

The Role and Significance of Host States' Due Diligence Obligation in Interpreting the Standard of Fair and Equitable Treatment

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Abstract

This Article explores the function and importance of the obligation of a host state's due diligence in interpreting and applying the standard of Fair and Equitable Treatment by arbitral tribunals. It aims at addressing the controversy of the application of the obligation of due diligence when the wrongful act is committed by the host state itself. The research is based on international legal documents, investment agreements, and arbitral awards pertinent to the topic. Additionally, this study is predicated on the work of many authors who have discussed the two legal concepts – the obligation of due diligence and the standard of FET – in their books and articles. According to the findings of the study, the obligation of the host state's due diligence is a key component in providing context for the standard of FET. Further, it is the source of the FET standard, through being one of the components of the Minimum International Standard under Customary International Law. The study highlights the importance of the host state's due diligence when interpreting the standard of FET from three different angles. First, it discusses when the FET standard is interpreted by considering its historical origins; second, it examines the relationships between FET and Full Protection and Security (FPS), and its implications for the application of the obligation of host states' due diligence in interpreting the standards of FET thereof. Thirdly, it examines how the gradually developed FET standard's features and structures reflect the application of due diligence in interpreting the standard of FET. Further, this study acknowledges the role of international investment law in the development of the concept of the obligation of due diligence generally, particularly for its second wing, the 'obligation to abstain' under international law.

Keywords: *the obligation of due diligence; the obligation to abstain; the standard of fair and equitable treatment; the standard of full protection and security; minimum international standard; host state's conduct.*

JEL Classification: K22, K33

DOI: 10.62768/IILJ/2026/6/1/04

Please cite this article as:

Hayle, Makda Gebru, 'The Role and Significance of Host States' Due Diligence Obligation in Interpreting the Standard of Fair and Equitable Treatment', *International Investment Law Journal* 6, issue 1 (February 2026): 37-53.

1. Introduction

1.1. The obligation of due diligence

The origin of the word 'due diligence' is the continental European legal

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tradition.² ‘Diligence’ is a Latin word composed of two words, ‘dis’ and ‘ligentia,’ which means ‘choice’ or ‘care.’³ Generally, it signifies the level of vigilance or care that an entity must demonstrate.⁴ Due diligence is an abstract word applied and practised through different principles.⁵ It is a well-known principle in international environmental law and diplomatic and consular relations law.⁶ Recently, it has extended to numerous areas of international law, including international law of the sea, international criminal law, international investment law, international human rights law, and international humanitarian law.⁷ However, despite frequent references and use of the term, it remains largely undefined; it remains ambiguous and unspecified.⁸ That is why it is known as a ‘familiar stranger’ in international law.⁹ Nevertheless, the International Law Association (ILA) has identified due diligence as a general principle of international law, and its applicability differs from one area of international law to another.¹⁰

Under the obligation of due diligence, a state has both positive and negative obligations.¹¹ The state has a negative obligation not to inflict harm on foreigners and their property through its organs and a positive duty to protect foreigners from the wrongful acts of third parties and provide justice in the event of a wrongful act. Therefore, under the obligation to abstain, a state has a negative obligation not to interfere in the rights of aliens and their property. Under the obligation to safeguard, the state has a positive duty to act in a certain way when the rights of aliens are about to be infringed or are being infringed by private third parties.¹²

In several cases when the acts of the state and its organs have infringed on physical safety, property rights, administrative rights, or any other rights, due diligence has never been raised; as such, it is irrelevant. Thus, a state’s obligation to exercise due diligence for the acts of its organs is not developed in the jurisprudence of international law.¹³ In international investment law, due diligence has existed with Fair and Equitable Treatment, Full Protection and Security, and the International Minimum Standard.¹⁴ Nevertheless, despite the frequent use of the obligation of due diligence in international investment Law as well, investment arbitral tribunals have also failed to define and

² Alice Ollino, *Due Diligence Obligations in International Law* (Cambridge University Press, 2022). p. 39.

³ Samantha Besson, *Due Diligence in International Law*, trans. Sévrine Knuchel, with The Hague Academy of International Law (Brill Nijhoff, 2023). p. 21.

⁴ *Ibid.*, p. 25.

⁵ Medes Malaihollo, ‘Due Diligence in International Environmental Law and International Human Rights Law: A Comparative Legal Study of the Nationally Determined Contributions under the Paris Agreement and Positive Obligations under the European Convention on Human Rights,’ *Netherlands International Law Review* 68, no. 1 (2021): 121–55, <https://doi.org/10.1007/s40802-021-00188-5>.

⁶ René Provost (ed.), *State Responsibility in International Law*, Library of Essays in International Law (Routledge, 2017), p.15, <https://doi.org/10.4324/9781315242439>.

⁷ See, Besson, *Due Diligence in International Law*. pp. 26.

⁸ Joanna Kulesza, *Due Diligence in International Law*, Series: Queen Mary Studies in International Law, volume 26 (Brill Nijhoff, 2016). p. 1.

⁹ Malaihollo, ‘Due Diligence in International Environmental Law and International Human Rights Law.’ p. 123.

¹⁰ *Ibid.*, p. 134.

¹¹ See, René Provost, *State Responsibility in International Law*, pp. 15.

¹² *Ibid.*, p. 16.

¹³ *Ibid.*

¹⁴ Dr. Eric De Brabandere, ‘Host States’ Due Diligence Obligations in International Investment Law’, *Syracuse Journal of International Law and Commerce* 42, no. 2 (2015): 319–362.

discuss its parameters in detail.¹⁵

1.2. The Obligation of the Host State's Due Diligence and the Standard of FET

The Fair and Equitable Treatment is a significant investor protection standard that has gradually developed.¹⁶ It appeared in international economic treaties following the Second World War.¹⁷ Even though its interpretation is gradual, it generally requires the host state to treat foreign investors in accordance with the rules of international law.¹⁸ According to the Vienna Convention on the Law of Treaties, provisions of a treaty should be interpreted literally in good faith in light of its purpose and objective.¹⁹ Nevertheless, there are scattered interpretations and applications of the standard of FET given by investment arbitral tribunals in different cases. Following the first case to enlist the parameters of the FET standard, in *Tecmed V. Mexico*,²⁰ the substantive specifications have been increasing. To mitigate the continuous evolving interpretation of the standard of FET, states have started codifying some of the already developed interpretations in their Free Trade Agreements (FTAs) and Bilateral Investment Treaties (BITs) as a new version of FET is emerging in Article 8.10 of the Comprehensive Economic and Trade Agreement (CETA), the trade and investment agreement signed between the European Union and Canada, and the Transatlantic Trade and Partnership Agreement (TTIP)²¹ and the protocol on investment to the African Continental Free Trade Agreement.²²

In *Lauder v. the Czech Republic*, the tribunal mentioned that, by referring to UNCTAD, FET is related to the traditional concept of due diligence, which demands the minimum international standard under customary international law. Moreover, it is a subject that requires a case-by-case analysis.²³ Furthermore, Arbitrator Pedro Nikken, in his dissenting opinion in the famous case *Suez and Interagua v. Argentina*, stated that Argentina failed to act with due diligence, as per the general understanding, and is liable for violating the FET standard. The FET standard assesses the standard of conduct of

¹⁵ Tobias Ackermann, *The Effects of Armed Conflict on Investment Treaties*, 1st ed. (Cambridge University Press, 2022), <https://doi.org/10.1017/9781009207805>. p. 11.

¹⁶ August Reinisch and Christoph Schreuer, *International Protection of Investments: The Substantive Standards*, 1st ed. (Cambridge University Press, 2020), <https://doi.org/10.1017/9781139004978>.

¹⁷ Jacob Stone, 'Arbitrariness, the Fair and Equitable Treatment Standard, and the International Law of Investment,' *Leiden Journal of International Law* 25, no. 1 (2012): 77–107 <https://doi.org/10.1017/S0922156511000598>.

¹⁸ Azernoosh Bazrafkan and Alexia Herwig, 'Reinterpreting the Fair and Equitable Treatment Provision in International Investment Agreements as a New and More Legitimate Way to Manage Risks,' *European Journal of Risk Regulation* 7, no. 2 (2016): 439–43, <https://doi.org/10.1017/S1867299X00005869>.

¹⁹ Vienna Convention on the Law of Treaties (1969).

²⁰ Técnicas Medioambientales Tecmed, S. A. v. The United Mexican States, ICSID Case No. ARB (AF)/00/2.

²¹ Florian Grisel, 'Fair and Equitable Treatment: Ordering Chaos through Precedent?,' in Daniel Behn, Ole Kristian Fauchald, Malcolm Langford (eds.) *The Legitimacy of Investment Arbitration*, 1st ed. (Cambridge University Press, 2022), <https://doi.org/10.1017/9781108946636.011>. p. 274.

²² AFCFTA Protocol on Investment (2023), Article 17.

²³ Ronald S. Lauder v. Czech Republic (Ad hoc Arbitration (Ad hoc Arbitration) September 3, 2001, <https://jsumundi.com/en/document/decision/en-ronald-s-lauder-v-czech-republic-award-monday-3rd-september-2001>. paragraph 292.

states, which should be evaluated against the principle of due diligence.²⁴ In *Mamidoil Jetoil v. Albania*, the tribunal stated in its award that the FET standard weighs the characteristics of the state conduct in light of the minimum standard of due diligence, considering the overall circumstances of the host state.²⁵

In *Bulusan v. Italy*, the investor brought three claims challenging the Constitutional Court's constitutional judgment regarding the registration of plants for subsidy requirements. The tribunal stated that the investor invested with full knowledge of the constitutional challenge, and the work stoppage order by the host state was not made in bad faith, arbitrarily, or discriminatory; it was made with due diligence. Thus, the stop-work order was given legally, with due process, and was temporary.²⁶ Similarly, in *Bahgat v. Egypt*, the denial of justice occurs when the state fails to act arbitrarily, with good faith, and without wilful disregard of any obligation to provide reasonable due diligence in apprehending, arresting, and prosecuting foreign investors.²⁷ Therefore, any act or omission that demonstrates these characteristics of due diligence in providing due process of law violates the standard of FET.

Considering the two distinct arguments on the application of due diligence: first, that due diligence for acts of state is not well developed in international law jurisprudence; and second, that the due diligence obligation is relevant in assessing state conduct regarding violations of the FET standard this research aims to examine the arbitral tribunal decisions, the evolving constituents of the FET standard, and the relationship between the FET standard and other standards to explore the relevance of the state's due diligence obligation to the standard FET.

2. The Relevance of Host States' Due Diligence to the Standard of Fair and Equitable Treatment

The writer argues that due diligence is remarkably relevant to the standard of FET on three bases. First, the historical origin of FET; second, the relationship of the standard of FET to the standard of Full protection and Security, and thirdly, most importantly, based on the gradually developed constituents or architectures of the FET standard.

2.1. Historical Origin of the Standard of FET

The first genesis of the FET standard can be traced back to Article 23(e) of the League of Nations Covenant, which places an obligation on member states to secure and maintain equitable treatment for the commerce of all members of the League.²⁸ However, the first legal instrument on trade that included the FET standard was the 1948 Havana Charter for an International Trade Organization. Although it was primarily

²⁴ See, Dr. Eric de Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, p. 31.

²⁵ *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S. A. v. Republic of Albania*, ICSID Case No. ARB/11/24.

²⁶ *Blusun S. A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, (ICSID Case No. ARB/14/3).

²⁷ *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I* (PCA Case No. 2012-07).

²⁸ Patrick Dumberry, *The Fair and Equitable Treatment Standard: A Guide to NAFTA Case Law on Article 1105* (Kluwer Law International, 2013). p. 8.

focused on trade, it also included provisions related to investment. For instance, provisions recommended for further negotiations and agreements on enterprises by the International Trade Organization (ITO) include the standards in further investment agreements. The Havana Charter did not come into force; however, the American Trade Association adopted the Bogota Agreement, which also failed to be ratified. The Bogota agreement was drafted in 1948, mentioning in Article 22 that ‘foreign capital shall receive equitable treatment’. It is believed that both the Havana and Bogota charter agreements included fair and equitable treatment in addition to customary international law.²⁹ Then, in 1959, under the leadership of Mr. Hermann Abs and the Lord Shawcross group of European lawyers and businessmen, they drafted the ‘Abs-Shawcross Draft Convention on Investments Abroad’. The convention provided fair and equitable treatment that fosters complete protection and security against discrimination. According to the wording of the article, ‘Each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other parties. Such property shall be accorded the most constant protection and security within the territories of the other parties, and unreasonable or discriminatory measures shall not impair the management, use, and enjoyment thereof.’³⁰

Furthermore, in 1967, the Organisation for Economic Co-operation and Development (OECD) developed a Draft Convention on the Protection of Foreign Property. The convention states that ‘each party shall at all times ensure fair and equitable treatment to the property of the nationals of the other parties. The OECD explained the FET standard by indicating its source of origin. The commentaries on Article 1 state that the FET standard entails treating aliens in accordance with the principles of customary international law.’³¹ Even though the OECD draft convention wasn’t opened for signature, it served as a model convention for further BITs and MITs between different countries. It is believed that it has expressed the collective will of states on investment.³² Non-binding instruments, such as the Draft United Nations Code of Conduct on Transnational Corporations and the 1992 World Bank Guidelines on the Treatment of Foreign Direct Investment, also played a significant role in the origin and development of the standard of FET, as they incorporated the FET standard into these instruments.³³

The failure to come up with Multilateral Investment Treaties (MIT) in the early attempts led to the emergence of BITs. Some scholars also argue that this is because the international customary law for the protection of aliens was insufficient, leading states to provide better protection to foreign investors through treaties.³⁴ Therefore, the ‘treatification’ period came into effect because the existing customs at that time were inadequate and outdated, failing to meet the demands of current investments.³⁵

²⁹ Ibid.

³⁰ Ibid.

³¹ *Fair and Equitable Treatment*, UNCTAD Series on Issues in International Investment Agreements/ United Nations Conference on Trade and Development II, Fai (United Nations, 2012). p. 24

³² Ibid.

³³ Dumbery, *The Fair and Equitable Treatment Standard*. p. 9.

³⁴ Jeswald W. Salacuse, *The Law of Investment Treaties*, Second edition, The Oxford International Law Library (Oxford University Press, 2015). p. 2.

³⁵ Ibid.

The first BIT in the world was signed between Germany and Pakistan in 1959; however, this BIT had no FET provision.³⁶ Nevertheless, the BITs starting from the 1960s and '70s incorporated the standard of FET in the investment agreements. The reasons why states still prefer to incorporate FET standards in their investment agreements from the 1960s and 1970s are divided into two arguments. The first argument states that FET is included as a reference to the Minimum International Standard (MIS), based on the commentary of the OECD draft convention, which correlates FET with MIS. Others argue that the main reason why states incorporated the FET standard is due to the ambiguity of the CIL on the protection of aliens; as such, FET deserves independent interpretation from the CIL. Thus, changing terms or names wouldn't make any difference if states wanted the CIL.³⁷

Only the OECD has clarified what the FET standard meant in its commentary on the history of the FET standard. Some scholars believe the Havana and Bogotá charters to be an addition to the existing MIS³⁸, but the documents themselves never explain this argument. Therefore, from a historical perspective, the FET standard was meant to be no more or less than the MIS of aliens under customary international law. The North American Free Trade Agreement (NAFTA) commentaries on Article 1105 have recognised this historical origin. The Free Trade Commission of NAFTA stated that FET represents its historical foundation under customary international law.³⁹ The CIL encompasses the due diligence obligation of states to abstain from causing any harm to foreign nationals and their properties and to protect them from any kind of harm caused by third parties.

Furthermore, from a historical perspective, the standard of FET can be expanded to mean a breach beyond MIS under international law.⁴⁰ For instance, in *S. D. Meyers, Inc. v. Canada*, the tribunal stated that breaching any customary international law obligation may violate FET under Article 1105 of NAFTA.⁴¹ The US-Model Treaty subparagraph (a) of Article 5 (2) made it clear that FET means denial of justice under customary international law or violation of any other specific rule of customary international law. This indicates that violating the standard of FET occurs when any other customary international law is breached.⁴² Therefore, the standard of FET can also be seen in light of any specific rule of customary international law for the protection of aliens and their properties in a foreign state. From this historical interpretation of the FET standard extending beyond MIS to encompass CIL, the obligation of due diligence is relevant to the standard of FET, not merely as part of MIS but as a principle of international law as due diligence is a general principle of international law. If the conduct of the state is assessed in light of due diligence and found to be unreasonable, arbitrary, or in bad faith, then these actions can amount to a breach of FET by the host state.

³⁶ Germany-Pakistan BIT, 1959.

³⁷ Dumberry, *The Fair and Equitable Treatment Standard*. p. 10.

³⁸ Dumberry, *The Fair and Equitable Treatment Standard*. p. 8.

³⁹ UNCTAD, *Fair and Equitable Treatment*. p. 24.

⁴⁰ Alireza Falsafi, „The International Minimum Standard of Treatment of Foreign Investors' Property: A Contingent Standard”, *Suffolk Transnational Law Review* 30, no. 2 (2007): 317–357.

⁴¹ Ibid.

⁴² Ibid.

2.2. The Relationship Between the Standards of Full Protection and Security and Fair and Equitable Treatment

The general international obligation of a host state to safeguard the physical integrity and property of aliens in its territory has also evolved into the standard of full protection and security. Consequently, the FPS was developed from the MIS to safeguard aliens under CIL. The term was initially defined in the United States' Friendship, Commerce, and Navigation Act, and it was subsequently incorporated into the world's first Bilateral Investment Treaty (BIT) between Germany and Pakistan.⁴³

The first case that aligned FPS with the obligation of due diligence was the 1990 *Asian Agricultural Products Ltd. (AAPL) v. Republic of Sri Lanka*. AAPL sued the government of Sri Lanka for failing to provide FPS under the UK-Sri Lanka BIT in 1980. The claimant was a corporation engaged in shrimp cultivation and export in Sri Lanka. According to the claimant, the Sri Lankan government failed to protect against the attacks made by the counter-insurgency operation, which resulted in damage to the shrimp farm and the deaths of 20 employees.⁴⁴ The tribunal found the government of Sri Lanka in violation of FPS because it acted negligently and resulted in the death and destruction of the farm. The tribunal noted that although Sri Lanka attempted to prove that 15 of the deceased employees were insurgents, it emphasised that, under the obligation of due diligence, the state must at least attempt to resolve the situation through peaceful communication. The peaceful channel may at least show the state's due diligence or reasonable action and reduce the death and destruction of the farmland. The tribunal used Prof. Freeman's definition of due diligence – '*Due diligence is nothing more nor less than the reasonable measures of prevention that a well-administered government could be expected to exercise under similar circumstances.*' And concluded that the Sri Lankan government didn't act reasonably on what is expected from a reasonable government.⁴⁵

The standards of Fair and Equitable treatment and Full Protection and Security overlap in many aspects because their foundation is the international norm for the protection of aliens.⁴⁶ However, the gradual development of their applications and interpretations varies, and they serve different aspects.⁴⁷ In *Wena Hotels v. Egypt* and *Occidental v. Ecuador*, the tribunals stated that both standards were the same. The tribunal in *Stati v. Kazakhstan* admitted that the FET standard addresses both physical and legal protection of the investor; as such, there is no need to revisit FPS and assess the same issue. The tribunal admitted that both standards overlap, but to what extent remains unanswered.⁴⁸ In *Plama v. Bulgaria* and *Spyridon v. Romania*, the tribunals

⁴³ Orsat Miljenić, "Full Protection and Security Standard in International Investment Law," *Pravni Vjesnik* 35, nos. 3–4 (2019): 35–62, <https://doi.org/10.25234/pv/8128>.

⁴⁴ Aloysius Llamzon and Jessica Beess Und Chrostin, 'The Due Diligence Expansion in International Investment Arbitration,' in Mahdev Mohan and Chester Brown (eds.) *The Asian Turn in Foreign Investment*, 1st ed., (Cambridge University Press, 2021), <https://doi.org/10.1017/9781108675772.015>. p. 3.

⁴⁵ Ibid.

⁴⁶ Miljenić, "Full Protection and Security Standard in International Investment Law." p. 7.

⁴⁷ Ibid.

⁴⁸ Dhruve Patel, "Full Protection and Security Standard: The Interpretation Challenge in Investment Treaty Arbitration", *International Journal of Law Management and Humanities*, Volume 4, Issue 2, 2021: 2171 - 2183, <http://doi.org/10.1732/IJLMH.26478>.

stated that the extension of FPS to legal protection would undoubtedly create an overlap with the FET standard.⁴⁹

In *Suez*, the tribunal considered whether breaches of the FET and FPS overlap, as the violation of one amounts to the violation of the other. However, the tribunal stated that the violation of FPS is not always necessary to amount to a breach of the FET standard. The FET standard is broader than the FPS; FPS may sometimes be considered part of the FET standard. That means the violation of FET may or may not constitute a violation of FPS, but a violation of FPS may constitute a violation of FET. Thus, the elements of FET are broader than FPS, including FPS protection. The standard of FPS is related to the standard of FET, like other standards, like expropriation, MFN, and unreasonable or discriminatory measures. The FPS and FET may overlap when the host state causes legal and physical harm to the foreign investor.⁵⁰

Three approaches have been tried to clarify the relationship between FET and FPS under international investment law. These are the equating approaches, which equate the standards together as one. The general particular approach treats FET as an all-encompassing treatment in which FPS is one element, and the autonomous approach states that both standards are different and have different applications.⁵¹ The tribunal in *Occidental V. Ecuador* (2004) stated that the respondent had violated the FET standard under article II(3)(a) of the treaty, and as to the violation of FPS, it is unnecessary to go through it, since the violation of FET means the state has failed to provide FPS. According to this case, the violation of FPS by a host state for failing to act in due diligence may also mean a violation of the FET standard. Through this token, the FET standard is relevant to the due diligence standard through the FPS standard. The tribunal further asserted the claimant's argument that the FPS standard is not limited to physical protection, as the investment has both tangible and intangible things; as such, the change of the regulatory framework, which caused uncertainty, is a violation of FPS as well. The tribunal concluded that the state violated FPS at the same time it violated the FET standard.⁵² Therefore, according to the tribunal, the overlap is when the FPS is broadly interpreted to include legal stability or legal protection. In *PSEG v. Turkey*, the tribunal stated that the relationship and overlap of FPS and FET became foreseeable when the interpretation of FPS goes beyond physical security to include legal security.⁵³

Many International Investment Agreements (IIAs) have also stated the application of FPS as one element of the FET standard. For instance, Article 3 of the BIT between the Netherlands and the Czech and Slovak Federal Republic (1991). From the BIT wording, the standard of FET was also meant to give physical protection. In other words, physical protection and security form part of the FET standard, which enables the standard of FET to have a relationship with due diligence through physical protection.

⁴⁹ See, Miljenić, 'Full Protection and Security Standard in International Investment Law.' p. 9.

⁵⁰ Nartnirun Junngam. "The Full Protection and Security Standard in International Investment Law: What and Who Is Investment Fully Protected and Secured From?" *American University Business Law Review* 7, no. 1 (2018): 1–101, p. 81.

⁵¹ Sebastián Mantilla Blanco, „Full Protection and Security in International Investment Law”, *European Yearbook of International Economic Law Ser.* v. 8 (Springer International Publishing AG, 2019). p. 555.

⁵² *Ibid.*

⁵³ Christoph Schreuer, 'Full Protection and Security,' *Journal of International Dispute Settlement* 1, no. 2 (2010): 353–69, <https://doi.org/10.1093/jnlids/idq002>. p. 14.

In a nutshell, the overlap of FPS and FET is when FPS is extended to include legal protection, and the standard of FET is extended to include physical protection. Legal protection means the host shouldn't change its laws, policies and terms of the contract without the knowledge of the investor. Here, if the behaviour of the state in changing its laws is assessed against the characteristics of a diligent state, it is related to the obligation of due diligence. Similarly, when the FPS becomes under the umbrella of FET, indirectly, the FET standard is also engaged in the protection of aliens from physical harm, which makes the involvement of due diligence vivid, as the state's infliction of harm to foreign investors will be assessed in light of the characteristics of a diligent state under international law.

2.3. The Characteristics of the Standard of FET

2.3.1. The Parameters of the Standard of FET

Due diligence can be applied through different principles in different branches of international law. For instance, in international environmental law, through the precautionary principle, states are obliged to reasonably prevent harm to the environment of another state. Similarly, due diligence in public international law has been applied through good faith, reasonableness, and non-arbitrariness. These principles are applicable in assessing the conduct of the state's due diligence when a foreigner and their property are harmed through the wrongful act of a third party.⁵⁴ However, as case law has elaborated, these principles are also used for assessing the state's own organs' conduct in determining the violation of the standard of FPS.⁵⁵ Therefore, it can be argued that the principles developed concerning the acts of third parties are extended to create the concept of the state's due diligence for the conduct of its organs as well.

Further, the due diligence obligation also applies to legal protection, unlike its original development for strikes and hostilities towards foreigners and their properties. The tribunal in *Global Telecom v. Canada* stated that the FPS extends to legal protection, and the state should act to comply with the obligation of due diligence to meet both physical and legal protection obligations.⁵⁶ Even though originally due diligence was developed in the context of physical protection, it has extended its application to different fields of international law and in different forms and scopes.

In *Parkerings v. Lithuania*, the tribunal did not find the host state in violation of due diligence for not interfering in the suit between the city authorities and the foreign investor by stating that the host state is only responsible for ensuring access to the judiciary for the foreign investor.⁵⁷ Thus, due diligence also mirrors the conduct of the state in legal matters, not only in terms of physical protection. Due process, denial of

⁵⁴ See, Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law,' p. 144.

⁵⁵ Schreuer, 'Full Protection and Security,' p. 6.

⁵⁶ *Global Telecom Holding v. Canada Global Telecom Holding S.A.E. v. Canada* (ICSID Case No. ARB/16/16).

⁵⁷ Aniruddha Rajput, 'Due Diligence in International Investment Law: From the Law of Aliens to Responsible Investment,' in Heike Krieger, Anne Peters, and Leonhard Kreuzer (eds), *Due Diligence in the International Legal Order* (Oxford, 2020; online edn, Oxford Academic, 18 Feb. 2021), <https://doi.org/10.1093/oso/9780198869900.003.0016>, pp. 273–287.

justice, and transparency, which are the further interpretations and applications of the FET standard, require the host state to act diligently in its legislative, executive, and judicial activities.⁵⁸

In *Blusun v. Italy*, the stop-work order was challenged, as it constitutes a violation of FET for legal uncertainty/stability. The tribunal held that the stop-work order was temporal, legally motivated, and done with due process within a short period. It wasn't unreasonable or discriminatory and, as such, doesn't constitute a violation of FET. The tribunal emphasised the due process of the judiciary, which assesses the due diligence of the judiciary. Therefore, the stop-work order was made with due diligence of the judiciary and, as such, didn't constitute a violation of the standard of FET.⁵⁹ Thus, the state is required to act with due diligence to come up with reasonable measures within its capacity to avoid the harm the foreign investor may suffer in its territory. Reasonable measures mean the obligation to act in a certain way before the conduct affects the foreign investor, like meaningful communication, transparency, good faith, etc.

In *Bahgat v. Egypt*, the claimant brought the case before the arbitral tribunal based on two BITs signed between the Finnish government and the Arab Republic of Egypt, the 1980 BIT and the 2004 BIT, respectively. Among other claims, the claimant alleged that the Arab Republic of Egypt violated the FET under both BITs.⁶⁰ The tribunal, after hearing both sides, concluded that the claimant was the victim of a denial of justice, which renders the respondent in violation of the FET standard under both BITs. The tribunal stated that under international law, denial of justice refers to the conduct of the judiciary pre-trial, during trial, and post-trial. The claimant was arrested before the termination of the time given to him to prove the payment to MD on behalf of ADEMCO, and after it was proven that the money was transferred, the prosecutor's office didn't close the case.⁶¹

The tribunal further supported its award based on the judgment of the Supreme State Security Court of Egypt, which identified the judgment of the other bench of the Supreme State Security Court of Egypt, following the dismissal of the judgment of the previous panel by the Egyptian Court of Cassation, as a 'clear example of fumbling, defectiveness, retrenchment, and failure, and the absence of a scientific methodology in the making and taking of decisions'. Thus, the claimant's persecution was made in bad faith, arbitrarily, and without reasonable conduct.

The due process lacks the due diligence of the judiciary and therefore violates the standard of FET. The tribunal refused to apply the restricted interpretation and application of FET by aligning it to MIS. It rather tried to refer to different interpretations from case law. The tribunal identified a lack of due diligence in providing due process of law as one way of violating the standard of FET. In its reference to due diligence, the tribunals seemed to recall the traditional definition of due diligence and further elaborated by stating that the due process wasn't in good faith, was arbitrary, and was unreasonable.⁶² Therefore, the conduct of the host state is assessed in light of the obligation of due diligence.

⁵⁸ *Blusun S. A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic* (ICSID Case No. ARB/14/3).

⁵⁹ *Ibid.*, paragraph 360, p. 135.

⁶⁰ *Mohamed Abdel Raouf Bahgat v. Arab Republic of Egypt I* (PCA Case No. 2012-07). paragraph 236, p. 68

⁶¹ *Ibid.*

⁶² *Ibid.*, Paragraphs 245-252, p. 73.

2.3.2. The Standard of FET as an Obligation of Conduct

Due diligence from a regulatory point of view is an obligation of result, but from a liability point of view, it is an obligation of conduct.⁶³ The FET standard is a positive obligation to give fair and equitable treatment; however, its compliance depends on the conduct of the state to act diligently. Violation of the FET standard occurs when the state fails to exercise certain norms or conduct in exercising all kinds of sovereign rights, which affects the rights of foreign investors. Arbitrator Pedro Nikken, in *Suez*, in his dissenting opinion, stated that the FET standard is the measurement of the conduct of the state towards the foreign investment it receives in its territory.⁶⁴ The FET obligation never creates subjective rights for investors but rather imposes an obligation of conduct on the states. When states enter the FET standard agreement, they assume the obligation to treat foreign investors with the obligation of due diligence. For instance, in *Argentina-France BIT*, referring to the treatment of FET by following international law can at least mean the observance of due diligence by the respective states.

Due diligence is a general principle of law that is developed in the protection of aliens, which has then developed into MIS treatment.⁶⁵ Therefore, under the FET standard, states are required to treat foreign investors according to the canons of good governance. No state would be ready to go beyond this treatment. Therefore, the measure of whether the state acted correctly or not within the limits of good governance is not the investor's expectation but the overall interpretation of the facts of the situation.⁶⁶

FET is a standard of conduct of the host state, not a right of investors. The state is not required to tie its hands to make regulatory changes; rather, it must act under good governance in a modern, well-organised state. The changes of law should be nonarbitrary, non-discriminatory, timely, consistent, reasonable, proportionate, and even-handed.⁶⁷ It is up to the government of Argentina which measures to take to tackle its emergency; it's its own explicit decision. However, the tribunal is required to assess whether the action taken by the victim's state of emergency to combat its situation is in line with good governance requirements or whether it is reasonable, arbitrary, in good faith, and not discriminatory. Alternative measures that could have been taken by the Argentine government are none of the tribunal's business.⁶⁸

The decision was made in favour of the claimant because Argentina failed to comply with the FET obligation. After all, it changed its regulatory framework during the emergency. This is like a state not being able to exercise its regulatory power even if it is confronted with severe emergencies. It is regulatory power, but it can't be exercised because it is not in the realm of the protection of the foreign investor. In his opinion, in such circumstances, states should make timely, consistent, non-discriminatory, reasonable, and non-arbitrary changes to their laws, as laws are the tools for economic

⁶³ Malaihollo, « Due Diligence in International Environmental Law and International Human Rights Law. » p. 122.

⁶⁴ *Suez, Sociedad General de Aguas de Barcelona S.A., and InterAgua Servicios Integrales Del Agua S.A. and The Argentine Republic*, (ICSID Case No. ARB/03/17), Dissenting Opinion of Arbitrator Pedro Nikken. Paragraph p. 19.

⁶⁵ *Ibid.*, paragraph 20.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*, paragraph 34.

⁶⁸ *Ibid.*, paragraph 37.

changes and answers to economic crises.⁶⁹ This doesn't mean Argentina didn't fail to give FET to the claimant. It failed to provide FET to the claimant, but in a different sense, the freezing of tariffs should have been temporary, for a short time, not extended indefinitely as Argentina did. In good governance, a state should act temporarily to tackle the situation. Once the situation is stabilised, it should be returned to the original agreement. Through this, it failed to give FET to Spanish and French investors. Therefore, the moment of violation of FET is not the moment of enactment of the new law but rather the moment the situation was normalised, but the law persists in existence.⁷⁰

Further, the unilateral renegotiation demand by Argentina for the terms of the concession never constitutes a violation of FET. Renegotiation should be one way of dealing with emergency sites and is renowned and discussed now and then with changing circumstances. The claimant was forced to renegotiate because, under Article 4.1 of the BIT, there is a clause for both parties to renegotiate *prima facie*, which never constitutes a violation of FET. However, the fact that Argentina consciously extended the renegotiation, tariffs were frozen, and no concern was given or a temporary remedy for the well-known financial difficulties was given to the claimant during these crises made Argentina in violation of FET.⁷¹ For not violating the legitimate expectations of the investor, the state is not prohibited from enacting laws or making modifications to its legal regime; what is needed is for the state to act by the general norms of protection of aliens in international law.

In *Blusun v. Italy*, the government of the Republic of Italy wasn't found in violation of the FET standard, as the tribunal mentioned that there was no lack of due diligence on the side of the government of Italy. The tribunal concluded that there was no failure of due diligence on the side of the Italian government, as the case for the constitutionality of the regional law was initiated before the investment began. As such, there is no violation of FET under Article 10 of the Energy Charter Treaty (ECT), first sentence. Thus, the measurement of FET is the due diligence of the host state. It was up to the investor's research and findings to know and predict the outcome of the constitutional challenge, not the host state. Therefore, the decision of the constitutional court on the constitutionality of the regional law is not in violation of the Article, ECT's first sentence.⁷²

One of the key characteristics of the FET standard is its identification by tribunals as an obligation of conduct. It is identified as 'acts showing a wilful 'neglect of duty, an insufficiency of action falling far below international standards, or even subjective bad faith'.⁷³ The general norms of good faith, reasonableness, and transparency call for the state to act with due diligence. Thus, the moment of violation is not when the state comes up with a new law but rather when it fails to exercise due diligence in enacting it; the conduct of the state matters more than coming up with a new law or amending a law.

Moreover, the main rationale behind classifying an obligation as an obligation

⁶⁹ Ibid., paragraph 41.

⁷⁰ Ibid., paragraph 44.

⁷¹ Ibid., paragraph 49.

⁷² *Blusun S. A., Jean-Pierre Lecorcier and Michael Stein v. Italian Republic*, (ICSID Case No. ARB/14/3), n.d. paragraph 329/c.

⁷³ See, Rajput, 'Due Diligence in International Investment Law.' p. 278.

of conduct or result is by determining the moment of violation and the burden of proof.⁷⁴ The FET standard is violated the moment the state fails to abide by the norm of a diligent state, and the burden of proof is on the investor, as the state is not found *ipso facto* in violation of the standard. In assessing the violation of the FET standard by tribunals, the burden of proof lies on the investor to show how the host state acted without due diligence. Most of the time, the investor is the claimant; it is up to the investor to show that the acts of the state violated the principle of reasonableness and good faith, and certain conduct of the state was done without meaningful communication that shows the transparency of the host state. Then, the host state tries to defend itself by justifying its acts in good faith, reasonably, and transparently, and this satisfies the FET standard to be an obligation of conduct.

2.3.3. The Relevance of the Doer of Wrongful Conduct

In the standard of FET, the assessment of the conduct of the host state in light of due diligence doesn't necessarily need to be any act committed by a private individual. In the first place, the state is not liable for the acts of private individuals, even for violation of due diligence by the actions of third parties under the conventional due diligence obligation; instead, it is responsible for its failure to act diligently.⁷⁵ In other words, to assess due diligence, the acts of private individuals are not a precondition for establishing the violation of the FET standard, as ultimately the state is liable for its acts, not the acts of a private person. Secondly, the argument that argues due diligence is irrelevant for the obligation to abstain or that due diligence is only relevant when third parties do the wrongful act is challenged by international investment law, as the application of due diligence has extended to the acts of the state organs in assessing the standard of FPS.⁷⁶ Moreover, the mirrors of due diligence for the acts of third parties are the standards that mirror the acts of the state's organs under the FET standard. These are reasonableness, good faith, and non-arbitrariness. Therefore, regardless of the identity of the perpetrator, be it a private third party or a state organ, the conduct required by the state to constitute a violation of the obligation of due diligence is the same. To that end, identifying the perpetrator to assess whether the state's due diligence is relevant remains irrelevant, as, ultimately, the due diligence requirements remain the same.

2.3.4. Subjectivity of the Standard of FET

Due diligence is a subjective standard that relies on the economic and other conditions of the state to act diligently. For the same issue, country A's breach of due diligence may not be a breach from another country, B, with different socioeconomic and political conditions.⁷⁷ Similarly, investment tribunals, in assessing the legitimate

⁷⁴ See, Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law,' pp. 128–130.

⁷⁵ Alice Ollino, 'Due Diligence under International Law: Reappraising its scope, functions and limits' (PhD Dissertation, 2016), pp. 10, <https://boa.unimib.it/handle/10281/199167?mode=complete>.

⁷⁶ See, Dhruvee Patel, Full Protection and Security Standard: The Interpretation Challenge in Investment Treaty Arbitration, p. 6.

⁷⁷ See, Malaihollo, 'Due Diligence in International Environmental Law and International Human Rights Law,' p. 140.

expectations of the investor as a definition of the standard of FET, take into account the socio-economic and political conditions of the host state. If the state is in an economic crisis or political instability, it is not expected to meet the investor's legitimate expectations.⁷⁸

There are criticisms of the fact that IIAs are created to provide a friendly environment for investors; however, when disagreement happens, the tribunal returning to consider the circumstances of the host state is unfair to the investor.⁷⁹ Similarly, at the beginning of applying the principle of due diligence under international law, some criticisms favoured the objective assessment of the standard rather than the subjective standard. However, it was gradually replaced by the subjective assessment, which considers the state's overall conditions.⁸⁰ Furthermore, the broad interpretation of IIAs' provisions by tribunals led to the undermining of constitutional and human rights laws in a country. To mitigate this risk of over-interpretation, it became inevitable to balance between the state's regulatory power and mitigate the investor's political risk.⁸¹ This notion is derived from the principle of due diligence, which shows the FET standard assesses the due diligence of the host state in exercising its sovereign right not to harm foreigners and their property rights in its territory. Focusing only on the legitimate expectations of the investor will give high protection to the investor as opposed to the state. Focusing only on the objective assessment may affect the investor while helping the host state exercise its regulatory power. The central point is the subjective standard derived from the general notion of due diligence.

In *Mamidoil v. Albania*, the claimant sued the respondent for violating the FET standard in failing to provide a stable and transparent legal framework, respecting the legitimate expectations of the investor, abstaining from exerting pressure, and denying the claimant justice.⁸² The respondent replied that it is expected that changes in laws and regulations happen in a transitional economy like Albania. It was up to the claimant to study the uncertainty of the laws beforehand or request a stabilisation clause. Moreover, there are no written commitments as to the approval of the business plan; the requirements for investment have to be studied and complied with by the investor, not the state. Besides, during that time, a change of plan for the Duress Port was initiated and communicated to the investor when the investment had not started yet.⁸³

The tribunal, in its definition and application of the FET standard, relied on the literal meaning and articles 31 and 32 of the Vienna Convention, which accommodate the purpose and objective of the BIT between countries to encourage and promote investment.⁸⁴ Nevertheless, the tribunal recalled the legal doctrine developed for the interpretation and application of FET. It stated that the FET standard requires the state

⁷⁸ Yulia Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law,' *Netherlands International Law Review* 67, no. 2 (2020): 233–55, <https://doi.org/10.1007/s40802-020-00170-7>. p. 238.

⁷⁹ Rudolf Dolzer, "Fair and Equitable Treatment: Today's Contours." *Santa Clara Journal of International Law* 12, no. 1 (2014), pp. 7-33, p. 23.

⁸⁰ See, Levashova, 'Fair and Equitable Treatment and Investor's Due Diligence Under International Investment Law.' p. 238

⁸¹ Ibid.

⁸² *Mamidoil Jetoil Greek Petroleum Products Societe Anonyme S. A. v. Republic of Albania*, ICSID Case No. ARB/11/24. paragraph 584, p. 115.

⁸³ Ibid., paragraph 591–597, p. 116.

⁸⁴ Ibid., paragraph 602, p. 119.

to act with the minimum standard of due diligence relevant to its circumstances. The tribunal recognised the application of due diligence to FET standards but failed to substantiate it. However, the tribunal also recalled the fact that due diligence is a subjective standard that takes into consideration the legal, political, social, and economic stability of a country.

Thus, Albania is required to act with due diligence when changing its laws and regulations, yet it is excused, as the changes were the result of the socio-economic and legal instability in the country. It was for the general welfare, and it was well expected that a regime change would happen, as it was struggling to change its economy to a market economy. Albania was just coming out of communist ideology and a destroyed government structure. It is a well-expected regime change, and regulatory amendments are to be implemented.⁸⁵ Therefore, the FET standard assesses the due diligence of the state in light of its legal and judicial stability and access. As it assesses due diligence, it demands the legal change or administrative shuffle to be without arbitrariness, reasonable, and in good faith according to the traditional definition of due diligence. Further, the FET standard should take into consideration the general socioeconomic and political conditions of the country; as such, the protection can't be similar to that of an investor in a relatively stable legal environment.⁸⁶

3. Conclusion

From a historical perspective, the strict interpretation of the standard of FET is the MIS; the MIS is developed based on states' due diligence for the protection of aliens. Furthermore, violating any CIL for the protection of foreigners may violate the standard of FET if provided in the BITs, which ultimately includes due diligence as a principle of international law. In addition, when the FPS covers legal protection and the FET standard includes physical protection, the overlap of FPS and FET requires assessing the FET standard in light of the obligation of due diligence. Most importantly, the gradual interpretations of the FET standard by arbitral tribunals, which include the principles of good faith, transparency, arbitrariness, legitimate expectations, due process, and denial of justice, require the host state to act within the bounds of its obligation of due diligence.

Furthermore, the FET standard is an obligation of conduct that requires the host state to exercise certain norms before passing legal, judicial, or administrative decisions. What matters is the conduct of the state, not the result. This state conduct is assessed in light of the norms developed to assess a state's due diligence under public international law for the protection of aliens and their property. Further, the state is not found to violate the standard unless the investor proves it. The burden of proof rests with the foreign investor to demonstrate that the state's actions were arbitrary, made in bad faith, or lacked transparency or any other factors. The mere act of enacting a new law does not automatically render the state in violation of the FET standard. Therefore, the FET standard is an obligation of conduct that requires the state to act within the characteristics of due diligence.

Moreover, as the obligation of due diligence is not an absolute standard, it considers the state's capacity to act reasonably. Likewise, the FET standard considers

⁸⁵ Ibid.

⁸⁶ Ibid., paragraphs 624–629, p. 124.

the socio-economic and political situation of the state and whether it allows it to act with due care and vigilance. Therefore, the host state's obligation of due diligence plays a significant role in the interpretation and application of the standard of Fair and Equitable Treatment.

The duty of due diligence, especially the duty to abstain, is rarely used under international law when state agencies conduct wrongdoings against foreigners. The obligation of due diligence is often used by tribunals when the act is committed by private individuals and the state fails to play its role. This study recognises the role of the standard of FET in developing the obligation to abstain. To evolve effectively, it is also advised that tribunals make explicit references to the obligation of due diligence in interpreting the standard of FET. Thus, the notion of due diligence in its obligation to abstain has shown promise in its development, and international investment lawyers and tribunals are encouraged to specifically mention and thoroughly examine its application in interpreting the FET standard. By offering a uniform interpretation of the FET standard, these ideas will help advance the obligation to abstain and lessen the current legitimacy issues with tribunal rulings.

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