be taken into consideration? This discussion exceeds the application of the due diligence standard,¹⁴⁶ but I will focus here only on the assessment criteria of the due diligence standard. Max Huber, in the *British Property in Spanish Morocco* case mentioned before,¹⁴⁷ explained in detail the due diligence standard to be applied, advocating the use of a standard which takes account of the circumstances of the situation and the means available to the State. This statement is worth reproducing *in extenso*:

Is the territorial State exempt from responsibility if it did what we may reasonably request from it, taking into account the actual situation? Or is the State required to guarantee some degree of security, being responsible for any failure to provide it?

.....

To require such means to correspond to the circumstances would impose on the State a burden which it will often not be able to bear. Also, the argument that the vigilance to be exercised must match the importance of the interests at stake has not been accepted. Vigilance, which from the point of view of international law the state is required to guarantee, can be characterized by applying by analogy the Roman law term of *diligentia quam in suis*. This rule, consistent with the overriding principle of the independence of States in their internal affairs, in fact offers States, for their nationals, the degree of security which they can reasonably expect. As long as the vigilance exercised clearly falls below this level compared to nationals of a foreign State, the latter is entitled to consider this to be an injury its interests which should enjoy the protection of international law.

What has been said about the due diligence with respect to general insecurity arising from the banditry, applies a fortiori to the other two situations envisaged above, namely common crimes and rebellion. In the first case, to require a vigilance beyond the *diligentia quam in suis* would require the State to provide special security services to

146. See Nick Gallus, *The “Fair and Equitable Treatment” Standard and the Circumstances of the Host State*, in *EVOLUTION IN INVESTMENT TREATY LAW AND ARBITRATION*, 223 (Cambridge University Press, 2011); see also Nick Gallus, *The Influence of the Host State’s Level of Development on International Investment Treaty Standards of Protection*, 5 *TRANSNATIONAL DISPUTE MANAGEMENT* (2006).

147. See also *Home Frontier & Foreign Missionary Soc’y of the United Brethren in Christ (U.S. v. U.K.)*, 9 R.I.A.A. 44 (1920).

foreigners, which certainly would go beyond the scope of accepted international obligations (with the exception of persons having a right to special protection).

In the other case, that of the rebellion, etc., responsibility is limited because the public authority is faced with an exceptional opposition.¹⁴⁸

Huber distinguished between the due diligence obligations of States in relation to acts committed by individuals against *other States*, which indeed requires States to exercise a specific degree of vigilance which may exceed the means available to the State,¹⁴⁹ and the due diligence obligation of States towards aliens. Huber supported the use of the *diligentia quam in suis* standard, which in essence requires States to act respecting the same standard as they ordinarily observe in relation to their own affairs.¹⁵⁰ This boils down to a *culpa in concreto*.¹⁵¹ This standard may be contrasted to the standard of a *diligens paterfamilias*,

148. Original in French ('L'État territorial est-il exonéré, s'il a fait ce qu'on peut raisonnablement lui demander, en tenant compte de sa situation effective? Ou est-il tenu de garantir un certain degré de sécurité, étant responsable de l'incapacité éventuelle de l'assurer? [...] Exiger que ces moyens soient à la hauteur des circonstances, serait imposer à l'État des charges auxquelles il ne pourrait souvent pas faire face. Aussi, la thèse que la vigilance à exercer doit correspondre à l'importance des intérêts en jeu, n'a-t-elle pu s'imposer. La vigilance qu'au point de vue du droit international l'État est tenu de garantir, peut être caractérisée, en appliquant par analogie un terme du droit romain, comme une *diligentia quam in suis*. Cette règle, conforme au principe primordial de l'indépendance des États dans leurs affaires intérieures, offre en fait aux États, pour leurs ressortissants, le degré de sécurité auquel ils peuvent raisonnablement s'attendre. Du moment que la vigilance exercée tombe manifestement au-dessous de ce niveau par rapport aux ressortissants d'un État étranger déterminé, ce dernier est en droit de se considérer comme lésé dans des intérêts qui doivent jouir de la protection du droit international. Ce qui vient d'être dit au sujet de la vigilance due par rapport à l'insécurité générale résultant de l'activité des brigands, s'applique à plus forte raison aux deux autres situations envisagées ci-dessus, savoir: la criminalité de droit commun et la rébellion. Dans le premier de ces cas, une vigilance poussée plus loin que la *diligentia quam in suis* imposerait à l'État l'obligation d'organiser un service de sûreté spécial pour les étrangers, ce qui dépasserait certainement le cadre des obligations internationales reconnues (en dehors des cas où il s'agit de personnes jouissant en droit d'une protection spéciale). Dans l'autre hypothèse, celle de la rébellion, etc., la responsabilité est limitée parce que la puissance publique se trouve en présence d'une résistance exceptionnelle.' - translation by the author). See *British Claims in the Spanish Zone of Morocco*, 2 R.I.A.A. 644 (U.K.-Spain 1925).

149. See Pisillo-Mazzeschi, *supra* note 16, at 31.

150. AARON X. FELLMEYER & MAURICE HORWITZ, GUIDE TO LATIN IN INTERNATIONAL LAW (2011), available at <http://www.oxfordreference.com/view/10.1093/acref/9780195369380.001.0001/acref-9780195369380> (last visited Mar. 30, 2015); Herbert Hausmaninger, *Diligentia Quam In Suis: A Standard of Contractual Liability from Ancient Roman to Modern Soviet Law*, 18 CORNELL INT'L L.J. 179, 180 (1985).

151. REINHARD ZIMMERMANN, THE LAW OF OBLIGATIONS: ROMAN FOUNDATIONS OF THE CIVILIAN TRADITION 210 (1996).

or *culpa in abstracto*,¹⁵² which requires States to act under a certain objective standard, namely that of a *pater familias*. *Diligens paterfamilias* leaves no room for taking the specific means of the State into consideration, since it requires States to act as a reasonable State only, the State equivalent of the *bonus pater familias*.¹⁵³

Certain authors have argued that international law adheres, generally, to the *diligens paterfamilias* standard,¹⁵⁴ which is also supported by certain old cases.¹⁵⁵ In his 1955 Hague Academy Lecture, Freeman noted that the standard of due diligence requires "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances."¹⁵⁶ This is an "objective" assessment criterion.

The objective standard has however been rejected by several scholars, and arbitrators, which have instead relied on the "subjective due diligence standard," taking into consideration the means at the disposal of the state, and the specific circumstances present in the state.¹⁵⁷ Brownlie for instance, following Max Huber, supported the application of the *diligentia quam in suis* standard. Brownlie considered that, while no all-encompassing definition of due diligence exists, the applicable standard is the standard ordinarily observed by the particular state in its own affairs, which means that variations in the wealth between States can be taken into account.¹⁵⁸ This is in line with the application of the principle in other fields of international law, such as international environmental law. The ILC, in its Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, for instance considers that the "economic level of States is one of the factors to be taken into account in determining whether a State has complied with its obligation of due diligence," in relation to States obligation of prevention, noting at the same time that "a State's economic level cannot be used to dispense the State from its obligation."¹⁵⁹

152. *Id.*

153. *Cf.* Hausmaninger, *supra* note 150, at 180.

154. Pisillo-Mazzeschi, *supra* note 16, at 41.

155. *See, e.g.*, H. G. Venable (U.S v. Mexico), 4 R.I.A.A. 229 (Mex.-U.S. Gen. Cl. Comm'n 1927) (referring to governmental action "so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency").

156. Alwyn V. Freeman, *Responsibility of States for Unlawful Acts of Their Armed Force*, 88 RCADI 1955-II, 267, 277-78 (Leiden, Sijthoff, 1956).

157. For an overview, see NEWCOMBE & PARADELL, *supra* note 80, at 310, para. 6.44.

158. BROWNLIE, *supra* note 141, para. 77.

159. U.N. GAOR, 56th Sess., U.N. Doc. A/56/10 (2001) *Draft Articles on Prevention*

Investment tribunals have only very sparsely addressed the question, and only in relation to the application of due diligence under the FPS standard of treatment. Case law thus is very limited on this specific question, which is also the consequence of the little information Tribunals usually give in relation to what the due diligence standard specifically entails. *AAPL v. Sri Lanka* is an exception, in that the Tribunal spent much time on elaborating its understanding of the standard. The Tribunal noted

A number of other contemporary international law authorities noticed the “sliding scale”, from the old “subjective” criteria that takes into consideration the relatively limited existing possibilities of local authorities in a given context, towards an “objective” standard of vigilance in assessing the required degree of protection and security with regard to what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State.

As expressed by Professor FREEMAN, in his 1957 Lectures at the Hague Academy of International Law:

The “due diligence” is nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances.

According to modern doctrine, the violation of international law entailing the State’s responsibility has to be considered constituted by “the mere lack or want of diligence”, without any need to establish malice or negligence.¹⁶⁰

Despite references to the “old ‘subjective’ criteria” of due diligence in that case, more recent cases suggest that the applicable standard is a subjective due diligence standard. In *Lauder*, the Tribunal considered that the FPS obligation “obliges the Parties to exercise such due diligence in the protection of foreign investment *as reasonable under the circumstance*.”¹⁶¹ In *CME*, the Tribunal also explained “a government is only obliged to provide protection which is *reasonable in the circumstances*.”¹⁶² The sole arbitrator, Jan Paulsson, in *Pantechniki v. Albania* also unambiguously adopted the subjective assessment method, distinguishing “physical protection and security” from “denial

of Transboundary Harm from Hazardous Activities, noted in commentary to Article 3, para. 13.

160. *Asian Agricultural Products Ltd. v. Republic of Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, para. 77 (June 27, 1990) (internal references omitted).

161. *Lauder v. Czech Republic*, UNCITRAL Arb., Final Award, para. 310 (Sept. 3, 2001).

162. *CME Czech Republic B.V. v. Czech Republic*, UNCITRAL, Partial Award, para. 353 (Sept. 13, 2001).

of justice," the latter not requiring to take into account the resources of the State, but the former allowing to take account of the resources of the State:

A failure of protection and security is to the contrary likely to arise in an unpredictable instance of civic disorder which could have been readily controlled by a powerful state but which overwhelms the limited capacities of one which is poor and 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.¹⁶³

In *Frontier* however, the Tribunal questioned in an *obiter dictum* whether the principle posited by the Tribunal in *Pantechniki* is applicable in situations not involving violence, without firmly establishing that an objective standard applies.¹⁶⁴

Despite these ambiguities, the preferable standard is without doubt *diligentia quam in suis*, when one deals with due diligence in relation to physical protection and security. As noted earlier, the application of due diligence in other fields of international law, notably environmental law, allows taking into account the economic and other capabilities of a State. This moreover conforms to the relevance of investor conduct when making the investment, and the expectations of investors. As noted by the Tribunal in *Parkerings* for instance:

The investor will have a right of protection of its legitimate expectations provided it exercised due diligence and that its legitimate expectations were reasonable in light of the circumstances. Consequently, an investor must anticipate that the circumstances could change, and thus structure its investment in order to adapt it to the potential changes of legal environment.¹⁶⁵

Which measures a State ought to have taken, as explained in Section 4, indeed has to be determined by reference to what can be expected from a State, and it would be difficult to accept that a State should provide protection and security to investors beyond the capacity

163. *Pantechniki S.A. Contractors & Engineers v. Republic of Albania*, ICSID Case No. ARB/07/21, Award, para. 77 (July 30, 2009).

164. *Frontier Petroleum Servs. Ltd. v. Czech Republic*, UNCITRAL, Final Award, para. 271 (Perm. Ct. Arb. Nov. 12, 2010), available at <http://www.italaw.com/sites/default/files/case-documents/ita0342.pdf> (last visited Apr. 1, 2015).

165. *Parkerings-Compagniet AS v. Republic of Lithuania*, ICSID Case No. ARB/05/8, Award, para 333. (Sept. 11, 2007).

of the State to do so. As noted by Huber, admitting the contrary would require States to organize a special security service for foreign investors,¹⁶⁶ which to date is only accepted in relation to certain specific categories of protection individuals in international law, such as foreign officials.

VI. COMPENSATION FOR BREACHES OF THE DUE DILIGENCE STANDARD

As noted in relation to the customary rules, the responsibility of States for breaching their obligations to exercise due diligence in preventing an injury caused to a foreign investor or investment, or for failing to exercise due diligence in apprehending and punishing the third party responsible for that injury, is not an "indirect responsibility" of the State for the act committed. The act attributable to the State is not the act that has caused harm, but rather the failure to exercise due diligence.

As a consequence, in principle, the compensation awarded to a foreign investor should be to provide reparation for the damage caused by the failure of the State to exercise due diligence, not to provide reparation for the damage caused by the act of the third party, as argued by Max Huber in the *British Property in Morocco* case¹⁶⁷ and the Commissioner in *Janes*.¹⁶⁸ As a consequence, "the measure of damages for which the Government should be liable can not be computed by merely stating the damages caused by the private delinquency of Carbajal."¹⁶⁹ These principles still stand today.¹⁷⁰ This does not imply that the compensation awarded may not take account of the damages caused by the act, but this will depend on the circumstances of each case. Indeed, in principle, the reparation should first of all remedy the obligation breached, which is not the act of the individual, but the obligation of the State to prevent an injury caused to an alien or apprehend and punish the individual responsible for that injury.

The practice of arbitral tribunals does not reveal much in this respect. First, findings of violations of the failure of a State only to exercise due diligence in relation to FPS, IMS or even FET are almost

166. *British Claims in the Spanish Zone of Morocco*, 2 R.I.A.A. 644 (U.K.-Spain 1925).

167. *Id.* at 709-10.

168. *Laura M. B. Janes et al. (U.S. v. Mexico)*, 4 R.I.A.A. 88 (Mex.-U.S. Gen. Cl. Comm'n 1925).

169. *Id.* at 89.

170. *See Crawford & Olleson, supra* note 15, at 454-55.

completely absent. In the majority of the cases, such findings are accompanied by findings of violations of other treaty provisions as well, such as those relating to the prohibition of unlawful expropriations, or other aspects of the FET standard. Then, a finding of a violation of the due diligence obligations of States does not influence the outcome of the decision, nor the calculation of compensation.¹⁷¹ Secondly, findings of violations of FPS alone are relatively scarce, at least when compared to findings of violations of other treaty standards.¹⁷²

In *AAPL* however, the Tribunal found that the State had failed to exercise due diligence in launching an armed attack causing the destruction of the farm owed by Claimant, and decided to calculate the compensation based on the loss suffered by the Claimant by the destruction of the property, although the Tribunal had not found that the armed forces of the host State were directly responsible for the destruction of the farm.¹⁷³ This may seem surprising. However, since the legal basis for equating the compensation to the effective losses suffered from the act itself, and not from the failure to exercise due diligence is not explicitly mentioned, this decision may be read as confirming the principle that the compensation awarded *may* be equivalent to the damage caused by the act, but that this is not automatically the case. In fact, when the failure to exercise due diligence is applied to a failure to prevent the occurrence of harm, such decision is perfectly arguable. However, when the failure to exercise due diligence relates to apprehending or punishing the individual responsible for the act that has caused damage, it seems more appropriate to calculate the compensation differently from the damage caused by the act itself, in line with the principles explained above.

171. See *Biwater Gauff (Tanzania) Ltd., v. United Republic of Tanzania*, ICSID Case No. ARB/05/22, Award, para 731 (Jul. 24, 2008) (where the Tribunal found violation of legal FPS, but acts in question were not considered to have 'caused any quantifiable financial or commercial loss'); see also *Waguith Elie George Siag & Clorinda Vecchi v. Arab Republic of Egypt*, ICSID Case No. ARB/05/15, Award, paras. 448, 450 (June 1, 2009) (the Tribunal found violation of FPS standard and due diligence obligation of State, but since it also found the State had made an unlawful expropriation, breached FET standard and subjected the investment to unreasonable measures, there was no influence on compensation). Further, the Tribunals found that a violation of FET entailed a violation of FPS, and again, there was no influence on the calculation of compensation. See *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, paras 408-09 (July 14, 2006); see also *Suez, Sociedad General de Aguas de Barcelona S.A. v. Argentine Republic*, ICSID Case No. ARB/03/19, Decision on Liability, paras 178-80 (July 30, 2010).

172. For instance, in *Lauder, Satuka, or Rumeli Telekom*, no violation of the due diligence obligations of the State in relation to FPS was found.

173. *L. F. H. Neer & Paulene Neer (U.S. v. Mexico)*, 4 R.I.A.A. 62 (Gen. Claims Comm'n 1926).

CONCLUSION

This article has discussed the role due diligence plays in contemporary international investment law; based not only on recent practice in this respect, but also on the historical roots of the current protection standards in international investment law. Such historical overview indeed has been useful to describe the contours of the application of due diligence in several standards of treatment, such as FPS, the IMS and FET.

The article has demonstrated that especially in relation to FPS, due diligence performs an important function. This function can be traced back to the historical interpretations of the obligations of States in respect to the treatment of aliens more generally. In particular, while case law suggests that the *acts of State organs*, which result in a deprivation of the protection and security to be guaranteed to aliens, and thus foreign investors and their investments, are wrongful as such without the need to enquire whether the State organ in question was diligent or not, the principle of due diligence applies fully to the state's duty to protect foreign investments from acts of third parties. Indeed, FPS requires the State to exercise due diligence in providing physical protection and security to foreign investments and investors from acts of third parties, which does not entail any form of strict liability for the host State. Such obligation also applies to the host State generally, including in cases of armed conflict, civil strife, revolution or natural disasters. The principle that a State is also under an obligation, in case of harm caused by acts of third parties to apprehend and punish those responsible for the acts, is considered part of the FPS standard, which implies that States should take all reasonable measures a diligent State would take, to apprehend and punish those responsible.

Whether viewed as part of the FPS or the IMS, it is clear that States have an obligation of due diligence in the administration of justice, also very often in relation to criminal acts towards the foreign investor. This principle is similar to the obligation of due diligence as understood in FPS, particularly in relation to the State's obligation to act with due diligence in apprehending and punishing those responsible for the harm. However, it applies more generally to making a functioning judicial system available to foreign investors. The obligation in making available an adequate judicial system is however not assessed by applying the due diligence standard.

In relation to the FET, this article has argued that because the FET requires at least treatment in accordance with the minimum standard of treatment as understood in general international law, there is a certain

overlap between the two standards, notably in relation to due diligence. References to due diligence in Tribunal's discussion of the FET standard are rather sparse, such references being made only when the FET standard is jointly discussed with the FPS standard.

As noted in relation to the customary rules, the responsibility of States for breaching their obligations to exercise due diligence in preventing an injury caused to a foreign investor or investment, or for failing to exercise due diligence in apprehending and punishing the third party responsible for that injury, is not an "indirect responsibility" of the State for the act committed. The act attributable to the State is not the act that has caused harm, but rather the failure to exercise due diligence.

In respect to the question of how the due diligence standard is applied, although it is not only impossible to define the standard in abstract terms, Tribunals require States to have knowledge of the situation and to react to that situation by taking reasonable measures. What could be *expected* from a State also cannot be described in general terms, and depends on the question whether this can be objectively defined. In that respect, I have argued that the preferable standard is without doubt *diligentia quam in suis*, which allows the taking into consideration of the specific circumstances of the cases and the means available to the State.

As far as compensation is concerned, this article has explained that compensation awarded to a foreign investor should be to provide reparation *for the damage caused by the failure of the State to exercise due diligence*, not to provide reparation for the damage caused by the act of the third party. The practice of arbitral tribunals however does not address this question in detail, notably because findings of violations of the failure of a State to exercise due diligence in relation to FPS, IMS, or even FET only are almost completely absent. There is however no reason to depart from this principle, established since long in customary law, and in line with the wrongful act in question, which is not the act that has caused harm, but rather the failure to provide protection and security.