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American University Business Law Review

Volume 7 • 2018 • Issue 1

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The AMERICAN UNIVERSITY BUSINESS LAW REVIEW is published three times a year by students of the Washington College of Law, American University, 4300 Nebraska Avenue, NW, Suite CT11 Washington, D.C. 20016. Manuscripts should be sent to the Executive Editor at the above listed address or electronically at blr-ee@wcl.american.edu.

Subscription rate per year is the following: $45.00 domestic, $50.00 foreign, $30.00 alumni, and $20.00 single issue. Periodicals postage is paid at Washington, D.C., and additional mailing offices. The Office of Publication is 4300 Nebraska Avenue, NW, Suite CT08, Washington, D.C. 20016. The Printing Office is Sheridan PA, 450 Fame Avenue, Hanover, Pennsylvania 17331. POSTMASTER: Send address changes to the AMERICAN UNIVERSITY BUSINESS LAW REVIEW, 4300 Nebraska Avenue,NW, Suite CT08, Washington, D.C. 20016.

Subscriptions are renewed automatically on expiration unless cancellation is requested. It is our policy that unless a claim is made for nonreceipt of the AMERICAN UNIVERSITY BUSINESS LAW REVIEW issues within six months of the mailing date, the *American University Business Law Review* cannot be held responsible for supplying those issues without charge.

Citations conform generally to *The Bluebook: A Uniform System of Citation* (20th ed. 2015).
To be cited as: 7 AM. U. BUS. L. REV.

American University Business Law Review
Print ISSN 2168-6890
Online ISSN 2168-6904

AU BLR
American University Business Law Review

Volume 7 • 2017-2018


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AMERICAN UNIVERSITY BUSINESS LAW REVIEW

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THE FULL PROTECTION AND SECURITY STANDARD IN INTERNATIONAL INVESTMENT LAW: WHAT AND WHO IS INVESTMENT FULLY[?] PROTECTED AND SECURED FROM?

NARTNIRUN JUNNGAM*

> Foreigners, as long as they live in alien territory, ought to be safe from every injury, and the ruler of the state is bound to defend them against it, that is, security is to be assured to foreigners living in alien territory.
>
> — CHRISTIAN WOLFF[1]

> The international duty of a government in respect of the property of foreigners cannot be dissevered from its international duty in relation to foreigners in other respects. It is, at least, difficult to suggest that a different standard of duty applies for the security of property and for the security of persons. . . . But the duty of a government towards individuals in respect of their property varies with each successive stage of civilization; it is not the same in the modern world as in ancient or medieval societies, nor is it the same in all countries [today]. A lawmaker should hesitate long before decreeing any absolute rule as a dogma exempt from the relativity which is the condition of human organizations.

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1. Christian Wolff, *Jus Gentium Scientifca Pertractum* (1749), *in* 2 CLASSICS OF INT'L L. 536 (Joseph H. Drake trans., James Brown Scott ed., 1934).

— JOHN FISCHER WILLIAMS[2]

The axis of this Article is a preferred interpretation and application of the full protection and security ("FPS") standard in contemporary international investment law. By carrying out the intellectual tasks of jurists proposed by the New Haven School of International Law, its findings are that the FPS standard covers both physical and legal harms to investments caused by state organs and/or third parties and that due diligence is decisive for determining the observation of the standard. To write up these findings, the Article first repudiates the conventional wisdom that the FPS standard owes its origin to treaties of friendship, commerce, and navigation ("FCN") concluded in the nineteenth century. It then relies on a historical analysis to refute the position that the FPS standard has historically applied exclusively to physical harms. It argues that the concept of the FPS standard since its genesis has been tied with legal protection, notably, administration of justice, and such a tie has not necessarily been established upon physical harms. Thus, based on the customary international law duty to provide foreigners with full protection and security, one is justified in interpreting the treaty-based FPS standard to cover legal harms that are even more delicate and wider in scope, given the context and conditions of international investment. By finding that the FPS standard covers legal harms, its overlap with the fair and equitable treatment ("FET") standard occurs and blurs their distinction in practice. Regardless of whether physical and legal harms are caused by state organs or by third parties, this Article advocates for a modified objective test of due diligence to determine whether host states comply with the FPS standard. To hold that the acts of state organs are wrongful as such without enquiring whether such organs were diligent or not is unconvincing on its own terms and not even consistent with the minimum standard of treatment. Host states' economic, social, and political realities bear relevance to their compliance with the FPS standard in both physical and legal contexts. Absence of due diligence is a contextual conclusion based on an assessment of what is "due" in the actual context. Therefore, host states can fail the due diligence test without intending to cause harms (dolus).

2. Sir John Fischer Williams, *International Law and the Property of Aliens*, 9 BRIT. Y.B. INT'L L. 1, 15 (1928).

I. INTRODUCTION

The full protection and security ("FPS") standard[3] is one of the "non-contingent" or "absolute" standards of treatment, a standard that is not dependent on the host state's treatment of other investments or investors.[4] It has been guaranteed in most international investment treaties, typically in the form of a full protection and security clause. Although its textual expression varies from treaty to treaty, "protection" and "security" are usually at its core. Traditionally, this standard has been construed as obliging host states to adopt measures protective of investments and investors from physical harms. In this respect, the standard is not especially nebulous. Subsequently, it has been expanded to cover legal protection and security for investments and investors, that is, in the case of infringement of the investors' rights. If the applicable FPS clause refers explicitly to full protection and legal security,[5] such an expansion is nothing more than a result of a textual interpretation that is neither "ambiguous or obscure" nor "manifestly absurd or unreasonable."[6] However, if the standard were crafted in a broad and general fashion as containing, for instance, "full protection

3. Sir Gerald Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RECUEIL DES COURS 7 (1957); Georg Schwarzenberger, *The Principles and Standards of International Economic Law*, 117 RECUEIL DES COURS 66 (1966) (both explaining the traditional and justified distinction among "rule," "standard" (crystalized rule), and "principle"); *see* Spyridon Roussalis v. Rom., ICSID Case No. ARB/06/1, Award, ¶¶ 10, 321, 609 (Dec. 7, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0723.pdf; Christoph Schreuer, *Full Protection and Security*, 1 J. INT'L DISP. SETTLEMENT 353, 358 (2010) (both exemplifying the interchangeable use of "standard" and "principle" in investment materials); Maurice Mendelson, *The International Court of Justice and the Sources of International Law*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS 63, 79-80 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (providing the ICJ's view regarding the interchangeability of "rule" and "principle").

4. CAMPBELL MCLACHLAN ET AL., INTERNATIONAL INVESTMENT ARBITRATION: SUBSTANTIVE PRINCIPLES 247 (2007); JESWALD W. SALACUSE, THE LAW OF INVESTMENT TREATIES 229 (2010); GUIGUO WANG, INTERNATIONAL INVESTMENT LAW: A CHINESE PERSPECTIVE 263 (2015).

5. *See, e.g.*, Treaty on the Encouragement and Reciprocal Protection of Investments art. 4(1), Arg.-Ger., Apr. 9, 1991, 1910 U.N.T.S 198.

6. *See* Vienna Convention on the Law of Treaties art. 32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT].

and security," then the interpretative issue related to its coverage arises and provokes discussion. Although investors have frequently invoked the standard,[7] regarding it as serving their objectives better,[8] host states have been opposed to its extended scope. Given this conflict, international investment tribunals maintain different perspectives. As a result, the jurisprudence on the FPS standard is highly controversial. This observation is not an exaggeration. One arbitral tribunal even acknowledged that the FPS standard has been "diversely interpreted" by its fellow tribunals.[9] From an academic perspective, even now, the standard has known no consensus.[10] Thus, it is essential to clear a path through the tangled *jurisprudence constante* of international investment tribunals to systematically address this standard of treatment.

A *prima facie* examination of such jurisprudence highlights the core question of this Article as to whether it is appropriate to expand the so-called conventional coverage of the FPS standard, which has traditionally been limited to physical protection against violence, to include legal and regulatory protection and stability? Two seminal cases initially analyzed this

7. Stanimir A. Alexandrov, *The Evolution of the Full Protection and Security Standard*, *in* BUILDING INTERNATIONAL INVESTMENT LAW: THE FIRST 50 YEARS OF ICSID 319-20, 329 (Meg Kinnear et al. eds., 2016); United Nations Conference on Trade and Development, *Investor-State Disputes Arising from Investment Treaties: A Review* 37, U.N. Doc. UNCTAD/ITE/IIT/2005/4 (2005). *But see* Giuditta Cordero Moss, *Full Protection and Security*, *in* STANDARDS OF INVESTMENT PROTECTION 131 (August Reinisch ed., 2008) (noting that the FPS standard is less frequently applied than other standards of investment protection).

8. JAN PAULSSON, DENIAL OF JUSTICE IN INTERNATIONAL LAW 171 (2005).

9. Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/02, Award, ¶ 535 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf.

10. *See* WANG, *supra* note 4, at 309 (observing that "[t]here is no consensus in arbitration practice on its interpretation and application, however"); *see also* Ralph Alexander Lorz, *Protection and Security (Including the NAFTA Approach)*, *in* INTERNATIONAL INVESTMENT LAW 764, 781 (Marc Bungenberg et al. eds., 2015) (noting that "[t]he arbitral tribunals are highly divergent on this matter"); Moss, *supra* note 7, at 142 (admitting that "[t]he question remains rather controversial"); STEPHAN W. SCHILL, THE MULTILATERALIZATION OF INTERNATIONAL INVESTMENT LAW 79 (2009) (noting that the exact content of the FPS standard "has not been authoritatively determined and remains contested"); SURYA P. SUBEDI, INTERNATIONAL INVESTMENT LAW: RECONCILING POLICY AND PRINCIPLE 67 (2008) (noting that "[t]here is no generally agreed definition of this term and different parties have claimed different levels of protection under this [FPS] principle"); Elizabeth Whitsitt & Nigel Bankes, *The Evolution of International Investment Law and Its Application to the Energy Sector*, 51 ALTA. L. REV. 207, 231 (2013) (noting that "[s]ome of the most contested issues with respect to the standard of full protection and security are whether or not it extends beyond the physical security of the investor or its investment is compromised, its relationship to other substantive disciplines within IIAs, and its relationship to customary international law").

question: *Asian Agricultural Products Ltd. v. Sri Lanka*[11] and *CME Czech Republic B.V. v. Czech Republic*.[12] While the former applied the FPS standard to physical violence, the latter extended its scope to cover legal infringement of investment. To this day, both arbitral decisions have had persuasive authority on subsequent tribunals' consideration of the standard. A second question relates to the precise degree of protection and security: how full is full enough for protection and security? Should the FPS standard continue to entail an obligation of due diligence or an obligation of conduct in every case, or should it give rise to strict liability in certain cases?

To answer these questions, this Article tries to take on the five intellectual tasks of jurists put forward by the New Haven School of International Law:

1. Goal clarification—an end sought to secure—is a preferred interpretation and application of the FPS standard that serves its very purpose.

2. A trend analysis is used to examine the degree to which an interpretation and application of the FPS standard has been achieved in past decisions and performs a historical function that identifies and organizes trends in pertinent past decisions in terms of the application thereof.

3. A factor analysis warrants the correlation of past decisions with conditions that influenced them and a consideration of whether the context of those conditions has changed materially and pertinently.

4. Predictions, possibly made by different techniques, are used to see the future results of actors' election. Surveying different decision options and scrutinizing the prospective aggregate-value consequences of each in terms of an interpretation and application of the FPS standard allow jurists to select and adjust specific recommendations in order that they may increase the probability of the eventuation of a preferred future.

5. Invention of alternatives and recommendations is not merely a summary of the rules of the past. Instead, it involves exploration of alternative arrangements to increase such probability.[13]

Although the protection and security of persons and property in international investment treaties in its broadest sense can be found in more than one context, this Article will focus only on the FPS standard as it is manifested in the form of FPS clauses and, thus, it will refrain from examining specific clauses in other relevant contexts—for example, access

11. ICSID Case No. ARB/87/3, Final Award, ¶ 50 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

12. UNCITRAL, Partial Award, ¶¶ 107, 119, 132, 474 (Sept. 13, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf.

13. W. Michael Reisman, *The View from the New Haven School of International Law*, 86 AM. SOC'Y INT'L L. PROC. 118, 123-24 (1992).

to courts and international tribunals, expropriation, and compensation.[14] Its discussion proceeds as follows: Part II offers a historical development of the FPS standard. It examines how the early concept of the standard was formed in various contexts and ultimately crystalized into the contemporary FPS standard. Part III presents an understanding of the FPS standard from scholarly and judicial perspectives at both the domestic and international levels, considering how scholars, domestic courts, and international courts and tribunals have approached the FPS standard. Specifically, Part III examines judgments of the United States Supreme Court and decisions by the International Court of Justice ("ICJ") and the Iran-United States Claims Tribunal ("IUSCT"). Part IV focuses exclusively on the interpretation and application of the FPS standard by investment tribunals under *ad hoc* arbitration pursuant to the United Nations Commission on International Trade Law ("UNCITRAL") Arbitrations Rules and institutional arbitration, such as the International Centre for Settlement of Investment Disputes ("ICSID Centre"), the Permanent Court of Arbitration ("PCA"), the London Court of International Arbitration ("LCIA"), and the Stockholm Chamber of Commerce ("SCC"). It systematically categorizes all salient arbitral findings about the FPS standard as follows: the treaty-based FPS standard and customary international law; its nature of protection and security; the materiality of terminological variations; its scope *ratione materiae*, its scope *ratione personae*, and its relation to other standards and principles in order to see a cumulative application of standards and principles of international investment law.[15] Part V offers an overarching analysis and several recommendations with respect to the genesis of the FPS standard, terminological variations, covered harms, covered perpetrators, due diligence, and the relation between the FPS standard and customary international law, as well as, the fair and equitable treatment ("FET") standard.

II. A HISTORICAL ACCOUNT OF THE FULL PROTECTION AND SECURITY STANDARD

As is rightly said, "[a] lawyer without history or literature is a mechanic, a mere working mason; if he possesses some knowledge of these, he may venture to call himself an architect."[16] This part of our trend analysis is thus

14. ROBERT RENBERT WILSON, UNITED STATES COMMERCIAL TREATIES AND INTERNATIONAL LAW 106-07 (1960).

15. *See* Schwarzenberger, *supra* note 3, at 69-70.

16. Vaughan Lowe, *Sir Robert Yewdall Jennings*, *in* FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONORS OF SIR ROBERT JENNINGS xv, xv (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (quoting WALTER SCOTT, GUY

devoted to the historical development of attitudes toward and treatment of foreigners, the granting of protection and security in various treaties, the emergence of the customary international law that provides protection and security, and, ultimately, the inclusion of modern FPS clauses in investment and other treaties. It presents a historical account, arranged chronologically, of full protection and security in both economic and political contexts according to the following timeline of five historical periods: Greece, Rome, the Middle Ages, the Renaissance to World War I, and World War I to the present. The core of this Section aims to illustrate that the FPS standard is rooted deeper in legal history than has been estimated by previous literature, which reports that the FPS standard's origin can be traced back to the nineteenth and early twentieth centuries.[17] Actually, it dates to at least ancient Greece, if not further. Moreover, this Section will show that since its very beginnings, the concept of protection and security has not been limited only to physical protection and security.

A. Greece

Foreigners in Greece included Greeks of other cities domiciling in a state, Greek travelers or visitors staying in a state temporarily, and "barbarians" (non-Hellenes). The Greek's initial antagonism toward foreigners was eventually mitigated by commercial exigencies and war followed by subsequent peaceful adjustments and alliances.[18] Inter-Greek treaties, normally in the form of political conventions, granted personal liberty and protection of property to their parties' citizens, allowing them, *inter alia*, to acquire real estate. Punishment for treaty violation was also introduced therein. The "isopolity" treaties of the Greeks, which allowed for the reciprocal granting of citizenship, placed citizens on roughly the same footing as nationals.[19] Where such treaties did not exist, it was still possible for citizens of one Greek state to receive equal rights or special protection from another state by virtue of their sense of kinship.[20]

MANNERING ch. XXXVII (P.D. Garside ed., 1839)).

17. *See* RUDOLF DOLZER & CHRISTOPH SCHREUER, PRINCIPLES OF INTERNATIONAL INVESTMENT LAW 161 (2d ed. 2012); SANTIAGO MONTT, STATE LIABILITY IN INVESTMENT TREATY ARBITRATION: GLOBAL CONSTITUTIONAL AND ADMINISTRATIVE LAW IN THE BIT GENERATION 69-70, 302 n.40 (2009); SALACUSE, *supra* note 4, at 231; Kenneth J. Vandevelde, *The Bilateral Investment Treaty Program of the United States*, 21 CORNELL INT'L L.J. 201, 203-04 (1988).

18. 1 COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 125-26 (1911) [hereinafter 1 PHILLIPSON].

19. *Id.* at 140-42; ARTHUR NUSSBAUM, A CONCISE HISTORY OF THE LAW OF NATIONS 5-6 (1954).

20. NUSSBAUM, *supra* note 19, at 6.

Despite their having treaties with Greece, non-Hellenic communities were regarded as barbarians destined to become enemies and slaves, and Greece's wars against them were once considered by Aristotle as a hunt and as "just by nature."[21] Nonetheless, non-Hellenes were not without legal status and protection. Legally recognized foreigners who resided permanently in Greece and formally registered as such, called *metoikoi*, received full juridical protection (i.e., access to courts) while having neither political rights nor a right to acquire real estate.[22] Unless prohibited by treaties, Greeks could launch private reprisals against the property of foreigners who were accused of wrongdoing or enact *androlepsia* against their fellows. Foreign judges were permitted to participate during foreign litigation.[23] Foreigners were also protected by the institution of *proxenia,* in which a *proxenos*, a prominent Geek or foreign citizen, was officially entrusted by a foreign state or a protecting state with protecting its citizens. This institution was often regarded as the earliest form of consulate authority.[24]

Eventually, restrictions against foreigners in Greece were gradually removed, and most Greeks were in favor of foreigners.[25] As a result, foreigners received protection and large concessions in most Greek states, especially in Athens. Free foreigners' persons and property and ransomed prisoners of war were each protected. In addition to *proxenia*, foreigners were also protected by the institution of private and public hospitality (*hospitium privatum* and *hospitium publicum*). Entered into by foreigners and their hosts, such hospitality was held to be a sacred bond to be passed from father to son.[26] The positive attitude toward foreigners underlying such protection was well-recorded. In the *Odyssey*, Homer wrote that "strangers and the poor came from Zeus [and] suppliants were under his special protection," and as Alcinous asserts to Odysseus, "[A]nyone with even a moderate share of right feeling is fully aware that it is his duty to treat a guest

21. *Id*. at 5.

22. *Id*. at 6.

23. *Id*. at 8; 1 PHILLIPSON, *supra* note 18, at 141 (discussing reprisals and androlepsia in Greece); 2 COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME 349-366 (1911) [hereinafter 2 PHILLIPSON].

24. NUSSBAUM, *supra* note 19, at 6-7; 1 PHILLIPSON, *supra* note 18, at 149-52; Wolfgang Preiser, *History of International Law, Ancient Times to 1648*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. ¶ 11, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e716?rskey=sCXBAE&result=4&prd=EPIL (last updated Aug. 2008).

25. *See* 1 PHILLIPSON, *supra* note 18, at 128-32 (stating that Greeks not only liked foreigners, but in most Greek states, laws protected foreigners' persons and property).

26. *Id*. at 148-49.

and a suppliant just as though he were his own brother."[27] There was also a law sanctioning citizens who denied foreigners' requests for accommodation after sundown; a table reservation and a prioritized meal-serving order for strangers at common meals; and public imprecation against those found liable for not showing the way to travelers who had strayed.[28] Various hostelries were established in Greece where food and shelter were available. These included inns, stopping places, lodgings, guest chambers, resting places, and the like.[29] According to *The Laws*, Plato's longest dialogue, "arbitrary offences committed against strangers were liable to the vengeance of the gods . . . the foreigner having no kindred and friends is all the more an object of sympathy both of gods and men."[30] Notably, foreigners enjoyed freedom of speech and movement, the latter of which could not be exercised at places reserved for citizens' performance of their sacred rites.[31] In addition, foreigners were given leave to freely exercise their national form of worship.[32]

As noted earlier, although granted official protection by a patron under Athenian law, the *metoikoi* had no right to own immovable property unless authorized to do so by a special decree. Nonetheless, their other interests concerning their persons and property were guaranteed by the Athenian government, even when they were temporarily absent. Only when they were exiled was their property confiscated.[33] For non-domiciled aliens, their persons and property received adequate protection as well.[34]

B. Rome

According to Phillipson, the Romans had less national pride than the Greeks, and their attitude toward foreigners "was marked by less exclusiveness and greater liberality of a systematic character than that of the Greek race."[35] As Nussbaum also observes, "one may say that in contradistinction to the Greeks, the Roman did not live in a state of latent hostility with the rest of the world."[36] Only in its prehistoric times did they

27. *Id*. at 131.
28. *Id.* at 132.
29. *Id*. at 133.
30. *Id*.
31. *Id*. at 136.
32. *Id*. at 169.
33. *See id*. at 145-46, 166, 172.
34. *Id*. at 146-47.
35. *Id*. at 213.
36. NUSSBAUM, *supra* note 19, at 12 (footnote omitted).

consider every stranger to be an enemy or *hostis*.[37]

Foreigners in Rome were legally protected, having some independent and dependent juridical capacity. For the former, they could exert it on their own. For the latter, they needed intervention through explicit pacts, conventions, or treaties to make it applicable and effective.[38] Foreigners received protection from their Roman patrons, who took care of their general interests pursuant to private hospitality, an institution borrowed from the Greeks. By this purely voluntary, reciprocal, and hereditary guest tie, foreigners were guarded by their protector if they were ill, were cremated if dead, and were advised as well as assisted if involved in legal proceedings. They were regarded as sacred and putting them to death was a heinous crime that was as serious as parricide.[39] Such private hospitality was extended by a public hospitality.[40] Accordingly, when residing in Rome, foreigners received, *inter alia*, a gratis lodging, utensils necessary for showering and cooking, gifts of gold or silverware, clothing, arms, and horses. This public hospitality was of great importance for the protection of foreigners, since it served as the foundation of the provisions in subsequent treaties and represented "the minimum of mutual rights and obligations laid down in an international compact."[41]

However, barbarians (or *alienigen*), as potential enemies, were not in the adequate confines of legal protection from the cradle to the grave. Denied admission to Roman territory on a regular basis, they were only rarely allowed to be in Rome, and when they were, they could do so only by an extraordinary concession on a case-by-case basis or occasionally by special compacts that allowed them to settle only in certain areas. Their commercial relationships with Romans were largely restricted. Theoretically, they did not receive any rights whatsoever, nor were they under *jus gentium* but rather inherent subjugation. Notably, their property was without protection, considered to be *res nullius* that might be acquired by anyone through simple occupation. If defeated, they might be enslaved. When buried, barbarians' graves received less protection than those of slaves and were not *res religiosa*.[42] Similarly, *dediticii*, conquered people who were degraded to this status, had only as much political and civil capacity as their conquerors conferred upon them. Their former rights and privileges were taken away,

37. 1 THOMAS ALFRED WALKER, HISTORY OF THE LAW OF NATIONS: FROM THE EARLIEST TIMES TO THE PEACE OF WESTPHALIA, 1648 44 (1899) [hereinafter 1 WALKER].

38. *See* 1 PHILLIPSON, *supra* note 18, at 213-14.

39. *See id.* at 218-19.

40. 1 WALKER, *supra* note 37, at 45.

41. 1 PHILLIPSON, *supra* note 18, at 225-26.

42. *Id.* at 230-31.

and they themselves, along with their things, human and divine, such as arms, cities, territory, temples, and property, were at their conquerors' disposal. However, for both *alienigen* and *dediticii*, broader conceptions and accommodating practices enabled them to receive better treatment than what the law prescribed.[43]

As for ordinary *peregrines*, or free subjects, comprised primarily of subjects from foreign states with friendly ties to Rome, they remained theoretically outside the confines of Roman civil jurisprudence, or *ius civile*, unless there existed subsequent extensions or conventions granting them special concessions.[44] They did not have political rights or the most important private rights.[45] Among the rights denied to them were the right to vote, the right to marry, and the right to inherit *ab intestato*.[46] They could not claim *jus commercii* and its corollaries, that is, quiritary ownership, except in case of provincial land and certain modes of property acquisition.[47] If granted *commercium*, they would have the right to enter into bilateral arrangements to acquire, hold, and transfer all manner of property pursuant to civil law.[48] If *commercium* was not granted, their daily intercourse, including commercial, was still possible under the regulations of a special magistrate, *praetor peregrinus*.[49] The creation of this magistrate in 242 B.C. marked official Roman recognition of foreigners' status, executing their litigation through appointed judges.[50] As a more permanent, comprehensive, and effective jurisdiction, the *praetor peregrinus* was created to protect all classes of *peregrines*, serving a similar function as the *xenodikai* did in Greece.[51] The rights of *peregrines* whose cities had entered into treaties with Rome would be even more secure. Latin *peregrines*, for example, could enjoy *recuperatio*, *jus commercii*, and *jus connubii* while in Rome.[52] These *peregrines* occupied and enjoyed "an intermediate juridical position between the Roman citizens and peregrins proper" in accordance with the class they belonged.[53]

Later, treatment toward ordinary *peregrines* was ameliorated by *jus*

43. *Id.* at 232.
44. *Id.*
45. *See id*. (explaining that the Roman system was limited to only citizens).
46. *Id.* at 233-35.
47. *Id.*
48. *Id.*
49. *Id.* at 234.
50. NUSSBAUM, *supra* note 19, at 13.
51. 1 PHILLIPSON, *supra* note 18, at 267.
52. *Id*. at 240.
53. *Id.*

gentium, comprising its new provisions and *jus praetorium*. In the event that the provisions of *jus gentium* were not enough to protect them substantively and procedurally, their law of origin (*lex peregrinorum*) could apply. In other words, *peregrines* were protected by certain Roman civil provisions by way of express extension, *jus gentium*,[54] and *lex peregrinorum*. Thus, their private rights regarding marital and family matters were recognized. *Jus gentium*, the evolution of which symbolizes Roman openness to foreigners, allowed them to acquire property through its various modes and enjoy rights *in rem* as well as *in personam*. As to their procedural protection, they were allowed to submit criminal claims of the civil law, such as theft and damage to property.[55] Protection of property had long been regarded as being included in *jus gentium*.[56] Romans also established *recuperatores* to consider foreigners' disputes, as was the *praetor peregrinus*.[57]

C. The Middle Ages

Alien residents during the Middle Ages received different but somewhat lenient treatment depending on their countries of residence and the prevailing policy. In some countries, foreigners were protected in life and limb and entitled to appear before ordinary courts.[58] As suitors, they received the privilege of a jury *de medietate linguae*, having both fellow foreigners and citizens listen to their cases.[59] Care provided by a special host remained in practice.[60]

Articulate legal rules were not always necessary to ensure the safety of foreigners' persons and goods.[61] Unwritten customs evolved and served their purpose well. Reference to such customs can be found, for example, in a letter written by Emperor Charlemagne to the king of Mercia in 796 in which Charlemagne assured protection for the king's merchants in accordance with "ancient custom of commerce."[62] In return, Charlemagne requested equal protection for his merchants in Mercia; should they be the victims of injustice, local rulers and courts should give them redress.[63] This

54. *See* NUSSBAUM, *supra* note 19, at 14.

55. *Id.* (including laws regarding marriage, property, and damages into *jus gentium*); 1 PHILLIPSON, *supra* note 18, at 235-39.

56. NUSSBAUM, *supra* note 19, at 14.

57. 1 PHILLIPSON, *supra* note 18, at 267.

58. 1 WALKER, *supra* note 37, at 119.

59. *Id.*

60. *See id.*

61. NUSSBAUM, *supra* note 19, at 27.

62. *Id.*

63. *Id.*

generally represented a unilateral grant of franchise effective in protecting merchants and their goods.[64] Considered a "man of the Emperor," foreign merchants were gladly welcomed by rulers, who physically defended them from attacks while taxing them in an appropriate and proportionate manner.[65] Legally, they could come from a foreign land to claim the heritage of their ancestors upon a payment of tax, otherwise known as *a droit de detraction*.[66] In case of their own death, "it commonly happened that the vultures of the Crown swooped down once more, and robbed the alien heir under the name of the *droit d'aubaine*."[67]

Foreign merchants in England benefited from statutes enacted to comfort and protect them. In times of peace, they could enter and leave the country without hindrance. Their transactions were without disturbance.[68] When acting as a plaintiff or a respondent, their fellow countrymen were included on their jury.[69] "In one particular alone was English law strict against the alien. He might hold and acquire personal property within the realm, and maintain a personal action; but he was forbidden property in real estate."[70]

Still, at the forefront of foreigners' concern was the use of reprisals.[71] As an obnoxious legal institution, reprisals were eventually suppressed by autonomous legislation and treaties that were more developed than those applicable in Greece.[72] Foreseeing possible danger caused by their subjects' reprisals, rulers, particularly those in Italy, found it necessary to control reprisals, enacting legislation that conditioned reprisals on government authorization.[73] Known in English as a "letter of reprisals," such authorization would be permitted if statutory requirements were fulfilled and only for the recovery of a specified amount.[74] Besides private reprisals, there existed town-to-town reprisals that were prohibited by the British Parliament in 1275.[75] As Walker describes:

> Amongst the special risks of his trading the merchant stranger of the Middle Ages numbered the liability to attachment in person or property in

64. *See id.*
65. 1 WALKER, *supra* note 37, at 119.
66. *Id*.
67. *Id*. at 120.
68. *Id.*
69. *Id*.
70. *Id*. at 121.
71. *See* NUSSBAUM, *supra* note 19, at 25.
72. *See id.*
73. *Id.*
74. *Id.*
75. *Id.* at 25-26.

> respect of the debts of a defaulting fellow-countryman, and the liability to the exercise of reprisals. Accordingly, by a statute of Edw. III, it was enacted that a Lombard company should be responsible for the debts of any of its merchants left unpaid within the realm, "o that any merchant, "which is not of the company, should not be thereby "grieved or impeached." And the grant of special reprisals, being the formal authorisation [sic] by his sovereign of a person judging himself wronged by a foreign power to indemnify himself by the seizure of property belonging to any subject of that power, was no uncommon occurrence.[76]

Internationally, Italian governments led in concluding treaties that restrained reprisals. Legislations and treaties for this purpose had something in common, requiring claimants to have suffered denial of justice in foreign countries where they first presented their claims.[77] By the end of the Middle Ages, a foreigner's protection and security was improved when the practice of private reprisals was abandoned, thereby strengthening the safety of the foreigner's person and goods, a condition indispensable for both the exchange of goods and for rulers' financial improvement through collection of duties and fees from foreign merchants.[78]

Apart from legislations and treaties suppressing reprisals, the Middle Ages witnessed other legislation, institutions, commercial comity of nations, and treaties protective of foreigners in general and of foreign merchants in particular.[79] For instance, the code of the Visigoths in 654 allowed foreign merchants to settle disputes among themselves using their own magistrates and law.[80] Such legislation increased in number in the last three centuries of the era and included the Magna Carta of 1215, the *Carta Mercatoria* of 1303, and the Statute of the Staple of 1353.[81]

On the Continent, Emperor Frederick II's *Authentica Omnes peregrini* of 1220 conferred upon all foreigners the freedom to dispose of their property by contract of will.[82] This famous, but futile decree, abdicated local rulers' right to seize foreigners' property upon death (i.e., *jus albinagii*, *droit d' aubaine*).[83] Enhancing protection of foreign merchants in such places as Champagne and Lyons, elaborate franchises, given by the state and the church, provided foreign merchants with procedural protection by

76. 1 WALKER, *supra* note 37, at 121.
77. NUSSBAUM, *supra* note 19, at 25-27.
78. *Id*.
79. *Id.* at 28.
80. *Id.*
81. *Id*.; Schwarzenberger, *supra* note 3, at 22.
82. NUSSBAUM, *supra* note 19, at 29.
83. *Id.*

establishing mercantile courts.[84] "Furthermore, permanent mercantile courts frequented by foreign parties appeared about the middle of the twelfth century in Italian city-states (Milan, Pisa) and later in other Mediterranean trade centers such as Narbonne and Barcelona."[85]

Medieval guest courts (so-called *Gastgerichte*) were also established in German towns for similar purposes.[86] Because of its great achievements and influence, the Hanseatic League was able to secure extensive franchises in important markets, thereby strengthening safety for persons and goods and the freedom of commerce and navigation.[87] The conditional right to have buildings for personal and commercial purposes, landing places, churches, and graveyards were also established.[88] Diplomatic protection, as an institution of modern public international law since the Middle Ages, was also exercised by countries, with variations in terminology and concept, to protect their mistreated nationals in other countries.[89] One example of commercial comity of nations is the granting of protection and privilege to the men of Cologne by Richard I of England in 1194.[90] Commercial treaties, especially inter-Italian ones, contained provisions regarding safe communication, travel, and stay,[91] even granting protection to certain foreigners by way of national treatment ("NT") and most-favored-nation ("MFN") clauses.[92]

D. The Renaissance to World War I

Protection and security of foreigners and their property was continually improved, mainly through treaties, custom, and municipal law. As a typical example of a political-commercial treaty, the *Intercursus Magnus* of 1496 between England and the house of Burgundy, which then controlled the Low

84. *See id.* at 21-22, 29.

85. *Id*. at 29.

86. Kay Hailbronner & Jana Gogolin, *Aliens*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. ¶ 9, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e744?rskey=BQqpok&result=1&prd=EPIL (last updated July 2013).

87. NUSSBAUM, *supra* note 19, at 34.

88. *Id.*

89. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 522 (7th ed. 2008). *But see* CHITTHARANJAN F. AMERASINGHE, DIPLOMATIC PROTECTION 8 (2008) (noting that there existed no recorded examples of possible exercise of diplomatic protection before the late eighteenth and early nineteenth centuries).

90. *See* GEOFFREY BUTLER & SIMON MACCOBY, THE DEVELOPMENT OF INTERNATIONAL LAW 211 (1928) (stating that they were permitted to trade freely and did not have to pay London tolls).

91. NUSSBAUM, *supra* note 19, at 32.

92. *Id*. at 33.

Countries, together with its alteration, the *Intercursus Malus* of 1506, assured the subjects of the contracting parties the protection of their lives, property, and commercial activities.[93] From the late 1570s to the early 1580s, generally recognized commercial custom led the rulers of the Low Countries to extend their protection to all Portuguese merchants doing business with Lowlanders, rendering those merchants more secure from all injury. Even in time of war, such merchants were not without protection.[94] As Grotius explains:

> When the situation at home grew unsettled, the States-General of the Low Countries provided documentary ratification of the arrangement in behalf of the Portuguese merchants, with the specific purpose of safeguarding the latter from the adverse treatment that might be accorded them under the pretext of war-time license. *Thus the Portuguese, with their wives, their children, and the other members of their household, were taken under the guardianship of the state, as were their domestic furnishings, merchandise, other possessions and all rights properly pertaining to them*, regardless of whether or not they were present in person. For they were empowered to enter, depart from, or remain within the territory of the Low Countries, and to import or export their merchandise, by land or by sea. Orders were even given to all of the military commanders and soldiers, instructing them to safeguard *the personal welfare and the goods* of Portuguese dwelling in the said territory. Moreover, after the Lowlanders had repudiated the rule of Philip, and the Portuguese, on the other hand, had acknowledged his sovereignty, with the result that the two peoples became enemies, that same States-General (acting at the request of the Portuguese who were residing or doing business in the Low Countries, and moved by the consideration that it was to the interest of the natives that commerce should be cherished in security rather than impeded by war), nevertheless confirmed its earlier rescript and exempted the Portuguese from the laws of war to the extent indicated in the following provision: that all Portuguese who might wish to do so, should without danger to *life or property* enjoy safe passage to and from, residence, and the practice of commerce, among the people of the Low Countries.[95]

Turning to the relation between Oriental and European rulers in the sixteenth century, their treaties—the so-called *capitulations*—conferred upon foreign merchants the right to settle their disputes under their specific

93. BUTLER & MACCOBY, *supra* note 90, at 213-15.

94. 1 HUGO GROTIUS, DE IURE PRAEDAE COMMENTARIUS: COMMENTARY ON THE LAW OF PRIZE AND BOOTY 173-74 (James Brown Scott ed., Gwladys L. Williams & Walter H. Zevdel trans., 1950).

95. *Id.* (emphasis added).

laws and usages and the freedom of religion.[96] Again, at the outbreak of war, foreigners, as enemy individuals, as well as their property, were protected by treaties of commerce that were concluded in this period.[97] Because of increasing hostilities, protection and security in time of war was more valuable than protection and security in time of peace.[98]

At the beginning of the eighteenth century, foreigners were not favored by states' customary law, either substantively or procedurally. Enemy individuals might be imprisoned or violently expelled, and their property, personal, real, or mercantile might be confiscated. In addition, their debtors might be released and their *locus standi* in civil courts removed.[99] It was treaties of commerce, the number of which had increased significantly in the seventeenth and eighteenth centuries, that saved them from such treatment.[100] In the France-Savoy treaty of 1713, for instance, the confiscation of enemy property was no longer tolerated.[101]

In the second half of the eighteenth century, full protection and security was not a novel concept. As Butler and Maccoby noted, several treaties of commerce and navigation of the century "protected more fully the person and property."[102] To illustrate, the Russia-Naples Treaty of 1787 permitted enemy subjects to finish their business in one year, free of government interference with their property removal.[103] Other treaties further permitted enemy aliens to continue their peaceful residence and exempted their assets from seizure. In the United States-Prussia Treaty of 1785, a period of nine months after the declaration of war was granted to merchants for similar purposes.[104] More importantly, it also contained "brief and cryptic reference" to protection of foreign merchants, providing that "the citizens or subjects of either party . . . shall be received, protected, and treated with humanity and kindness."[105] Later, the United States was more elaborate on this point as evident from Article XIV of the Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and the United States of

96. Hailbronner & Gogolin, *supra* note 86, ¶ 9.

97. BUTLER & MACCOBY, *supra* note 90, at 222.

98. *Id.* at 197.

99. *Id.* at 196.

100. *Id.* at 196, 222, 488.

101. *Id*. at 197.

102. *Id.*

103. *Id.*

104. *Id.* at 197-98, 218.

105. 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, 1118, 1118 n.6 (2012) (citing Treaty of Amity and Commerce, art. XVIII, Prussia-U.S., Sept. 10, 1785, 8 Stat. 84).

1794, in which merchants and traders on each side received "the most complete protection and security for their commerce."[106] With few exceptions, this trend of leniency toward enemy persons and property continued in the nineteenth century.[107] Another important theme in treaties concluded in the seventeenth and eighteenth centuries was the abolition of the *droit d'aubaine*.[108] Modern diplomatic protection was also exercised in the late eighteenth century, when the authorizations of private reprisals disappeared.[109] Notably, in the seventeenth century, the concept of protection and security in foreign affairs clearly went beyond physical protection of persons and property, though this extension might be limited to certain types of persons and property. Such a concept sometimes included the protection of reputation. This is evident in the earliest municipal law on persons of diplomatic status of the Netherlands in 1651, which prohibited:

> [*O*]*ffending*, *damaging*, *injuring by word*, *act or manner*, the ambassadors, residents, agents, or other ministers of the kings, princes, republics, or others having the quality of public ministers; or *to do them injury or insult directly or indirectly, in any fashion or manner whatever*, in their own persons, gentlemen of their suite, their domestic servants, dwellings, carriages, etc., under penalty of being corporeally punished as violators of the law of nations and disturbers of the public peace.[110]

Later, especially since the period of the Congress of Vienna (1814–1815), numerous instruments commonly (albeit loosely) called commercial treaties inherited from preceding treaties what may be called an "international bill of rights."[111] Consequently, the nationals or subjects of both parties to treaties, when in the territory of the other contracting party and when in compliance with the laws and regulations of the country, usually enjoyed freedom to enter and depart the country and settle in it, full protection and security for their persons, goods, and property, free sojourn, admission and establishment, protection from discriminatory treatment in taxation and the like, free access to courts, freedom of worship, and exemption from military service.[112]

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106. Treaty of Amity, Commerce, and Navigation art. 14, U.K.-U.S., Nov. 19, 1794, 8 Stat. 116, T.S. No. 105.

107. BUTLER & MACCOBY, *supra* note 90, at 198.

108. *Id.* at 198-99.

109. BROWNLIE, *supra* note 89, at 522.

110. JOHN P. GRANT & J. CRAIG BARKER, THE HARVARD RESEARCH IN INTERNATIONAL LAW: ORIGINAL MATERIALS 94 (1966).

111. NUSSBAUM, *supra* note 19, at 204.

112. *See id*. (emphasizing the reciprocity of rights citizens of contracting states enjoy); 1 INTERNATIONAL LABOR OFFICE, LEAGUE OF NATIONS, EMIGRATION AND IMMIGRATION LEGISLATION AND TREATIES 356 (1922) [hereinafter 1 INTERNATIONAL LABOR OFFICE]

Particular provisions for the protection of persons and private property rights in those commercial treaties were normally found in more than one context, commonly occurring in contexts relating to "(1) access to courts, (2) embargoes and detentions, (3) general statements as to protection and security, and (4) specific references to expropriation and compensation."[113] For the last context, the exact phrases used in such statements in the nineteenth century included "'special protection' of private property,"[114] "special protection to the persons and property of the citizens of each other,"[115] "constant protection and security,"[116] "the most constant protection and security for their persons and property,"[117] "the most constant security and protection for their persons and property and for their rights,"[118] "the same security and protection that is enjoyed by the citizens or subjects of each country shall be guaranteed on both sides,"[119] "full and complete protection and security,"[120] and "full and perfect protection for their persons and property."[121]

Suffice it to say that it was in the nineteenth century that the FPS standard, though various in its expression, was widely included as a regular clause in "Treaty of Friendship and Commerce," "Treaty of (Friendship), Commerce, and Establishment," or "Treaty of (Friendship), Commerce, and Navigation (FCN)[122]—the new titles reflecting the fact that other non-commercial matters had also been included therein.[123] Its concept accounted for strong states insisting on obtaining the right of extraterritoriality to protect their nationals' persons and property in the territory of weak ones.[124]

An example of the interpretation of FPS clauses in the nineteenth century that went beyond physical protection and security can be found in An

(limiting reciprocal rights to citizens who respect the laws of their own country).

113. WILSON, *supra* note 14, at 106-07.

114. *Id.* at 106.

115. Treaty of Amity, Commerce, and Navigation art. X, Chile-U.S., May 16, 1832, 8 U.S.T. 434.

116. WILSON, *supra* note 14, at 109 n.68.

117. *Id.*

118. *Id.*

119. *Id.*

120. Treaty with Borneo, art. 3, Borneo-U.S., June 23, 1850, 10 U.S.T. 909; WILSON, *supra* note 14, at 111 n.74.

121. *Id.*; 2 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 4 (1941) [hereinafter 2 HACKWORTH] (quoting Treaty of Commerce and Navigation art. 1, Jap.-U.S., Nov. 22, 1894); WILSON, *supra* note 14, at 106.

122. NUSSBAUM, *supra* note 19, at 204-05.

123. MONTT, *supra* note 17, at 67.

124. 2 HACKWORTH, *supra* note 121, at 528.

Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation of 1832 between the United States and Chile of 1833. In Article II of the 1833 Additional and Explanatory Convention, the parties clarified the meaning of the FPS clause that appeared in Article X of the original Treaty of Peace, Amity, Commerce and Navigation of 1832 as follows:

> It being agreed by the [tenth] article of the aforesaid treaty, that the citizens of the United States of America, personally or by their agents, shall have the right of being present at the decisions and sentences of the tribunals, *in all cases which may concern them*, and at the examination of witnesses and declarations that may be taken in their trials . . . .[125]

Apart from FCN treaties, there are other relevant treaties that should not be overlooked. Treaties concerning the residence of foreigners, concluded in the nineteenth and early twentieth centuries, though small in number, laid down the residence conditions of nationals of one state in the territory of the other state.[126] Of particular relevance, they also granted such nationals free access to courts and constant and complete protection and security for their person and property.[127] Treaties relating to emigration that were made during the same period should also be mentioned because of their protection of emigrants.[128] Peace treaties produced similar effects. For example, according to the Treaty of Paris of 1898, which ended the Spanish-American War, the United States held Cuba under a trust relation for the inhabitants of the island, thus exercising the powers and functions consistent with its "duties as a trustee for the protection and security of persons and property."[129]

E. World War I to the Present

From the nineteenth century to the World War I period, the FPS standard still secured its place in commercial treaties that had continuously increased in number.[130] However, the war years (1914–1918) had seen the departure from the standard, since the practice regarding enemy aliens and property

125. An Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation art. 2, Chile-U.S., Sept. 1, 1833, 8 Stat. 434, T.S. No. 40 (emphasis added).

126. *See* 1 INTERNATIONAL LABOR OFFICE, *supra* note 112, at 360-62 (providing examples of countries that agreed to provide foreigners rights via treaties).

127. *Id.*

128. *See id*. at 328, 331-32 (originating with emigration resulting from the African slave trade).

129. 1 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 157 (1940) [hereinafter 1 HACKWORTH].

130. *See* 1 INTERNATIONAL LABOR OFFICE, *supra* note 112, at 357.

was understandably more severe. Enemy aliens were imprisoned or expelled for security and strategic reasons in most belligerent states, while enemy property was placed under a custodian and frequently liquidated.[131]

The situation was improved at the end of the war. As part of a series of the peace treaties of 1919 and 1920 that put an end to World War I, Article 277 of the Treaty of Versailles of 1919, for instance, contains the provision that "[t]he nationals of the Allied and Associated Powers shall enjoy in German territory a constant protection for their persons and for their property, rights and interests, and shall have free access to the courts of law."[132] Actually, the rest of the treaties in the series all provide for "the free enjoyment and protection of the life and liberty of all inhabitants."[133] Similarly, Article 10 of the 1919 convention that revised the General Act of Berlin of 1885 and the General Act of Brussels of 1890 provides that "[t]he Signatory Powers acknowledge their obligation to maintain in the regions under their control actual authority and police forces sufficient to insure protection for persons and property and, if the case should arise, freedom for commerce and transit."[134] In the context of League of Nations mandates elaborated in Article 22 of the Covenant of the League of Nations, the FPS standard was not disregarded. Each mandatory was required "to secure to all nationals of states members of the League the same rights as are enjoyed by its own nationals with respect to entry into and residence in the territory, protection, acquisition of property, exercise of professions and trades, transit, and complete economic, commercial, and industrial equality."[135]

Thereafter, an FPS clause remained a regular part of treaties but with more clarification; the parties to the treaties more explicitly determined the degree of the FPS standard. For instance, besides granting "the most constant protection and security for their persons and property" to the nationals of each party, Article I of the United States-Germany Treaty of 1923 also referred to "that degree of protection that is required by international law."[136] This type of FPS clause was later included in other treaties.[137] Again, as was

131. BUTLER & MACCOBY, *supra* note 90, at 198.

132. Treaty of Peace with Germany art. 277, June 28, 1919, Ger.-Gr. Brit., T.S. No.4 (1919) (Cd.153) [hereinafter Treaty of Versailles]; *see* 1 INTERNATIONAL LABOR OFFICE, *supra* note 112, at 355.

133. WILLIAM EDWARD HALL, A TREATISE ON INTERNATIONAL LAW 63 (A. Pearce Higgins ed., Oxford Univ. Press 8th ed. 1924).

134. 1 HACKWORTH, *supra* note 129, at 403.

135. *Id.* at 122.

136. Treaty of Friendship, Commerce, and Consular Rights art. I, U.S.-Ger., Dec. 8, 1923, 44 Stat. 2132.

137. 3 GREEN HAYWOOD HACKWORTH, DIGEST OF INTERNATIONAL LAW 630, 653 (1942) [hereinafter 3 HACKWORTH].

the situation in the seventeenth century, an understanding of protection and security in international relations of this period was not limited to physical concerns. Under the title "Personal Protection and Security," Article 17 of the Harvard Draft Convention on Diplomatic Privileges and Immunities includes interference with security, peace, or dignity in the concept of protection and security.[138]

Shortly after World War II, the FPS standard remained able to save its place in commercial treaties and the failed multilateral trade treaty. Its significance was also evident in international relations as a new government's intention to provide "adequate protection of foreign property under international practice" was critical for considering whether recognition of that government should be granted.[139]

The first post-World War II treaty between the United States and China of 1946 adopted, as its predecessors had, "the most constant protection and security." However, "that degree of protection that is required by international law" was changed to "the full protection and security required by international law."[140] The object of protection of the standard was clarified by a separate provision that defined "property" as including "interests held directly or indirectly,"[141] which by 1957 had become a general understanding and standard practice of the United States.[142] Still, such a terminological change connecting full protection and security with international law did not make its way to all treaties. As is the case with the U.S.-Uruguay Treaty of Friendship, Commerce, and Economic Development, the degree of protection and security was still connected with the national treatment standard.[143] Placing great emphasis on protection and security for property, this treaty also contained a separate clause dealing especially with property.[144] So did the U.S.-Ireland Treaty.[145] As Wilson concluded, the "most constant protection and security" for property was included in all postwar treaties that the U.S. signed up to the end of 1958, except for the treaty with Muscat, in which "all possible protection and security" was used. Only four of its treaties—those with China, Italy, Ireland, and Iran—link the degree of protection specifically to international

138. GRANT & BARKER, *supra* note 110, app. 4, at 449.
139. 1 HACKWORTH, *supra* note 129, at 232.
140. WILSON, *supra* note 14, at 116.
141. *Id.* at 117.
142. *Id.* at 120.
143. *See id.* at 118.
144. *Id.*
145. *Id.* at 119.

law.[146]

Multilaterally, the abortive Havana Charter of 1948 intended to establish the International Trade Organization ("ITO") also contained an obligation to grant "adequate security for existing and future investments."[147]

In 1959, the FPS standard was incorporated into the first bilateral investment treaty ("BIT") specifically designated for investment protection, the Treaty between the Federal Republic of Germany and Pakistan for the Promotion and Protection of Investments of 1959. Its Article 3(1) reads "[i]nvestments by nationals or companies of either Party shall enjoy protection and security in the territory of the other Party."[148] Since then, the protection and security of investment has been an intrinsic part of numerous BITs and other international investment agreements ("IIAs").[149] Article 10(1) of the Energy Charter Treaty[150] and Article 11(1), (2)(b), of the Association of Southeast Asian Nations ("ASEAN") Comprehensive Investment Agreement ("ACIA")[151] serve as good examples.

The proliferation of investment treaties, especially BITs, was accompanied by a corresponding lack of uniformity. The FPS standard's exact formulations and patterns vary from treaty to treaty. "Full protection and security,"[152] "full security and protection,"[153] "full and complete protection and security,"[154] "most constant protection and security,"[155]

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146. *Id.* at 119-20.

147. Havana Charter art. 12 ¶ 2(a)(i), U.N. Doc. E/Conf.2/78 (Mar. 24, 1948).

148. Treaty for Promotion and Protection of Investments art. 3(1), Ger.-Pak., art. 3(1), Nov. 25, 1959, 457 U.N.T.S. 23.

149. SALACUSE, *supra* note 4, at 233; KENNETH J. VANDEVELDE, BILATERAL INVESTMENT TREATIES: HISTORY, POLICY, AND INTERPRETATION 244-47 (2010).

150. Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 100 ("Such Investments shall also enjoy the most constant protection and security and no Contracting Party shall in any way impair by unreasonable or discriminatory measures their management, maintenance, use, enjoyment or disposal. In no case shall such Investments be accorded treatment less favourable than that required by international law, including treaty obligations.").

151. ASEAN Comprehensive Investment Agreement, art. 11(1)-(2), Feb. 26, 2009 ("Each Member State shall accord to covered investments of investors of any other Member State, fair and equitable treatment and full protection and security. (2) For greater certainty: . . . (b) full protection and security requires each Member State to take such measures as may be reasonably necessary to ensure the protection and security of the covered investments.").

152. Agreement for the Promotion and Protection of Investments art. 2(2), Tanz.-U.K., Jan. 7, 1994, T.S. No. 90.

153. Agreement on Encouragement and Reciprocal Protection of Investments art. 3 ¶ 2, Czech-Neth., Apr. 29, 1991, 2242 U.N.T.S. 205.3(2).

154. Agreement on the Reciprocal Promotion and Protection of Investments, art. 4(3), Fr.-Mex., Nov. 12, 1998.

155. Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 100.

"broad and full protection and security,"[156] "full protection and legal security,"[157] "full physical protection and security,"[158] "full legal protection,"[159] "full protection,"[160] "adequate protection and security,"[161] "protection and constant security"[162] and "protection"[163] are illustrative of this diversity in treaty language.

It should be noted, too, that besides the "full protection and security" clause, some BITs also contain the "full protection" clause in a separate article at the beginning of the treaty. For instance, while Article 2(3) of the Czech-Germany BIT requires that "[i]nvestments and revenue arising hereof and in the event of their re-investment such revenue shall enjoy full protection," its Article 4(1) further provides that "[i]nvestments by investors of either Contracting Party shall enjoy full protection and security in the territory of the other Contracting Party."[164] Even in the complete absence of "full protection and security" and the like, the FPS standard can still be part of investment treaties. An equivalent of such a phrase is, for example, "[i]nvestments . . . shall be fully and completely protected and safeguarded" or "[e]ach Party shall protect . . . investments."[165] In terms of its scope

156. Agreement on the Reciprocal Promotion and Protection of Investments art. 5(1), Fr.-Peru, Oct. 6, 1993, 1980 U.N.T.S. 105.

157. Promotion and Reciprocal Protection of Investment art, 4(1), Arg.-Ger., Apr. 9, 1991, 1910 U.N.T.S. 198.

158. Agreement on Encouragement and Reciprocal Protection of Investments art. 3(1), Neth.-Rom., Oct. 27, 1983.

159. Agreement on Encouragement and Reciprocal Protection of Investments art. 2.2, Mong.-Russ., Nov. 29, 1995; Agreement for the Reciprocal Promotion and Protection of Investments art. 3(2), Arg.-Mex., Nov. 13, 1996, 2033 U.N.T.S. I-35107.2.2.

160. Agreement for the Promotion and Protection of Investments art. 4(1), Egypt-Italy, Mar. 2, 1989.

161. Agreement on Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference art. 2.2, June 5, 1981.

162. Agreement for the Promotion and Protection of Investments art. 2(2), Arg.-U.K., Dec. 11, 1990.

163. Agreement Concerning the Encouragement and Reciprocal Protection of Investments art. 3(1), P.R.C.-Laos, Jan. 31, 1993.

164. *See* Treaty for the Promotion and Mutual Protection of Investments art. 4(1), Czech-Ger., Oct. 2, 1990; *see also* Agreement on the Promotion and Reciprocal Protection of Investments art. 2(3), 4(1), Italy-Leb., Nov. 7, 1997 (emphasis added) ("Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments . . . "[i]nvestments by investors of either Contracting Party shall enjoy *full protection and security* in the territory of the other Contracting Party.").

165. Agreement on the Reciprocal Promotion and Protection of Investments art. 5(1), Arg.-Fr., July 3, 1991, 1728 U.N.T.S. 281; Agreement on the Reciprocal Promotion and

ratione tertiis, the FPS standard applies in the territory of the other party or in the territory and maritime area of the other contracting party.[166]

In some investment treaties, the FPS standard has been referred to as a separate and independent standard.[167] In others, it has been explicitly tied to general or customary international law—disallowing protection and security that is "less favourable than that required by international law"[168] or not "in accordance with international law"[169]—and/or supplemented by the national treatment and the most-favored-nation treatment.[170] In still other investment treaties, the FPS standard has clearly been treated as a core element of the minimum standard of treatment,[171] as is the case, for example, with Article 1105 of the North American Free Trade Agreement ("NAFTA"), captioned as "Minimum Standard of Treatment."[172] For greater clarity, the three parties to NAFTA have stated in their binding interpretation note that "full protection and security" contained in Article 1105 is nothing more than a reflection of customary international law.[173] Thus, it is not an autonomous treaty norm that requires more than what is required by the minimum

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Protection of Investments art. 3(1), Arg.-Spain, Mar. 10, 1991, 1699 U.N.T.S. 187.

166. *See, e.g.*, Agreement on the Reciprocal Promotion and Protection of Investments art. 4(3), Fr.-Mex., Dec. 11, 1998; Agreement on the Reciprocal Promotion and Protection of Investments art. 5(1), Peru-Fr., Oct. 6, 1993, 1980 U.N.T.S. 105.

167. *See, e.g.*, Agreement for the Promotion and Protection of Investments art. 2, Tanz.-U.K., Jan. 7, 1994, U.K.T.S. No. 90 (1996) (Cm. 2593).

168. *See, e.g.*, Energy Charter Treaty art. 10, Dec. 17, 1994, 2080 U.N.T.S. 100.

169. North American Free Trade Agreement art. 1105, Can.-Mex.-U.S., Jan. 1, 1994, 32 I.L.M. 289 (1993) [hereinafter NAFTA].

170. *See, e.g.*, Agreement on Encouragement and Reciprocal Protection of Investments art.3(2), Neth.-Czech, Apr. 29, 1991 ("More particularly, each Contracting Party shall accord to such investments full security and protection which in any case shall not be less than accorded either to investments of its own investors or to investments of investors of any third State, whichever is more favourable to the investor concerned.").

171. *See* R.R. Dev. Corp. v. Guat., ICSID Case No. ARB/07/23, Award, ¶ 238 (June 29, 2012).

172. NAFTA art. 1105(1).

173. Glob. Affairs Can., *Notes of Interpretation of Certain Chapter 11 Provisions*, GOV'T CAN. (July 31, 2001), http://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/disp-diff/NAFTA-Interpr.aspx?lang=eng&_ga=2.79003799.2006136802.1507650265-675927542.1507650265 (clarifying that the "fair and equitable treatment" and "full protection and security" standards provided in NAFTA Chapter 11 "do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens").

standard,[174] nor is it a "free-standing obligation."[175]

Similarly, the Australia-United States Free Trade Agreement clarifies that the FPS standard merely requires the level of police protection in accordance with customary international law.[176] Also for clarification, but in the opposite direction, some treaties specifically refer to both protection and legal security as falling within the scope of the FPS standard, as is the case with the Germany-Argentina BIT of 1991.[177] In addition, host states' provision of full protection and security is not merely for determining their observation of the FPS standard per se. It is also for the purpose of determining the lawfulness of expropriation carried out by the host states. This is because the parties to investment treaties expressly condition such lawfulness on compliance with the FPS standard.[178] Regarding its exception, the FPS is not applicable in certain circumstances, for example, war, armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot in the territory, as the parties agreed.[179]

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174. *See* Clayton v. Can., PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 432, 441 (Mar. 17, 2015), https://www.pcacases.com/web/sendAttach/1287 (holding that the "fair and equitable treatment" and "full protection and security" standards are not above and beyond requisite minimum standards).

175. *See* Loewen Grp., Inc. v. United States, ICSID Case No. ARB(AF)/98/3, Award, ¶ 128 (June 26, 2003) (explaining that "fair and equitable treatment" and "full protection and security" are not a "free standing obligation").

176. *See* Free Trade Agreement art. 11(5), Aus.-U.S., May 18, 2004, S. Treaty Doc. No. 4759; *see also* Free Trade Agreement art, 10.5, C.A.-Dom. Rep.-U.S., Aug. 5, 2004, S. Treaty Doc. No. 1307 ("For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of 'fair and equitable treatment' and 'full protection and security' do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide . . . (b) 'full protection and security' requires each Party to provide the level of police protection required under customary international law."); Free Trade Agreement art. 10.4, Chile-U.S., June 6, 2003, S. Treaty Doc. No. 2738 (clarifying that security standards and fair treatment standards "do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights").

177. Treaty on the Encouragement and Reciprocal Protection of Investments art. 4(1), Arg.-Ger., Apr. 9, 1991, 1910 U.N.T.S. 171.

178. *See* Treaty on the Encouragement and Reciprocal Protection of Investment, Ecuador-U.S., arts. II(3), III(1), Aug. 27, 1993, S. Treaty Doc. No. 103-15; *see also* Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 342(D) (June 2, 2010); Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Reconsideration and Award, ¶¶ 155, 163-166 (Feb. 7, 2017).

179. *See, e.g.*, Agreement Concerning the Encouragement and Reciprocal Protection of Investments art. 4(3), F.R.G.-Zim., Sept. 29, 1995, http://investmentpolicyhub.unctad.org/Download/TreatyFile/1453; Agreement on the Promotion and Reciprocal Protection of Investments art. 7(1), Switz.-Zim., Aug. 15, 1996, http://investmentpolicyhub.unctad.org/Download/TreatyFile/4837.

Beneficiaries or objects of protection of the FPS standard in investment treaties can be investors and/or investments, depending on the parties thereto. "Investment" has regularly been adopted as corresponding to "property" in commercial treaties.[180] Now, "property" is of more historical importance. Modeled on the 1959 Abs-Shawcross Draft Convention on Investment Abroad but with a number of modifications,[181] the 1962 Organization for Economic Co-operation and Development ("OECD") Draft Convention on the Protection of Foreign Property, adopted in 1967, contains in its Article 1 each party's obligation to accord within its territory "the most constant protection and security" to "the property of the nationals of the other Parties." By "property," it means, as Article 9(c) defines, "all property, rights and interests, whether held directly or indirectly."[182] Such a definition is consistent with customary international law and international law as applied by international courts and tribunals.[183] And by "the most constant protection and security," it refers to "the obligation of each Party to exercise due diligence as regards actions by public authorities as well as others in relation to such property."[184] For the relation between "property" and "investment," the former includes, but is not limited to, the latter.[185] In other words, "investment" is currently used as *pars pro toto*.[186]

Besides investment treaties containing FPS clauses, the period after World War II witnessed human rights instruments that concern, in their own context and fashion, investment protection. Although their primary purpose is not to protect investment, their relevance to investment protection cannot be denied.[187] For example, the Universal Declaration of Human Rights of 1948 endorses, *inter alia*, security of person, the right to own property, and non-arbitrary deprivation of property.[188] With binding force, Article I of the Protocol to the Convention for the Protection of Human Rights and

180. A.Z. El Chiati, *Protection of Investment in the Context of Petroleum Agreements*, 204 RECUEIL DES COURS 19, 79 (1987).

181. Antonio R. Parra, *The Convention and Centre for Settlement of Investment Disputes*, 374 RECUEIL DES COURS 315, 326 (2014).

182. GEORG SCHWARZENBERGER, FOREIGN INVESTMENTS AND INTERNATIONAL LAW 114 (George W. Keeton & Georg Schwarzenberger eds., 1969).

183. *See id.* 114, 157 (using "property" as an example that includes "all property, rights and interests whether held directly or indirectly").

184. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, DRAFT CONVENTION ON THE PROTECTION OF FOREIGN PROPERTY 9 (1962) [hereinafter OECD].

185. *Id.* at 43.

186. SCHWARZENBERGER, *supra* note 182, at 157.

187. THOMAS M. FRANCK, FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS 455 (1995).

188. G.A. Res. 217 (III) A, Universal Declaration of Human Rights arts. 3, 17 (Dec. 10, 1928).

Fundamental Freedoms (Protocol I of 1952) provides that "[e]very natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law."[189] Common Article 1 of the 1966 Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights recognizes a collective right of "all peoples" to "freely dispose of their natural wealth and resources."[190] The beneficiaries of such recognition include both aliens and nationals within the state parties' territory and subject to their jurisdiction.[191] Providing for aliens' fundamental human, economic, and social rights, the Declaration on Human Rights of Individuals who are not Nationals of the Country in which They Live of 1985 prohibits, for instance, the subjection of aliens to torture or to cruel, inhuman, or degrading treatment and arbitrary deprivation of aliens' lawfully acquired assets.[192]

III. THE FULL PROTECTION AND SECURITY STANDARD AS ADDRESSED BY SCHOLARS AND APPLIED BY COURTS AND TRIBUNALS

The preceding historical account reveals states' long law-making practice of utilizing the FPS standard in conducting their international relations. This Section will deal with the standard from academic and law-applying perspectives, considering the relevant legal literature and judicial decisions that touch upon protection and security of foreigners and their property, which is the converse way to describe responsibility of states for injuries to foreigners.[193] Its purpose is to examine the degree to which an interpretation and application of the FPS standard has been accomplished in pertinent past decisions to see trends therein.

A. Scholarly View

1. Protection and Security in General

One reasonable and prevalent answer to the question of why it is essential

189. Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms art. 1, Nov. 4, 1940, E.T.S. No. 009, http://www.echr.coe.int/Documents /Convention_ENG.pdf.

190. International Convention on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3.

191. 1 OPPENHEIM'S INTERNATIONAL LAW 909 (Sir Robert Jennings & Sir Arthur Watts eds., 9th ed. 1992) (1905).

192. G.A. Res. 40/144, arts. 6, 9 (Dec. 13, 1985).

193. PHILLIP C. JESSUP, A MODERN LAW OF NATIONS: AN INTRODUCTION 97 (1948). *See generally* JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART (2013).

to grant protection to the persons and property of foreigners—indeed, to those of every human being—can be discerned from the great "Lockean trinity" of human rights, which is formed by linking property with life and liberty. In this view, property was not limited to assets having a cash value; it also included "all that belongs to a person, especially the rights he wished to preserve."[194] The answer was also reflected in the Virginia Declaration of Rights, in which George Mason proclaimed that:

> [A]ll men are created equally free and independent, and have certain inherent natural rights of which they cannot, by any compact, deprive or divest their posterity; among which are the enjoyment of life and liberty, with the means of acquiring and possessing *property*, and pursuing and *obtaining* happiness and safety.[195]

In the absence of property, *in rem* and *in personam*, "one could not enjoy life or liberty, and could not be free and independent. Only the property holder could make independent decisions and choices because he was not beholden to anyone; he had no need to be subservient."[196] Theoretically, this remains true no matter where human beings live and what their status is. Neither in their own motherland as citizens, nor in an alien land as foreigners shall they be without protection of personal and property rights.

2. Protection and Security in International Law

In the realm of international law, there are two conflicting claims regarding the protection of the persons and property of aliens, both of which are equally based on state sovereignty, as Lauterpacht pointed out. On the one hand, national states insist that while their subjects are abroad, their personal rights and property shall be respected. On the other hand, territorial states plead that they have full freedom to legislate and administrate so long as they do not discriminate against foreigners, thus putting them on the same footing as their own subjects.[197] The following discussion highlighting works of prominent international law scholars will serve to illustrate these two claims, which had been discussed for centuries.

According to Grotius, although the sovereign's power of eminent domain was unlimited over its own subjects, it did not have control over the property

194. Leonard W. Levy, *Property As a Human Right*, 5 CONST. COMMENT. 169, 175 (1988) (quoting THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHAPTERS, AND OTHER ORGANIC LAW 3813 (F. Thorpe ed. 1909)).

195. *Id.* at 173.

196. *Id*. at 175.

197. HERSCH LAUTERPACHT, *Delictual Relations between States. State Responsibility*, *in* 1 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 383, 386 (E. Lauterpacht ed., 1970).

of foreigners.[198] For Wolff, foreigners as temporary citizens ought to be safe from every injury, and the rulers of the states in which they live are bound to defend them against such injury. Such rulers ought to shield foreigners from physical and nonphysical harms caused by their subjects; they "ought not to allow any one of [their] subjects to cause a loss or do a wrong to the citizen of another nation."[199] Having failed to do so, they ought to punish those subjects and require them to repair the harms unless the rulers cause that loss or do that wrong by their tacit approval of the act, rendering the states themselves under the assumption of having done the wrong or inflicted the injury. This duty to provide protection and security was based on a tacit agreement between foreigners and the rulers of the states, by which the former promises temporary obedience of the law of the latter, who promises protection.[200] Wolff's use of "injury," "loss," and "wrong" suggests quite strongly that he did not limit states' duty to defend foreigners to physical protection. Later, Vattel observed that when receiving foreigners, states engage to protect them as their own subjects and to "afford them perfect security."[201] As to a foreigner's property, Vattel considered it "a part of the aggregate wealth of his nation. Any power, therefore, which the lord of the territory might claim over the property of a foreigner would be equally derogatory to the rights of the individual owner and to those of the nation of which he is a member."[202] In contrast to Bynkershoek, who considered the confiscation of alien property at the outbreak of war to be legal, Vattel opined that such property in land had special claims on the protection of the sovereign and ought not to be seized unless there was debt or money due to foreigners. But when it comes to the expulsion of alien residents, both scholars agree that foreigners should be allowed to delay their departure to wrap up their business.[203]

Calvo put forward what was later known as the Calvo Doctrine, according to which foreigners are entitled to treatment that is not different or better than that accorded to the citizens of the country in which they live. Thus, the protection of their persons and property is dependent on that of the citizens. In cases of personal and proprietary grievance, citizens cannot seek recourse

198. HUGO GROTIUS, DE JURE BELLI AC PACIS LIBRI TRES (1646), *reprinted in* 2 THE CLASSICS OF INTERNATIONAL LAW 385 (James Brown Scott ed., Francis W. Kelsey trans., 1925).

199. WOLFF, *supra* note 1, at 536.

200. *Id.* at 537.

201. EMMERICH DE VATTEL, THE LAW OF NATIONS; OR, PRINCIPLES OF THE LAW OF NATURE, APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS 173 (Joseph Chitty ed., 1867) (1758).

202. *Id.* at 174.

203. BUTLER & MACCOBY, *supra* note 90, at 196-97.

to diplomatic protection; neither can foreigners.[204] Borchard, in his treatise on diplomatic protection, observed that states are not "a guarantor of the safety of aliens."[205] Providing administrative and judicial machinery normally protecting the alien in his rights is simply what states are bound to do. This remains the case even when there exists a treaty that provides "special protection"; the treaty is not "an insurance against all injury" but an instrument that places aliens on the same footing as citizens. States simply have to protect aliens as much as their actual ability to protect permits.[206] In favor of the national treatment standard, Sir John Williams noted that "it becomes difficult to see why the standard of the duty of a government in relation to this particular class of individuals [foreigners], and that normally a small class, should be different from the standard of its duty to its own citizens."[207] Both protection of foreigners' property and protection of foreigners in other respects do not require a different standard of duty.[208] For Eagleton, although a state has control over its own territory, it is not always incumbent upon it to be responsible for any injury occurring therein. It cannot be considered "as an absolute guarantor of the proper conduct of all persons within its bounds."[209] And "[t]he law of nations does not make the state a guarantor of life and property."[210] In Freeman's view, "[t]he State into which an alien has entered . . . is not an insurer or a guarantor of his security, any more than that of its own citizens. It does not, and could hardly be asked to, accept an absolute liability for all injuries to foreigners."[211] In Hall's treatise on international law, it was once reaffirmed that the concept of protection of subjects of states that were abroad is not limited to a physical dimension but extended to "the justice of the courts."[212]

In protecting aliens, writers have generally agreed that states have been

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204. *See* Patrick Juillard, *Calvo Doctrine/Calvo Clause*, MAX PLANCK ENCYCLOPEDIA PUB. INT'L L. ¶ 2, http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e689 (last updated Jan. 2007) ("The Calvo Doctrine rests upon one core proposition: aliens should not be entitled to any rights or privileges not accorded to nationals.").

205. EDWIN M. BORCHARD, THE DIPLOMATIC PROTECTION OF CITIZENS ABROAD OR THE LAW OF INTERNATIONAL CLAIMS 179 (1916).

206. *Id*.

207. Williams, *supra* note 2, at 15.

208. *See id.* (noting that the practice with citizens differs from theory).

209. CLYDE EAGLETON, THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW 77 (1928).

210. *Id*. at 8.

211. ALWYN V. FREEMAN, RESPONSIBILITY OF STATES FOR UNLAWFUL ACTS OF THEIR ARMED FORCES 14 (A.W. Sijthoff ed., 1957).

212. HALL, *supra* note 133, at 331-33.

required to exercise due diligence.[213] By defining "due diligence" as "nothing more nor less than the reasonable measures of prevention which a well-administered government could be expected to exercise under similar circumstances," it follows naturally that "[t]he precise degree of such vigilance is not necessarily the same for all situations."[214] Still, due diligence has been disputed by international law authorities as to who should really serve as *tertium comparationis* (a common comparative denominator) in such situations; there could be either a subjective or objective denominator. For the former, "the relatively limited existing possibilities of local authorities in a given context" is to be considered, while, for the latter, "what should be legitimately expected to be secured for foreign investors by a reasonably well organized modern State" takes precedence as the quoted definition suggests.[215] In Brierly's view, it is a reasonable state that serves as a denominator. The standard it has to obey "is not an exacting one, nor does it require a uniform degree of governmental efficiency irrespective of circumstances."[216] For Brownlie, it is a state in such situations itself that serves as a referee: "Where a reasonable care or due diligence standard is applicable, then *diligentia quan in suis* might be employed . . . [it] would allow for the variations in wealth and educational standards between the various states of the world."[217]

According to *Oppenheim's International Law*, the very first point in understanding protection and security of foreigners seems to be marked by

213. FREEMAN, *supra* note 211, at 15-16; IAN BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (PART I) 162, 168 (1986) [hereinafter BROWNLIE 1986]; *see* BROWNLIE, *supra* note 89, at 455 (indicating the existence of writers' general agreement that "the rule of non-responsibility cannot apply where the government concerned has failed to show due diligence").

214. FREEMAN, *supra* note 211, at 15-16.

215. Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 77 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

216. J. L. BRIERLY, THE LAW OF NATIONS: AN INTRODUCTION TO INTERNATIONAL LAW OF PEACE 280 (Humphrey Waldock ed., 6th ed. 1963) (1928) (further exemplifying that "measures of police protection which would be reasonable in a capital city cannot fairly be demanded in a sparsely populated territory, and a security which is normal in times of tranquility cannot be expected in a time of temporary disorder such as may occasionally occur even in a well-ordered state").

217. BROWNLIE, *supra* note 89, at 526 (footnote omitted); *see also* Pierre Dupuy, *Due Diligence in the International Law of Liability*, *in* LEGAL ASPECTS OF TRANSFRONTIER POLLUTION 369, 375 (OECD ed., 1977) (noting that "factors may exist . . . which lead to the relaxation and adaption of the application of the minimum standard of behaviour, connected not with the circumstances in which the damage occurred, but with the status of the defendant State itself"); BRIAN SMITH, STATE RESPONSIBILITY AND THE MARINE ENVIRONMENT: THE RULES OF DECISION 40 (1988) (concluding that "the diligence of the state will be considered in light of its particular capacities and practices").

customary international law that leaves the reception of foreigners to states' discretion, unless there are treaties that provide otherwise.[218] Next, upon entering a state, foreigners on the one hand fall under the territorial jurisdiction of the state while remaining under personal jurisdiction of their national states. Thus, they are responsible to the state for all acts they commit on its territory.[219] On the other hand, protection must be afforded to the persons and property of foreigners by the territorial state. Such a state has to grant foreigners' persons and property "at least that level of protection which is sufficient to meet those minimum international standards prescribed by international law, and must grant [them] at least equality before the law with its own nationals as far as safety of person and property is concerned."[220]

In other words, foreigners must not be wronged in person or property by the officials or courts of states, arrested by the police without just cause, arbitrarily treated by administrative officials, or unjustly treated by courts inconsistent with the law.[221] For their property, the same treatise puts it the following way:

> A state must not, through its officials or courts, injure an alien through injury to his property, an alien must be allowed access to the courts in order to protect his property, and have equality before the law in doing so; a state's duty to protect aliens applied as much to their property as to their persons; a state's obligation to observe in its treatment of aliens certain minimum international standards applies also in respect of their property. The rule is clearly established that a state is bound to respect the property of aliens, and that for their part aliens have the right to the peaceful use and enjoyment of their property.[222]

However, protection of their property is by no means absolute. As territorial states and foreign property are politically, socially, and economically connected and the former can determine their relations with the latter to produce certain results, property rights of the latter can thus be diminished or extinguished.[223]

It is worth turning back to the second conflicting claim referred to earlier, that territorial states have full freedom to legislate and administrate so long as they do not discriminate against foreigners as compared with their nationals. The prevailing counterclaim is that they are not free to wield their

218. *See* OPPENHEIM'S INTERNATIONAL LAW, *supra* note 191, at 897-98.
219. *Id.* at 904.
220. *Id.* at 910; *see also* 3 HACKWORTH, *supra* note 137, at 630, 660.
221. OPPENHEIM'S INTERNATIONAL LAW, *supra* note 191, at 910-11.
222. *Id.* at 912.
223. *Id.*

legislative and administrative powers to avoid their international obligations. States cannot plead that their own law and practice do not consider a disputed act as involving discrimination against foreigners as compared with their own nationals. In this case, it is the customary international law minimum standard of treatment that takes precedence over domestic law in determining whether states incur international responsibility.[224]

Two relevant questions arise at this point: (1) is the FPS standard contained in investment treaties of exactly the same content as that of the customary international law obligation to provide full protection and security; and (2), how fully does the treaty-based FPS standard protect and secure investment? The debate on these two questions brings together international law experts with conflicting views.

For the first question, some scholars, for example, Sacerdoti, opine that the FPS standard manifested in the form of a standard clause "does not add to the protection to which foreigners are entitled as to their persons and assets abroad under international law."[225] By contrast, others, for example, Dolzer and Schreuer, hold that the FPS standard "represents an autonomous treaty standard that is independent of the international minimum standard under customary international law."[226] Between these two positions is Lorz's position that the FPS standard is "the bottom line of protection and security, unless the State parties to the treaty at issue have clearly stated their intent to stall the development of the treaty standard at this point."[227] For Subedi, the qualifying phrase—"as required by international law"—that accompanies the FPS standard plays a role in determining its level of protection. In the absence of reference to international law, the level of protection and security would be as high as the provisions in investment treaties indicate, which is often higher than customary international law.[228] Accordingly, there are two conflicting views on the scope of the FPS standard. Conservatively, the FPS standard has been interpreted as exclusively or principally covering physical violence as uncontestably required by customary international law.[229]

224. *Id.* at 931.

225. Giorgio Sacerdoti, *Bilateral Treaties and Multilateral Instruments on Investment Protection*, 269 RECUEIL DES COURS 251, 347 (1997); *see* VANDEVELDE, *supra* note 149, at 243.

226. Schreuer, *supra* note 3, at 364.

227. Lorz, *supra* note 10, at 773.

228. Surya P. Subedi, *The Challenge of Reconciling the Competing Principles Within the Law of Foreign Investment with Special Reference to the Recent Trend in the Interpretation of the Term "Expropriation,"* 40 INT'L L. 121, 125-26 (2006).

229. MCLACHLAN ET AL., *supra* note 4, at 247; SALACUSE, *supra* note 4, at 239-40; SCHILL, *supra* note 10, at 81; SUBEDI, *supra* note 10, at 67; ANDREAS F. LOWENFELD, INTERNATIONAL ECONOMIC LAW 558 (2d ed. 2008).

Liberally, it has been viewed as extending beyond physical protection to legal protection.[230] In discussing physical protection, there are two different views as to whether legal remedies for physical harms remain within the traditional scope of the FPS standard or should be considered as an extension of the traditional scope. Moss considers "[t]he protection that the legal systems affords in order to prevent or prosecute actions that threaten or impair the physical safety of the investment" as "an extension of . . . physical security."[231] Lorz, on the other hand, does not view the provision of legal remedies as really constituting such an extension "as long as the availability of the judicial system in particular to remedy and to prosecute stays connected with a physical impairment of the investment."[232] In describing legal protection, Wälde included economic regulatory powers in the scope of the FPS standard, "the omission of the State to intervene where it had the power and duty to do so to protect the normal ability of the investor's business to function."[233] But the FPS standard is not intended to protect an investment from threats that it contributed.[234]

For the second question regarding liability standards, although there is a view that the FPS standard imposes strict liability in cases of damage by state organs,[235] most commentators agree that it does not do so. For them, the FPS standard does not grant investments absolute but rather reasonable protection and security determined by "due diligence,"[236] the very dogmatic definition of which would be inappropriate, since it is to be determined dependent on the circumstances.[237] Host states thus owe an obligation of conduct or obligation of means in lieu of an obligation of result. "[O]bligations of due

230. Alejandro M. Garro, *Trade and Investment Treaties, the Rule of Law, and Standards of the Administration of Justice*, 42 U. MIAMI INTER-AM. L. REV. 267, 269 (2011); M. SORNARAJAH, THE INTERNATIONAL LAW ON FOREIGN INVESTMENT 205, 359-60 (3d ed. 2010); Moss, *supra* note 7, at 131; A. REDFERN ET AL., LAW AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION 492 (4th ed. 2004); Thomas W. Wälde, *Energy Charter Treaty-Based Investment Arbitration: Controversial Issues*, 5 J. WORLD INV. & TRADE 373, 390-91 (2004); RUDOLF DOLZER & MARGRETE STEVENS, BILATERAL INVESTMENT TREATIES 61 (1995); Foster, *supra* note 105, at 1149-50.

231. Moss, *supra* note 7, at 131.

232. Lorz, *supra* note 10, at 782.

233. Wälde, *supra* note 230, at 390-91.

234. Maximilian Hocke, *Have Measures Adopted by States to Cope with the Global Financial Crisis Been in Accordance with Their Obligations Under International Investment Law?*, 4 GOETTINGEN J. INT'L L. 177, 191 (2012).

235. Lorz, *supra* note 10, at 778.

236. DOLZER & STEVENS, *supra* note 230, at 61; DOLZER & SCHREUER, *supra* note 17, at 161; VANDEVELDE, *supra* note 149, at 243-44; Moss, *supra* note 7, at 139.

237. BROWNLIE, *supra* note 89, at 455.

diligence are relative."[238] Once again, as has been the case under customary international law, there is an open question as to the relevance of host states' level of development to a determination of the precise level of due diligence. Some hold that due diligence is objective and not affected by host states' level of development.[239] Others insist that due diligence is subjective and dependent on host states' development, stability, capacity, and resources.[240]

B. Local Judicial Perspective

The United States, because of its well-recognized role in developing customary international law serving as a basis for the FPS standard, is exemplary of local decisions that are in line with the "Lockean trinity" of human rights,[241] having continued to shed light on the standard through its treaties, legislations, and judicial judgments. Internationally, the United States has led in the making of treaties protective of its nationals' persons and property abroad through FCNs and BITs.[242] In its making of FCNs, the United States made it clear that the intent of the FPS standard was to "commit the government to that measure of security which its legal, judicial and protective agencies are capable of ensuring" and that it extended to "government protection against violence or persecution at private hands."[243] Later, in some of its investment treaties, the United States is more specific in limiting the standard to police protection.[244] Nationally, the previously

238. CRAWFORD, *supra* note 193, at 227.

239. *See* Stephen J. Schnably, Comment, *The Human Element: The Impact of Regional Trade Agreements on the Human Rights and the Rule of Law*, 42 U. MIAMI INTER-AM. L. REV. 275, 276-77 (2011); Lawal Oluwaseun Sadiq, *Variability of Fair and Equitable Treatment Standard According to the Level of Development, Governance Capacity and Resources of Host Countries*, 9 J. INT'L COM. L. & TECH. 229, 234 (2014).

240. ANDREW NEWCOMBE & LLUÍS PARADELL, LAW AND PRACTICE OF INVESTMENT TREATIES 310 (2009); Eric De Brabandere, *Host States' Due Diligence Obligations in International Investment Law*, 42 SYRACUSE J. INT'L L. & COM. 319, 357, 361 (2015); Ursula Kriebaum, *The Relevance of Economic and Political Conditions for Protection Under Investment Treaties*, 10 LAW & PRAC. INT'L CTS. & TRIBUNALS. 383, 384 (2011); Nick Gallus, *The Influence of the Host State's Level of Development on International Investment Treaty Standards of Protection*, 6 J. WORLD INV. & TRADE 711, 714 (2005); Lorz, *supra* note 10, at 779-80; Helge Elisabeth Zeitler, *The Guarantee of "Full Protection and Security" in Investment Treaties Regarding Harm Caused by Private Actors*, 2005:3 STOCKHOLM INT'L ARB. REV. 1, 21-23 (2005).

241. *See* SORNARAJAH, *supra* note 230, at 359; *see also* Foster, *supra* note 105, at 1142.

242. *See* Vandevelde, *supra* note 17, at 203; Subedi, *supra* note 228, at 125.

243. John F. Coyle & Jason Webb Yackee, *Reviving the Treaty of Friendship: Enforcing International Investment Law in U.S. Courts*, 49 ARIZ. ST. L.J. 61, 94 (2017) (footnotes omitted) (quoting CHARLES H. SULLIVAN, DOS, STANDARD DRAFT TREATY OF FRIENDSHIP, COMMERCE, AND NAVIGATION 84 (1981)).

244. *See supra* note 176 and accompanying text; 2012 U.S. Model Bilateral

noted Virginia Declaration of Rights' proclamation was proposed and accepted as the first article of the U.S. Bill of Rights. Property rights have been explicitly protected by the United States Constitution by its Fourth, Fifth, Seventh, and Fourteenth Amendments, as well as by the contract clause of Article I, section 10. In particular, the taking of private property for public use "without just compensation" is prohibited by the Fifth Amendment.[245]

Judicially, the United States Supreme Court has had occasion to address FPS-related issues that remain particularly relevant to a contemporary understanding of the standard. First, in *Barbier v. Connolly*,[246] the Court confirmed that all persons should have equal protection and security for their persons and property regardless of whether they are citizens or aliens:

> The fourteenth amendment, in declaring that no State "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have *like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts*; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences.[247]

The above statement was approvingly quoted and applied to aliens in *Yick Wo v. Hopkins*[248] to invalidate the conviction of an alien for violation of an ordinance that was administered discriminately against persons of Chinese descent.[249] In *Lynch v. Household Finance Corp.*,[250] the Court explained the link between property and rights as follows:

Investment Treaty art. 5, U.S. TRADE REP. (2012), https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.

245. FRANCK, *supra* note 187, at 453.

246. 113 U.S. 27 (1884).

247. *Id.* at 31 (emphasis added).

248. 118 U.S. 356 (1886).

249. *Id.* at 367-68.

250. 405 U.S. 538 (1972).

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right of speak or the right to travel, is in truth a 'personal' right. . . . In fact, a fundamental interdependence exists between the personal right to liberty and the personal right to property. Neither could have meaning without the other.[251]

Of immediate relevance to an understanding of the FPS standard is *Maiorano v. Baltimore and Ohio Railroad Co.*[252] In this case, the Court shed light on the scope *ratione tertiis*, *ratione personae*, and *ratione materiae* of the FPS clause in the Treaty of Commerce and Navigation between the United States of America and His Majesty the King of Italy of 1871.[253] The plaintiff was an Italian resident and subject of the King of Italy who brought action in a Pennsylvania court to recover damages for the death of her husband caused by the defendant's negligence.[254] The Supreme Court of Pennsylvania held, prior to this case, that the applicable law of Pennsylvania gave the right of action to the deceased's relatives, except those who were non-resident aliens.[255] The U.S. Supreme Court found no reason to depart from that holding.[256] Thus, she was denied the right of action due to her non–resident–alien status. Nonetheless, the plaintiff based her right to recover not only on that applicable law but also on the aforementioned treaty.[257] In particular, emphasis was placed on its Article 3, which accorded the citizens of each party in the territory of the other "the most constant protection and security of person and property."[258] Since the plaintiff and her property had never been within the territory of the United States, she herself was found outside the *ratione tertiis* reach of the clause, being incompetent to claim protection and security for her person or property.[259]

Still, there was another argument that "if the right of action for her husband's death is denied to her, that he, the husband, has not enjoyed the equality of protection and security for his person which this article of the treaty assures to him."[260] Although the Court accepted that the argument was

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251. *Id.* at 552.

252. 213 U.S. 268 (1909).

253. *Id.* at 272.

254. *Id.* at 271.

255. *Id.* (noting that the Pennsylvania statute at-issue "does not give to relatives of the deceased, who are nonresident aliens, the right of action therein provided for").

256. *Id.* at 275.

257. *Id.* at 271-72.

258. *Id.* at 273.

259. *Id.* at 271-74.

260. *Id.* at 274.

not completely without weight, it was of the opinion "that the protection and security thus afforded are so indirect and remote that the contracting powers can not [sic] fairly be thought to have had them in contemplation."[261] The Court accordingly found that the scope *ratione personae* of the FPS clause under consideration was limited to an Italian subject residing in the United States and not extended to his non-resident relatives.[262] Regarding the scope *ratione materiae* of the clause, the Court did not limit it to physical harms, construing it as including rights of actions that did not necessarily stem from physical harms. In the Court's own words:

> If an Italian subject, sojourning in this country, is himself given all the direct protection and security afforded by the laws to our own people, including *all rights of actions for himself or his personal representatives to safeguard the protection, and security*, the treaty is fully complied with, without going further and giving to his non-resident alien relatives a right of action for damages for his death, although such action is afforded to native resident relatives, and although the existence of such an action may indirectly promote his safety.[263]

Barbier, *Yick Wo*, and *Maiorano* can thus be read to confirm that from the United States's perspective, the FPS standard had not been limited to physical violence. Legal protection and entitlement relating to the protection and security for persons or property thus fall within the scope thereof as much as the language used in the treaty permits. This has been confirmed in other judgments issued by the Court and other courts. For example, in *Asakura v. City of Seattle*,[264] the Court found that an ordinance prohibiting a Japanese subject from getting a license to engage in the business of pawnbroking, as included in the treaty meaning of "trade," violated the FPS clause in the treaty between the United States and Japan of 1911.[265] The Court found that such an ordinance was inconsistent with the parties' intention to accord the citizens or subjects of either side liberty in the territory

261. *Id.* at 274-75.

262. *Id.* at 275 (explaining that the treaty affords Italian subjects a right of action, not non-resident relatives).

263. *Id.* (emphasis added).

264. 265 U.S. 332 (1924).

265. *Id.* at 343.

of the other to engage in "trade."[266] Additionally, in *In re Estate of Yano*,[267] the Supreme Court of California confirmed that the FPS standard was only available to alien subjects in a matter that directly related to their persons and property.[268] In this case, a Japanese subject was denied the right to be appointed as a guardian of his minor daughter who was a United States citizen by reasons of domestic laws. It was contended that such denial was in violation of the FPS clause in the same treaty discussed in *Asakura*.[269] However, the Supreme Court of California found otherwise, rendering such a right unnecessary for the security or protection for persons or property:

> The rights and privileges which [the treaty] declares the Japanese citizen shall enjoy here are such rights and privileges only as may be necessary for the protection and security of his own person or property. It cannot be said that it is necessary for the security or protection of either the person or the property of a parent that he should become the guardian of his own child. Eligibility to appointment as guardian is not property, nor is it a right of property. It pertains exclusively to the person. It may be given or withheld by the law of the state in which the parent and child reside. The withholding thereof from all parents would be within the power of the state. Undoubtedly, when given, it is a privilege pertaining to the individual parent, but it is not a privilege which enhances his own personal security or which assists him in protecting his property. A deprivation of the privilege would in no manner endanger the person of the parent, or jeopardize his property.[270]

Both in *Patsone v. Pennsylvania*[271] and *Heim v. McCall*,[272] the U.S. Supreme Court made it clear that the equality of rights assured by the FPS clause was not without limit. It emphasized "that the equality of rights that it [the treaty] assures is equality only in respect of *protection and security for persons and property*."[273] Equality of rights in all respects is not the case.

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266. *See id.* at 342-43; *see also* Ohio v. Deckebach, 274 U.S. 392, 395-96 (1927) (holding that the city of Cincinnati's ordinance that prohibited the issuance of pool room licenses to aliens did not violate Article I of the treaty of commerce of 1815 between the United States and Great Britain, which provided that the nationals of each in the territory of the other shall "enjoy the most complete protection and security for their commerce." This is because the proprietor of the pool room did not "engage in commerce within the meaning of a treaty which merely extends to 'merchants and traders' 'protection and security for their commerce'").

267. 206 P. 995 (Cal. 1922).

268. *See generally id.* at 997-1003.

269. *Id.* at 999.

270. *Id.* at 999-1000.

271. 232 U.S. 138 (1914).

272. 239 U.S. 175 (1915).

273. *Patsone*, 232 U.S. at 145 (emphasis added).

Accordingly, the law that illegalized the killing of wild game by unnaturalized foreign-born residents and their possession of shotguns and rifles for that killing, as discussed in the former case, did not violate the FPS standard.[274] Nor did the law that prohibit the employment of aliens upon public works and required that preference be given to citizens of a particular state over others as deliberated in the latter case.[275]

C. International Judicial Perspective

In interpreting and applying the FPS standard in investment treaties, decisions of other judicial bodies discussing certain fundamentals for treating aliens and state responsibility can serve as a guideline for investment tribunals. Made either in the general international context or in the specific contexts of protectorate and of friendship, commerce, and navigation, they can be informative of how past participants had addressed protection of foreigners and construed some issues that have turned to be critical for determining host states' compliance with the FPS standard nowadays in the context of international investment.

The first context gave rise to "the historical starting point"[276] for a discussion on the international standard of treatment for foreigners. It is in *Neer v. Mexico*,[277] wherein such a point was made and has later been regarded as declarative of the customary international law minimum standard of treatment of aliens. Presented with the murder of a U.S. national in Mexico, the General Claims Commission had to decide if the Mexican authorities lacked diligence in apprehending or punishing those guilty of murder as alleged by the United States. In its finding that a lack of diligence on the part of the Mexican authorities was not established and that the claim was disallowed, the Commission stated that "the treatment of an alien to constitute an international delinquency, should amount to an outrage, to bad faith, to willful neglect of duty, or to an insufficiency of government action so far short of international standards that every reasonable and impartial man would readily recognize its insufficiency."[278]

Although *Neer* did not concern foreign investment, it illustrates the traditional threshold of the international standard of treatment of foreigners. Having been criticized for its height, the *Neer* threshold still does not impose strict liability on states.

For the second context, *Spanish Zone of Morocco Claims (Great Britain*

274. *Id.* at 145-46.
275. 239 U.S. at 194.
276. DOLZER & SCHREUER, *supra* note 17, at 139.
277. 4 R.I.A.A. 60 (Perm. Ct. Arb. 1926).
278. *Id.* at 61-62.

v. Spain)[279] is worth mentioning. In adjudicating claims for damage to British subjects or protected persons' life or property against the Spanish authorities in the Spanish Zone of Morocco, Arbitrator Max Huber laid down some principles relating to state responsibility. Of particular relevance here are the following: (1) although states are not responsible for the occurrence of a war or revolt, they can be found responsible for their authorities' acts or omissions to stop it as far as possible, by using appropriate diligence in giving help or adopting preventive or protective measures; (2) regarding acts of plunder not tantamount to a state of rebellion, states are responsible if they fail by an appreciable margin to exercise *diligentia quam in suis* (one is required to exercise a level of care that he exercises in his own affairs); and (3) states can be responsible for their failure to prosecute wrongdoers causing harms to aliens or to apply proper civil sanctions.[280] From this decision, current participants have learned—and made use of the opinion—that diligence applies and is to be determined by various factors.

In the third context, the *Sambiaggio Case (Italy v. Venezuela)*,[281] decided by the Italy-Venezuela Mixed Claims Commission, also offers an insight on the standard of liability. In determining whether Venezuela was responsible to Mr. Salvatore Sambiaggio, an Italian citizen, for damage caused by revolutionists' acts in its territory, Umpire Jackson H. Ralston had to consider Article 4 of the Italy-Venezuela Treaty of Friendship, Commerce, and Navigation of 1861, which promised each party's citizens and subjects "the fullest measure of protection and security of person and property."[282] The umpire "accepts the rule that if in any case of reclamation submitted to him it is alleged and proved that Venezuelan authorities failed to exercise due diligence to prevent damage from being inflicted by revolutionists, that country should be held responsible."[283] Since no lack of due diligence had been alleged or proved, the claim was dismissed.[284]

Besides *Sambiaggio*, there are other cases that dealt with the FPS standard in the context of FCN treaties before other judicial fora, for example, the International Court of Justice and the Iran-United States Claims Tribunal. Thus, let us turn now to their treatment of the standard.

1. The International Court of Justice

Searching through the dockets of the Permanent Court of International

279. 2 R.I.A.A. 615 (1924).
280. *Id.* at 615.
281. 10 R.I.A.A. 499 (Mixed Claims Comm'n 1903).
282. *Id.* at 518.
283. *Id.* at 524.
284. *Id.* at 512, 524.

Justice ("PCIJ") and the International Court of Justice ("ICJ") shows that the FPS standard was rarely raised before the world's most senior international court. There appear to be only two cases in which the ICJ addressed "the most constant protection and security": *United States Diplomatic and Consular Staff in Tehran* and *Elettronica Sicula S.p.A. (ELSI)*. Other judgments or opinions just referred to the standard in passing.[285]

The Islamic Revolution in late 1978 and early 1979 entailed a number of legal disputes among various international law participants of different levels. At the interstate level, one of those disputes concerning the climax of the revolution, Iranian demonstrators' invasion of the U.S. Embassy compound,[286] was brought before the ICJ in *United States Diplomatic and Consular Staff in Tehran*.[287] Therein, the United States claimed that in respect of the two private U.S. individuals said to be held hostage during the seizure of the U.S. Embassy in Tehran and its Consulates in Tabriz and Shiraz by the invading demonstrators ("Muslim Student Followers of the Imam's Policy"), Iran violated Article II(4) of the Treaty of Amity, Economic Relations, and Consular Rights of 1955.[288] According to the article, it was a duty of the parties to the treaty to provide "the most constant protection and security" to each party's nationals in the territory of the other.[289] The Court found that in the presence of the Iranian government's inaction, the seizure of those individuals as hostages by the invading demonstrators incidentally entailed a breach of Iran's obligations both under the aforesaid article and general international law.[290] This was consistent with the purpose of treaties of this kind, that is, "to promote friendly relations between the two countries concerned, and between their two peoples, more especially by mutual undertakings to ensure the protection and security of their nationals in each other's territory."[291]

In *Elettronica Sicula S.p.A. ("ELSI")* lies the most frequently cited, and probably most authoritative,[292] ICJ pronouncement on the FPS standard. The United States argued that Italy violated its obligations under Article V of the

285. *See* Oil Platforms (Iran v. U.S.) I.C.J. 1996, Preliminary Objection, Judgment, I.C.J. Rep. 803 (Dec. 12); Oil Platforms (Iran v. U.S.) I.C.J. Preliminary Objection, Judgment, 1996.) I.C.J. Rep. 874, 876 (Dec. 12) (dissenting opinion of Vice President Schwebel).

286. Charles N. Brower, *The Iran-United States Claims Tribunal*, 224 RECUEIL DES COURS 135, 271-72 (1998).

287. Judgment, 1980 I.C.J. Rep. 3 (May 24).

288. *Id.* at 6, 13.

289. *Id.* at 32.

290. *Id.* at 13-14, 17, 27-28, 32.

291. *Id.* at 28.

292. SALACUSE, *supra* note 4, at 232.

Treaty of Friendship, Commerce, and Navigation between Italy and United States of 1948, which required the granting of the full protection and security required by international law and supplemented by the national treatment and the most-favored-nation treatment. According to paragraph 1 thereof, the nationals of one party in the territory of the other party shall receive "the most constant protection and security for their persons and property, and shall enjoy in this respect the full protection required by international law."[293] And as continued in paragraph 3, such protection and security shall not be less than that granted to the nationals, corporations, and associations of the other party or of any third country. The United States claimed that by allowing workers at ELSI, an Italian company wholly owned by two U.S. corporations, to occupy the plant belonging to ELSI, Italy breached its obligations.[294]

A Chamber of the Court found that the reference to "constant protection and security" was not of absolute force, rendering it incapable of being construed as "the giving of a warranty that property shall never in any circumstances be occupied or disturbed."[295] This statement is consistent with the court's prior conclusion in *Corfu Channel (U.K. v. Albania)*[296] that under customary international law, a state that exercised control over its territory does not bear *prima facie* responsibility.[297] Having considered the reasonable foreseeability of the protest and the occupation by those dismissed workers, a failure to establish that any deterioration in the plant and machinery was caused by the workers' presence, and the Italian authorities' ability to protect the plant and in some measure to continue production, the Chamber thus ruled that the protection so provided could be regarded as falling below neither the full protection and security required by international law nor the national and most-favored-nation treatments. In addition, the unlawfulness of the occupation pronounced by the competent domestic court per se did not necessarily suggest that the national treatment had been violated. Instead, it was the local law in book and in practice that did. In the absence of the establishment that such law had treated U.S. nationals less well than Italian nationals, the Chamber thus found no violation of both paragraphs 1 and 3 of Article V.[298]

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293. Treaty of Friendship, Commerce, and Navigation, art. V, It.-U.S., Feb. 2, 1948, 63 Stat. 2255.

294. Elettronica Sicula S.P.A. (U.S. v. Italy), Judgment, 1989 I.C.J. Rep. 63, 65, ¶¶ 102-07 (July 20).

295. *Id.* at 65.

296. Judgment, 1949 I.C.J. Rep. 4 (Apr. 9).

297. *Id.* at 18.

298. *Elettronica Sicula*, 1989 I.C.J. ¶ 108.

Notably, in addition to the physical occupation of the plant, the United States further referred to a sixteen-month period before the Prefect decided ELSI's administrative appeal against the requisition order as violating the FPS obligation.[299] Having considered the circumstances concerned, the Chamber found that "[i]t must be doubted whether in all the circumstances, the delay in the Prefect's ruling in this case can be regarded as falling below that standard."[300] It noted that the FPS standard in the present case that was supplemented by reference to international law "may go further" than what general international law requires.[301] Reference to international law does not limit the FPS standard to the minimum standard of treatment. It serves as a threshold below which the FPS cannot fall.

2. The Iran-United States Claims Tribunal

In addition to giving rise to *United States Diplomatic and Consular Staff in Tehran*, the Islamic Revolution led to the establishment of the Iran-United States Claims Tribunal ("IUSCT") in 1981. As an arbitral body, its purpose was to settle disputes that arose during the revolution between United States nationals and Iran, Iranian nationals and the United States, and the two governments, as the United States waived any right to submit its disputes concerning the hostages to the ICJ or other fora.[302] One of the issues submitted was related to the interpretation of the FPS standard in their treaty.

In *Rankin v. Iran*,[303] a Chamber of the IUSCT suggested that both violence and harassment of various types against foreigners and their property resulting from the anti-American statements could violate the FPS standard. It also confirmed that protection and security has been part of customary international law. Put in the Chamber's own words:

> The statements . . . of the leaders of the Revolution could, however, have reasonably been expected to initiate or prompt *the types of harassment* and *violence* that were suffered by individual U.S. nationals and other foreigners. . . . These statements, which clearly are attributable to the Revolutionary Movement and thereby to the Iranian State . . . , were inconsistent with the requirements of the Treaty of Amity and customary international law to accord protection and security to foreigners and their property.[304]

Claiming for compensation for lost property and property rights (lost

299. *Id.*
300. *Id.* ¶ 111.
301. *Id.*
302. *See* Brower, *supra* note 286, at 135.
303. Case No. 10913, 17 Iran-U.S. Cl. Trib. Rep. 135 (1987).
304. *Id.* ¶ 30 (emphasis added).

salary and other employment-related benefits) arising from alleged wrongful expulsion from Iran, the claimant could not release its burden of proof. It failed to show that its departure was caused by the alleged wrongful acts of Iran. Accordingly, the claim was dismissed.[305] In *Starrett Housing Corp. v. Iran*,[306] a Chamber held that "interests in property" was "sufficiently broad to include indirect ownership of property rights held through a subsidiary that is not a United States national."[307]

Additionally, there are dissenting opinions in which FPS-related issues were addressed. In *Lillian Byrdine Grimm v. Iran*,[308] Judge Holtzmann opined that a widow's right to financial support from her husband who was assassinated in Iran constituted property that Iran was obliged to accord the most constant protection and security.[309] In *Ina Corp. v. Iran*,[310] Judge Ameli considered the United States blockage of property and interests in property of Iran, the prohibition on exports to and imports from Iran, and the armed invasion of Iran as the Unites States' failure to comply with its most constant protection and security obligation.[311]

IV. THE FULL PROTECTION AND SECURITY STANDARD AS APPLIED BY INTERNATIONAL INVESTMENT TRIBUNALS

Our task in this Section is to continue our trend analysis. To project arbitral trends in dealing with the FPS standard, we will examine the degree to which an interpretation and application of the FPS standard has been achieved in investment awards. Although the 1990s witnessed the first two international investment law cases addressing the FPS standard, the decades that followed saw an increase in the number of cases touching upon the same standard. Those cases, from 1990 to early 2017, serve as our first platform from which to consider how tribunals have construed the FPS standard. We find that arbitral tribunals have interpreted the FPS standard in diverse ways. Their divergent interpretations serve as our basis for systematically categorizing them. Thus, in this part, all salient aspects of arbitral treatment of the FPS standard will be presented analytically. Also, a factor analysis will now be conducted, along with our ongoing trend analysis, to correlate past decisions with conditions that influenced them and consider whether the context of such conditions has changed in a meaningful way.

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305. *Id.* ¶¶ 38-39.
306. Case No. 24, 16 Iran-U.S. Cl. Trib. Rep. 112 (1987).
307. *Id.* ¶ 262.
308. Case No. 71, 2 Iran-U.S. Cl. Trib. Rep. 78 (1983).
309. *Id.* at 81, 86 (Holtzmann, J., dissenting).
310. Case No. 161, 8 Iran-U.S. Cl. Trib. Rep. 373 (1985).
311. *Id.* at 438-39 (Ameli, J., dissenting).

Our review of arbitral awards reveals that the extant body of international investment law jurisprudence on the treaty-based FPS standard sheds light on its relation to customary international law, its nature of protection and security, the materiality of terminological variations, its scope *ratione materiae*, its scope *ratione personae*, and its relation to other standards and principles, that is, the FET standard, the principles of effectiveness and procedural economy, the MFN treatment, protection against unreasonable or discriminatory measures, expropriation, and full protection crafted in general terms at the beginning of BITs.

A. Treaty-Based FPS Standard and Customary International Law

A careful reading of the awards reveals contradictions between tribunals' views on the relation between the treaty-based FPS standard and a customary international law duty to provide full protection and security. There are skeptics, opponents, and advocates of the independence of the FPS clause from customary international law.

For skeptics, it seems unclear whether the FPS standard as manifested in the form of an FPS clause in investment treaties can be understood as having a wider scope than the general duty of due diligence to provide foreign nationals with full protection and security found in customary international law.[312]

For opponents, the FPS standard is not an autonomous treaty norm that imposes more requirements than does the minimum standard. It is "no more than the traditional obligation to protect aliens under international customary law."[313] This has also been confirmed indirectly: by first finding that the FET standard is indistinguishable from the customary international minimum standard and then ruling that a violation of the FET standard is enough to prove a breach of the FPS standard,[314] the customary international law minimum standard and the FPS are considered alike.[315] The opponents' opinion has been passed even in the absence of any specific reference to general or customary international law in the FPS clause.

A fortiori, the dependence of the FPS standard has been established when the FPS clause was formulated in a way that explicitly reduced it to part of

312. Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶¶ 164-66 (Oct. 12, 2005) 16 ICSID 210 (2012).

313. El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, ¶ 522 (Oct. 31, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf.

314. Rusoro Mining Ltd. v. Venez., ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 520, 548 (Aug. 22, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf.

315. *Id.* ¶¶ 514-26.

the customary international law minimum standard of treatment of aliens, the explanatory note of which clarifies that the minimum standard neither requires treatment additional to or beyond treatment required by customary international law nor creates additional substantive rights.[316] Thus, a threshold for its breach is relatively high.[317] In this case, the minimum standard of treatment, the element of which includes the FPS standard, "cannot be interpreted in the expansive fashion in which some autonomous fair and equitable treatment or full protection and security provisions of other treaties have been interpreted."[318] To prove a breach of the minimum standard of treatment, the claimant is required to show that the respondent "has acted with a gross or flagrant disregard for the basic principles of fairness, consistency, even-handedness, due process, or natural justice expected by and of all States under customary international law."[319] Since the bar for a breach of the minimum standard of treatment is relatively high, the bar of the FPS standard is elevated to the same level.[320] Opponents hold that as textually part of the minimum standard of treatment, the FPS standard cannot be interpreted as expansively as can an autonomous FPS clause. Its scope and content are determined by customary international law, the threshold of which was originally high, as set forth in *Neer*.[321]

Nonetheless, this does not mean that the FPS standard has been completely frozen in time. Some tribunals, openly accepting that customary international law evolves and is shaped by the conclusion of investment treaties, have adopted an evolutionary interpretation of the FPS standard.[322]

316. *See* Grand River Enters. Six Nations, Ltd., v. U.S., UNCITRAL, Award, ¶¶ 174, 176, 214 (Jan. 12, 2011), https://www.state.gov/documents/organization/156820.pdf.

317. Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, ¶¶ 181, 380, 382, 383, 386 (Nov. 3, 2015), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1960/DC6932_En.pdf; Bilcon of Del. v. Can., UNCITRAL, PCA Case No. 2009-04, Award on Jurisdiction and Liability, ¶¶ 360, 392, 431, 432, 441 (Mar. 17, 2015), https://www.pcacases.com/web/sendAttach/1287.

318. *Al Tamimi*, ICSID Case No. ARB/11/33, ¶ 382; *see also* ADF Grp. Inc. v. United States, ICSID Case No. ARB(AF)/00/01, Award, ¶ 183 (Jan. 9, 2003), 6 ICSID Rep. 449 (2004) ("We are not convinced that the Investor has shown the existence, in current customary international law, of a general and autonomous requirement (autonomous, that is, from specific rules addressing particular, limited, contexts) to accord fair and equitable treatment and full protection and security to foreign investments.").

319. *Al Tamimi*, ICSID Case No. ARB/11/33, ¶ 390.

320. *Id.* ¶¶ 394, 448-50.

321. Neer v. Mex. (U.S. v. Mexico), 4 R.I.A.A. 60, 61-62 (Perm. Ct. Arb. 1926).

322. Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 116, 125 (Oct. 11, 2002), 6 ICSID 181 (2004); *see also* Int'l Thunderbird Gaming Corp. v. Mex., UNCITRAL, Award, ¶ 194 (Jan. 26, 2006), https://www.gob.mx/cms/uploads/attachment/file/29506/260106_Laudo_ING.pdf (holding that "[t]he content of the minimum standard should not be rigidly interpreted and it should reflect evolving

"[I]t is unconvincing to confine the meaning of . . . 'full protection and security' of foreign investments to what those terms - had they been current at the time - might have meant in the 1920s when applied to the physical security of an alien."[323] As a result, its threshold may not be as high as it was set by the *Neer* Commission.[324] Even in cases where specific textual interpretation leads to the conclusion that the FPS standard is a higher standard than the minimum standard of treatment and that the latter serves as a floor rather than a ceiling for the former, both standards could still be found to have substantially similar contents due to their evolution.[325]

Finally, for advocates, the FPS standard is considered a distinct and autonomous treaty standard, regardless of whether it has been qualified by reference to principles of international law. Its content is not the same as that of the minimum standard of treatment.[326] If the FPS standard is qualified by reference to international law, such reference is "to set a floor, not a ceiling."[327] Thus, the FPS standard can be interpreted textually as a higher standard than required by international law.[328] If it is not qualified by reference to international law, such non-reference serves as support for not equating the FPS standard with customary international law.[329]

Even when the FPS standard has textually been formulated as included in the customary international law minimum standard of treatment, as is the case with NAFTA, one of its possible interpretations is that it goes beyond customary international law. This "additive interpretation," put forward before the issuance of the FTC's Notes of Interpretation, treats both the FPS and FET standards ("the fairness elements")[330] as "additive" to the requirements of international law. Therefore, investors can claim the

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international customary law").

323. *See Mondev*, ICSID Case No. ARB(AF)/99/2, ¶ 116; *see also* Chemtura Corp. v. Can., UNCITRAL, Award, ¶ 121 (Aug. 2, 2010), http://www.international.gc.ca/trade-agreements-accords-commerciaux/assets/pdfs/disp-diff/chemtura-14.pdf.

324. *Al Tamimi*, ICSID Case No. ARB/11/33, Award, ¶ 390.

325. Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 361 (July 14, 2006), 14 ICSID 367 (2009).

326. Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 632 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.

327. *Azurix*, ICSID Case No. ARB/01/12, Award, ¶ 361.

328. *Id.*

329. Frontier Petroleum Serv. Ltd. v. Czech, UNCITRAL, Final Award, ¶ 268 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

330. Pope & Talbot Inc. v. Can., UNCITRAL Arbitration Rules, Award on the Merits of Phase 2, ¶ 109 n.95 (Apr. 10, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0678.pdf.

international law minimum standard and the fairness elements[331]:

> Investors are entitled to those elements, no matter what else their entitlement under international law. A logical corollary to this language is that compliance with the fairness elements must be ascertained free of any threshold that might be applicable to the evaluation of measures under the minimum standard of international law . . . . Accordingly, the Tribunal interprets Article 1105 to require that covered investors and investments receive the benefits of the fairness elements under ordinary standards applied in the NAFTA countries, without any threshold limitation that the conduct complained of be "egregious," "outrageous" or "shocking," or otherwise extraordinary.[332]

In short, advocates have interpreted the FPS clause as distinct from and more protective of investment than the minimum standard of treatment, especially but not necessarily because of its qualifying term "constant" or "full."[333]

B. Nature of Protection and Security

Since its debut in investment arbitration in 1990, the FPS standard has been given various interpretations, except for the nature or standard of protection and security it provides. Its relativity has been confirmed by all arbitral awards under consideration here. According to these awards, the FPS standard does not impose on the host state strict liability,[334] the

331. *Id.* ¶ 110.

332. *Id.* ¶¶ 111, 118 (footnotes omitted).

333. *See* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 50 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf. *But see* Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 632 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.

334. *Asian Agric. Prods.*, No. ARB/87/3, ¶ 50; Tulip Real Estate Inv. and Dev. Neth. B.V. v. Turk., ICSID Case No. ARB/11/28, Award, ¶¶ 430-37 (Mar. 10, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3126.pdf; Allard v. Barb., PCA Case No. 2012-06, Award, ¶¶ 240-250 (June 27, 2016), https://www.pcacases.com/web/sendAttach/1955; Técnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB (AF)/00/2 Award, ¶ 177 (May 29, 2003), 19 ICSID Rev.—FILJ 158 (2004); Von Pezold v. Zim., ICSID Case No. ARB/10/15, Award, ¶¶ 582-96 (July 28, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf; MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶ 351 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf; Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶¶ 241, 245 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf; Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Alb., ICSID Case No. ARB/11/24, Award, ¶ 821 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf; Gemplus S.A. et al. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/3 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-10, 9-11, 9-12 (June 16, 2010), https://www.italaw.com/sites/default/files/case-

imposition of which is not allowed in the absence of a specific treaty provision.[335] Rather, in protecting investment as long as it remains in place,[336] the FPS standard requires the host state to fulfill its obligation to exercise due diligence,[337] which has also been referred to as "a best efforts obligation,"[338] prudence,[339] vigilance (and care),[340] or reasonableness[341]

documents/ita0357_0.pdf; AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 13.3.2 (Sept. 23, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf; Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-2, Award, ¶ 6.81 (Mar. 15, 2016), https://www.pcacases.com/web/sendAttach/1957.

335. Lauder v. Czech, UNCITRAL, Final Award, ¶ 308 (Sept. 3, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf.

336. Eureko B.V. v. Slovk., UNCITRAL, PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶ 260 (Oct. 26, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf.

337. *Asian Agric. Prods.*, ICSID Case No. ARB/87/3, ¶ 50; Saluka Invest. B.V. v. Czech, UNCITRAL, Partial Award, ¶¶ 483-84 (Mar. 17, 2006); Rumeli Telekom A.S. v. Kaz., ICSID Case No. ARB/05/16, Award, ¶¶ 668-70 (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf; Siag v. Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445-48 (June 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf; Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶¶ 164-66 (Oct. 12, 2005); El Paso Energy Int'l Co. v. Arg., Award, ¶ 522 (Oct. 31, 2011); Suez, Sociedad General de Aguas de Barcelona S.A. v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 173, 179 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf; Plama Consortium Ltd. v. Bulg., ICSID Case No. ARB/03/24, Award, ¶¶ 179-80 (Aug. 27, 2008); Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 223 (Jan. 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C45/DC2872_En.pdf.

338. Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 537 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf.

339. OI European Grp. B.V. v. Venez., ICSID Case No. ARB/11/25, Award, ¶ 577 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf.

340. *See* Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, Award, ¶¶ 6.05-6.06 (Feb. 21, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf (viewing the FPS standard as requiring the host state to fulfill its obligation of vigilance but paradoxically finding that the obligation was breached by the mere existence of damage, which implied strict liability); Paushok v. Mong., UNCITRAL, Award on Jurisdiction and Liability, ¶ 323 (Apr. 28, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf; El Paso Energy Int'l Co., ICSID Case No. ARB/03/15, Award, ¶ 522 (Oct. 31, 2011); Ulysseas, Inc. v. Ecuador, UNCITRAL, Final Award, ¶ 272 (June 12, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1019.pdf.

341. Allard v. Barb., PCA Case No. 2012-06, Award, ¶¶ 240-50 (June 27, 2016), https://www.pcacases.com/web/sendAttach/1955.

against injuries and harassment[342] in response to the circumstance.[343] In *Toto Costruzioni Generali S.p.A. v. Lebanon*,[344] the Tribunal described the standard as requiring that states shall not act negligently in the prevailing circumstance.[345] Pursuant to this obligation, host states must undertake "all possible measures that could be reasonably expected" to protect and secure investment[346] or "take all measures necessary to ensure the full enjoyment of protection and security of . . . investment."[347] Such measures can be precautionary,[348] preventive,[349] remedial,[350] coercive (against those disrupting investment),[351] and/or responsive[352] in nature. What the FPS standard requires is host states' active conduct, which is more than "the mere abstention from prejudicial conduct."[353] All in all, this does not mean that host states must adopt every specific measure proposed by investors. Neither

342. Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Alb., ICSID Case No. ARB/11/24, Award, ¶ 821 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf; AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 13.3.2. (Sept. 23, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf.

343. Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 73 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

344. ICSID Case No. ARB/07/12, Award, ¶ 229 (June 7, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C104/DC2552_En.pdf.

345. *Id.*

346. *See Asian Agric. Prods.*, ICSID Case No. ARB/87/3, ¶ 85(b); Saluka Invest. B.V. v. Czech, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006) (holding that the host state was under an obligation to "adopt all reasonable measures to protect assets and property from threats or attacks"); Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, ¶¶ 449, 451 (Nov. 3, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf; Técnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB (AF)/00/2, Award, ¶ 177 (May 29, 2003), 19 ICSID Rev.—FILJ 158 (2004); *AES Summit Generation Ltd.*, ICSID Case No. ARB/07/22, Award, ¶ 13.3.2.

347. Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, Award, ¶ 6.05. (Feb. 21, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf.

348. *Id.* at ¶¶ 6.07-6.11; OI European Grp. B.V. v. Venez., ICSID Case No. ARB/11/25, Award, ¶ 580 (Mar. 10, 2015), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1800/DC7992_En.pdf.

349. Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Award, ¶¶ 85-95 (Dec. 8, 2000), 41 I.L.M. 896 (2002).

350. Toto Costruzioni Generali S.p.A. v. Leb., ICSID Case No. ARB/07/12, Award, ¶ 229 (June 7, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

351. *OI European Grp.*, ICSID Case No. ARB 11/25, ¶ 580.

352. Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 245 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

353. Copper Mesa Mining Corp. v. Ecuador, PCA No. 2012-2, Award, ¶ 6.81 (Mar. 15, 2016), https://www.pcacases.com/web/sendAttach/1957.

is their FPS obligation tightened by the fact that they have been parties to other treaties related to the investment at issue but in a different angle, such as environmental treaties.[354]

In detailed arbitral awards, an obligation of due diligence has been bifurcated as having "a duty of prevention" and "a duty of repression" as its element. Host states are required to use due diligence to, first, prevent the persons or property of aliens from being wrongfully injured within their territory, and second, to punish such injuries if they have failed to prevent them. Failing to perform either duty gives rise to issues of state responsibility and compensation. However, this due diligence obligation does not require host states to prevent all and every risk or injury.[355] Instead, it requires them to take reasonable acts within their power to prevent the injury, restore the previous situation, and/or punish the author of the injury when states are, or should be, aware of a risk of injury, depending on the prevailing circumstances on a case-by-case basis.[356] Thus, an arbitral answer to the question of how fully investment is protected and secured is that investment is not under absolute protection and security, but rather under "a certain level of protection."[357] This is the point of commonality among many FPS-related issues that investment tribunals have addressed.[358]

However, in their commonality lies the dichotomy between objectivity and subjectivity. Initially, a debate on due diligence did not receive much attention. The Tribunal in *AAPL v. Sri Lanka*[359] shed light on it by adopting

354. Allard v. Barb., PCA Case No. 2012-06, Award, ¶¶ 240-50 (June 27, 2016), https://pcacases.com/web/sendAttach/1955.

355. Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Alb., ICSID Case No. ARB/11/24, Award, ¶ 821 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf; Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 223 (Jan. 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C45/DC2872_En.pdf.

356. El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, ¶ 523 (Oct. 31, 2011); Oxus Gold v. Uzb., UNCITRAL, Final Award, ¶¶ 353-55 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf)); Ulysseas, Inc. v. Ecuador, UNCITRAL, Final Award, ¶ 272 (June 12, 2012); Sergei Paushok CJS v. Mong., UNCITRAL, Award on Jurisdiction and Liability, ¶¶ 324-25 (Apr. 28, 2011); Parkerings-Compagniet AS v. Lith., ICSID Case No. ARB/05/8, Award, ¶ 355 (Sept. 11, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C252/DC682_En.pdf.

357. Rumeli Telekom A.S. v. Kaz., ICSID Case No. ARB/05/16, Award, ¶¶ 668-70 (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf.

358. *See* Alexandrov, *supra* note 7, at 323 (explaining different FPS-related issues, such as whether the FPS standard is extended to legal security and concluding that the standard demands states to act with due diligence).

359. ICSID Case No. ARB/87/3, Final Award, ¶ 77 (June 27, 1990), 4 ICSID Rep. 246 (1997).

Freeman's definition, noted previously, that 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."[360] Therefrom, a well-administered government objectively serves as *tertium comparationis* (a common comparative denominator) to indicate the reasonable measures expected to be adopted under similar circumstances. Later, the Tribunal in *American Manufacturing & Trading, Inc. v. Zaire*[361] added that this objective obligation must not be inferior to the international law minimum standard of treatment.[362] In practice, awards dealing with a violation of the FPS standard have not been made in the abstract without mentioning the prevailing circumstance of the case.[363] Still, in so doing, tribunals seem to pay lip service to due diligence. They have not discussed much about due diligence per se.

It is in few cases that the objectivity of due diligence has been discussed. The tribunal in *Pantechniki S.A. Contractors & Engineers v. Albania*[364] viewed an objective minimum standard of due diligence as "a modified objective standard" of due diligence, bringing it closer to a subjective standard of due diligence.[365] According to this tribunal, in according investment physical protection, due diligence of different host states can be different.[366] What matters is due diligence of the host state at issue. Its level of development and resources is considered to see how due is due enough in exercising due diligence; investors cannot have the same expectation of protection from different host states whose local situation and governance are dissimilar.[367] While a proportionality factor has not been generally accepted in addressing claims of denial of justice, the tribunal believed that it should be accepted in deciding whether the host state fulfills its duty of

360. *See id.; see also* Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 625 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf; AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 13.3.3 (Sept. 23, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C114/DC1730_En.pdf.

361. ICSID Case No. ARB/93/1, Award, ¶ 6.06. (Feb. 21, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf.

362. *Id.*

363. *See, e.g.*, MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 349-56 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf.

364. Pantechniki S.A. Contractors & Eng'rs v. Alb., ICSID Case No. ARB/07/21, Award, ¶¶ 76 (July 30, 2009), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C113/DC1133_En.pdf.

365. *Id.* ¶ 81.

366. *Id.*

367. *Id.*

physical protection and security.[368] In other words, the host state's international responsibility in this regard should be proportional to its resources.[369] Given the claimant's awareness of "an environment of desolation and lawlessness," the scale of the disorder, and the police's inability—not refusal—to protect the claimant's investment, the tribunal concluded that the respondent had no power under the circumstances and did not breach the FPS standard.[370]

On the contrary, a modified objective standard of due diligence, along with the proportionality test, has recently been denied both in BIT and NAFTA contexts. In the former context, the tribunal in *Von Pezold v. Zimbabwe*[371] rejected the host state's argument that its police were overwhelmed as the invasions occurred spontaneously and across the country or that its intervention would have demanded disproportional force given its constraints and would have resulted in many deaths.[372] In the latter setting, the tribunal in *Glamis Gold v. United States*,[373] by its finding that the minimum standard of treatment as a whole did not vary from state to state, implied that the FPS standard as part of the minimum standard of treatment was of the same nature. Otherwise, the protection granted would have no minimum. This denial of a modified objective standard was elaborated in the following terms:

> The customary international law minimum standard of treatment (including the FPS standard) is just that, a minimum standard. It is meant to serve as a floor, an absolute bottom, below which conduct is not accepted by the international community. *Although the circumstances of the case are of course relevant, the standard is not meant to vary from state to state or investor to investor.*[374]

C. Materiality of Terminological Variations

A critical reading of awards discloses that tribunals' view on the relevance of terminological differences to an interpretation and application of the FPS standard is bifurcated—there are opponents and proponents of textualism. Their first point of disagreement centers on interpreting various patterns of

368. *Id.* ¶ 76.

369. *Id.* ¶¶ 77, 81.

370. *Id.* ¶¶ 82, 84.

371. ICSID Case No. ARB/10/15, Award, ¶ 1 (July 28, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf.

372. *Id.* ¶¶ 589-91, 596-99.

373. UNCITRAL, Award ¶ 1 (June 8, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0378.pdf.

374. *Id.* ¶ 615 (emphasis added).

the FPS standard. Their second point centers on interpreting the beneficiary of the standard. For both opponents and proponents, however, it is not necessary to distinguish between "protection" and "security" as it is similarly unnecessary to distinguish "fair" from "equitable" when dealing with "fair and equitable" as a single and unified treatment standard.[375]

In terms of interpreting patterns of the FPS standard, the majority of tribunals are opposed to textualism, viewing terminological differences among formulations of the FPS standard as immaterial and having no effect on their interpretation and application of FPS clauses. The presence or absence of adjectives such as "full," "adequate," and "most constant" does not affect the degree of protection the FPS standard provides.[376] Neither does the putting of "protection" before "security," or vice versa. "Protection" alone can even carry the same weight as "full protection and security." "It is generally accepted that the variation of language between the formulation 'protection' and 'full protection and security' does not make a significant difference in the level of protection a host state is to provide."[377] "Protection and full security" is regarded as an equivalent of "full protection and security."[378] In spite of their textual difference, "full legal protection" for "investors and their investments" and "full and complete protection and security" for "investments" have been considered substantially similar.[379] Even for "most constant," it does not elevate the level of protection and security to a particularly high standard of treatment but stabilizes it for the period of the investment. As the MNSS B.V. Tribunal explained:

> As regards the meaning of "most constant," the plain meaning of "constant" is "unchanging," "that remains the same." Thus, the level of protection and security should not change for the duration of the

375. DOLZER & SCHREUER, *supra* note 17, at 133.

376. Asian Agric. Prod. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 50 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf; Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 630 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf; Frontier Petroleum Servs. Ltd. v. Czech, UNCITRAL, Final Award, ¶ 260 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

377. Parkerings-Companiet AS v. Lith., ICSID Case No. ARB/05/8, Award, ¶ 354 (Sept. 11, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C252/DC682_En.pdf.

378. Compañiá de Aguas del Aconquija S.A. v. Arg., ICSID Case No. ARB/97/3, Award, ¶¶ 7.4.13, 7.4.17 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf (showing that the phrases "protection and full security" and "full protection and security" are used interchangeably, and therefore mean the same thing).

379. Gemplus S.A. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-10, 9-11, 9-12 (June 16, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C41/DC2112_En.pdf.

> investment. But the expression "most constant" does not increase the level of protection and security as understood under international law.[380]

Unsurprisingly, when the precise wording of the FPS clause is "the most constant protection and security," it has still been used interchangeably with "full protection and security."[381]

In further regard to this first point of the disagreement, the minority of tribunals emphasize that the precise legal formulations and patterns of FPS clauses are to be taken seriously; such tribunals have come under criticism for an overemphasis on the ordinary meaning.[382] They consider the presence of "constant" or "full" as according more protection and security to investment than the minimum standard of treatment.[383] "Full protection and security" or "full security" could extend the content of the FPS standard beyond physical security.[384] Conversely, one could think that if "protection" and "security" are not qualified by "full," they are meant to cover physical protection and security. Against an overly extensive interpretation of the FPS standard that might lead to an unnecessary and undesirable overlap with other standards of protection, the Tribunal in *Suez, Sociedad General de Aguas de Barcelona S.A., v. Argentina*[385] explicitly considered the absence of "full," "fully," or "legal security" as supporting its interpretation that the FPS standard was limited to physical protection and legal remedies for physically injured investors and their assets. It did not cover a stable and secure legal and commercial environment.[386] When the disputed phrase was "full physical security and protection," its scope was limited to physical

380. MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶ 351 (May 4, 2016) (footnote omitted), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf.

381. *See* Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 3.9, 6.49, 6.119, 7.57, 7.80 (Nov. 30, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf.

382. MONTT, *supra* note 17, at 305 n.57.

383. *See* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 50 (June 27, 1990) https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf. *But see* Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB (AF)/11/2, Award, ¶ 632 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.

384. *See* Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 408 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf; Biwater Gauff Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf.

385. ICSID Case No. ARB/03/19, Decision on Liability, ¶ 1 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

386. *See id.* ¶¶ 168-69, 173-76, 179.

security and protection.[387]

Turning to the second point of their disagreement as to the term "investment" designated as the sole beneficiary or object of FPS clauses, some tribunals have interpreted the term textually and strictly as covering only foreign investment or foreign assets and property in a traditional sense.[388] Investors per se are not its beneficiaries. Thus, physical violence to investors does not generally breach the FPS standard. "[M]easures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of that standard of protection."[389] Nonetheless, if the foreign investment or property at issue was willingly abandoned by an investor, it would not be protected by the FPS standard. As the Tribunal in *Al Tamini v. Oman*[390] noted that the FPS standard "cannot extend to providing physical protection in perpetuity to an investment that has been expressly 'abandoned' by its owners (and over which all property rights have long been extinguished)."[391] Other tribunals have been less strict, implicitly including "investor" in the meaning of "investment." They have referred to harm to investors as violating the FPS clause despite the apparent designation of "investments" as the sole bearer of a right to full protection and security.[392] More clearly, it has been held that full protection and security of investment provides protection against physical harm to persons and property.[393]

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387. OI European Grp. B.V. v. Venez., ICSID Case No. ARB 11/25, Award, ¶¶ 576-77 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf.

388. *See id.* ¶¶ 577, 580; Saluka Invs. B.V. v. Czech, UNCITRAL, Partial Award, ¶ 484 (Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf; Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, ¶¶ 394, 448-49 (Nov. 3, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf; Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 624 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf; Compañiá de Aguas del Aconquija S.A. v. Arg., ICSID Case No. ARB/97/3, Award, ¶¶ 46, 62 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf.

389. *Al-Warraq*, UNCITRAL, Final Award, ¶ 629.

390. ICSID Case No. ARB/11/33, Award, ¶ 1.

391. *See id.* ¶ 450.

392. *See* Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 85(b) (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf; Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 152 (Oct. 11, 2002), https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf; MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 282, 352-56 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf; Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Alb., ICSID Case No. ARB/11/24, Award, ¶ 821 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf.

393. *See* Gold Reserve Inc. v. Venez., ICSID Case No. ARB(AF)/09/1, Award, ¶¶

D. Scope Ratione Materiae of the Full Protection and Security Standard

As to the question of *what* it is that investment is protected and secured from, we have divided relevant cases into three categories: cases whose circumstances and rulings were concerned primarily with physical harms; cases whose circumstances and rulings dealt mainly with legal harms, which includes instances of a host state's failure to provide legal protection of investment, its modifications of legal and regulatory frameworks, and other regulatory acts negatively affecting the legal security and stability of investment; and cases whose circumstances and rulings concerned both physical and legal harms. If a tribunal, in making its rulings and obiter dicta, gave a clear and general answer to this question of "what," we also considered that answer a criterion for determining which category the case belongs to.

In any case of harm to be discussed shortly, it is investors' burden to show how materially detrimental the harms are to their investment and prove that the harms and losses could have been prevented had host states exercised due diligence.[394] If they do not show that they suffer damage caused by host states, there will be no basis for awarding damages, even if a breach of the FPS standard is established.[395] If their argument is that host states have violated the FPS standard by failing to punish a theft of property committed either by states themselves or by private individuals, investors' failure to make a criminal complaint at the domestic level could lead the tribunal to reject their claim. Such rejection is to disapprove of a "fundamental double standard," according to which the same action is regarded as locally immaterial but internationally material.[396] Host states, in turn, cannot

622-23 (Sept. 22, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4009.pdf; E. Sugar B.V. v. Czech, SCC Case No. 088/2004, Partial Award, ¶ 203 (Mar. 27, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf; Suez, Sociedad General de Aguas de Barcelona S.A.v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 174-75 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

394. *See* Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶¶ 164-66 (Oct. 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf; Plama Consortium Ltd. v. Bulg., ICSID Case No. ARB/03/24, Award, ¶ 222 (Aug. 27, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf; *see also Al-Warraq*, UNCITRAL, ¶ 626; Parkerings-Compagniet AS v. Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 356-57 (Sept. 11, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C252/DC682_En.pdf.

395. MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶ 356 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf.

396. GEA Grp. Aktiengesellschaft v. Ukr., ICSID Case No. ARB/08/16, Award, ¶¶ 243-49 (Mar. 31, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C440/DC3408_En.pdf.

disregard international law and rely instead on their own law to derogate their FPS obligation, as is generally the case with their other obligations under international law.[397]

1. Physical Harm

Led by *AAPL*,[398] arbitral awards have traditionally construed the FPS standard as applying exclusively or primarily to physical protection and security of investment, that is, against physical harms to investment in accordance with the ordinary meaning of "protection" and "security."[399] Examples of this type of harm drawn from arbitral awards include (1) civil unrest, civil strife, civil disturbance, and physical violence;[400] (2) threats and attacks on investment;[401] (3) physical invasion of business premises or investment sites;[402] (4) rioting and looting;[403] (5) attack and seizure of

397. Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, Award, ¶ 6.06 (Feb. 21, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf.

398. ICSID Case No. ARB/87/3, Final Award, ¶¶ 77, 86 (June 27, 1990), 4 ICSID Rep. 246 (1997).

399. *See* Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 632, 634 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf; BG Grp. Plc. v. Arg., UNCITRAL, Final Award, ¶¶ 324, 326 (Dec. 24, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0081.pdf; Rumeli Telekom A.S. v. Kaz., ICSID Case No. ARB/05/16, Award, ¶¶ 668-70 (July 29, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0728.pdf; E. Sugar B.V. (Neth.) v. Czech, SCC Case No. 088/2004, Partial Award, ¶ 203 (Mar. 27, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf; Von Pezold v. Zim., ICSID Case No. ARB/10/15, Award, ¶¶ 582-96 (July 28, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf; Oxus Gold v. Uzb., UNICTRAL, Final Award, ¶¶ 353-54 (Dec.17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf; Suez, Sociedad General de Aguas de Barcelona S.A. v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶ 173 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

400. *See* OI European Grp. B.V. v. Venez., ICSID Case No. ARB 11/25, Award, ¶¶ 576-77 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf; Pantechniki S.A. Contractors & Eng'rs v. Alb., ICSID Case No. ARB/07/21, Award, ¶¶ 1, 13 (July 30, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0618.pdf.

401. *See* Saluka Invests. B.V. v. Czech, UNCITRAL, Partial Award, ¶¶ 483-84 (Mar. 17, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0740.pdf; Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability & Heads of Loss, ¶¶ 246, 286-90 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

402. Tulip Real Estate v. Turk., ICSID Case No. ARB/11/28, Award, ¶¶ 430-37 (Mar. 10, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3126.pdf.

403. Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, Award, ¶ 6.07-6.11 (Feb. 21, 1997), https://www.italaw.com/sites/default/files/case-documents/ita0028.pdf.

property;[404] (6) impairment affecting the physical integrity of investment by forceful interference;[405] (7) wrecking, looting, and dismantlement of equipment and property;[406] (8) forceful expropriation of investment;[407] (9) killings and destruction of property;[408] and (10) occupation of a building and physical assault of the CEO.[409] A novel example of physical harm might be environmental damage to investment, for example, natural damage to an ecotourism site.[410] On the other hand, harms found not to constitute a breach of the FPS standard include temporary physical obstruction not tantamount to an impairment affecting the physical integrity of investment[411] and the presence of the host state's armed contingents and their continued presence at the investment site that was not harassing or threatening but was only for peacekeeping at the site in view of protests by the workers.[412]

2. Legal Harm

Despite its finding that the host state's non-physical action (a change in law and administrative proceedings) did not violate the FPS standard, the Tribunal in *Lauder v. Czech Republic*[413] stated for the first time in investment

404. Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Award, ¶ 80 (Dec. 8, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf.

405. *See Saluka Invs.*, UNCITRAL, ¶ 484; Binder v. Czech, UNCITRAL, Final Award, ¶ 477 (July 15, 2011), https://www.italaw.com/sites/default/files/case-documents/italaw4179.pdf; Toto Costruzioni Generali S.p.A. v. Leb., ICSID Case No. ARB/07/12, Award, ¶ 229 (June 12, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf; Spyridon Rosssalis v. Rom., ICSID Case No. ARB/06/1, Award, ¶¶ 362, 609 (Dec. 7, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C70/DC2431_En.pdf.

406. Al Tamimi v. Oman, ICSID Case No. ARB/11/33, Award, ¶¶ 394, 448-49 (Nov. 3, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4450.pdf.

407. Siag v. Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445-48 (June 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf.

408. Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 85(b) (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

409. MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 352-55 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf; Von Pezold v. Zim., ICSID Case No. ARB/10/15, Award, ¶¶ 582-96 (July 28, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7095_0.pdf.

410. Allard v. Barb., PCA Case No. 2012-06, Award, ¶¶ 240-52 (June 27, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7594.pdf.).

411. Toto Costruzioni Generali S.p.A. v. Leb., ICSID Case No. ARB/07/12, Award, ¶ 229 (June 12, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

412. OI European Grp. B.V. v. Venez., ICSID Case No. ARB 11/25, Award, ¶¶ 578-79 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf.

413. UNCITRAL, Final Award, 3 (Sept. 3, 2001), https://www.italaw.com/sites/def

arbitration that the standard guaranteed the protection of legal rights through the availability of the host state's judicial system that endured a proper trial. In doing so, it did not limit the standard to legal rights consequential upon physical harms. As it explained:

> The investment treaty created no duty of due diligence on the part of [the Respondent] 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*.[414]

Shortly thereafter, the Tribunal in *CME*[415] was more affirmative in extending the FPS standard to legal protection. It found that a change in law and administrative proceedings was in violation of the FPS standard. Even in the absence of physical harms, the FPS obligation could be breached if investments were adversely affected by the host state's regular performance of its functions, notwithstanding its motivation.[416] The host state deprived the investor of legal protection by reversing its own action that approved the partnership between the investor and its local partner, allowing the latter to terminate the contract upon which the former relied in making its investment.[417] As it ruled:

> The Media Council's actions in 1996 and its actions and inactions in 1999 *were targeted to remove the security and legal protection of the Claimant's investment* in the Czech Republic. The Media Council's (possible) motivation to regain control of the operation of the broadcasting after the Media Law had been amended as of January 1, 1996 is irrelevant. *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*.[418]

Following *CME*, arbitral awards have interpreted the FPS standard as extending to legal protection and security of investment,[419] that is, against

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ault/files/case-documents/ita0451.pdf.

414. *Id.* ¶ 314 (emphasis added).

415. UNCITRAL, Partial Award, ¶ 1 (Sept. 13, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf.

416. *Id.* ¶¶ 591-92.

417. *Id.* ¶¶ 107, 119, 132, 474.

418. *Id*. ¶ 613 (emphasis added); *see also* CME Czech B.V. v. Czech, UNCITRAL, Partial Arbitration Award, 16 (Sept. 11, 2001) (Hándl J., dissenting), https://www.italaw.com/sites/default/files/case-documents/ita0179.pdf.

419. Unglaube v. Costa Rica, ICSID Case Nos. ARB/08/1 and ARB/09/20, Award, ¶¶ 97(d), 281 (May 16, 2012), https://www.italaw.com/sites/default/files/case-docum

legal harms to investment. A stable and secure legal and commercial environment counts as much, and is as important as, physical security to investors.[420] This is especially the case when "full," "fully," or "legal security" is part of the applicable FPS clause. Breaches of investors' rights are thus covered by the FPS standard.[421] However, that investment is commercially lost or unsuccessful is not a ground for invoking the FPS standard.[422] It has been affirmed that legal protection and security does not have to be associated with physical harms in the first place.[423] The existence of physical harms is not a prerequisite for legal protection and security.[424] In terms of its substance, legal protection and security covers both substantive protection of investments and effective procedural protection in cases of harms against investments.[425] Thus, access to fair and impartial courts—the provision of tools for obtaining redress by the host state (a duty of repression)—in case of nonviolence, such as contractual disputes between investors and private persons or host states, is also within the realm of the FPS standard.[426] By "legal security," the Tribunal in *Siemens v. Argentina*[427] defined it as "the quality of the legal system which implies certainty in its norms and, consequently, their foreseeable application."[428] Still, this by no

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ents/ita1052.pdf.

420. Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶ 408 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf; Biwater Gauff Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 729 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf.

421. *Azurix Corp.*, ICSID Case No. ARB/01/12, ¶¶ 406-08.

422. Frontier Petroleum Servs. Ltd. v. Czech, UNCITRAL, Final Award, ¶¶ 261-62, 264, 292 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

423. *Azurix Corp.*, ICSID Case No. ARB/01/12, Award, ¶¶ 406-07 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf.

424. Occidental Exploration & Prod. Co. v. Ecuador, UNCITRAL Case No. UN 3467, Final Award, ¶¶ 181, 183-84, 187 (July 1, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf.

425. *See Frontier Petroleum Servs.*, ¶¶ 263-64, 268.

426. Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.146 (Nov. 30, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC2853_En.pdf; Parkerings-Compagniet AS v. Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 358-60 (Sept. 11, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C252/DC682_En.pdf; Gemplus S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶ 9-12 (June 16, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C41/DC2112_En.pdf.

427. ICSID Case No. ARB/02/8, Award, ¶ 1, at 4 (Jan. 17, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf.

428. *Id.* ¶ 303.

means indicates that host states cannot do anything that affects investment. They can only do so with due diligence. If their conduct is beyond reproach, the FPS claim is without merit.[429]

Shedding more light on a legal and business environment, the Tribunal in *Mamidoil Jetoil Greek Petroleum Products Societe S.A. v. Albania*[430] accentuated the specificity of instances of harassment as indicating whether the FPS standard is breached. Due diligence is to be exercised in the specific circumstances. As a matter of fact, both the host state and the investor were aware of smuggling, fuel adulteration, and tax evasion.[431] Still, the investor decided to make its investment under these insecure conditions.[432] The Tribunal regarded such illegal activities as part of the *general* business environment and investment conditions that had existed before the making of investment.[433] Therefore, the activities were not *specific* to the investor's investment, and the allegation that they distorted the investment conditions after the making of the investment was incorrect.[434] The investor could only expect to be protected from *specific* instances of harassment as opposed to the *general* insecurity inherent to the investment climate:

> General insecurity was also a consequence of weak government structures and institutions at the time of the investment. [The Respondent] was confronted with the general duty to confirm itself as a State and build efficient institutions to combat criminality in general and smuggling, fuel adulteration and tax evasion in particular. This is all the more so since the incriminated activities particularly prejudiced Respondent itself. . . . *While Claimant might have been entitled to expect that the general conditions of insecurity would improve over time, it was not entitled to expect that Respondent would protect its investment against the general insecurity that was inherent to the investment climate as opposed to specific instances of harassment*.[435]

As the investor was not injured by such acts and the host state made both national and international attempts to seriously combat them, the FPS standard was not breached under the prevailing circumstances.[436] Similar to

429. Plama Consortium Ltd v. Bulg., ICSID Case No. ARB/03/24, Award, ¶¶ 265-71 (Aug. 27, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0671.pdf.

430. ICSID Case No. ARB/11/24, Award, ¶ 1, at 1 (Mar. 30, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw4228.pdf.

431. *Id.* ¶ 823.

432. *Id.*

433. *Id.*

434. *Id.* ¶¶ 822-23.

435. *Id.* ¶ 824 (emphasis added).

436. *Id.* ¶¶ 825-29.

this separation between generality and specificity of harassment instances is that between "an objective requirement of stability, certainty and foreseeability" and "a subjective standard reduced to the protection of [investors'] specific expectations."[437]

In addition to the host state's failure to keep its judicial system available for the investor to bring claims and the host state's change of the legal framework making the investor susceptible to negative acts by private persons, other possible examples of legal harms include the following:

- the host state's conferral of immunity from suit for public authorities' assaults of the investor's staff[438]
- the host state's refusal to honor a "cover losses" provision in its written agreement with the investor[439]
- the host state's change in its tax law interpretation and refusal to reimburse value-added tax (VAT) paid by the investor[440]
- the host state's failure to apply the regulatory framework and the concession agreement[441]
- the host state's illicit deprivation of the investor's access to foreign currency indispensable for the daily operations of its subsidiaries[442]
- measures that deprive investors of or restrict property or that have similar effects[443]
- the host state's allowance of wrongful application of new legislation by its agency, failure to comply with domestic law, and breach of the provisions of the investment agreement[444]

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437. Paushok v. Mong., UNCITRAL, Award on Jurisdiction and Liability, ¶327 (Apr. 28, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf.

438. *See* Mondev Int'l Ltd. v. U.S., ICSID Case No. ARB(AF)/99/2, Award, ¶¶ 151-52 (Oct. 11, 2002), https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf.

439. *Id*. at ¶¶ 153-54.

440. Occidental Expl. & Co. v. Ecuador, UNCITRAL Arbitration, London Court of International Arbitration Administered Case No. UN 3467, Final Award, ¶¶ 181, 183-84, 187 (July 1, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf.

441. Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶¶ 395-96 (July 14, 2006), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C5/DC507_En.pdf.

442. Rusoro Mining Ltd. v. Venez., ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 549-54 (Aug. 22, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf.

443. Goetz v. Burundi, ICSID Case No. ARB/95/3, Award, ¶ 131 (Feb. 10, 1999), 6 ICSID Rep. 5 (2004).

444. AES Corp. v. Kaz., ICSID Case No. ARB/10/16, Award, ¶¶ 337-39 (Nov. 1, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw8205_0.pdf (noting, however, the Claimants failed to substantiate their FPS claim).

- judicial wrongs (the whole trial and resultant judgments)[445]
- court decisions that lack independence and impartiality[446]
- "the initiation of the renegotiation of the Contract [by the host state] for the sole purpose of reducing its costs, unsupported by any declaration of public interest, affected the legal security of [the investor's] investment"[447]
- the changes made to the regulatory framework by the host state's measures adopted to address its crisis, which resulted in the effective dismantlement of the framework and the uncertainty reigning[448]
- the denial of procedural protection of the investor's right to recover effective participation in the capital equity, the non-compliance of the host state's court judgments by other state organs, the inability of the host state's legal system to correct its error, or the alleged insufficiency of its courts, and the involvement of the host state's legislative and executive branches in decreasing the impartiality of the host state's judges or courts[449]
- the amendments of the law or administrative actions causing negative effects on investment[450]
- the removal of the management and the seizure of the premises by the host state not associated with use of force but unnecessary and abusive[451]

From the list above, the amendment of law and the efficiency of the host state's legal system, including the availability of tools for obtaining redress, have been elaborated with reserve. First, the FPS standard does not completely prevent the host state from exercising its right to legislate or regulate. Even though its legislation or regulation might adversely affect

445. Loewen Grp., Inc. v. U.S., ICSID Case No. ARB(AF)/98/3, Award, ¶¶ 121, 241 (June 26, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0470.pdf; Loewen Grp., Inc. v. U.S., ICSID AF Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ¶¶ 40-60 (Jan. 5, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0469.pdf.

446. Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 228 (Jan. 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C45/DC2872_En.pdf.

447. Siemens A.G. v. Arg., ICSID Case No. ARB/02/8, Award, ¶¶ 308-09 (Jan. 17, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf.

448. Nat'l Grid PLC v. Arg., UNCITRAL, Award, ¶ 189 (Nov. 3, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf.

449. Levy de Levi v. Peru, ICSID Case No. ARB/10/17, Award, ¶¶ 410, 412, 425, 430-43, 506. (Feb. 26, 2014), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1142/DC4212_En.pdf.

450. PSEG Glob. v. Turk., ICSID Case No. ARB/02/5, Award, ¶¶ 257-59 (Jan. 19, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C212/DC630_En.pdf.

451. Biwater Gauff Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 731 (July 24, 2008), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C67/DC1589_En.pdf.

investment, the host state is not prevented from seeking recourse to it, given that its acts are circumstantially reasonable for the purpose of reaching its "objectively rational public policy goals."[452]

To conclude that the right to constant protection and security implies that no change in law that affects the investor's rights could take place, would be practically the same as to recognizing the existence of a non-existent stability agreement as a consequence of the full protection and security standard.[453]

Second, for the efficiency of the host state's legal system, "[t]he question is not whether the host State['s] legal system is performing as efficiently as it ideally could: it is whether it is performing so badly as to violate treaty obligations to accord fair and equitable treatment and full protection and security."[454]

Making a functioning system of courts and legal redress available is also not without qualification:

> [N]ot every failure to obtain redress is a violation of the principle of full protection and security. Even a decision that in the eyes of an outside observer, such as an international tribunal, is "wrong" would not automatically lead to state responsibility as long as the courts have acted *in good faith* and have reached decisions that are *reasonably tenable*. In particular, the fact that protection could have been more effective, procedurally or substantively, does not automatically mean that the full protection and security standard has been violated.[455]

Turning now to acts that have been found not to breach the FPS standard on a case-by-case basis, the list includes the following:

- the host state's conferral of limited immunity from suit for public authorities' tortious interference with contractual relations[456]
- the bailout of the bank where investment was made, which is a permissible preventive measure under the investment treaty and "falls within the reasonable measures expected from a well administered government in similar circumstances"[457]

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452. AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 13.3.2 (Sept. 23, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C114/DC1730_En.pdf.

453. *Id.* ¶ 13.3.5.

454. Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 227 (Jan. 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C45/DC2872_En.pdf.

455. Frontier Petroleum Servs. Ltd. v. Czech, UNCITRAL, Final Award, ¶ 273 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

456. Ceskoslovenská Obchodní Banka A.S. v. Slovk., ICSID Case No. ARB/97/4, Award, ¶ 170 (Dec. 29, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0146_0.pdf.

457. Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 628 (Dec. 15, 2014), https://

- the host state's violations of the investor's due process rights (even when the sole beneficiary of the FPS clause is investment not investor)[458]
- the regulation of the sale and export of gold and the elimination of a swap market that did not breach the FET standard[459]
- the declaration of bankruptcy of the company in which the investor invested and other acts and omissions of the bankruptcy judge, the sale of the company's asset by the bankruptcy trustee, the deletion of the company from the commercial registry, and the failure of the host state's police and state attorneys to carry out the criminal proceedings against the bankruptcy trustee[460]
- the host state's refusal to guarantee against a price reduction caused by its instructions[461]
- the host state's passiveness toward its municipality's breach of an agreement with the investor (the nonintervention in the legal dispute between the investor and its municipality)[462]
- the amendment and implement of law on rational public policy grounds[463]
- the actions that are merely against domestic law[464]
- the termination of the investment contract by the host state's agency[465]

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www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

458. *Id.* ¶ 630.

459. Rusoro Mining Ltd. v. Venez., ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 451, 469, 470, 544, 547, 548 (Aug. 22, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf.

460. Voecklinghaus v. Czech, UNCITRAL, Final Award, ¶¶ 40, 175, 214 (Sept. 19, 2011), https://www.italaw.com/sites/default/files/case-documents/italaw4182.pdf.

461. Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 7.80-7.83, 7.147, 7.165 (Nov. 30, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC2853_En.pdf.

462. Parkerings-Compagniet AS v. Lith., ICSID Case No. ARB/05/8, Award, ¶¶ 358, 359 (Sept. 11, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C252/DC682_En.pdf.

463. AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶¶ 13.3.5-13.3.6 (Sept. 23, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C114/DC1730_En.pdf.

464. Frontier Petroleum Servs. Ltd. v. Czech, UNCITRAL, Final Award, ¶ 452 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

465. Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶ 224 (Jan. 16, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C45/DC2872_En.pdf.

3. Physical and Legal Harms

Last, there are awards in which the FPS standard has clearly been interpreted as covering both physical and legal protection and security, that is, against physical and legal harms ("adverse action").[466] Although the standard has historically been applied and developed in physical contexts to protect the company's officials, employees, or installations, it might, as a matter of principle, apply in other contexts, such as "the broader ambit of the legal and political system," overlapping in content with the FET standard and expropriation.[467] Both physical violence and "the disregard of legal rights" are contrary to the FPS standard.[468] Textually, "full protection and security" alone is enough to cover both physical and legal protection, given that the definition of covered investment also includes intangible assets.[469] There is no rationale for limiting the application of the FPS standard only to physical interferences in the absence of the contracting parties' restriction to that effect.[470] It covers more generally "the rights of investors."[471] Any act or measure depriving investment of protection and full security counts; harassment without physical harm or seizure is not out of its reach.[472] As the Tribunal in *Siemens* noted:

> As a general matter and based on the definition of investment, which includes tangible and intangible assets, the Tribunal considers that the

466. Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.145 (Nov. 30, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC2853_En.pdf; Gemplus S.A. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-10, 9-11, 9-12 (June 16, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C41/DC2112_En.pdf; *AES Summit Generation Ltd.*, ICSID Case No. ARB/07/22, ¶ 13.3.2; *Frontier Petroleum Servs.*, UNCITRAL, ¶¶ 261-64, 292; *Vannessa Ventures Ltd.*, ICSID Case No. ARB(AF)04/6, ¶ 223.

467. Enron Corp. v. Arg., ICSID Case No. ARB/01/3, Award, ¶¶ 286, 287 (May 22, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0293.pdf; PSEG Glob. Inc. v. Turk., ICSID Case No. ARB/02/5, Award, ¶¶ 257-59 (Jan. 19, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C212/DC630_En.pdf; Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award, ¶¶ 323-24 (Sept. 28, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0770.pdf.

468. *Vannessa Ventures Ltd.*, ICSID Case No. ARB(AF)04/6, ¶ 223.

469. Nat'l Grid PLC v. Arg., UNCITRAL, Award, ¶¶ 187, 189 (Nov. 3, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0555.pdf; Siemens A.G. v. Arg., ICSID Case No. ARB/02/8, Award, ¶ 302 (Jan. 17, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0790.pdf.

470. *Siemens A.G.*, ICSID Case No. ARB/02/8, ¶¶ 187, 189; Compañiá de Aguas del Aconquija S.A. v. Arg., ICSID Case No. ARB/97/3, Award, ¶ 7.4.15. (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf.

471. Levy de Levi v. Peru, ICSID Case No. ARB/10/17, Award, ¶ 406 (Feb. 26, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw3109.pdf.

472. *Compañiá*, ICSID Case No. ARB/97/3, ¶¶ 7.4.15, 7.4.17.

> obligation to provide full protection and security is wider than "physical" protection and security. It is difficult to understand how the physical security of an intangible asset would be achieved.[473]

When the applicable FPS clause contains "full protection and legal security," it is possible to interpret "full protection" as covering physical security" and "legal security" as targeting legal harms.[474]

An illustrative example of a case in which both physical and legal harms were discussed in tandem is *Copper Mesa Mining Corp. v. Ecuador*.[475] In this case, the investor, a concessionaire of mining concessions, suffered from both physical hindrance by a third party and legal impossibility caused by the host state.[476] Because of the host state's failure to ensure the investor's access to its concessions, which resulted from the anti-miners' physical blockade of the concessions, to complete its required consultations and do required activities for an environmental impact study ("EIS"), the Tribunal ruled that the host state breached the FPS standard together with the FET standard. This flowed from the facts that (1) the risk from anti-miners in the concession area had long existed and had been evident even before the concessions were granted to the investor and that (2) the host state's presence in the concession area, including its police, was invariably weak, intermittent, and ineffective.[477] Although the local government "could hardly have declared war on its own people, . . . it could not do nothing."[478] Furthermore, the Tribunal found that the host state did exactly what it could not do under the BIT: it worsened the investor's already difficult situation by making it legally impossible for the investor to carry out its EIS and do other required activities, adopting the Suspension Resolution containing such suspended acts, the violation of which would be criminally penalized. In other words, the host state added legal force to the factual effect of the physical possibility (blockade of the concessions by the anti-miners) the investor had already suffered.[479] So doing "was arbitrary, in the sense that it was unreasonable and disproportionate at that time to side so completely with the anti-miners as to make it impossible, both *legally and physically*, for the [investor] to complete its EIS, with inevitable consequences."[480]

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473. *Siemens A.G.*, ICSID Case No. ARB/02/8, ¶ 302.

474. *Id.* ¶ 303.

475. PCA No. 2012-2, Award, pt. 1 (Mar. 15, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf.

476. *Id.* ¶ 6.81.

477. *Id.* ¶ 6.83.

478. *Id.*

479. *Id.* ¶¶ 1.106, 4.300, 6.83, 6.84.

480. *Id.* ¶ 6.84.

E. Scope Ratione Personae of the Full Protection and Security Standard

As per the question of *whom* investment is protected and secured from, the answer found in arbitral awards is trifurcated. Persons whose acts have been rendered to violate the FPS standard include state organs and other entities whose acts are attributable to states; third parties; and both state organs and third parties. By the same logic as was used in determining the scope *ratione materiae* of the FPS standard, these three categories of covered perpetrators are based on circumstances, rulings, and obiter dicta of the cases. In every single case, the host state, of course, is the respondent. However, in defining the categories, we first focus on the primary perpetrators who cause harms to foreign investment, whether it is states themselves, third parties, or both.

1. States

State organs and entities whose acts are attributable to them,[481] can harm investment. Their action, inaction, approval, and omission count.[482] Examples include harms perpetrated by military,[483] security forces,[484] armed contingents of the national guard or police force,[485] courts,[486] commercial registers,[487] government authorities,[488] and employees of state entities.[489]

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481. Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 3 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf; Am. Mfg. & Trading, Inc. v. Zaire, ICSID Case No. ARB/93/1, Award, ¶¶ 6.02-6.11 (Feb. 21, 1997), 5 ICSID Rep. 14 (1997); Eureko B.V. v. Pol., Ad Hoc Arbitration, Partial Award, ¶¶ 236-37 (Aug. 19, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0308_0.pdf.

482. Asian Agric. Prods. Ltd., ICSID Case No. ARB/87/3, ¶ 85(b); Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Award, ¶¶ 85-95 (Dec. 8, 2000), 41 ILM 881 (2002); Arif v. Mold., ICSID Case No. ARB/11/23, Award, ¶¶ 504-06 (Apr. 8, 2013), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C1740/DC3223_En.pdf; Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 245 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf; CME Czech B.V. v. Czech, UNCITRAL, Partial Award, ¶ 613 (Sept. 13, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0178.pdf.

483. *Am. Mfg. & Trading, Inc.*, ICSID Case No. ARB/93/1, ¶¶ 6.07-6.11.

484. *Asian Agric. Prods. Ltd.*, ICSID Case No. ARB/87/3, ¶ 3; OI European Grp. B.V. v. Venez., ICSID Case No. ARB 11/25, Award, ¶ 580 (Mar. 10, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7100.pdf.

485. *OI European Grp.*, ICSID Case No. ARB 11/25, ¶¶ 578-80; Frontier Petroleum Servs. Ltd. v. Czech, UNCITRAL, Final Award, ¶¶ 432, 436 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf.

486. *Frontier Petroleum Servs.*, ¶ 273.

487. *Id.* ¶ 452.

488. *Am. Mfg. & Trading, Inc.*, ICSID Case No. ARB/93/1, ¶¶ 6.07, 6.11; *Eureko B.V.*, ¶¶ 236-37; *OI European Grp.*, ICSID Case No. ARB 11/25, ¶ 580.

489. Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, ¶ 84 (Dec. 8, 2000),

Host states' executive, legislative, and judicial branches are all capable of causing harms to investment. For instance, it was found that "complaints about lack of due process [against the host state's courts] in disputes with private parties are better dealt with in the context of the full protection and security standard."[490]

2. Third Parties

Some tribunals have limited the FPS standard to third parties in general terms or have considered it as covering third parties in accordance with the parties' argument presented on a case-specific basis.[491] The tribunal in *El Paso Energy Co. v. Argentina*[492] stated clearly that the FPS standard "is a residual obligation provided for those cases in which the acts challenged may not in themselves be attributed to the Government, but to a third party."[493] In *Loewen Group, Inc. v. United States*,[494] the standard was extended to "the protection of foreign investors from private parties when they act through the judicial organs of the State."[495] Examples of third parties are community,[496] demonstrators, unpaid and disgruntled employees,[497] and "mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force."[498]

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https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf.

490. *Frontier Petroleum Servs.*, ¶ 296.

491. El Paso Energy Int'l Co. v. Arg., ICSID Case No. ARB/03/15, Award, ¶ 522 (Oct. 31, 2011), 21 ICSID Rev. 488 (2006), https://www.italaw.com/sites/default/files/case-documents/ita0270.pdf; Oxus Gold v. Uzb., UNICTRAL, Final Award, ¶¶ 353-54 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf;); Ulysseas, Inc. v. Ecuador, UNCITRAL, Final Award, ¶ 272 (June 12, 2012) https://www.italaw.com/sites/default/files/case-documents/ita1019.pdf;); Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶ 7.145 (Nov. 30, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1071clean.pdf); E. Sugar B.V. v. Czech, SCC Case No. 088/2004, Partial Award, ¶¶ 203-07, 335 (Mar. 27, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf.

492. ICSID Case No. ARB/03/15, Award, 1 (Oct. 31, 2011).

493. *Id.* ¶ 522.

494. ICSID Case No. ARB(AF)/98/3, Decision on Hearing of Respondent's Objection to Competence and Jurisdiction, ¶ 1 (Jan. 5, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0469.pdf.

495. *Id.* ¶ 58.

496. Técnicas Medioambientales Tecmed, S.A. v. Mex., ICSID Case No. ARB (AF)/00/2 Award, ¶¶ 175-77 (May 29, 2003), 19 ICSID Rev.—FILJ 158 (2004).

497. MNSS B.V. v. Montenegro, ICSID Case No. ARB(AF)/12/8, Award, ¶¶ 352-55 (May 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7311_0.pdf.

498. E. Sugar B.V. v. Czech, SCC Case No. 088/2004, Partial Award, ¶ 203 (Mar. 27, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf.

By their failure to prevent third parties' actions that need to be prevented, host states fail to accord full security and protection to investment.[499]

3. States and Third Parties

The FPS standard has also been interpreted as applying equally to states and third parties.[500] Emphasis may be placed on how host states respond to harms inflicted either by themselves or third parties. As the Tribunal in *Ampal-American Israel Corp. v. Egypt*[501] elaborated:

> The duty imposed by the international standard is one that rests upon the State. However, since it concerns an obligation of diligence, the Tribunal is of the view that *the operation of the standard does not depend upon whether the acts that give rise to the damage to the Claimants' investment are committed by agents of State (which are thus directly attributable to the State) or by third parties*. *Rather the focus is on the acts or omissions of the State in addressing the unrest that gives rise to the damage*.[502]

Compared with the FET standard, which requires host states to behave fairly and equitably, the FPS standard requires host states to provide "a legal framework that grants security and protects the investment against adverse action by private persons as well as state organs."[503]

F. Relation to Other Standards and Principles

In arbitral awards, the FPS standard has been found to be closely related

499. *Id.*

500. Suez, Sociedad Gen. de Aguas de Barcelona S.A., v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, Decision on Liability, ¶¶ 173 (July 30, 2010), 21 ICSID Rev. 342 (2006); Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 245 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf; Parkerings-Compagniet AS v. Lith., ICSID Case No. ARB/05/8, Award, ¶ 355, (Sept. 11, 2007), https://www.italaw.com/documents/Pakerings.pdf; Biwater Gauff Ltd. v. Tanz., ICSID Case No. ARB/05/22, Award, ¶ 730 (July 24, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0095.pdf; Gemplus S.A., SLP S.A., Gemplus Indust. S.A. de C.V. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-10, 9-11, 9-12 (June 16, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0357.pdf); AES Summit Generation Ltd. v. Hung., ICSID Case No. ARB/07/22, Award, ¶ 13.3.2 (Sept. 23, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0014_0.pdf; Paushok v. Mong., UNCITRAL, Award on Jurisdiction and Liability, ¶ 327 (Apr. 28, 2011), https://www.italaw.com/sites/default/files/case-documents/ita0622.pdf.

501. ICSID Case No. ARB/12/11, ¶ 1.

502. *Id.* ¶ 245 (emphasis added) (footnote omitted).

503. Frontier Petroleum Servs. Ltd. v. Czech, UNCITRAL, Final Award, ¶ 296 (Nov. 12, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0342.pdf).

to or even "integrated" with other standards of treatment,[504] for example, the FET standard, the MFN treatment standard, the protection against unreasonable or discriminatory measures, expropriation, and the general provision on protection. Whether tribunals would deal with their relation in detail or deny doing so *ab initio* has largely depended on the principle they adopted, that is, the principle of effectiveness or procedural economy, respectively.

1. Fair and Equitable Treatment

Besides the customary international law minimum standard of treatment discussed earlier, it is the FET standard that is often cited as relevant to the FPS standard. Before considering how they are related, it is indispensable to have a basic understanding of the former sufficient to allow for a comparative analysis. For this purpose, we adopt the widely accepted and influential explanation put forward in *Técnicas Medioambientales Tecmed, S.A. v. Mexico*,[505] according to which the FET standard was described in the following terms:

> The Arbitral Tribunal considers that this provision of the Agreement, in light of the good faith principle established by international law, requires the Contracting Parties to provide to international investments treatment that does not affect the basic expectations that were taken into account by the foreign investor to make the investment. The foreign investor expects the host State to act in a consistent manner, free from ambiguity and totally transparently in its relations with the foreign investor, so that it may know beforehand any and all rules and regulations that will governs its investments, as well as the goals of the relevant policies and administrative practices or directives, to be able to plan its investment and comply with such regulations . . . . The foreign investor also expects the host State to act consistently, i.e., without arbitrarily revoking any preexisting decisions or permits issued by the State that were relied upon by the investor to assume its commitments as well as to plan and launch its commercial and business activities. The investor also expects the State to use the legal instruments that govern the actions of the investor or the investment in conformity with the function usually assigned to such instruments, and not to deprive the investor for its investment without the required compensation.[506]

Similar to our prior discussion on the relation between the FPS standard

504. Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶ 182 (Oct. 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf.

505. ICSID Case No. ARB (AF)/00/2, Award, 1 (May 29, 2003), https://www.italaw.com/sites/default/files/case-documents/ita0854.pdf.

506. *Id.* ¶ 154.

and customary international law, awards deliberating the FPS and FET standards are trifurcated. Advocates, opponents, and passivists of the distinction between the FPS standard and the FET standard have their own ways of addressing them.

For advocates, the two standards are distinct.[507] A finding that the FET standard is violated does not necessarily entail a breach of the FPS standard,[508] and vice versa. Thus, it is incumbent upon claimants to separately prove that the FPS standard is also violated after a breach of the FET has been established. To hold otherwise would be contradictory to the principles of treaty interpretation under the Vienna Convention on the Law of Treaties ("VCLT"). Rejection of an FET claim does not dictate that of the FPS standard.[509] In applying BITs where both standards were clearly addressed in separate articles, a tribunal strongly rejected an argument that if the FET standard was breached, the FPS standard was *ipso facto* violated. Having failed to prove how the respondent's acts and omissions were in breach of its obligation, the claimant was unsuccessful in making its FPS claim.[510] In some cases, the parties to the dispute addressed the FPS claim and the FET claim separately at the outset. They did not rely on the same set of facts as concurrently constituting breaches of both standards. Nor did they treat the claims as alternatives of each other.[511]

Having affirmed that the two standards are not coterminous but complementary, several tribunals rendered each of them applicable to a different perpetrator of harm. Unless the applicable BIT provides otherwise, the FET standard protects investment against *a state's acts*, whereas the FPS

507. Jan de Nul N.V. v. Egypt, ICSID Case No. ARB/04/13, Award, ¶ 269 (Nov. 6, 2008), https://www.italaw.com/sites/default/files/case-documents/ita0440.pdf; Electra bel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 7.80-7.83, 7.147, 7.165 (Nov. 30, 2012), https://www.italaw.com /sites/default/files/case-documents/italaw1071clean.pdf; Vannessa Ventures Ltd. v. Venez., ICSID Case No. ARB(AF)04/6, Award, ¶¶ 216, 224, 226-28 (Jan. 16, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1250.pdf.).

508. Gemplus S.A., v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-10, 9-11, 9-12 (June 16, 2010), https://www.italaw .com/sites/default/files/case-documents/ita0357.pdf.

509. Mamidoil Jetoil Greek Petroleum Prods. Societe S.A. v. Alb., ICSID Case No. ARB/11/24, Award, ¶¶ 819-20 (Mar. 30, 2015), https://www.italaw.com/sites/def ault/files/case-documents/italaw4228.pdf.

510. Arif v. Mong., ICSID Case No. ARB/11/23, Award, ¶¶ 504-06 (Apr. 8, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw1370.pdf; Ulysseas, Inc. v. Ecuador, UNCITRAL, Final Award, ¶ 272 (June 12, 2012), https://www.italaw .com/sites/default/files/case-documents/ita1019.pdf.

511. *See generally* Allard v. Barb., PCA Case No. 2012-06, Award, ¶¶ 169-228, 232-52 (June 27, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw 7594.pdf.

standard protects against those of *a third party* not attributable to the state in the context of use of force.[512] The latter does not guarantee investment against unfair and inequitable treatment caused by a third party, including state-owned commercial entities that operate independently in accordance with commercial law and practice.[513]

Specifically presented with the phrase "fully and completely protected . . . in accordance with the principle of just and equitable treatment in Article 3" in one applicable BIT, the Tribunal in *Suez* considered whether breaches of the FET and FPS standards are necessarily simultaneous.[514] It found that they were not, saying that:

> [T]he concept of full protection and security is included within the concept of fair and equitable treatment, but that the scope of full protection and security is narrower than the fair and equitable treatment. Thus, State action that violates the full protection and security clause would of necessity constitute a violation of fair and equitable treatment under the . . . BIT. On the other hand, all violations of fair and equitable treatment are not automatically also violations of full protection and security . . . . [I]t is possible for [the Respondent] to violate its obligation of fair and equitable treatment toward the Claimants without violating its duty of full protection and security. In short, there are actions that violate fair and equitable treatment that do not violate full protection and security.[515]

The same tribunal ruled that the FET and FPS standards were separate and applicable to different situations. The former applies to business environment and legal security while the latter is aimed at physical harm, punishment, and remedies:

> The fact that the . . . BIT employs the fair and equitable treatment standard and the full protections and security standard in two distinct articles and refers to them as separate and distinct standards leads to the conclusion that the Contracting Parties must have intended them to mean two different things. Thus, in interpreting these two standards of investor treatment it is desirable to give effect to that intention by giving the two concepts distinct meanings and fields of application.[516]

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512. Oxus Gold v. Uzb., UNCITRAL, Final Award, ¶¶ 353-54 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf; E. Sugar B.V. v. Czech, SCC Case No. 088/2004, Partial Award, ¶¶ 204-07, 335 (Mar. 27, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0259_0.pdf.

513. *Oxus Gold*, UNCITRAL, Final Award, ¶¶ 353-54.

514. *See* Suez, Sociedad Gen. de Aguas de Barcelona S.A. v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶¶ 170-71 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

515. *Id.* ¶ 171.

516. *Id.* ¶ 172.

The Tribunal continued:

> In this respect, this Tribunal is of the view that the stability of the business environment and legal security are more characteristic of the standard of fair and equitable treatment, *while the full protection and security standard primarily seeks to protect investment from physical harm. This said, this latter standard may also include an obligation to provide adequate mechanisms and legal remedies for prosecuting the State organs or private parties responsible for the injury caused to the investor.*[517]

For opponents, it is unnecessary to distinguish between the FPS and FET standards. A breach of one shows a breach of the other. One tribunal regarded the obligations imposed by the two standards as legally distinct but unnecessary to be distinguished.[518] Unfair and inequitable treatment also breaches the FPS standard.[519] To exemplify, by undermining the stability of the legal and business framework of the investment through changes in tax law, which were followed by ambiguity and inconsistency, one respondent was found to be in violation of its FET obligation. And such violation simultaneously indicated its failure to comply with the FPS standard:[520] "[A] treatment that is not fair and equitable automatically entails an absence of full protection and security of the investment."[521] In contrast, measures formalized in laws and regulations that are not in breach of the FET standard do not imply a breach of the FPS standard.[522]

Conversely, the host state's violation of the FPS standard automatically breaches the FET standard.[523] When the wording used is "investments . . . shall enjoy . . . protection and full security in accordance with the principle of fair and equitable treatment," it covers "any act or measure which deprives an investor's investment of protection and full security, providing . . . the act

517. *Id.* ¶ 173 (emphasis added).

518. Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-2, Award, ¶ 6.82 (Mar. 15, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf.

519. Azurix Corp. v. Arg., ICSID Case No. ARB/01/12, Award, ¶¶ 406-08 (July 14, 2006), https://www.italaw.com/sites/default/files/case-documents/ita0061.pdf.

520. Occidental Expl. & Prod. Co. v. Ecuador, LCIA Case No. UN3467, Final Award, ¶¶ 181, 183-84, 187 (July 1, 2004), https://www.italaw.com/sites/default/files/case-documents/ita0571.pdf.

521. *Id.* ¶ 187.

522. Rusoro Mining Ltd. v. Venez., ICSID Case No. ARB(AF)/12/5, Award, ¶¶ 451, 469-70, 544, 547-48 (Aug. 22, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7507.pdf.

523. Wena Hotels Ltd. v. Egypt, ICSID Case No. ARB/98/4, Award, ¶¶ 83, 95 (Dec. 8, 2000), https://www.italaw.com/sites/default/files/case-documents/ita0902.pdf; *Copper Mesa Mining Corp.*, PCA Case No. 2012-2, ¶ 6.85.

or measure also constitutes unfair and inequitable treatment."[524] This relational explanation suggests the trend toward the integration of standards of treatment, viewing the FET and FPS standards, along with other standards, as integrated. One possible interpretation of the FPS standard that was preceded by the FET standard in the same BIT is that the FET standard is "a more general standard which finds its specific application in, *inter alia*, the duty to provide full protection and security."[525]

Finally, passivists have no need to delve into a discussion of the relation between the FPS and FET standards. They have found it unnecessary to deal with the FPS standard separately after a violation of the FET standard has been established, and vice versa. This is the case regardless of whether the claimant referred to the same facts already giving rise to a breach of the FET standard or different facts specifically alleged as in breach of the FPS standard.[526] An arbitral finding that the host state violated the FET standard by adopting the ban on profits and the ban on transfers of portfolio that deprived the claimant of access to the commercial value of its investment disposes of the FPS claim.[527] However, passivists have not denied the possible relation between them *in toto*. As observed in *Binder v. Czech Republic*,[528] "[i]n so far as the 'full protection and security' clause should be considered to provide further protection, it is difficult to see how such protection would go beyond that of the clause on 'fair and equitable treatment.'"[529]

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524. Compañiá de Aguas del Aconquija S.A. v. Arg., ICSID Case No. ARB/97/3, Award, ¶ 7.4.15 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0206.pdf.

525. Noble Ventures, Inc. v. Rom., ICSID Case No. ARB/01/11, Award, ¶ 182 (Oct. 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf.

526. *See* Valeri Belokon v. Kyrgyz Rep., UNCITRAL, Award, ¶ 254 (Oct. 24, 2014), https://www.italaw.com/sites/default/files/case-documents/ITA%20LAW%207008_0.pdf; PSEG Glob. v. Turk., ICSID Case No. ARB/02/5, Award, ¶ 259 (Jan. 19, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C212/DC630_En.pdf; Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 291 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf; Impregilo S.p.A. v. Arg., ICSID Case No. ARB/07/17, Award, ¶¶ 331, 334 (June 21, 2011), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C109/DC2171_En.pdf.

527. *See* Eureko B.V. v. Slovak Rep., PCA Case No. 2008-13, UNCITRAL, Final Award, ¶¶ 259-63, 279, 284 (Dec. 7, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw3206.pdf.

528. UNCITRAL, Final Award, ¶ 1 (July 15, 2011), https://www.italaw.com/sites/default/files/case-documents/italaw4179.pdf.

529. *Id.* ¶ 477; *see also* PSEG Glob. v. Turk., ICSID Case No. ARB/02/5, Award, ¶¶ 257-59 (Jan. 19, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C212/DC630_En.pdf; Sempra Energy Int'l v. Arg., ICSID Case No. ARB/02/16, Award, ¶¶ 323-24 (Sept. 28, 2007), http://icsidfiles.worldbank.org/icsid/IC

Having found that the respondent violated the FET standard by its "string of measures of coordinated harassment by [its] various institutions,"[530] the Tribunal in *Stati v. Kazakhstan*[531] deemed it superfluous to consider the claimant's argument that the "most constant protection and security" standard was stronger than "full protection and security" and extended to both physical protection and legal security.[532] This is because once the relief was granted on the basis of the FET standard, it was no longer necessary to further consider if the same relief would to be granted on the basis of the FPS standard in the absence of any other relief not entailed by the violation of the FET standard. The tribunal admitted that the FET and FPS standards overlapped. However, to what extent they did so remains arguable.[533]

2. Effectiveness and Procedural Economy

Whether in dealing with the FPS and FET standards separately or in refusing to address them in tandem, tribunals have not lacked for underlying principles. In ruling that the two standards are not coterminous, tribunals have referred to the principle of effectiveness (*la règle de l'effet utile*) to justify their distinction. According to the principle:

> [A]ll provisions of the treaty . . . must be supposed to have been intended to have significance and to be necessary to convey the intended meaning; that an interpretation which reduces some part of the text to the status of a pleonasm, or mere surplusage, is prima facie suspect.[534]

Construing the FPS standard more extensively entails its overlap with the FET standard, depriving the latter of its meaning. So doing is thus

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SIDBLOBS/OnlineAwards/C8/DC694_En.pdf.

530. Stati v. Kaz., SCC Case No. V (116/2010), Award, ¶ 1095 (Dec. 19, 2013), https://www.italaw.com/sites/default/files/case-documents/italaw3083.pdf.

531. *Id.* ¶ 1.

532. *See id.* ¶¶ 1233-43.

533. *See id.* ¶¶ 1254-57.

534. *See* I HUGH THIRLWAY, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE 293 (2013) (explaining that the other meaning of the principle of effectiveness (*la règle de l'efficacité*) is that "the instrument as a whole, and each of its provisions, must be taken to have been intended to achieve some end, and that an interpretation which would make the text ineffective to achieve the object in view is, again, prima facie suspect. . . . [It] is however also conveniently defined by the adage ut res magis valeat quam pereat"); JAMES R. FOX, DICTIONARY OF INTERNATIONAL AND COMPARATIVE LAW 97 (3d ed. 2003) (defining *effet utile* as a teleological interpretation, according to which the object and purpose of a treaty, as well as the context thereof, will be considered in interpreting its terms in a way that furthers the object and purpose to make the treaty more effective); *see also* JOHN P. GRANT & J. CRAIG BARKER, PARRY & GRANT ENCYCLOPEDIC DICTIONARY OF INTERNATIONAL LAW 177 (3d ed. 2009).

inconsistent with the principle of *effet utile*.[535] To comply with it, the distinction between them is to be maintained.[536]

To deny addressing the FPS and FET standards separately, tribunals' justification rests on the principle of procedural economy,[537] according to which any unnecessary repetition of proceedings and judicial organs' waste of energy[538] should be avoided. Similar to other international courts that have also applied the principle,[539] investment tribunals have sought recourse to it in refusing to address the FET standard after establishing a violation of the FPS standard, and vice versa. Their application of the principle may be accompanied by (1) the absence of greater relief sought by claimants relying specifically on the FPS standard and/or (2) the non-impact of tribunals' further findings on the determination of the resulting damages.[540]

3. Most-Favored-Nation Treatment

If the FPS standard under consideration is in the form of a narrow FPS clause, the most-favored-nation treatment can be invoked. Claimants' typical argument would be that their narrowly worded FPS clause in the BIT could be broadened by the operation of the MFN clause in the same BIT. As a result, they could avail themselves of the broadly worded FPS clause

535. Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶¶ 634-35 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf; Electrabel S.A. v. Hung., ICSID Case No. ARB/07/19, Decision on Jurisdiction, Applicable Law and Liability, ¶¶ 7.80-7.83, 7.147, 7,165 (Nov. 30, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C111/DC2853_En.pdf.

536. Oxus Gold v. Uzb., UNCITRAL, Final Award, ¶¶ 353-54 (Dec. 17, 2015), https://www.italaw.com/sites/default/files/case-documents/italaw7238_2.pdf.

537. Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 291 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

538. Luca Mezzetti, *Human Rights, Between Supreme Court, Constitutional; Court and Supranational Courts: The Italian Experience*, *in* THE CONVERGENCE OF THE FUNDAMENTAL RIGHTS PROTECTION IN EUROPE 29, 51 (Rainer Arnold ed. 2016).

539. SERENA FORLATI, THE INTERNATIONAL COURT OF JUSTICE: AN ARBITRAL TRIBUNAL OR A JUDICIAL BODY? 63 n.27 (2014).

540. *See* R.R. Dev. Corp. v. Guat., ICSID Case No. ARB/07/23, Award, ¶ 238 (June 29, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C116/DC2572_En.pdf; Occidental Petroleum Corp. v. Ecuador, ICSID Case No. ARB/06/11, Award, ¶ 456 (Oct. 5, 2012), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C80/DC2672_En.pdf; Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 538 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf; Chevron Corp. v. Ecuador, UNCITRAL, PCA Case No. 34877, Partial Award on the Merits, ¶ 275 (Mar. 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0151.pdf; Standard Chartered Bank v. Tanz., ICSID Case No. ARB/10/12, Award, ¶¶ 272-73 (Nov. 2, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1184.pdf.

contained in another BIT. This tends to be the case if tribunals take terminological variations seriously. For instance, "protection and security" could be replaced by "full protection and security." Also, "adequate protection and security" in one BIT could be replaced by seemingly more favorable "full protection and security" in another BIT by virtue of the MFN clause. After such replacement, however, it does not necessarily mean that there would be a substantive difference in the degree of protection.[541] Similarly, as between full protection and security that is qualified by reference to international law and unqualified full protection and security, it has been found unnecessary to consider whether they are replaceable through the MFN clause. This is because there is no sufficient evidence that their interpretation would be different.[542]

4. Protection Against Unreasonable or Discriminatory Measures

Tribunals have either discouraged or encouraged distinguishing between a provision on protection against unreasonable or discriminatory measures and the FPS standard. In arguing against making such a distinction, the Tribunal in *Lauder* referred to its prior finding on prohibition against arbitrary and discriminatory measures as also applying to its consideration of whether the FPS standard was fulfilled.[543] For the Tribunal in *Noble Ventures, Inc. v. Romania*,[544] both the prohibition against arbitrary and discriminatory measures and the FPS standard were equally specific applications of the FET standard.[545] However, the Tribunal in *Eureko B.V. v. Slovak Republic*[546] implied that the two standards were not always the same, noting that "[t]he right to full protection and security subsists for as long as the investment remains in place . . . no matter whether or not the treatment complained of is discriminatory."[547]

541. *See* Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 630 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

542. *See* Crystallex Int'l Corp. v. Venez., ICSID Case No. ARB(AF)/11/2, Award, ¶ 632, n.862 (Apr. 4, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7194.pdf.

543. Lauder v. Czech, UNCITRAL, Final Award, ¶ 310 (Sept. 3, 2001), https://www.italaw.com/sites/default/files/case-documents/ita0451.pdf.

544. ICSID Case No. ARB/01/11, Award, ¶ 2, at 9 (Oct. 12, 2005), https://www.italaw.com/sites/default/files/case-documents/ita0565.pdf.

545. *See id.* ¶ 182.

546. PCA Case No. 2008-13, Award on Jurisdiction, Arbitrability and Suspension, ¶¶ 1-4, at 1. (Oct. 26, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0309.pdf.

547. *Id.* ¶ 260.

5. Expropriation

At least four types of relationships between the FPS standard and expropriation have been established by arbitral tribunals: (1) the compliance with the FPS standard is an element of lawful expropriation; (2) the FPS standard need not be addressed if expropriation is confirmed, and vice versa; (3) the FPS standard is breached if expropriation is established; and (4) the FPS standard is not automatically violated by the mere existence of expropriation. Each type of relationship has been explained in the following way.

In some BITs, a host state's granting of full protection and security is not only for fulfilling its FPS obligation per se but also for determining the lawfulness of its expropriation, because the compliance with the FPS standard, *inter alia*, is a decisive factor of lawful expropriation. Thus, it could be the case that although a tribunal has found that it had no jurisdiction *ratione materiae* over an investor's separate FPS claim,[548] it could consider whether the FPS standard was observed. This is because the tribunal has jurisdiction over an expropriation claim, the consideration of which dictated, in accordance with *effet utile*, against ignoring whether the FPS standard was breached. Still, doing so is not to allow the investor to revive its FPS claim "through the back door."[549]

A second type of relationship between the FPS standard and expropriation arises out of the argument that the host state unlawfully expropriated investment and breached the FPS standard. In such a situation, the investor in *Vestey Group Ltd. v. Venezuela*,[550] for instance, stated that if the tribunal upheld its unlawful expropriation claim "with the natural damages consequences," it did not need to decide the FPS claim.[551] For the host state, the FPS claim was subsumed in the unlawful expropriation claim "as, once compensation is determined for the taking, 'there can be, virtually by definition, no loss or damage left to be compensated separately based on a breach of other, lesser standards.'"[552] Based on the investor's statement and the principle of procedural economy as well as its finding of the host state's unlawful expropriation, the Tribunal found it unnecessary to address the FPS

548. *See* Burlington Res. Inc. v. Ecuador, ICSID Case No. ARB/08/5, Decision on Jurisdiction, ¶ 342 (June 2, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C300/DC2777_En.pdf.

549. *Id.* ¶¶ 155, 163-66; Copper Mesa Mining Corp. v. Ecuador, PCA Case No. 2012-2, Award, ¶ 6.85 (Mar. 15, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7443.pdf.

550. ICSID Case No. ARB/06/4, Award, ¶¶ 1-5, at 6 (Apr. 15, 2016), https://www.italaw.com/sites/default/files/case-documents/italaw7230.pdf.

551. *Id.* ¶ 207.

552. *Id.* ¶ 317 (footnote omitted).

and other claims.[553] Conversely, a finding that the host state violated the FPS standard could render the tribunal's consideration of an expropriation claim unnecessary.[554]

A third type of relationship arises when unlawful expropriation itself is considered as constituting a breach of the FPS standard. There is a case in which the host state allowed the investors' investment to be forcibly expropriated regardless of their explicit pleas for police protection and failed to return it to them in accordance with its own courts' decisions affirming the illegality of the expropriation. Therein, the Tribunal found that the host state violated its obligation to provide full protection.[555] It considered the host state's conduct "the most egregious element in the whole affair."[556]

As for the last type of relationship, the existence of expropriation has been found not to indicate that there had been a breach of the FPS standard.[557]

6. Full Protection and the Full Protection and Security Standard

As noted in Part II, Section E, some investment treaties have two separate full protection clauses. The first is articulated first, at the beginning of the treaty, providing investments with "full protection." The second clause follows, granting investments "full protection and security." The Tribunal in *Binder* expressed doubt as to why the two clauses were included in the same treaty.[558] Regarding their relation, the Tribunal in *Toto Costruzioni Generali S.p.A. v. Lebanon*[559] opined that the latter strongly overlapped the former. The claim that did not fall within the scope of full protection was also outside of that of full protection and security.[560]

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553. *Id.* ¶ 318.

554. *See* Ampal-Am. Isr. Corp. v. Egypt, ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss, ¶ 291 (Feb. 21, 2017), https://www.italaw.com/sites/default/files/case-documents/italaw8487.pdf.

555. Siag v. Egypt, ICSID Case No. ARB/05/15, Award, ¶¶ 445-48 (June 1, 2009), https://www.italaw.com/sites/default/files/case-documents/ita0786_0.pdf.

556. *Id.* ¶ 448.

557. Gemplus S.A. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9 to -12 (June 16, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0357.pdf.

558. Binder v. Czech, UNCITRAL, Final Award, ¶¶ 173-74, 474 (July 15, 2011), https://www.italaw.com/sites/default/files/case-documents/italaw4179.pdf.

559. ICSID Case No. ARB/07/12, Award, ¶ 1 (June 7, 2012), https://www.italaw.com/sites/default/files/case-documents/ita1013.pdf.

560. Agreement on the Promotion and Reciprocal Protection of Investments art. 2.3 n. 431, n.272 supp. 292, Italy-Leb., Nov. 19, 1999 (noting that "[e]ach Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments . . . [i]nvestments by investors of either

V. OVERALL ANALYSIS AND RECOMMENDATIONS

We start this part with our factor analysis, correlating past decisions that addressed the FPS standard, mainly in the FCN and BITs contexts, with conditions that influenced them. Then we consider whether such contexts have changed significantly and whether they have affected an interpretation and application of the FPS standard. Next, we will predict which international law participants should or will act. Our survey of different decision options and our scrutiny of the prospective aggregate value consequences of each act in terms of the interpretation and application of the FPS standard allow us to select and adjust specific recommendations.[561] Finally, we will propose alternatives and recommendations on how the FPS standard should be understood.[562] Salient and problematic issues will be analyzed and accompanied by preferred policy alternatives and recommendations. They are related to the genesis of the FPS standard, terminological variations, covered harms, covered perpetrators, due diligence, and the relation of the FPS standard to other standards.

A. The Genesis of the Full Protection and Security Standard

Our historical review leads us to the conclusion that the FPS standard existed earlier than previously estimated in mainstream literature on the topic. Early civilizations were antagonistic to foreigners, viewing them unfavorably as outsiders, enemies, and, sometimes, non-human beings, bearing no rights or legal capacity. This antagonism arose from physical and psychological causes, such as their population density, natural conditions, racial distinction, moral and intellectual capacity, religious motives, culture, and national exclusivity.[563] However, political and economic necessities were among the factors that ameliorated the treatment of foreigners and set the trend toward internationalism, encouraging "an increasingly liberal grant of individual safe-conducts."[564]

Thus, in ancient political and economic contexts, the seed of the FPS standard was planted no later than during the making of treaties in ancient

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Contracting Party shall enjoy *full protection and security* in the territory of the other Contracting Party"); *Toto Costruzioni Generali S.p.A.*, ICSID Case No. ARB/07/12, Award, ¶ 171.

561. *See* Reisman, *supra* note 13, at 123-24.

562. *See Id.*

563. *See* NUSSBAUM, *supra* note 19, at 7; 1 PHILLIPSON, *supra* note 18, at 122-26 (highlighting the impact of population density, racial traits, and national exclusivity).

564. Schwarzenberger, *supra* note 3, at 19; *see also* 1 PHILLIPSON, *supra* note 18, at 267 (noting that treaties for commerce, peace, and alliance provided benefits that led to a reduction in hostilities towards foreigners and an increase in capacity to adjudicate disputes with foreigners).

Greece. It then germinated for millennia, having grown steadily in various kinds of treaties, especially treaties of commerce. Next, there emerged in the customary international law of aliens a general duty to provide foreign nationals with full protection and security. In general, this lengthy process is accurately described by Schwarzenberger in the following way:

> [T]he detailed clauses, in which provision was made for the protection of the person, dignity, life and property of foreign merchants gradually coalesced into a wider rule. Originally, on a treaty basis and, subsequently, under international customary law, it came to cover all nationals abroad and be known as the minimum standard of international law on the treatment of foreign nationals.[565]

In particular, in the field of international investment law, one example of an application of such customary international law was described as follows:

> It is a generally accepted rule of international law, clearly stated in international awards and judgments and generally accepted in the literature, that a State has a duty to protect aliens and their investment against unlawful acts committed by some of its citizens . . . . If such acts are committed with the active assistance of state-organs a breach of international law occurs.[566]

The FPS standard has continued to make its way into modern treaties of FCN and investment treaties as a treaty provision either with or without reference to international law. From this, it can be said that the FPS standard has overlapped with the customary international law minimum standard of treatment.[567] Based on our historical findings, we conclude that it is not true that treaties protecting aliens and their property were only recently developed.[568] Nor is it true that the FPS standard had its origin in post-war bilateral treaties.[569]

To be more specific about its early appearance, while it has been asserted elsewhere that "the FPS standard was seen as early as the 1833 Friendship, Commerce and Navigation Treaty between the United States and Chile,"[570]

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565. *Id.* at 67 (describing the lengthy process).

566. Amco Asia Corp. v. Indon., ICSID Case No ARB/81/1, Award, ¶ 172 (Nov. 20, 1984), 1 ICSID Rep. 413.

567. VANDEVELDE, *supra* note 149, at 226, 243.

568. *But see* FRANCK, *supra* note 187, at 457 (arguing that the treaties protecting aliens and their property originated later in time).

569. *But see* Mondev Int'l Ltd. v. United States, ICSID Case No. ARB(AF)/99/2, Award, ¶ 123 (Oct.11, 2002), https://www.italaw.com/sites/default/files/case-documents/ita1076.pdf (citing UNCTAD, BILATERAL INVESTMENT TREATIES IN THE MID-1990S 53-55 (1998)).

570. David Collins, *Applying the Full Protection and Security Standard of International Investment Law to Digital Assets*, 12 J. WORLD INV. & TRADE 225, 228 (2011).

archival research indicates otherwise. The preceding century had already witnessed the FPS standard being included in treaties of commerce and navigation that were concluded in the latter part of the eighteenth century. One example is the Treaty of Amity, Commerce, and Navigation between His Britannic Majesty and the United States of 1794, Article XIV of which provided merchants and traders on each side with "the most complete protection and security for their commerce."[571] The identical phrase appeared in Article I of A Convention to Regulate the Commerce between the Territories of the United States and of his Britannick Majesty of 1815[572] and Article III of A Treaty of Amity, Commerce, and Navigation between the United States of America and the United Mexican States of 1831.[573] Similar phrases—"the most complete security and protection for the transaction of their business" and "the same security and protection as the natives of the country wherein they reside"—were included in Article I of the Treaty of Friendship and Commerce between the United States and Sweden and Norway of 1816[574] and Article 1 of the treaty of 1828 between the United States and Prussia,[575] respectively. In brief, our historical account showing the existence of ancient treaties and the foregoing 1794 treaty run counter to the mainstream position that the root of the FPS standard can be traced back to the nineteenth and early twentieth centuries.[576]

B. Terminological Variations

Literally, it can be seen that "protection and security," "*full* protection and security," "*adequate* protection and security," "*constant* protection and security," "*most constant* protection and security," among others, are not identical and seems to carry unequal weight. On the face of it, such different formulations intuitively suggest difference in degree of protection and security provided. However, they do not necessarily produce significantly different results. This is because the quintessence of the terms used remains "protection and security," which is, as we will see shortly, enough to protect and secure investments. Greater emphasis should be place on "protection and security" rather than their positive adjectives, which should be

571. Treaty of Amity, Commerce, and Navigation art. 14, *supra* note 106.

572. Convention to Regulate the Commerce art. 1, U.K.-U.S., July 3, 1815.

573. Treaty of Amity, Commerce, and Navigation art. 3, Mex.-U.S., Apr. 5, 1831, 8 Stat. 410.

574. Treaty of Friendship and Commerce art. 1, Nor.-Swed.-U.S., Sept. 4, 1816, 8 Stat. 232.

575. 3 HACKWORTH, *supra* note 137, at 571.

576. *See* SALACUSE, *supra* note 4, at 231; DOLZER & SCHREUER, *supra* note 17, at 161; MONTT, *supra* note 17, at 69-70, 302 n.40; Vandevelde, *supra* note 17, at 204.

interpreted as enhancing, not reducing, the protection and security provided by the FPS standard. Alternatively, if various formulations of FPS clauses were drafted in a way that really lead to their different meaning, the MFN clause in the same BITs could properly modify the scope of the FPS standard by importing a more favorable FPS clause from another BIT. For instance, if the FPS clause in BIT A is clearly limited to physical harms, it can be extended to legal harms that are covered by the FPS clause in BIT B through the operation of the MFN clause in BIT A.

As for the beneficiary of the FPS standard or the object of protection, the ordinary meaning of "investment" and "investor" should be maintained in accordance with the nature of international investment protection.

When "investment" has been designated as the sole bearer of the right to full protection and security, investors should not benefit therefrom especially in relation to their personal or human aspects unless harms to them also adversely affect their investment. Thus, it is right to hold that "measures that affect an investor personally with no concomitant effect on the investment do not amount to a breach of standard of protection [granted only to its investment]."[577] In this scenario, it is still possible and consistent with legal methodology for investors to enjoy protection and security by invoking customary international law or to invoke the MFN clause to avail themselves of personal protection. Had host states intended to extend treaty-based full protection and security to investors, they could easily have done so by explicitly referring to both "investors and their investments," as is the case with some BITs.[578]

When "investor" has been made the beneficiary of the FPS standard, it is by no means manifestly absurd or unreasonable to give protection to their investments. This is nothing more than protecting investors in accordance with the nature of things, giving them protection of life, liberty, and property (investment), as the great "Lockean trinity" calls for. Still, for the sake of clarity, the parties to BITs could be more specific in nominating the beneficiary of the FPS standard.

C. Covered Harms

It perhaps goes without saying that drafting FPS clauses as clearly as possible is highly recommended. This recommendation is blunt but practical. Parties to investment treaties can limit the FPS standard to either

577. Al-Warraq v. Indon., UNCITRAL, Final Award, ¶ 629 (Dec. 15, 2014), https://www.italaw.com/sites/default/files/case-documents/italaw4164.pdf.

578. *See, e.g.*, Gemplus S.A. v. Mex., Talsud S.A. v. Mex., ICSID Case Nos. ARB (AF)/04/03 & ARB(AF)/04/4, Award, ¶¶ 9-9, 9-12 (June 16, 2010), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C41/DC2112_En.pdf.

a physical or legal aspect of protection and security. Otherwise, the FPS standard should be interpreted as applying to both physical and legal harms as much as the nature of covered investments and/ or investors permits them to be so protected and secured. Measures that destabilize investments' legal and business environments count as much as measures that physically harm them. In our view, legal protection and security can be either consequential upon or independent of physical harms; it is not limited only to preventing or prosecuting acts that threaten or impair the physical safety of investments. This remains our position even in cases where "protection and security" alone is used in the applicable FPS clause. Our position is based on (1) the ordinary meaning of "protection" and "security," their context, and the object and purpose of investment treaties; (2) a historical analysis of the FPS standard; and (3) past domestic and international judicial decisions that rationally found the FPS standard applicable beyond physical harms.

Regarding the ordinary meanings of "protection" and "security," the terms adopted to express the intention of the parties to investment treaties, each is too broad to exclusively mean physical harms. The ordinary meaning of "protection" is "[t]he action of protecting, or the state of being protected."[579] For "security," its ordinary meaning is "[t]he state of being free from danger or threat."[580] "Protecting" and "being protected" are not qualified by "physically" or "legally." Likewise, neither "danger" nor "threat" is qualified by "physical" or "legal." Thus, there is no compelling reason to interpret the FPS standard to cover only one side of protection and security. Even without seeking recourse to the evolutionary interpretation of treaties, according to which the meaning of treaty terms can evolve over times,[581] our interpretation is sustained. *A fortiori*, if brought into play, such interpretation can concretize our position, given the velocity of changes in the international investment law context.

Considering the ordinary meaning of "protection" and "security" in their context and in light of the object and purpose of investment treaties confirms our position. As part of their context, the definition of covered investments includes both tangible and intangible assets. Protection and security granted to them have to correspond to their nature. It is difficult to discern how intangible investments, such as claims to money and intellectual properties, given their intangibility, can enjoy physical protection and security. The protection and security that their intangibility allows them to receive is a

579. *Protection*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/protection (last visited Jan. 18, 2018).

580. *Security*, OXFORD DICTIONARY, https://en.oxforddictionaries.com/definition/security (last visited Jan. 18, 2018).

581. *See* EIRIK BJORGE, THE EVOLUTIONARY INTERPRETATION OF TREATIES 1 (2014).

legal one. This is in line with the argument that the FPS standard should apply to digital assets, safeguarding investors in the twenty-first century against modern security threats.[582]

Of course, we are aware that other provisions in the same investment treaties that provide for other standards of treatment, especially the FET standard, are also part of the context as much as is the definition of investments. And we do not suggest that one context outweighs another or should receive more attention; they all should be considered.[583] In light of the prototypical object and purpose of investment treaties usually found in their preamble, to mutually promote or encourage and protect foreign investment, the ordinarily broad meaning of "protection" and "security" in their context are at least not barred or at most affirmed. When the object and purpose of investment treaties is to create and maintain favorable conditions for investments, our position remains the same, i.e., the FPS standard should cover legal protection. This is because, as Professor Reisman rightly elaborates, such conditions "are comprised of more than natural phenomena, such as climate, ecology, geography, and natural and human resources. Critically, 'favorable conditions' must also encompass appropriate internal legal, administrative, and regulatory arrangements, conducted through procedures designed to ensure that the arrangements are applied as they are supposed to be applied."[584] Thus, while it has been held elsewhere that including within the FPS standard legal protection cannot be induced by the wording of the treaty but "a distinct philosophy of property protection,"[585] we believe otherwise. It is the wording of the treaties read in its context considering the object and purpose of the treaties that can properly produce such inclusion. They do not leave the meaning of the FPS standard ambiguous or obscure. Nor do they lead to a result that is manifestly absurd or unreasonable. Thus, there is no need to seek recourse to supplementary means of interpretation, considering the preparatory work of investment treaties and the circumstances of their conclusion.

Second, contrary to the traditional view that the FPS standard has exclusively applied to physical security, our research shows that the FPS standard has also related to legal protection since its origin in the treaties of ancient Greece. It has not been limited to physical harms to persons and

582. *See* Collins, *supra* note 570, at 225.

583. *But see* Lorz, *supra* note 10, at 770 (referring only to other standards of protection when explaining the context of a treaty).

584. W. Michael Reisman, *The Future of International Investment Law and Arbitration*, *in* REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL INVESTMENT LAW 275, 278 (Antonio Cassese ed. 2012).

585. SORNARAJAH, *supra* note 230, at 360.

property of foreigners. Criticizing other tribunals for failing to take a historical analysis of the concept of the FPS standard into account, the Tribunal in *Suez* itself did what it blamed others for doing. Relying on its incomplete historical analysis of the FPS standard, the Tribunal ruled that the standard applies only to physical harms and, at most, to legal redress consequential upon such harms.[586] Had it thoroughly surveyed the FPS concept, it could have seen that the FPS standard has also been tied to legal protection. Notably, foreigners' access to local courts in general is among the various kinds of legal protection that have also been part of the concept of the FPS standard at the outset. Others falling well within the same realm include their right to be heard by their own foreign judges, to freedom of speech, movement, and religion, and to safe communication.

Ancient Rome's *jus gentium* serves well as evidence of its openness to foreigners, allowing them to enjoy both rights *in rem* and *in personam*. Foreigners could claim the heritage of their forerunners located in another land upon a payment of tax. Legal protection in ancient political and commercial contexts was not necessarily a consequence of physical harms.[587] In the subsequent political and commercial contexts where FCN treaties incidentally protected investment, legal protection was already beyond doubt. An important piece of historical evidence that the FPS standard was understood as covering legal protection can be found in An Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation of 1832 between the United States and Chile of 1833. Therein, the parties clarified the meaning of the FPS clause in Article X of the Treaty of Peace, Amity, Commerce and Navigation of 1832 in Article II as follows:

> It being agreed by the [tenth] article of the aforesaid treaty, that the citizens of the United States of America, personally or by their agents, shall have the right of being present at the decisions and sentences of the tribunals, *in all cases which may concern them*, and at the examination of witnesses and declarations that may be taken in their trials . . . .[588]

Thus, we do not subscribe to the view that the historical origins of the FPS standard support limiting its application only to physical harms.[589] In the present context of international investment in which investment treaties

586. Suez, Sociedad Gen. de Aguas de Barcelona S.A. v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶ 177 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

587. *See generally supra* Part II.A and B.

588. An Additional and Explanatory Convention to the Treaty of Peace, Amity, Commerce and Navigation, *supra* note 125, art. 2.

589. *But see* VANDEVELDE, *supra* note 149, at 253.

purposely protect investment, legal protection is even more secured and can be wider in its scope.

Third, our position that the FPS standard applies to both physical and legal protection finds support from domestic and international judicial decisions. According to the U.S. Supreme Court's judgment interpreting the FPS standard in U.S. treaties, protection and security includes legal entitlement and "all rights of actions for himself or his personal representatives to safeguard the protection, and security."[590] Turning to the ICJ, never has it affirmatively ruled that the FPS standard is limited exclusively to physical harms. In its first case, the ICJ simply decided the FPS claim in the context of physical harms as presented by the parties, giving no ruling in general terms that the FPS standard was reserved for physical harms only.[591] In its second case, a chamber of the Court was also presented with a non-physical harm, that is, the delay in the local dispute settlement procedure. It did not reject at the outset that such delay was not within the scope of the FPS standard. Instead, having considered all circumstances concerned, it implied that the application of the FPS standard was not limited only to physical harms.[592] Had it been limited strictly to physical harms, the chamber could have stated clearly and dismissed the claim at the beginning without considering the circumstances concerned.[593] Our next judicial support for applying the FPS standard to legal protection is derived from the IUSCT. In its most relevant case, its chamber included both violence and various types of harassment in the scope thereof.[594]

Given the number and outcome of investment law cases dealing with the FPS standard, it may no longer be true that interpreting FPS clauses to protect more specifically the physical integrity of investments against interference by use of force is the prevailing interpretation.[595] Although it might be too early to tell in 2007 whether extending the FPS standard to legal protection would form a new pattern in investor-state dispute settlement practice, such a pattern is evident now. As presented earlier, there are many arbitral awards

590. Maiorano v. Balt. & Ohio R.R. Co., 213 U.S. 275 (1909).

591. United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran), Judgment, 1980 I.C.J. at 13, 14, 17, 27, 28, 32 (May 24).

592. Elettronica Sicula S.p.A. (U.S. v. Italy), Judgment, 1989 I.C.J. at 66 (July 20).

593. *See* Compañiá de Aguas del Aconquija S.A. v. Arg., ICSID Case No. ARB/97/3, Award, ¶ 7.4.17 (Aug. 20, 2007), https://www.italaw.com/sites/default/files/case-documents/ita0215.pdf. *But see* WANG, *supra* note 4, at 309.

594. Rankin v. Iran, Case No. 10913, Award No. 326-10913-2, ¶ 30 (Nov. 3, 1987), 17 Iran-U.S. Cl. Trib. Rep. 135.

595. *But see* Deutsche Bank AG v. Sri Lanka, ICSID Case No. ARB/09/2, Award, ¶ 535 (Oct. 31, 2012), https://www.italaw.com/sites/default/files/case-documents/italaw1272.pdf.

that applied the FPS standard to legal protection and security.[596]

While it has been said elsewhere that the seminal and earliest case illustrative of an application of the FPS standard to legal protection and security is *CME*,[597] our research suggests otherwise. The first case supporting such an application of the FPS standard is *Lauder*, which was decided days earlier. Although the facts presented in both cases are the same, their tribunals reached different conclusions. The Tribunal in *Lauder*, though admitting that legal harms in principle could trigger the operation of the FPS standard, found that the facts referred to did not constitute legal harms and thus that the FPS standard was not breached. The Tribunal in *CME* held the same view regarding the application of the FPS standard to legal harms but found that such harms existed and adversely affected the investment to the extent that it violated the FPS standard. Thus, it is misleading to read the two cases as contradictory and representing divergent interpretations of the FPS standard, as did the Tribunal in *Suez*[598] and the Respondent in *Sempra Energy International v. Argentine Republic*.[599] Actually, they shared the same view about the applicability of the FPS standard to legal protection. But it was their different assessments of the facts that led them to draw different conclusions. Although legal acts, such as law amendment and administrative proceedings, are within the prospective reach of the FPS standard, only those deemed to be detrimental to investments may breach the standard.

In short, it is submitted that the FPS standard covers both physical and legal harms. And by legal harms, it is not limited to the unavailability of a judicial system for investors to bring their claims. It includes other non-physical acts that adversely affect investments in the prevailing circumstances where host states fail to exercise due diligence. We do not regard this interpretation as outlining the scope of the FPS standard too broadly.[600]

D. Covered Perpetrators

To avoid ambiguity, it might be advisable to limit an application of the

596. *See supra* Part IV.D.2.

597. Parra, *supra* note 181, at 393.

598. *See* Suez, Sociedad General de Aguas de Barcelona S.A. v. Arg., ICSID Case No. ARB/03/19, Decision on Liability, ¶ 167 (July 30, 2010), https://www.italaw.com/sites/default/files/case-documents/ita0826.pdf.

599. ICSID Case No. ARB/02/16, Award, ¶ 4, at 3 (Sept. 28, 2007), http://icsidfiles.worldbank.org/icsid/ICSIDBLOBS/OnlineAwards/C8/DC694_En.pdf; *see id.* ¶ 322.

600. *But see* Foster, *supra* note 105, at 1149-50.

FPS standard only to harms perpetrated by third parties. However, so doing is not supported by the ordinary meanings of the terms "protection" and "security." As discussed earlier, the meanings are not limited to physical or legal aspects of protection and security. Neither are they limited to specific perpetrators of harms. Thus, our position here is that the FPS standard protects and secures investments from both state organs and third parties regardless of whether they act individually or collectively.

Limiting the FPS standard to either state organs or third parties also lacks support from our historical analysis. Since the early history of the FPS standard in the period of ancient Greece, foreigners have been protected against both territorial states' and their people's actions. On the one hand, states promised foreigners protection and security of persons and property against their own authorities. On the other hand, *androlepsia* and private reprisals serve well as historical examples of harms that were perpetrated by local people on foreigners' fellows and property but were suppressed by states.[601] Our position is consistent with the 1962 OECD Draft Convention on the Protection of Foreign Property. According to its notes and comments, the FPS standard covers "actions by public authorities as well as others."[602] In reality, there are cases in which harms caused by states and by third parties were presented together as previously demonstrated.[603]

E. Due Diligence

The FPS standard requires host states to exercise due diligence regarding their own acts and acts by third parties rather than imposing strict liability upon them.[604] Regardless of whether such acts cause physical or legal harms, we propose that due diligence is still the standard of liability.[605] We do not recommend that the liability standard should be distinguished from the beginning, that is to say, strict liability in case of harms perpetrated by state organs and due diligence in case of harms inflicted by third parties.[606] It should not be the case that host states bear strict liability because of the mere fact that harms are caused by their own organs. Although host states must abstain from conducts harmful to investments, their failure to do so should not automatically entail strict liability.[607] The statement that 4he acts of state

601. See *supra* Part II.A.

602. OECD, *supra* note 184, at 9.

603. *See supra* Part IV.D.3.

604. Schreuer, *supra* note 3, at 354.

605. *But see* Brabandere, *supra* note 240, at 345-46 (noting that due diligence is not applicable to the FPS standard in relation to legal protection and security).

606. *But see* Lorz, *supra* note 10, at 777-78.

607. *But see id*. at 777.

organs that injure investment are wrongful as such without considering whether they exercise due diligence[608] is unconvincing on its own terms and not even consistent with *Neer*. If such organs exercise due diligence but cannot avoid causing harms to investment, there should be no breach of the FPS standard.[609] For example, if host states use force to suppress armed demonstrators who occupy the investment site as a shelter or occupy a base near the investment site, their exercise of due diligence in the prevailing circumstance should prevent them from breaching the FPS standard, even if the investment site is physically impaired. And investors should not be able to claim that the FPS standard is breached. Absence of due diligence is a contextual conclusion based on an assessment of what is "due" in the actual context. States can fail the due diligence test without intending to cause harms.

As to the issue of objectivity or subjectivity of due diligence, it is proposed that a modified objective standard of due diligence should take precedence. In so doing, we fully understand that it brings due diligence closer to subjectivity and, more importantly, reality in the international community. Although a full consideration of host states' varying development, stability, and other resources as relevant for determining whether they have exercised due diligence[610] could run the risk of violating the minimum standard of treatment and deprive the FPS standard of its value, we still support a modified objective standard if it is not below the threshold of the minimum standard of international law. Such a threshold can be raised but cannot be lowered by the national treatment standard and the most-favored-nation treatment standard, whichever standard or combination of standards is likely to produce the most beneficial results for investments.[611] To elaborate, only if host states exercise extra due diligence in dealing with their own nationals' investments, foreign investors' investments have to be dealt with in the same manner to ensure inland parity. In cases where investments of investors having one foreign nationality receive extra due diligence from host states, those of other investors having a different foreign nationality will receive that due diligence to ensure foreign parity. Thus, it does not seem correct to assume in general terms that the FPS standard provides no more protection than the national treatment and the most-favored-nation treatment.[612] This assumption is only true if the treatment accorded by both standards is not

608. Brabandere, *supra* note 240, at 324, 333-34, 337, 360.

609. *But see id*. at 345-46.

610. NEWCOMBE & PARADELL, *supra* note 240, at 310.

611. *See* Schwarzenberger, *supra* note 3, at 80.

612. *But see* DOLZER & SCHREUER, *supra* note 17, at 162 (citing LESI v. Alg., Award, ¶ 174 (Nov. 12, 2008).

below the minimum standard of international law.

At this point, we would like to confirm our position that due diligence applies to cases of both physical and legal harms. Then, in determining whether host states exercise due diligence, a modified objective standard is to be considered. For us, it is not convincing to argue that host states' varying development and stability should be considered only in case of physical protection but not in case of legal protection, including, but not limited to, host states' failure to keep its judicial system available and effective for investors to bring their claims. Even assuming (*quod non*) that legal protection is not concerned with physical infrastructure that some host states might lack, legal protection is obviously related to legal resources that they might not have in their administration of justice, such as sufficiently trained judges and other officials as well as instrumentalities for carriage of justice. Physical harms might be more visible than legal harms, but both types of harms could equally be inflicted by lack of resources. Physical and legal infrastructures are equally in need of resources to build them. From this, there is no compelling reason to consider host states' development, stability, and resources only in the physical context but disregard them in the legal context.[613]

Only in a hypothetical case in which it had been possible to build up judicial systems in the abstract at no cost might it be true that "[d]ue process standards like the right to be heard or to have an independent and impartial tribunal should not depend on the economic or political situation prevailing in a country."[614] On this point, we are in agreement with Garro that the FPS obligation "should be measured in accordance with the range of responses most realistic in light of the host country's judicial and legal infrastructure" and "[t]here should, then, be a standard of due diligence on the part of the investor - a standard which . . . is sensitive to the resources available to the host country to provide full protection and security."[615]

F. Relation to Customary International Law and Fair and Equitable Treatment

For the sake of certainty, we recommend that the parties to investment treaties attempt to reduce the ambiguity surrounding the FPS standard as early in their treaty-making processes as possible. This is because, to a certain degree, the relation between the FPS standard and others depends on

613. *But see* Lorz, *supra* note 10, at 780; Brabandere, *supra* note 240, at 325 (citing 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)).

614. Kriebaum, *supra* note 240, at 403.

615. Garro, *supra* note 230, at 272-73.

the exact wording used to describe them. At the outset, the parties can either distinguish the FPS standard from the customary international law minimum standard or regard it and the FET standard as part of the minimum standard.[616] Then, they can elaborate the scope of the FPS standard and the FET standard. For instance, they can determine that the former only provides investments with physical protection, together with legal remedies for physical harms, in accordance with the principle of due diligence while the latter grants them legal protection pursuant to the principle of due process.

In the absence of the foregoing attempts, our position is that the treaty-based FPS standard as such is independent of but still related to customary international law and the FET standard. Let us start with customary international law. As earlier noted in Part III.A.2, considerable debate has surrounded the issue of whether the FPS standard merely restates customary international law or is an autonomous standard additive to it.[617] From a textual perspective, we concur with Schreuer that it is hardly understandable why the parties to the treaty would refer to "full protection and security" in expressing their intention of granting the "minimum standard under customary international law," especially when the same treaty also contains another reference to general international law.[618]

Based on our earlier conclusion that ancient treaty provisions concerning protection and security of aliens paved the way for the customary international law regarding their protection and security, we will see next how today, the FPS standard and such customary international law are related to each other. Generally, treaties can contribute to the formation of customary international law. It can confirm and/or modify preexisting customary international law that is not part of *jus cogens*. When the intention of the parties is expressed in the form of treaty, it is the text of the treaty that primarily declares such an intention. Even though we conclude that the FPS standard overlaps with customary international law, the standard can have its own content as conveyed by the language used to express it.

Of course, customary international law as referred to in the same treaty or as "relevant rules of international law applicable in the relations between the parties"[619] shall be taken into account in interpreting the FPS standard. Thus,

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616. *E.g.*, Catharine Titi, *Full Protection and Security, Arbitrary or Discriminatory Treatment and the Invisible EU Model BIT*, 15 J. WORLD INV. & TRADE 534, 544, 550 (2014) (supporting an unqualified full protection and security provision that is not linked to the minimum international standard in the EU investment treaty model).

617. See *supra* Part III.A.2.

618. Schreuer, *supra* note 3, at 364.

619. VCLT art. 31(3), *supra* note 6.

we view customary international law as a threshold not a ceiling. In our view, it should not matter what the FPS standard was *intended* by states to mean. Neither should it decide whether the FPS clause at issue was intended to confirm or modify preexisting customary international law. Our attention does not go to whether the treaty "intended, merely, to consolidate the pre-existing rules of international law, or, on the contrary, it tended to innovate by imposing on the host state a higher standard of international responsibility."[620] What deserves our attention is the meaning and content of the FPS standard conveyed by its texts. As our support, we recall the following view of the ICJ regarding treaty interpretation: "the attitude of the Court to a text is not, primarily, to ask itself what was this text *intended to mean* (still less of course what ought it to mean, or to be made to mean), but what does it in fact *mean* on its actual wording?"[621]

Turning to the FET standard, we opine that its textual appearance distinguishes it from the FPS standard. "Full protection and security" and "fair and equitable treatment" should not be interpreted as having the same content, especially given that they were listed separately. Still, our finding indicates that the FET standard overlaps with the FPS standard, but it is not yet replaced by the FPS standard in its entirety. Both standards tighten the security of foreign investment and are protective of commercial and business activities of investors.[622] Given that the specific applications of the FET standard have been confirmed in situations concerning stability, transparency, investors' legitimate expectations, compliance with contractual obligations, procedural propriety and due process, action in good faith, and freedom from coercion and harassment,[623] the overlap between the two standards is evident. This is especially the case when the FPS standard applies to legal harms caused by state organs. In other words, where there are legal harms caused by state organs that breach the FPS standard, there could be a violation of the FET standard as well. But legal harms caused by third parties—for example, domestic private cartels against foreign investment—that are not diligently responded to by host states should constitute a breach of the FPS standard. In this sense, while the FPS standard protects investment against physical and legal harms caused by state organs and by third parties, the FET standard protects investment against legal

620. Asian Agric. Prods. Ltd. v. Sri Lanka, ICSID Case No. ARB/87/3, Final Award, ¶ 42 (June 27, 1990), https://www.italaw.com/sites/default/files/case-documents/ita1034.pdf.

621. SIR GERALD FITZMAURICE, THE LAW AND PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE 48 (Cambridge Univ. Press 1995) (1986) (emphasis added).

622. *See* Técnicas Medioambientales Tecmed S.A. v. Mex., ICSID Case No. ARB (AF)/00/2, Award, ¶¶ 154-56 (May 29, 2003), 19 ISCID Rev.—FILJ 158 (2004).

623. DOLZER & SCHREUER, *supra* note 17, at 145-60.

harms caused only by state organs. Thus, it is arguable whether it is correct to maintain that the FPS standard is more restrictive in scope than the FET standard,[624] especially from a historical perspective. Bearing in mind the relation between the FPS and FET standards, it is understandable if tribunals wish to avoid dealing with both standards in tandem by referring to the principle of procedural economy. Still, if they insist on addressing them both, they might be able to do so consistently with the principle of effectiveness. To find that the FPS and FET standards partly overlap is not the same as to deprive the FET standard of its meaning entirely.

VI. CONCLUSION

The current health of the international investment law jurisprudence on the FPS standard is not flawless—as is usually the case with jurisprudence on other standards. Neither is it irreversibly frail. The FPS standard is notably marked by a sharp division between two extremes: on one side, it has been limited to physical harms; on the other side, it has been extended to legal harms. Incentivized thereby, this Article strives to propose a preferred interpretation and application of the FPS standard.

Starting with its historical development, we find that the seed of the FPS standard dates back to ancient Greece, if not earlier. Initially, the concept of full protection and security has already been tied to both physical and legal protection and security for foreigners. Scholarly debates and judicial decisions at both the domestic and international levels lend support for our position. Then, we turn to international investment tribunals and find both proponents and opponents of the position. Having correlated past decisions with conditions that affected them, and having considered that the context of those conditions has changed materially, we conclude that an interpretation of the FPS standard to cover legal harms is preferred. In prior political and commercial contexts surrounding the making of FCN treaties, for example, foreign investment was incidentally protected. Even with such incidental protection, legal protection was granted. Thus, in the context of contemporary international investment, in which investment treaties have been concluded to specifically protect investment, it is even more justifiable to interpret "protection and security" in accordance with the VCLT rules to cover both physical and legal harms caused by state organs and third parties, either acting individually or collectively.

Regarding the relation between the treaty-based FPS standard and customary international law, the former can be more far-reaching and has the latter as its threshold. As a *lex specialis*, its scope is not entirely determined

624. *But see* MONTT, *supra* note 17, at 302 n.40.

by customary international law as a *lex generalis*. It can go beyond physical and some legal protection already embedded in customary international law. Still, the observation of the treaty-based FPS standard is measured by due diligence, as is the case with the customary international law duty to provide aliens with full protection and security. In our view, due diligence is to be determined in accordance with a modified objective standard, considering host states' level of development, capacity, stability, and resources. Although the FPS standard is a distinct treaty standard, it overlaps with other standards, especially with the FET standard when the FPS standard is considered in the context of legal harms. Whether to deal with such overlap or to ignore it is an open issue and a matter of policy that is not without supporting principles, that is, the principles of effectiveness and procedural economy, respectively. Another issue that can be further debated is whether we should put a limit on legal harms covered by the FPS standard. For instance, the categorization of legal harms that should be within the scope of either the FPS standard or the FET standard can be called into question.

FORM I-9 IN THE DIGITAL AGE: EMPLOYER COMPLIANCE AND ENFORCEMENT CHALLENGES

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† Special thanks also to Marva Deskins, Counsel, at Faegre Baker Daniels LLP and Julia M. Steggerda-Corey, Law Clerk, Faegre Baker Daniels LLP for research support.

I. INTRODUCTION

More than 187,000 jobs were added to the U.S. economy each month in 2016.[1] For every new employee hired into one of those jobs, employers must complete and retain a Form I-9.[2] The I-9 requirement applies to every employee hired after November 6, 1986, including U.S. citizens as well as foreign national employees.[3] Compliance with I-9 requirements has long posed challenges for employers, and because employer enforcement initiatives have increased in the past eight years (with no signs of slowing), employers are obliged to continuously review and update their onboarding processes, training, and retention practices. Some employers have opted to address these challenges by using an electronic system for completing the I-9.[4] Others have decided to continue completing the form in its paper format, but retain it electronically for ease of record-keeping and file management.[5] These electronic solutions can increase employer compliance with I-9 rules, but present new challenges and issues as electronic I-9 systems are governed by a separate, specific set of regulations and guidance.[6]

Over the past decade, there has been an increase in both the number of companies providing electronic I-9 products and the number of employers using some kind of electronic form generation or retention system.[7] These include highly sophisticated electronic I-9 systems that are integrated with the employer's HRIS platform and E-Verify, as well as basic electronic retention systems involving document scanning.[8] The spectrum of electronic

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1. *Employment Up 156,000 in August, Averaging 176,000 per Month So Far This Year*, DOL BUREAU OF LAB. STAT. (Sept. 6, 2017), https://www.bls.gov/opub/ted/2017/employment-up-156000-in-august-averaging-176000-per-month-so-far-this-year.htm.

2. *Who Needs the Form I-9*, USCIS, https://www.uscis.gov/i-9-central/complete-correct-form-i-9/who-needs-form-i-9 (last updated July 17, 2017).

3. *See id.*

4. *See generally 4 Benefits of Completing E-Verify Through an Integrated Form I-9 Solution*, HIRERIGHT (Apr. 2, 2012) [hereinafter *4 Benefits*], http://www.hireright.com/blog/2012/04/4-benefits-of-completing-e-verify-through-an-integrated-electronic-form-i-9-solution/ (explaining that electronic I-9 forms increase efficiency and reduce possible errors with respect to completing the Form I-9).

5. *See Storing Form I-9*, USCIS, https://www.uscis.gov/i-9-central/retain-store-form-i-9/storing-form-i-9 (last updated Feb. 13, 2017).

6. *See* Ben Olson, *The Growing Challenge of I-9 Compliance for HR*, ESSIUM (Jan. 25, 2017), http://essium.co/2017/01/the-growing-challenge-of-i-9-compliance-for-hr/.

7. *See* Dave Zielinski, *Automating I-9 Verification*, SOC'Y FOR HUM. RESOURCE MGMT. (May 1, 2011), https://www.shrm.org/hr-today/news/hr-magazine/pages/0511zielinski.aspx.

8. *See What Is HRIS?,* HR PAYROLL SYS., https://www.hrpayrollsystems.net/hris/ (last visited Oct. 15, 2017) (noting that HRIS, or human resource information system, "is basically an intersection of human resources and information technology through HR software"); *4 Benefits*, *supra* note 4 ("E-Verify is an online system that compares

I-9 generation and/or retention systems are subject to specific regulation and enforcement standards and require in-depth review to ensure compliance.[9] Not only must the I-9s produced by these systems meet basic standards for I-9 compliance, but the systems and associated processes themselves must be compliant with electronic I-9 regulations.[10]

The cost of non-compliance can be high, as employers who cannot produce compliant I-9s to government officials within three business days of a Notice of Inspection ("NOI") are at risk of substantial fines.[11] Each I-9 could potentially contain many errors, particularly between what the employee is required to complete in Section 1 and what the employer is required to complete in Section 2.[12] Even one error on a single I-9 can result in fines between $216 and $2,156.[13]

Multiplied over the size of an employer's workforce, these numbers can add up quickly. This is assuming, of course, that there exists a Form I-9 for every employee and that there are no unauthorized workers in the workforce. With the latter, additional fines and civil and criminal penalties will accrue.[14] Beyond errors on the face of the Form I-9 itself, employers can incur fines and other penalties related to the compliance of their electronic systems.[15]

This Article will provide an overview of the regulatory structure for I-9s generally, enforcement trends since the I-9 became mandatory for all employers, an analysis of current enforcement actions, additional electronic I-9 system requirements, and recommendations for employers considering

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information from an employee's I-9 form against data from the U.S. Department of Homeland Security (DHS) and Social Security Administration records to confirm an individual's eligibility to work in the United States.").

9. *See Statutes and Regulations*, USCIS, https://www.uscis.gov/i-9-central/about-form-i-9/statutes-and-regulations (last updated Nov. 14, 2016) (highlighting the federal statutes and regulations that govern Form I-9 compliance and employment verification).

10. *See Handbook for Employers M-274,* USCIS, https://www.uscis.gov/book/export/html/59502/en (last updated July 14, 2017) [hereinafter *Handbook for Employers*] (explaining that electronic Form I-9s must comply with regulations included in 8 C.F.R. pt. 274a.2(e)-i)).

11. *Form I-9 Inspection Overview*, USCIS (June 26, 2013), https://www.ice.gov/factsheets/i9-inspection ("Penalties for substantive violations, which includes failing to produce a Form I-9, range from $110 to $1,100 per violation.").

12. *See* Allen Smith, *'Smart' I-9 Form Comes Up Short*, SOC'Y FOR HUM. RESOURCE MGMT. (Jan. 20, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/proposed-smart-i-9.aspx (explaining that electronic Form I-9s are effective, but are not capable of catching all potential errors).

13. *See* 28 C.F.R. § 85.5 (2018).

14. *See id.*

15. *Penalties*, USCIS, https://www.uscis.gov/i-9-central/penalties (last updated Sept. 14, 2017) (noting that penalties may be imposed on an employer who fails to comply with employment verification requirements, including Form I-9 issues).

electronic I-9 systems.

II. STATUTORY AND REGULATORY FRAMEWORK

Congress introduced the employment eligibility verification requirements captured in the Form I-9 as part of the Immigration Reform and Control Act of 1986, otherwise known as IRCA.[16] When President Reagan signed IRCA into law on November 6, 1986, he "ushered in the most far-reaching changes in immigration law since the passage of the 1965 Immigration and Nationality Act."[17] IRCA established sanctions for employers who hire workers without work authorization and also "held out the promise of legal status and eventual citizenship to millions of unauthorized immigrants, marking the first large-scale legalization program in U.S. immigration history."[18]

IRCA established new federal criminal and civil penalties for employers who knowingly hired unauthorized workers, as well as fines for failure to correctly complete and retain Form I-9.[19] Congress also rolled back a provision that had previously protected employers from criminal liability for employing unauthorized workers and extended criminal prohibition on the use of fraudulent documents used to gain lawful employment.[20] Until IRCA, employers had no federal penalty for employing unauthorized workers.[21]

The Code of Federal Regulations ("CFR") sets forth requirements for the Form I-9 and employer practices for verifying the employment authorization of its workforce.[22] The regulations dictate acceptable documentation for proving worker identity, provide standards for completing the Form I-9, and

16. *See* Immigration Reform & Control Act of 1986, 8 U.S.C. § 1101 (2012).

17. Muzaffar Chishti et al., *At Its 25th Anniversary, IRCA's Legacy Lives On*, MIGRATION POL'Y INST. (Nov. 16, 2011), http://www.migrationpolicy.org/article/its-25th-anniversary-ircas-legacy-lives.

18. *Id.*

19. *See* Immigration & Nationality Act, 8 U.S.C. § 1324a(e)(5) ("With respect to a violation of subsection (a)(1)(B), the order under this subsection shall require the person or entity to pay a civil penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred."); *see also* 8 C.F.R. § 274a.10(a) (2018) ("Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of the Act shall be fined not more than $3,000 for each unauthorized alien, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.").

20. *See* United States v. Kim, 193 F.3d 567, 573-74 (2d Cir. 1999) (affirming criminal conviction under harboring statute for factory owner who knowingly employed workers without authorization).

21. *See* De Canas v. Bica, 424 U.S. 351, 360 (1976).

22. 8 C.F.R. § 274a.2.

instruct employers on retaining and inspecting Form I-9s, as well as the standards for electronic retention of Form I-9s.[23] Section 270.3 of the CFR delineates criminal and civil penalties for employees who present fraudulent documents.[24]

The regulations outlining the requirement for U.S. employers to verify the identity and work authorization of employees are found at title 8, section 274a.2. These regulations describe requirements for completing each section of the I-9 and outline the acceptable identification documents that employees may present to verify their identity and work authorization, respectively.[25]

U.S. Citizenship and Immigration Services ("USCIS") and Immigration and Customs Enforcement ("ICE") establish and ensure compliance with I-9 regulations and processes. Both agencies are part of the Department of Homeland Security ("DHS"), created in 2002.[26] USCIS has authority over Form I-9 and related guidance, as well as E-Verify, whereas ICE oversees enforcement of the penalty provisions of section 274A of the Immigration and Nationality Act ("INA") and other immigration enforcement.[27]

A. Regulations Governing Electronic I-9s

Congress enacted legislation in 2004 allowing employers to complete, sign, and retain electronic versions of the Form I-9.[28] Up until 2004, I-9s could only be retained in their original paper format, on microfilm, or microfiche. The form could not be completed or signed electronically.[29]

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23. *See id.* § 274a.2(b) (providing requirements for employment verification).

24. *See id.* § 270.3.

25. *See id.* § 274a.2(b)) (explaining the numerous employment verification requirements imposed on employers, including, among other things, examining documentation presented by the prospective employee and completing Section 2 of the Form I-9 within three business days of the hire).

26. Homeland Security Act of 2002, 6 U.S.C. § 101 (2012).

27. *See Handbook for Employers*, *supra* note 10 (noting that "USCIS is responsible for most documentation of alien employment authorization, for Form I-9, and for the E-Verify employment eligibility program"); *see also id.* ("ICE is responsible for enforcement of the penalty provisions of section 274A of the INA and for other immigration enforcement within the United States.").

28. H.R. Rep. No. 108–731, at 1 (2004) (proposing amendments to "Section 274A of the Immigration and Nationality Act to improve the process for verifying an individual's eligibility for employment"); *see also* Consolidated Appropriations, Act, Pub. L. No. 108-399, 118 Stat. 2292 (2005).

29. *See* William E. Hannum III, *Navigating the Form I-9 Maze: Tips for Complying with the Changing Employment Eligibility Verification Process*, SCHWARTZ HANNUM PC (Aug. 2006), http://www.shpclaw.com/Schwartz-Resources/navigating-the-form-i-9-maze-tips-for-complying-with-the-changing-employment-eligibility-verification-process?p=11399 (explaining that DHS and ICE issued rules in 2006 to implement electronic signature options).

Interim regulations published by DHS on June 15, 2006 did not specifically identify what electronic I-9 systems would be acceptable under the law.[30] The final rule amending the interim rule became effective on August 23, 2010, enabling employers to electronically complete and/or retain the Form I-9.[31]

The electronic I-9 regulations permit (but do not require) employers to complete, sign, and/or store I-9s electronically, which includes scanning and retaining paper I-9s. The electronic I-9 regulations require:

> (i) Reasonable controls to ensure the integrity, accuracy and reliability of the electronic generation or storage system;
> (ii) Reasonable controls designed to prevent and detect the unauthorized or accidental creation of, addition to, alteration of, deletion of, or deterioration of an electronically completed or stored Form I-9, including the electronic signature if used;
> (iii) An inspection and quality assurance program evidenced by regular evaluations of the electronic generation or storage system, including periodic checks of the electronically stored Form I-9, including the electronic signature if used;
> (iv) In the case of electronically retained Forms I-9, a retrieval system that includes an indexing system that permits searches consistent with the requirements of paragraph (e)(6) of this section; and
> (v) The ability to reproduce legible and readable hardcopies.[32]

In the event of an ICE audit, electronic I-9s must be made available for review (either printed or on-screen), along with associated audit trails that show who has accessed the system and the actions performed within or on the system during a given period.[33]

Section H of the electronic I-9 regulations specifically outlines requirements for electronic signatures:

> (1) If a Form I-9 is completed electronically, the attestations in Form I-9 must be completed using a system for capturing an electronic signature that meets the standards set forth in this paragraph. The system used to capture the electronic signature must include a method to acknowledge that the attestation to be signed has been read by the signatory. The electronic signature must be attached to, or logically associated with, an electronically completed Form I-9. In addition, the system must:
>
> (i) Affix the electronic signature at the time of the transaction;
> (ii) Create and preserve a record verifying the identity of the person

30. *See* Electronic Signature and Storage of Form I-9, Employment Eligibility Verification, 71 Fed. Reg. 34510 (June 15, 2006) (to be codified at 8 C.F.R. pt. 274a).

31. *See* 8 C.F.R. § 274a.2 (2018).

32. *Id.* § 274a.2(e)(i)-(v).

33. *Id.* § 274a.2(e)(8)(i).

> producing the signature; and
> (iii) Upon request of the employee, provide a printed confirmation of the transaction to the person providing the signature.
>
> (2) Any person or entity who is required to ensure proper completion of a Form I-9 and who chooses electronic signature for a required attestation, but who has failed to comply with the standards set forth in this paragraph, is deemed to have not properly completed the Form I-9, in violation of section 274A(a)(1)(B) of the Act and 8 CFR 274a.2(b)(2).[34]

The electronic signature requirements apply both to the employee signature and interpreter/preparer signature in Section 1, and to the employer's signatures in Sections 2 and 3.[35] Merely typing a name in a signature box does not constitute a compliant electronic signature.[36]

B. Completing and Retaining Form I-9

Employees are required to complete Section 1 of the Form I-9 and attest to their status as it relates to U.S. work authorization.[37] The employee must sign and date the form, attesting under penalty of perjury that the information is true and correct.[38] Employees must complete Section 1 "at the time of hire."[39]

The employee must then present original identity and/or work authorization documents from a prescribed list of documents.[40] An employer representative must examine the original documents and assess whether the documents relate to the person presenting them and whether the documents presented appear to be genuine.[41] The employer representative must then

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34. *Id.* § 274a.2(h).

35. *See Handbook for Employers*, *supra* note 10 (highlighting section 10.3.2 of the Handbook for Employers).

36. *See* United States v. Agri-Sys. D/B/A ASI Indus., 12 OCAHO no. 1301, 14-15 (2017).

37. *See* 8 C.F.R. § 274a.2(b)(1)(i)(A) (noting that employers must ensure that employees complete Section 1 "on the Form I-9 at the time of hire and [sign] the attestation with a handwritten or electronic signature").

38. *See Instructions for Form I-9, Employment Eligibility Verification*, USCIS 4 (2017) [hereinafter *Instructions for Form I-9*], https://www.uscis.gov/system/files_force/files/form/i-9instr.pdf?download=1 (noting that when an employee signs the Form I-9, the employee attesting under penalty of perjury all of the information contained therein is true and correct); *see also Declaration under Penalty of Perjury*, USCIS, https://www.uscis.gov/tools/glossary/declaration-under-penalty-perjury (last updated Dec. 15, 2010) (defining "Declaration under Penalty of Perjury" as "[a] statement by a person, in which the person states that the information is true, to support his or her request or application").

39. 8 C.F.R. § 274a.2(b)(1)(i)(A).

40. *Id.* § 274a.2(b)(1)(i)(B), (b)(1)(B)(v).

41. *See id* § 274a.2(b)(1)(ii)(A) (noting that employers are not required to be

complete Section 2 of the form within three business days of hire, entering in the details from the document(s) presented by the employee.[42]

As with the employee's signature requirement, the employer representative must sign and date Section 2, attesting under penalty of perjury "that (1) I have examined the document(s) presented by the above-named employee, (2) the above-listed document(s) appear to be genuine and to relate to the employee named, and (3) to the best of my knowledge the employee is authorized to work in the United States."[43]

If a translator or preparer is required, he or she must also sign an attestation that the information is true and correct to the best of his or her knowledge.[44] Once the form is complete, the employer must retain the form securely, either (1) the original "wet ink" paper version, (2) an electronic version, which could be a scan of the paper original,[45] or (3) as an on-screen version generated by an electronic system that can be printed in paper as necessary.[46] The form must be retained throughout the employee's period of employment with the employer and then for one year after the date the employee ends employment with the employer or three years after his or her date of hire, whichever is later.[47] The form can then be destroyed or deleted from the electronic system.[48]

If an employee presents work authorization documents that have a future expiration date, the employer is required to re-verify those expiring documents and either complete Section 3 with new documents or create a new Form I-9, retaining both the original I-9 and the new one.[49]

C. E-Verify

E-Verify is a free online tool developed and maintained by USCIS that

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document experts capable of identifying counterfeit or fraudulent documents, but that the standard is whether the documents "appear" to be genuine).

42. *Id.* § 274a.2(b)(1)(ii)(B).

43. *Id.*; *see also Instructions for Form I-9*, *supra* note 38, at 12.

44. § 274a.2(b)(1)(i)(A).

45. *Id.* § 274a.2(b)(2)(i).

46. *Id.* § 274a.2(e)(8)(i).

47. *Id.* § 274a.2(b)(2)(i)(A).

48. *See I-9 Retention Worksheet*, GOFFWILSON, https://www.goffwilson.com/CMSTemplates/Goff/pdfs/RetentionWorksheet20111.pdf (last updated June 14, 2010) ("On the retention date, destroy [the I-9 Retention Form] and the I-9 form.").

49. *See Completing Section 3, Reverification and Rehires*, USCIS, https://www.uscis.gov/i-9-central/complete-correct-form-i-9/completing-section-3-reverification-and-rehires (last updated July 17, 2017) (noting that when employee employment authorization or authorization documentation expires, employers must reverify that the employee remains authorized to work. In doing so, the employer will have to complete Section 3 of the Form I-9 or complete a new Form I-9).

employers may use in conjunction with the I-9 practices outlined above to verify work authorization.[50] E-Verify does not replace the requirement to complete and retain a Form I-9 for all employees, but rather supplements it.[51] Employers are required to sign a Memorandum of Understanding ("MOU") with E-Verify agreeing to comply with certain technical and procedural rules.[52] Employers take the information entered on an employee's I-9, create an E-Verify case for the employee, and transfer the data from the I-9 into the E-Verify online system.[53] The information is checked against databases at DHS and the Social Security Administration ("SSA").[54] Employers then receive either a "work authorized" result or a Tentative Non-Confirmation ("TNC").[55] The employee then has the option to contest the TNC, at which point the system generates instructions on how to resolve the issue (i.e., by contacting DHS or the SSA). If the employee can resolve the TNC, the E-Verify system produces a "work authorized" result.[56] If the employee is unable to resolve the TNC, however, E-Verify produces a Final Non-Confirmation ("FNC").[57]

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50. *See E-Verify*, USCIS, https://www.uscis.gov/e-verify (last visited Oct. 15, 2017) ("E-Verify is an Internet-based system that allows businesses to determine the eligibility of their employees to work in the United States.").

51. *See About the Program*, USCIS, https://www.uscis.gov/e-verify/about-program (last updated May 10, 2017) (explaining that employers "submit information taken from a new Form I-9 . . . through E-Verify . . . to determine whether the information matches government records and whether the new hire is authorized to work in the United States").

52. *See generally The E-Verify Memorandum of Understanding for Employers*, DHS, https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/MOU_for_E-Verify_Employer.pdf (last updated June 1, 2013).

53. *See E-Verify and Form I-9*, USCIS, https://www.uscis.gov/i-9-central/about-form-i-9/e-verify-and-form-i-9 (last updated Nov. 14, 2016).

54. *See What Is E-Verify?,* USCIS, https://www.uscis.gov/e-verify/what-e-verify (last updated July 20, 2017) (explaining that the information in the Form I-9 is compared with data from DHS and the SSA).

55. *See Tentative Nonconfirmations*, USCIS, https://www.uscis.gov/e-verify/employers/tentative-nonconfirmations (last updated May 11, 2017) ("Generally, if the information matches, the employee receives an 'Employment Authorized' response in E-Verify . . . [but if] the information from an employee's Form I-9 does not match government records . . . E-Verify will display a temporary case status . . . [and] E-Verify will return a response called a 'Tentative Nonconfirmation (TNC).'").

56. *See generally How to Correct a Tentative Nonconfirmation*, USCIS, https://www.uscis.gov/e-verify/employees/how-correct-tentative-nonconfirmation (last updated May 18, 2017).

57. *See 3.5 SSA or DHS Final Nonconfirmation,* USCIS, https://www.uscis.gov/e-verify/publications/manuals-and-guides/35-ssa-or-dhs-final-nonconfirmation (last updated June 12, 2017) (stating that an SSA or DHS Final Nonconfirmation case result is received when E-Verify cannot verify an employee's employment eligibility after an employee has visited a SSA field office or contacted DHS during the TNC referral

Employers may choose to continue to employ an individual who receives an FNC.[58] Nonetheless, the employer risks being fined for employing an unauthorized worker.[59]

E-Verify's Monitoring and Compliance Unit "observes system use to help users comply with the E-Verify Memorandum of Understanding, E-Verify Manuals, Form I-9 instructions, and applicable laws."[60] The Monitoring and Compliance Unit may perform "desk audits" with employers, highlighting trends in system usage that could signal noncompliance.[61] Such signals could include: a statistically significant number of permanent residents who have presented permanent resident cards as part of the I-9 process (as opposed to other possible documents), indicating an unlawful practice of requiring certain documents from certain employee populations; not printing TNC notices when E-Verify produces a TNC result; not closing E-Verify cases in a timely manner; or routinely opening E-Verify cases more than three days after the employee's first day, among other trends or patterns.

Although the Monitoring and Compliance Unit cannot issue fines for noncompliance, they may refer employers to other agencies for further investigation.[62]

Some electronic I-9 systems can integrate with E-Verify, keeping all I-9 and E-Verify information for each employee in one electronic location.[63]

Congress mandated that the program be freely available to employers in all states in 2003,[64] and in 2007, all federal employers were required to use

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process).

58. *See id.* (noting that the employer "may terminate employment" based on the employee's receipt of an FNC).

59. *See id.* (explaining that the employer may terminate employment without civil or criminal liability).

60. *Monitoring and Compliance*, USCIS, https://www.uscis.gov/e-verify/employers/monitoring-and-compliance (last updated Mar. 7, 2017).

61. *See SAVE Program Guide*, USCIS 11, https://save.uscis.gov/web/media/resourcescontents/saveprogramguide.pdf (last updated July 2017).

62. *See Settlements and Lawsuits*, DOJ, https://www.justice.gov/crt/settlements-and-lawsuits (last updated Nov. 28, 2017) (stating that in American Cleaning Company the employer agreed to a $195,000 settlement for implementing a pattern or practice of requesting different List A documents from non-citizens); s*ee also id.* (stating that in Infinity Group the employer agreed to pay $53,880 in civil penalties and be subject to ongoing monitoring, and noting that in Washington Potato Company DOJ brought a complaint against the employer for unfair documentary practices on a referral from E-Verify).

63. *See I-9 Complete Overview*, TRACKER COMPLETE COMPLIANCE, http://www.trackercorp.com/i9-compliance.php (last visited Oct. 15, 2017) (stating that I-9 Complete is a product that allows you to integrate the Form I-9 with other HR processes).

64. Marc Rosenblum & Lang Hoyt, *The Basics of E-Verify, the U.S. Employer Verification System*, MIGRATION POL'Y INST. (July 13, 2011), https://www.migrationpolicy.org/article/basics-e-verify-us-employer-verification-system ("In 2003, Congress

E-Verify.[65] E-Verify is not federally mandated for private employees, but several states mandate that employers use E-Verify for all hires, and some states mandate E-Verify for all state employees and contractors.[66] Although federal immigration law preempts "any State or local law imposing civil or criminal sanctions (other than through licensing and similar laws) upon those who employ . . . unauthorized aliens,"[67] the United States Supreme Court upheld state laws mandating E-Verify through this licensing exception.[68]

Attorney General Jeff Sessions has advocated for mandatory E-Verify for all employers.[69] It is likely that any Congressional action on immigration reform will include mandatory E-Verify for all employers. Indeed, President Donald Trump's Fiscal Year 2018 budget calls for an additional $131.5 million to make E-Verify mandatory in the next three years, although Congress must vote to pass this budget.[70]

D. Enforcement from Bush to Trump

As mentioned, the requirement that employers verify the work authorization of employees stems from IRCA. President Reagan signed IRCA in 1986 to address the employment of undocumented immigrants and prevent, or significantly reduce, the future hiring of undocumented immigrants within the U.S.

Congress amended IRCA with the Immigration Act of 1990, which

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expressed its support for electronic verification by expanding Basic Pilot from the five states in which it was first tested . . . to make it available on a national basis . . . .").

65. *See For Federal Contractors*, USCIS, https://www.uscis.gov/e-verify/federal-contractors (last updated May 18, 2017) (stating that a presidential Executive Order and other regulations required "federal contractors to use E-Verify to electronically verify the employment eligibility of employees working under covered federal contracts").

66. *See generally Findings of the E-Verify User Survey*, WESTAT (Apr. 30, 2014), https://www.uscis.gov/sites/default/files/USCIS/Verification/E-Verify/E-Verify_Native_Documents/Everify%20Studies/E-Verify_User_Survey_Report_April2014.pdf.

67. Immigration & Nationality Act, 8 U.S.C. § 1324a(h)(2) (2012).

68. *See generally* Chamber of Commerce v. Whiting, 563 U.S. 582, 587 (2011) (holding that Arizona's law requiring employers to verify employees through an internet-based system is not pre-empted by federal law).

69. *See* Kate Morrissey, *Workplace Immigration Enforcement Could Come Roaring Back Under Trump*, SAN DIEGO UNION TRIB. (Feb. 17, 2017, 6:00 PM), http://www.sandiegouniontribune.com/news/immigration/sd-me-worksite-enforcement-20170217-story.html ("Attorney General Jeff Sessions . . . has pushed for requiring all employers to use a program called e-verify [sic] . . . .").

70. *See FY 2018 Budget in Brief*, DHS 5 (May 23, 2017), https://www.dhs.gov/sites/default/files/publications/DHS%20FY18%20BIB%20Final.pdf (stating that $131.5 million was allocated for E-Verify "operations and upgrades").

President George H. W. Bush signed into law on November 29, 1990.[71] In terms of worksite enforcement, President George W. Bush's administration focused on high-profile raids and arrests of undocumented workers in factories and meatpacking plants.[72] President Barack Obama's strategy for curbing employment of undocumented immigrants shifted the focus away from employees and squarely onto employers. Compliance audits, specifically, I-9 paperwork audits of employers increased four-fold under President Obama, which resulted in an uptick in civil and criminal penalties charged against employers.[73] I-9 audits skyrocketed in 2008, from 503 to more than 8,000 in 2009.[74] These include audits of large, high–profile companies, including Abercrombie and Fitch[75] and the Chipotle restaurant chain.[76] The goal of this shift in focus was to "deter illegal employment and create a culture of compliance," indicating that compliance was more important than ever before for employers.[77]

President Trump has unequivocally indicated that his immigration enforcement priorities are sweeping, targeting individuals present in the United States without authorization, as well as their employers. In February 2017, DHS issued new orders outlining the implementation of President Trump's tougher stance on immigration.[78] Policy directives aimed at

71. *See generally* Immigration Act of 1990, Pub. L. No.101-649, § 358, 104 Stat. 4978 (1990).

72. *See* Angelo A. Paparelli & Ted J. Chiappari, *Immigration Law*, N.Y.L.J. (Oct. 22, 2007), https://www.law.com/newyorklawjournal/almID/900005493981/ ("[A]dministrative law judges in the Office of the Chief Administrative Hearing Officer (OCAHO) who hear civil immigration violations involving illegal employment are about as busy as the Maytag repairman. For example, of the 66 published OCAHO decisions from 2000 to 2007, only two involved unlawful employment of aliens . . . .").

73. *See* News Release, ICE, ICE Assistant Secretary John Morton Announces 1,000 New Workplace Audits to Hold Employers Accountable for Their Hiring Practices (Nov. 19, 2009), http://www.faegrebd.com/webfiles/New%20Workplace%20Audits.pdf.

74. *See* Amy Sherman, *Obama Holds Record for Cracking Down on Employers Who Hire Undocumented Workers, Says Wasserman Shultz*, POLITIFACT FLA. (July 3, 2013, 4:46 PM), http://www.politifact.com/florida/statements/2013/jul/03/debbie-wasserman-schultz/obama-holds-record-cracking-down-employers-who-hir/.

75. News Release, ICE, Abercrombie & Fitch Fined After I-9 Audit (Sept. 28, 2010) [hereinafter Abercrombie & Fitch], www.aila.org/File/DownloadEmbeddedFile/51319.

76. *See generally* Chipotle Mexican Grill, Inc., Annual Report (Form 10-K) (Feb. 8, 2013).

77. *Worksite Enforcement*, ICE (Apr. 1, 2013), https://www.ice.gov/factsheets/worksite.

78. *See* Memorandum from John Kelly, Sec'y, DHS, Implementing the President's Border Security and Immigration Enforcement Improvements Policies (Feb. 20, 2017) [hereinafter Border Security Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Implementing-the-Presidents-Border-Security-Immigration-Enforcement-Improvement-Policies.pdf; *see also* Memorandum from John Kelly, Sec'y,

enhancing "interior enforcement" through proposed budget increases for ICE were implemented to achieve policy goals. These new policy directives, coupled with statutory increases for I-9 compliance and I-9 related discrimination violations, make I-9 paperwork violations riskier than ever before.[79] Consequently, employers are bracing for an expected increase in document audits and potential worksite raids.[80]

	FY2011	**FY2012**	**FY2013**	**FY2014**	**FY2015**
I-9 Audits ("Notices of Inspection")[81]	2,496	3,000	3,127	1,320	435
Worksite Enforcement Cases	3,291	3,904	3,903	2,022	Unavailable
Fines[82]	$10.4 million $7.1 million criminal fines and forfeitures	$12.4 million $14.2 million criminal fines and forfeitures	$15.8 million $2.2 million criminal fines and forfeitures	$16.2 million $35.1 million criminal fines and forfeitures	$4.62 million $35.5 million criminal fines and forfeitures
Individuals Arrested on Administrative Charges[83]	1,471	1,118	868	541	Unavailable
Individuals Arrested on Criminal Charges[84]	713	520	452	362	Unavailable

DHS, Enforcement of the Immigration Laws to Serve the National Interest, (Feb. 20, 2017) [hereinafter National Interest Memo], https://www.dhs.gov/sites/default/files/publications/17_0220_S1_Enforcement-of-the-Immigration-Laws-to-Serve-the-National-Interest.pdf.

79. *See generally* 28 C.F.R. § 85.5 (2018).

80. Alexia Elejalde-Ruiz, *Illinois Businesses Prepare for Possibility of Dramatic Immigration Raids*, CHI. TRIB. (Mar. 9, 2017, 10:12 AM), http://www.chicagotribune.com/business/ct-workplace-raids-primer-0309-biz-20170308-story.html (noting that aggressive enforcement of immigration laws under a new administration worries employers in many industries); *see also* National Interest Memo, *supra* note 78 ("Facilitating the efficient and faithful execution of the immigration laws of the United States—and prioritizing [DHS'] resources—requires the use of all available systems and enforcement tools . . . .").

81. *See* Jessica M. Vaughan, *ICE Records Reveal Steep Drop in Worksite Enforcement Since 2013*, CTR. FOR IMMIGR. STUD. (June 2015), https://cis.org/sites/default/files/vaughan-WSE.pdf (highlighting the precipitous decline in worksite audits from 2013 to 2015).

82. *See* ANDORRA BRUNO, CONG. RESEARCH SERV., R40002, IMMIGRATION-RELATED WORKSITE ENFORCEMENT: PERFORMANCE MEASURES 5, 9 (2015).

83. *Id.* at 5-6.

84. *Id.*

Other Penalties[85]	221 employers charged with violations related to employment; debarred 97 companies from federal contracts. ICE issued 347 criminal indictments and saw 364 convictions.	ICE made 520 criminal arrests tied to worksite enforcement investigations. ICE issued 318 criminal indictments and saw 292 convictions.	ICE made 452 criminal arrests tied to worksite enforcement investigations. 179 were owners, managers, supervisors, or HR employees. ICE issued 296 criminal indictments and saw 319 convictions.	ICE arrested 172 employer agents or representatives for criminal violations related to the knowing employment of aliens not authorized to work in the United States. ICE issued 327 criminal indictments and saw 312 convictions.	ICE arrested 65 employer agents or representatives.

E. Anatomy of an ICE Audit and Fine

Although ICE has authority to enforce a variety of immigration laws, its Homeland Security Investigations ("HSI") department focuses specifically on worksite enforcement, aiming to reduce the demand for unauthorized employment to protect employment opportunities for U.S. workers.[86]

Under IRCA, ICE agents or auditors have the authority to enforce employer compliance with Form I-9 requirements.[87] Although any employer could be subject to an audit, several triggers appear to precipitate a visit from ICE:

- Credible tip
- High-risk industry (i.e., with high turnover, percentage of hourly workers)
- History of violations
- Geographic area with concentration of undocumented immigrants
- Referral from another government agency
- Public worksite observations

The administrative process begins when ICE presents an employer with an NOI that gives the employer seventy-two hours to present requested documentation, which may include a list of current employees for a certain

85. *Id*. at 7-8.

86. *See Worksite Enforcement*, *supra* note 77 (noting that HSI is charged with conducting worksite visits to reduce unauthorized employment in the United States). *See generally Homeland Security Investigations*, ICE, https://www.ice.gov/hsi (last updated Aug. 22, 2017).

87. *See* BRUNO, *supra* note 82, at 2 (explaining that ICE can inspect or audit an employer's I-9 records "to determine whether they are in compliance with employment eligibility verification laws and regulations").

location, all I-9s associated with those employees, payroll records, and related business documentation.[88]

Once the employer provides the requested documentation, ICE will conduct a review and investigation of the documents to determine: (1) whether there is an I-9 on file for every employee; (2) whether the I-9s presented have substantive or technical errors; and (3) whether there are any suspect documents among the I-9s.[89] There are three categories of violations: (1) technical violations that can be corrected, such as entering the wrong date of birth in Section 1; (2) substantive violations that are not considered correctable, such as failure to sign the attestation in Section 1; and (3) violations where evidence shows that the employer either knowingly employed an employee that was not authorized to work or continued to employ a worker after finding out that he or she was not authorized to work.[90] If ICE discovers technical or procedural violations, an employer is typically given ten business days to make corrections.[91]

If substantive violations are discovered, or if an employer fails to make the necessary corrections to the technical violations, ICE may assess a monetary fine.[92] If ICE determines that an employer knowingly hired or continued to employ unauthorized workers, the employer will be required to terminate those workers, may be subject to a fine, and may face criminal prosecution. Employers may also be subject to debarment from participation in future federal contracts.[93]

For substantive violations and any uncorrected technical violations, ICE will issue a Notice of Intent to Fine ("NOIF") assessed by analyzing the number of substantive errors compared to the overall number of I-9s

88. *See Form I-9 Inspection Overview*, *supra* note 11 (explaining that the NOI initiates the inspection process, and that employers have at least "three business days" to identify the requested forms, along with additional evidence).

89. *See generally id.*

90. *See id*. ("When technical or procedural violations are found . . . an employer is given ten business days to make corrections. An employer may receive a monetary fine for all substantive and uncorrected technical violations. Employers determined to have knowingly hired or continued to employ unauthorized workers . . . will be required to cease the unlawful activity, may be fined, and in certain situations may be criminally prosecuted.").

91. Immigration & Nationality Act, 8 U.S.C. § 1324a(b)(6)(B) (2012); *see also Form I-9 Inspection Overview*, *supra* note 11 (noting that employers have ten business days to correct technical or procedural violations related to the Form I-9).

92. *See* 8 U.S.C. § 1324a(b)(6)(B); *see also Form I-9 Inspection Overview*, *supra* note 11 (noting that "[a]n employer may receive a monetary fine for all substantive and uncorrected technical violations").

93. *See Form I-9 Inspection Overview*, *supra* note 11 (explaining that employers who knowingly hire and continue to employ unauthorized employees are barred from "participating in future federal contracts and from receiving other government benefits").

reviewed.[94] Fines will also be assessed for knowingly hiring and continuing to employ workers without valid U.S. work authorization. Note that the I-9 fines in the second table pertain to fines assessed against one error on a single Form I-9.

Knowing Hire / Continuing to Employ Fine Schedule (effective 8/1/2016)[95]

	Standard Fine Amount		
Knowing Hire and Continuing to Employ Violations	First Tier $539 – $4,313	Second Tier $4,313 – $10,781	Third Tier $6,469 – $21,563

Substantive / Uncorrected Technical Violation Fine Schedule (effective 8/1/2016)

	Standard Fine Amount		
Substantive Verification Violations	First Offense $216 – $2,156	Second Offense $216 – $2,156	Third Offense + $216 – $2,156

The total proposed fine provided in the NOIF is determined by adding the amount derived from the Fine Schedules for Knowing Hire / Continuing to Employ (plus enhancement or mitigation) and the amount derived from the Substantive / Uncorrected Technical Violations (plus enhancement or mitigation).[96] The agent or auditor will divide the number of violations by the number of employees for which a Form I-9 should have been prepared to obtain a violation percentage.[97] The percentage itself provides a base fine amount, and the fine is determined based on whether this is the employer's first offense, second offense, or third (or more) offense. [98]

If an employer chooses to contest the fine, it must appeal to the Office of

94. *See id.* (noting that a NOIF "may be issued for substantive, uncorrected technical, knowingly hire and continuing to employ violations").

95. *See* 28 C.F.R. § 85.5 (2018). *See generally Form I-9 Inspection Overview*, *supra* note 11 (providing that no information has been published since FY2014).

96. *See Form I-9 Inspection Overview*, *supra* note 11 (explaining how the agency determines the fine recommended in the NOIF).

97. *See id*.

98. *Id.*

the Chief Administrative Hearing Officer ("OCAHO").[99] An Administrative Law Judge ("ALJ") will review the facts and assess whether the fine assessed by ICE should be maintained or, as is often the case, lowered based on mitigating circumstances.

Five factors are considered when ICE assesses mitigating factors of civil penalties associated with failure to comply with I-9 regulations: (1) the size of the employer's business; (2) the employer's "good faith"; (3) the scope of the seriousness of the violations; (4) whether any unauthorized workers were involved; and (5) previous history of I-9 violations.[100] ICE bears the burden of proof in assessing penalties and liabilities. Note that these factors can both aggravate and mitigate the fines assessed.

F. OCAHO and Civil Penalties

As explained above, employers who receive a NOIF from ICE may seek review of the penalty by OCAHO, an administrative court with jurisdiction to review employer sanction cases brought under the INA.[101] If an employer chooses to request a hearing, "DHS can decide to pursue the matter by filing a complaint with OCAHO."[102] An analysis of OCAHO decisions shows that employers continue to obtain significant decreases of I-9 penalties before this court. OCAHO decisions provide important insights on the costs of non-compliance, as well as how simple it is to commit substantive violations when completing I-9 forms.[103]

OCAHO case law has long affirmed that there is no single preferred method of calculating penalties.[104] The penalty amount must be sufficiently meaningful to enhance the probability of future compliance,[105] without being

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99. *See id.* ("The employer has the opportunity to . . . request a hearing before [OCAHO] within 30 days of receipt of the N[O]IF.").

100. *See id.* (explaining that ICE will utilize several factors, including business size, good faith, seriousness, the number of unauthorized aliens, and history, to enhance or mitigate the recommended fine).

101. *See generally Office of the Chief Administrative Hearing Officer*, DOJ, https://www.justice.gov/eoir/office-of-the-chief-administrative-hearing-officer-decisions#GeneralInformation (last updated Nov. 20, 2017).

102. *Id.*

103. Shelby S. Skeabeck, *I-9 Violations Can Be Costly for Employers*, SOC'Y FOR HUM. RESOURCE MGMT. (Nov. 16, 2016), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/i-9-substantial-fines-awarded.aspx (noting that Form I-9 violations can be very costly for employers and that it is crucial for employers to diligently ensure that new employees complete the Form I-9 correctly and on time).

104. *See* United States v. Senox Corp., 11 OCAHO no. 1219, 4 (2014) (citing to United States v. Filipe, Inc., 1 OCAHO no. 108, 726, 731 (1989)) (stating that "nothing . . . mandates or precludes the use of a mathematic formula to assess penalties . . . .").

105. *See* United States v. Jonel, Inc., 8 OCAHO no. 1008, 1998 WL 804705, 19

unduly burdensome considering the employer's resources. The employer can show financial hardship in its pleading and through documentary evidence in the form of its tax returns.[106] Additionally, the court will consider a company's inability to pay in making the penalty assessment. OCAHO addressed this issue in *United States v. Wave Green, Inc.*,[107] where the court upheld ICE's penalty assessment of $7,106, finding that the employer did not raise financial hardship.[108]

The largest fine to date for failure to comply with I-9 documentation rules is $605,250.[109] In that case, OCAHO ordered Hartmann Studios, an events-planning company, to pay the fine because of more than 800 I-9 violations.[110] ICE notified Hartmann Studios in 2011 that it would conduct an audit of the company's I-9 forms and payroll records. ICE identified over 800 violations and issued Hartmann a NOIF—most of the violations at issue were failure to complete Section 2 of the I-9, which requires the employer to review employee documents proving identity and work authorization.[111] This section was left blank on almost all of Hartmann's I-9s. The penalty also hinged on the employer's failure to ensure that each employee check a box in Section 1 attesting to citizenship, which is also a substantive violation.[112]

Although Hartmann ramped up its I-9 processes and took steps to cure its I-9s after the ICE inspection, such steps did not constitute mitigating circumstances that would warrant lesser fines in the eyes of the ALJ.[113] The ALJ noted that Hartmann did not cure its I-9s until after ICE notified the

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(1998).

106. *See* United States v. Sols. Grp. Int'l, LLC, 12 OCAHO no. 1288, 11-12 (2016) (citing to United States v. Niche, Inc., 11 OCAHO no. 1250, 11 (2015)) (noting that an appropriate factor to consider is whether the imposition of a fine would cause the company financial hardship).

107. 11 OCAHO no. 1267, 15 (2016).

108. *See id.* 11 OCAHO no. 1267 at 16 (demonstrating that when the employer is unable to prove financial hardship, the government's fine may be upheld).

109. *See* Roy Maurer, *Company Hit with Largest I-9 Paperwork Penalties to Date*, SOC'Y FOR HUM. RESOURCES MGMT. (Aug. 3, 2015), https://www.shrm.org/resources andtools/hr-topics/talent-acquisition/pages/largest-i-9-paperwork-penalties.aspx ("Failure to thoroughly complete form I-9 paperwork has led to a fine of $605,250—the largest amount ever ordered . . . .").

110. *See* United States v. Hartmann Studios, Inc. 11 OCAHO no. 1255, 20 (2015) (holding Hartmann Studios, Inc. liable for 808 employment verification violations).

111. *See id*. at 2 ("Count IV alleged that Hartmann failed to properly complete section 2 of the I-9 forms for 797 named individuals.").

112. *See id.* at 5 (highlighting various employees that allegedly failed to check a box in Section 1 of the form I-9 to identify their immigration status).

113. *See id.* at 14 (indicating that Hartmann's conduct warrants no "reduction of a penalty").

company that it would be fined.[114] The ALJ further acknowledged ICE's position that Hartmann's procedures (or lack thereof) evidenced a general disregard for ensuring its workers were authorized to work.[115] Although the ALJ ultimately reduced the fine from ICE's recommendation of $812,665 down to $602,250, the judge still felt the seriousness of the violations merited a substantial penalty, noting that "the company does appear to need additional motivation to conform its employment verification processes to what the law requires."[116] The judge noted that fines of this degree are reserved for the most egregious offenses: falsifying attestation, previous violations, and an overwhelmingly unauthorized workforce, showing blatant disregard for the employment verification process.[117] The Hartmann decision reinforces the need for employers to take I-9 compliance seriously, and shows that extensive training and self-audits can help companies avoid penalties in the long run.[118]

OCAHO decisions show that employer size and business impact are mitigating factors that *may* reduce the ultimate fine. All U.S. employers are subject to I-9 employment verification and compliance requirements, and ICE enforcement trends show that small employers are particularly vulnerable to I-9 investigations.[119] In 2016, thirteen of the sixteen cases litigated before OCAHO involved small employers—those with less than 100 employees. In one such case, the ALJ minimized the fine by $44,987 to diminish the financial impact on the 55-employee cherry harvesting business.[120]

Good faith comes into play even before the civil penalty amount is at issue, as the employer must make a good faith effort to make I-9 technical

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114. *Id.* at 8-9.

115. *Id.* at 12.

116. *Id.* at 15.

117. *See id.* at 13 (stating that "OCAHO cases say penalties at [such a severe level] are reserved for the most egregious violations").

118. Mary G. Shukairy & Matthew O. Wagner, *Employer Slapped with $600,000 Fine for I-9 Violations*, FROST BROWN TODD (July 28, 2015), http://www.frostbrowntodd.com/resources-1827.html ("*Hartmann* serves as a powerful reminder that the government takes I-9s extremely seriously, and companies must do the same.").

119. *See* Allen Smith, *SHRM: I-9 Paperwork Burdens Too Much for Small Businesses*, SOC'Y FOR HUM. RESOURCES MGMT. (Apr. 4, 2017), https://www.shrm.org/resourcesandtools/legal-and-compliance/employment-law/pages/paperwork-burdens.aspx (summarizing a congressional hearing, wherein Frank Cania, President of a human resource firm, stated that employers face particular restraints resulting from small I-9 errors because of significant fines).

120. *See* United States v. SKZ Harvesting, Inc., 11 OCAHO no. 1266, 2, 16-17, 22 (2016) (stating that the parties should enter into a payment schedule to "minimize the impact on SKZ's business").

corrections following an ICE inspection.[121] Good faith is one of the five mitigating factors that may be applied to reduce the civil penalty.[122] Alternatively, an employer's bad faith may be considered an aggravating factor that increases the penalty. For example, failure on the part of the employer to improve its I-9 compliance until more than six years after receiving a warning notice from ICE does not establish good faith.[123]

G. Civil and Criminal Penalties Motivate I-9 Compliance

Civil monetary penalties are assessed for paperwork violations according to the parameters set forth at title 8, section 274a.10(b)(2) of the CFR: the minimum penalty for everyone with respect to whom a violation occurred after September 29, 1999, and before November 2, 2015, is $110, and the maximum is $1,100. As of August 1, 2016, and effective for ICE audits conducted after November 2, 2015, the minimum and maximum penalties increased dramatically: the minimum penalty for each I-9 is $220, and the maximum is $2,191.[124] After issuing an NOI, ICE will conduct its inspection of the employer's Form I-9s with supporting documents. If, during this inspection, ICE identifies substantive violations and uncorrected technical violations, then the agency may levy a fine against the employer for each violation.[125] As an example, ICE HSI's investigation of Asplundh Tree Experts, Co. led to the largest civil settlement in ICE history, resulting in fines of $95 million for knowingly hiring and retaining unauthorized workers.[126]

H. Unique Electronic I-9 Pitfalls

The discussions above relate primarily to basic I-9 compliance, applicable both to paper-based I-9s and electronic I-9s. If compliance with "standard"

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121. Immigration & Nationality Act, 8 U.S.C. § 1324a(b)(6)(B) (2012) ("[A] person or entity is considered to have complied with a requirement . . . notwithstanding a technical or procedural failure to meet such requirement if there was a good faith attempt to comply with the requirement.").

122. *Id.* § 1324a(b)(e)(5).

123. *See* Ketchikan Drywall Servs. Inc. v. ICE, 725 F.3d 1103, 1116 (9th Cir. 2013) (upholding ALJ's finding not to mitigate a penalty based on good faith when the employer waited more than six years to improve its I-9 compliance).

124. 8 C.F.R. § 274a.10(b)(2) (2018).

125. *See* 8 U.S.C. § 1324a(e)(5)(B) (explaining that violators are required to pay specified civil penalties for "each individual with respect to whom such violation occurred"); *see also Handbook for Employers*, *supra* note 10.

126. *See* News Release, ICE, Asplundh Tree Experts, Co. Pays Largest Civil Settlement Agreement Ever Levied by ICE (Sept. 28, 2017), https://www.ice.gov/news/releases/asplundh-tree-experts-co-pays-largest-civil-settlement-agreement-ever-levied-ice.

I-9 requirements seems fraught, consider the additional regulatory requirements involved with electronic I-9 systems. As outlined above, the regulatory requirements for electronic I-9 systems pose a substantial burden on employers to ensure that their electronic I-9 system complies.

The regulations governing electronic I-9s at title 8, section 274a.2 of the CFR provide guidance on system requirements, electronic signatures, security, audit trails, and general format. Despite the fact that good electronic I-9 systems are "smart" enough to prevent human errors in completing Sections 1 and 2, pitfalls specific to these electronic systems may give some employers pause.[127] Pros and cons of moving from a paper-based to an electronic system must be weighed against the type and size of an employer's business, an employer's current I-9 practices, its ability to learn and implement a compliant system, access to immigration counsel to review the system before implementation, and the reputation of the electronic I-9 provider.

Perhaps the most relevant cautionary tale in electronic I-9 systems is that of Abercrombie & Fitch. In November 2008, ICE issued an NOI to Abercrombie's Michigan retail stores—Abercrombie was using an electronic I-9 system that it developed in-house for all stores nationwide.[128] The audit uncovered problems with the electronic system, and although there was no evidence that Abercrombie employed any workers without proper authorization, the company nevertheless paid a $1,047,110 fine to settle the case.[129] Essentially, the electronic system defect meant that none of Abercrombie's I-9s were compliant.

Given the various laws governing employer compliance with immigration and anti-discrimination in hiring, an electronic I-9 system poses specific risks, outlined below.

i. Risk: Discrimination

The Immigrant and Employee Rights ("IER") section of the U.S.

127. *See* Matthew E. Orso & Susan C. Rodriguez, *The Compliance Risks of I-9 Software*, SOC'Y FOR HUM. RESOURCE MGMT. (Aug. 25, 2016), https://www.shrm.org/hr-today/news/hr-magazine/0916/pages/the-compliance-risks-of-i-9-software.aspx (explaining that I-9 electronic systems may still encounter integrity and compliance issues). *See generally* Abercrombie & Fitch, *supra* note 75 (noting that Abercrombie & Fitch paid a large fine because its I-9 electronic system had a defect).

128. Abercrombie & Fitch, *supra* note 75 (noting that Abercrombie & Fitch's electronic employment verification system, specifically its systems in the Michigan retail stores, were audited in November 2008).

129. *See id*. (stating that although ICE discovered "numerous technology-related deficiencies" in Abercrombie & Fitch's electronic employment verification system, the company did not "knowingly" employ unauthorized individuals, but nonetheless settled the case for over $1 million).

Department of Justice is tasked with enforcing the anti-discrimination provision of the INA.[130] IRCA created the Office of Special Counsel for Immigration Related Unfair Employment Practices, which became the IER in 2017, to oversee the provisions that made it unlawful for an employer to discriminate against a job applicant based on his or her national origin or citizenship status.[131] Specifically, IRCA prohibits: "1) citizenship status discrimination in hiring, firing, or recruitment or referral for a fee, 2) national origin discrimination in hiring, firing, or recruitment or referral for a fee, 3) unfair documentary practices during the employment eligibility verification, Form I-9 and E-Verify, and 4) retaliation or intimidation."[132]

Electronic I-9 systems that limit the types of documents an employee may present relating to Section 2 of the I-9 based on the immigration status the employee entered in Section 1 could implicate employee rights protected by the IER and IRCA.

In *Rose Acre Farms*, IER filed suit against the egg producer "alleging that Rose Acre engaged in a pattern or practice of discrimination against work-authorized non-citizens in the employment eligibility verification process."[133] The complaint indicated that the company purchased an electronic I-9 system that "may" have led human resources staff to request specific documents from non-U.S. workers.[134]

ii. Risk: System Error

In 2010, ICE announced that it had reached a $1.047 million settlement agreement with Abercrombie & Fitch following a 2008 I-9 audit that resulted in numerous "technology-related deficiencies" in the retailer's electronic I-9 system.[135] Notably, the company was not found to have employed any workers who did not have U.S. work authorization, nor was the company found to have been aware of the problems with its I-9 compliance, but the

130. *See generally* 8 U.S.C. § 1324b (providing anti-discrimination rules for employers hiring immigrants).

131. *Id.* § 1324b(c)(2) ("The Special Counsel shall be responsible for investigation of charges and issuance of complaints . . . and in respect of the prosecution of all such complaints before administrative law judges . . . .").

132. *Immigrant and Employee Rights Section*, DOJ, https://www.justice.gov/crt/immigrant-and-employee-rights-section (last visited Nov. 29, 2017).

133. Press Release, DOJ Office of Pub. Affairs, Justice Department Files Lawsuit Against Rose Acre Farms in Indiana Alleging Discrimination Against Work-Authorized Non-Citizens (June 19, 2012), https://www.justice.gov/opa/pr/justice-department-files-lawsuit-against-rose-acre-farms-indiana-alleging-discrimination.

134. *Id.*

135. *See id.* (noting that Rose Acre's electronic system "may have prompted [HR] officials to demand certain documents from non-U.S. citizens").

system glitch was such that none of Abercrombie's electronic I-9s were compliant.[136] Widespread system glitches that may not be apparent to HR users until the event of an audit would impact the totality of an employer's I-9s.

iii. Risk: Gray Areas

Although the electronic I-9 regulations exist to provide clarity to employers in selecting a compliant electronic system, there are still gray areas that employers must accept as possible risks if embracing an electronic I-9 system.[137]

a. Pre-population

One of the benefits of an electronic I-9 system, as mentioned above, is the possibility for integration with existing human resources systems and onboarding processes.[138] The ability to have information entered by an employee during the onboarding process to seamlessly transfer to the electronic I-9 is a tempting feature for many employers.[139] It saves time, it ensures that the information in the HRIS system and Form I-9 are consistent, and it reduces data entry errors that can occur when employees are required to re-type the same data in multiple places (i.e., name, address, telephone number, Social Security number, email address, etc.).

Although not part of any official guidance or regulation, ICE has referenced the issue of pre-population of employee data on Section 1 of electronic Forms I-9 to legal immigration stakeholders:

> Prepopulation of the Form I-9 has never been approved and is not acceptable. Having a translator/preparer sign a prepopulated Form I-9 is not appropriate since, under the relevant regulation, this section is meant to be used when someone other than the employee is filling out the form in the presence of the employee. The translator/preparer reads the form to

136. *See* Abercrombie & Fitch, *supra* note 75 (noting that although Abercrombie & Fitch's electronic employment verification system was flawed, "[t]he company was fully cooperative during the investigation and no instances of the knowing hire of unauthorized aliens were discovered").

137. *See generally* Orso & Rodriguez, *supra* note 127 (emphasizing the importance of employers selecting I-9 systems that lack integrity issues and are compliant with the I-9 process).

138. *See* Aleksandra Michailov, *Paper or Electronic?*, HRO TODAY (Jan. 3, 2013), http://www.hrotoday.com/news/talent-acquisition/paper-or-electronic/ (highlighting the general benefits of electronic I-9 systems); *see also 4 Benefits*, *supra* note 4 (arguing that E-Verify's electronic input will help middle and large organizations eliminate human error during the data input process).

139. *See* Michailov, *supra* note 138 (noting that there are benefits to an electronic I-9).

> the individual, and the individual provides responses. Prepopulating Form I-9 is considered a violation. HSI was not certain how it would charge prepopulation – as a substantive or technical violation - failure to prepare would be a possibility. Prepopulating Form I-9 and completing the preparer/translator section is 'absolutely not' acceptable to HSI.[140]

IER has also issued guidance discouraging the use of pre-population of Section 1.[141] Despite these warnings, electronic I-9 vendors continue to offer pre-population of Forms I-9 as part of their system capabilities, although the related service contracts sometimes explicitly disclaim any liability on the part of the vendor if an employer chooses to implement the pre-population capability.[142] To date, no fines or other enforcement actions have referenced pre-population of employee information in Section 1 as a substantive violation.[143]

b. Electronic signatures

For many electronic systems, the ability to sign the document electronically is the whole point. Employers could otherwise complete the Form I-9 "on-screen" and take advantage of the most recently-released free version that has "smart" attributes mimicked by many electronic I-9 systems (i.e., field validations for alpha or numeric characters, character limits, warnings for incorrectly completed fields, etc.). However, the regulations governing electronic signatures for electronic I-9s are far from clear. The system must "include a method to acknowledge that the attestation to be

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140. *AILA Verification and Documentation Liaison Committee Meeting with ICE Homeland Security Investigations (HSI)*, AILA DOC. NO. 13062401 4 (Apr. 11, 2013), http://www.aila.org/File/DownloadEmbeddedFile/50415.

141. *See* Technical Assistance Letter from Seema Nanda, Deputy Special Counsel, DOJ Civil Rights Div., to Lesley A. Carr (Aug. 20, 2013), https://www.justice.gov/sites/default/files/crt/legacy/2013/08/23/169.pdf ("From the perspective of the anti-discrimination provision, OSC discourages the practice of an employer pre-populating Section 1 with previously obtained employee information.").

142. *See* Giselle Carson, *Employers: Answers to Your Top 10 FAQ About the New "Smart" Form I-9*, MARKS GRAY (Nov. 4, 2016), http://www.marksgray.com/wp-content/immigration/FAQ/FAQs%20about%20the%20New%20Smart%20I-9%20Form.pdf (explaining that employers must use due diligence when selecting I-9 vendors); *see also* Roy Maurer, *Clearing Up Confusion over Prepopulating Your Form I-9s*, SOC'Y FOR HUM. RESOURCE MGMT. (Aug. 28, 2013), https://www.shrm.org/resourcesandtools/hr-topics/global-hr/pages/confusion-prepopulating-form-i9s.aspx (suggesting that employers should do their due diligence when selecting an electronic I-9 vendor).

143. *See* Bruce Buchanan, *I-9 E-Verify Immigration Compliance: USCIS Offers New Guidance on Pre-Population of I-9 Forms*, ILW.COM (Nov. 8, 2016, 3:57 PM), http://blogs.ilw.com/entry.php?9540-USCIS-Offers-New-Guidance-on-Pre-Population-of-I-9-Forms (explaining that employers are subject to a civil penalty if ICE finds that the Section 1 violation is substantive).

signed has been read by the signatory" and that a record is created to "preserve a record verifying the identity of the person producing the signature."[144] This, in addition to the requirement that no additional data elements or language are inserted,[145] makes the practical implementation of the signature uncertain. As far as the authors are aware, no fines have been assessed against employers specifically due to noncompliant electronic signatures, but it appears to be an area ripe for enforcement should ICE so choose.

c. Audit trails

Electronic I-9 regulations require that employers produce audit trails for each electronic I-9 under audit. Although ICE has issued explicit guidelines with respect to what audit trails must include, no fines or other enforcement actions have explicitly referenced inadequate audit trails.[146]

d. Online security, data integrity, outages, and service provider issues

The electronic I-9 regulations clearly outline the requirements for system security, data integrity, and quality assurance procedures specific to electronic I-9 systems.[147] To date, ICE has not issued a publicly-noted fine for an employer's failure to maintain system security or data integrity, but again, it is an area that is only likely to grow in importance as more and more employers adopt electronic I-9 systems. Relatedly, if an employer chooses to engage a commercial electronic I-9 service provider (as opposed to building an electronic I-9 system in-house), it is unclear how a system failure on the provider's side (i.e., a hack, server breakdown, or other issue entirely outside the employer's control) could be assessed and enforced by ICE.

e. Home or remote employees

Although not limited to electronic I-9 systems, home-based or remote

144. Verification of Identity and Employment Authorization, 8 C.F.R. § 274a.2(h) (2018).

145. *See id.* § 274a.2(a)(2) ("Alternatively, Form I-9 can be electronically generated or retained, provided that the resulting form is legible; there is no change to the name, content, or sequence of the data elements and instructions; no additional data elements or language are inserted; and the standards specified under 8 CFR 274a.2(e), (f), (g), (h), and (i), as applicable, are met.").

146. *See generally* Memorandum from James Dinkins, Exec. Assoc. Dir., HSI, Guidance on the Collection and Audit Trail Requirements for Electronically Generated Forms I-9 (Aug. 22, 2012), https://www.ice.gov/doclib/foia/dro_policy_memos/collect-audit-forms-i9.pdf.

147. *See* 8 C.F.R. § 274a.2(e)(1)(i)-(v).

employees have always posed challenges for I-9 completion, specifically as it relates to the identification of an individual who can serve as a "designated representative" of the company to review the original identification and work authorization documents and complete Section 2.[148] In instances where an employee is not geographically proximate to a company office, he or she would not have access to corporate sites or even a computer upon which to enter the information for Section 2. Furthermore, the temptation for employers with remote employees is to "skip" the requirement that a company representative review the employee's original documents for purposes of completing Section 2. Employers have asked whether documents can be reviewed by webcam frequently enough that USCIS added it as one of their Frequently Asked Questions.[149] Whether an employer uses a paper-based system or an electronic one, an in-person review of original documents must be conducted for all remote employees. Electronic I-9 systems do not alleviate this burden.[150]

f. Reverification

Section 3 must be completed when re-hiring a former employee or when re-verifying expiring work authorization documents.[151] Although employers may opt to complete a fresh Section 2 or an entirely new I-9, depending on the circumstances, Section 3 is available for that purpose. However, some electronic systems do not have the capability to re-open an I-9 for Section 3 completion. The internal "pathing" required for the system to make Section 3 available for completion is complicated, so companies with such systems must complete a new I-9 for re-verification. Ensuring the old I-9 and the new I-9 are "linked" for future document production is important. Otherwise, the system will only show the old I-9 with expired work

148. *See I Hire My Employees Remotely. How do I complete Form I-9?*, USCIS, https://www.uscis.gov/i-9-central/i-9-central-questions-answers/faq/i-hire-my-employees-remotely-how-do-i-complete-form-i-9 (last updated Mar. 27, 2014) (explaining that "[y]ou may designate an authorized representative to fill out Forms I-9 on behalf of your company, including personnel officers, foremen, agents or notary public").

149. *See I-9 Central Questions and Answers*, USCIS, https://www.uscis.gov/i-9-central/questions-and-answers (last updated Nov. 7, 2017) (answering the following question: "May I review my employees documents via webcam to complete Form I-9?").

150. *Id.*

151. *See Completing Section 3, Reverification and Rehires*, *supra* note 49; *see also Questions and Answers: National Stakeholder Teleconference on the Revised Form I-9*, USCIS 3 (May 7, 2013), https://www.uscis.gov/sites/default/files/USCIS/Outreach/Notes%20from%20Previous%20Engagements/2013/May%202013/FormI9-QAs-050713.pdf (noting that if employers complete new Form I-9s for reverification, "only Section 3 of the new Form I-9 . . . should be completed").

authorization documents, or the new "Section 2-only" version.

Employers are ultimately responsible for the compliance of their Form I-9s, regardless of whether those forms are completed in paper or created via an electronic I-9 system. The employer, not the third-party service provider, is responsible for ensuring that the electronic I-9 system is compliant with the applicable regulations.[152] Furthermore, no electronic system can overcome poor training of HR administrators and managers responsible for managing and completing I-9s. No system is smart enough to resolve sloppy document review practices, discriminatory behavior (such as requesting certain documents from certain employees), or timeliness of I-9 creation.

III. CONCLUSION

Since President Trump took office, he has made it clear through executive orders and speeches that his highest priorities include enforcing immigration laws and discouraging unauthorized immigration.[153] Enforcement actions against employers who violated I-9 rules were at an all-time high under President Obama, so it stands to reason that the trend will continue. With Acting ICE Director Thomas Homan specifically citing plans to quadruple enforcement against employers, it is evident that the Trump administration and its agencies intend to use the letter of the law to address the issue of unauthorized employment.[154]

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152. Dave Zielinski, *Does Your Automated I-9 System Comply with ICE Regulations?*, SOC'Y FOR HUM. RESOURCE MGMT. (May 1, 2011), https://www.shrm.org/hr-today/news/hr-magazine/Pages/0511zielinski2.aspx ("In effect, the ICE ruling tells employers to 'select an electronic I-9 system at your own risk' . . . . [I]t's up to HR leaders and their legal advisors to ensure that electronic systems comply with rigorous ICE regulations.").

153. *See* Buy American and Hire American, Exec. Order No. 13788, 82 Fed. Reg. 76,18837 (Apr. 21, 2017) (citing Inadmissible Aliens, 8 U.S.C. § 1182(a)(5) (2012)) ("In order to create higher wages and employment rates for workers in the United States, and to protect their economic interests, it shall be the policy of the executive branch to rigorously enforce and administer the laws governing entry into the United States of workers from abroad, including section 212(a)(5) of the Immigration and Nationality Act."); Protecting the Nation from Foreign Terrorist Entry Into the United States, Exec. Order No. 13780, 82 Fed. Reg. 45,13209 (Mar. 9, 2017) ("Recent history shows that some of those who have entered the United States through our immigration system have proved to be threats to our national security."); Enhancing Public Safety in the Interior of the United States, Exec. Order No. 13768, 82 Fed. Reg. 18,8799 (Jan. 30, 2017) ("[The] Secretary shall issue guidance and promulgate regulations, where required by law, to ensure the assessment and collection of all fines and penalties that the Secretary is authorized under the law to assess and collect from aliens unlawfully present in the United States and from those who facilitate their presence in the United States. . . . [The] Secretary . . . shall . . . hire 10,000 additional immigration officers . . . .").

154. *See* Tal Kopan, *ICE Chief Pledges Quadrupling or More of Workplace Crackdowns*, CNN (Oct. 17, 2017, 9:32 PM), http://www.cnn.com/2017/10/17/politics/ice-crackdown-workplaces/index.html; *see also* John Fay, *How Does Trump's*

I-9 violations can be costly to employers, and complying with ever-changing I-9 rules is a constant challenge. Electronic I-9 systems are attractive to employers who hope to streamline the paperwork involved in onboarding a new employee, and as HRIS platforms evolve in sophistication and ubiquity, electronic I-9 "add-on" modules will become the norm. Nonetheless, it is incumbent upon employers to scrutinize any electronic I-9 system and seek guidance from an experienced immigration attorney to ensure that the system meets electronic I-9 standards. Failure to double-down on this due diligence at the outset of the implementation of an I-9 system can have costly implications—both civil and criminal—and any employer who thinks that a fancy electronic I-9 system is the silver bullet to sloppy I-9 practices and policies is in for a rude awakening.

Presidential Victory Impact I-9 and E-Verify Compliance?, L. LOGIX (Nov. 10, 2016), https://www.lawlogix.com/how-does-trumps-presidential-victory-impact-i-9-and-e-verify-compliance/ ("Since 2009, ICE has audited more than 10,000 employers and imposed more than $100 million in financial sanctions related to I-9 and worksite violations . . . . Mr. Trump may adopt a similar stance and increase (or at the very least maintain) ICE's mission of creating a 'culture of compliance . . . .'").

BREMAINING IN VOGUE: THE IMPACT OF BREXIT ON THE FASHION INDUSTRY

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I. INTRODUCTION

In the United Kingdom, fashion has evolved into a central pillar of British culture. Over time the British fashion industry has emerged as a global force, hosting the thirty-second anniversary of London Fashion Week,[1] and directly contributing £28.1 billion to the United Kingdom's gross domestic product ("GDP") in 2015 alone.[2] Notwithstanding stiff competition from countries such as France, Spain, Italy, and the United States, the United Kingdom has nevertheless established itself as a fashion powerhouse.[3] Notably, British fashion designers and retailers recently started working exclusively with British manufacturers.[4] In fact, brands such as Topman, headquartered in London, have experienced "positive consumer response" to products that unambiguously display a "Made in England" designation.[5] As such, the British Fashion industry has increased efforts to maintain its national identity

1. *See History of the BFC*, BRITISH FASHION COUNCIL, http://www.britishfashioncouncil.com/About/History (last visited Sept. 30, 2017) (explaining the origins of the British Fashion Council and the advent of London Fashion Week).

2. *See The Economic Value of the United Kingdom's Fashion Industry in 2015*, BRITISH FASHION COUNCIL 6 (May 2016) [hereinafter *Economic Value of the U.K.'s Fashion Industry*], http://www.britishfashioncouncil.com/uploads/files/1/J2089%20Economic%20Value%20Report_V04.pdf (introducing the British Fashion Council report on the significance of the fashion industry as compared to other industries in the United Kingdom).

3. *See* Rachel Dicker, *10 Most Fashionable Countries*, U.S. NEWS (Sept. 22, 2016, 2:56 PM), https://www.usnews.com/news/best-countries/articles/2016-09-22/10-most-fashionable-countries (ranking Italy, France, Spain, the United States, and the United Kingdom as the top five most fashionable countries in the world based on global survey data).

4. *See* Karen Kay, *Luxury Brands Feed Demand for Return of UK's Cotton and Knitwear Mills*, GUARDIAN (Oct. 29, 2016, 7:05 PM), https://www.theguardian.com/fashion/2016/oct/30/fashion-luxury-brands-return-of-uk-cotton-mills (highlighting designers that are focusing on domestic manufacturers rather than foreign ones); *see also The BFC's 'Future of Fashion'*, FASHION UNITED (Feb. 20, 2012), https://fashionunited.uk/v1/fashion/the-bfcs-future-of-fashion/2012022011516 (referencing a report by the British Fashion Council that illustrated the benefits of manufacturing solely in the United Kingdom and how consumers prefer a unique identity from fashion retailers).

5. *The BFC's 'Future of Fashion'*, *supra* note 4 ("Over half the designers showing at London Fashion Week make some of their collections in the UK, and some retailers including John Lewis and Topman have championed British-made after positive consumer response.").

embedded in its designs.[6]

In 2016, however, the British populace voted in favor of the United Kingdom's withdrawal from the European Union ("EU").[7] Prominent members of the fashion industry vehemently opposed[8] the United Kingdom's withdrawal from the EU, also known as "Brexit,"[9] citing trade, manufacturing, pricing, and employment concerns.[10] Additionally, the industry is concerned about the fate of intellectual property protection or lack thereof, after Brexit, particularly because a significant amount of the United Kingdom's intellectual property law is enforced through EU directives.[11] Moreover, members of the fashion industry generally choose to apply through systems that provide international intellectual property protection rather than strictly national protection.[12] A fashion designer's right to intellectual property in a given work is imperative to the fashion business, and the United Kingdom's post-Brexit intellectual property protection laws will certainly impact the fashion industry as a whole. The United Kingdom's approach to Brexit and its international trade relationship with the EU will likely materially alter the fashion industry in terms of the success and global

6. *See id*. (noting that the connection between designers and retailers is strengthening the industry).

7. *See* Alex Hunt & Brian Wheeler, *Brexit: All You Need to Know About the UK Leaving the EU*, BBC NEWS, http://www.bbc.com/news/uk-politics-32810887 (last updated Sept. 26, 2017) (providing background on Britain's withdrawal from the EU).

8. *See The British Fashion Council Announces Survey Results on Brexit*, BRITISH FASHION COUNCIL (June 14, 2016), http://www.britishfashioncouncil.com/pressreleases/The-British-Fashion-Council-Announces-Survey-Results-on-Brexit (reporting the results of a survey of United Kingdom designer businesses on their preference to remain or leave the EU).

9. *See* Tom Moseley, *The Rise of the Word Brexit*, BBC (Dec. 25, 2016), http://www.bbc.com/news/uk-politics-37896977 (explaining how the term "Brexit" gained popularity and is now included in the Oxford English Dictionary).

10. *See* Vanessa Friedman, *British Fashion Takes a Stand Against Brexit*, N.Y. TIMES (June 15, 2016), http://www.nytimes.com/2016/06/16/fashion/brexit-british-fashion-industry-european-union.html (highlighting the prominent fashion figures that opposed Brexit, such as designer Vivienne Westwood).

11. *See Enforcement of Intellectual Property Rights*, EUROPEAN COMMISSION, http://ec.europa.eu/growth/industry/intellectual-property/enforcement_en (last updated Sept. 30, 2017) (providing a general guide on how directives are applied to member states of the EU in terms of intellectual property); *see also* Sahira Khwaja et al., *Brexit – Implications for the Fashion and Luxury Brands Industry*, HOGAN LOVELLS (July 25, 2016), http://ehoganlovells.com/cv/de421f1c78a188e4bd157758ac1bb4b40709f2a9 (explaining how the EU directives will no longer govern the intellectual property laws in the United Kingdom after Brexit).

12. *See* Holger Gauss et al., *Red Soles Aren't Made for Walking: A Comparative Study of European Fashion Laws*, 5 LANDSLIDE 19, 24 (2013) (explaining how the EU system of registration "has proved to be far more popular" in fashion design than the United Kingdom's registration system).

availability of its products.[13] The United Kingdom will undoubtedly need to adopt new regulations on imports and exports in the textile and clothing sectors to reflect its separation from the EU market.[14]

This Comment focuses on the impact of Brexit on the British fashion industry's tangible and intangible assets, particularly within the realms of intellectual property and trade. First, this Comment describes the rise of the British fashion industry and British fashion in the context of intellectual property and trade under the EU system. Once Brexit achieves fruition, the United Kingdom will be uniquely positioned to implement new legal models in an independent country. This Comment analyzes Switzerland's intellectual property and trade systems against post-Brexit fashion companies Zara and Asos. Finally, this Comment argues that the United Kingdom should adopt aspects of Switzerland's models for intellectual property and trade to bolster the protections afforded to fashion designers and ease the trade relationship with the EU.

II. THE FASHION INDUSTRY'S PLACE IN THE UNITED KINGDOM

In 1983, the British Fashion Council and London Fashion week were created, establishing the United Kingdom as a leading player in international fashion.[15] Brexit could either strengthen or weaken the British fashion industry, depending on the way in which the British government addresses trade, intellectual property, employment, and other industry-related issues.[16] To exemplify Brexit's potential impact on the fashion industry one may look

13. *See* Ben Chu, *Brexit: True Cost of UK Leaving Without Trade Deal Revealed*, INDEP. (Sept. 23, 2016, 3:31 PM), http://www.independent.co.uk/news/business/news/brexit-latest-cost-uk-leaving-eu-without-trade-deal-exports-negotiations-david-davis-a7325326.html (noting that Brexit could result in tariffs on trade with the EU, which would make British exports, including clothing, "less attractive" to other countries); *see also* Oscar Williams-Grut, *UK Retailers Are Worried Brexit Could Lead to Empty Shelves*, BUS. INSIDER (Aug. 30, 2017, 2:01 AM), http://www.businessinsider.com/brc-brexit-border-report-exit-of-customs-union-risks-empty-shelves-2017-8 (noting that the availability of clothing in the United Kingdom could be disrupted by Brexit due to increases in customs declarations and subsequent import delays).

14. *See Alternatives to Membership: Possible Models for the United Kingdom Outside the EU*, HM GOV'T 8 (Mar. 2016) [hereinafter *Alternatives to Membership*], https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/504604/Alternatives_to_membership_-_possible_models_for_the_UK_outside_the_EU.pdf ("The UK now has a special status in the EU . . . . We have full voting rights, a full voice at the table and a full say over the rules of the Single Market.").

15. *Economic Value of the U.K.'s Fashion Industry*, *supra* note 2.

16. *See* Friedman, *supra* note 10 (citing the general concerns and uncertainty of members of the fashion industry following Brexit).

to Asos and Zara, two important companies with ties to the British market.[17] Asos is a British online retailer that manufactures products in the United Kingdom.[18] As a relatively young and exclusively internet-based company, Asos's business model relies on the ability to swiftly operate digitally between countries.[19] Zara, a Spanish-based global retailer, similarly relies on strong IP protections within the United Kingdom to uphold its pre-Brexit business model.[20] The fashion conglomerate operates about sixty-eight stores in the United Kingdom and has increased sales growth in recent years, with 2016 sales in the United Kingdom totaling 535.2 million pounds.[21] Accordingly, Zara's business model requires the ability to import foreign-manufactured goods into the United Kingdom with ease.[22]

A. Intellectual Property in British Fashion as Part of the EU: Trademarks

Pre-Brexit, the United Kingdom heavily relied upon its membership in the EU for its trademark and design protection.[23] In the fashion industry, designers and retailers primarily benefit from trademark and design protection procured by a system of intellectual property laws.[24] According

17. *See* Sam Chambers, *Retailer Asos Boosts U.K. Sourcing After Pound's Brexit Fall*, BLOOMBERG (Dec. 12, 2016, 5:03 AM), https://www.bloomberg.com/news/articles/2016-12-12/retailer-asos-boosts-u-k-sourcing-after-pound-s-brexit-fall (referencing Asos and Zara considering the impact of Brexit on fashion companies).

18. *See id.* (suggesting that Asos's manufacturing activity in the United Kingdom will increase because the pound's value decreased due to Brexit).

19. *See id.* (noting that about "57 percent of [Asos's] sales are outside the U.K.," and that Asos is distinct from its "domestically focused fashion rivals" because of its international scope of sales).

20. *See* Suzy Hansen, *How Zara Grew into the World's Largest Fashion Retailer*, N.Y. TIMES (Nov. 9, 2012), http://www.nytimes.com/2012/11/11/magazine/how-zara-grew-into-the-worlds-largest-fashion-retailer.html (noting that Zara is a global manufacturer of clothes and reaches countries including Portugal, Morocco, Turkey, China, and Bangladesh).

21. Tara Hounslea, *Zara Continues Assault on UK Market*, DRAPERS (June 21, 2016), https://www.drapersonline.com/news/zara-continues-assault-on-uk-market/7008521.article ("Zara has continued to grow its UK market share with sales of its UK subsidiary rising by 8% to £535.2m for the year to January 31 year on year, while gross margin grew by 140 basis points to 56.6%.").

22. *See* Chambers, *supra* note 17 (noting that Zara's reliance on quick turnaround in importing and exporting clothing, and stating that Zara's parent company, Inditex, "gets designs into stores in as little as two weeks by producing 60 percent of its merchandise in Spain, Portugal or Morocco").

23. *See* Alistair Maughan et al., *Brexit: The UK Clarifies Its Position on Intellectual Property*, MORRISON & FOERSTER 1-3 (Aug. 16, 2016), https://media2.mofo.com/documents/160816-brexit-intellectual-property.pdf.

24. *See generally* Gauss et al., *supra* note 12 (detailing the uses of trademark and

to the World Intellectual Property Organization ("WIPO"), trademark law protects "sign[s] [or logos] capable of distinguishing the goods and services of one enterprise from those of other enterprises."[25] Trademark protection is crucial for successful fashion companies because it is the primary means by which a company protects its brand equity.[26] For instance, Burberry, a United Kingdom-based fashion brand, could register a trademark for its distinctive "check pattern."[27] Without such protection, other fashion companies would be able to use the same check pattern to entice consumers to purchase from them, possibly even at a lower price.

Fashion companies that apply for trademarks in the United Kingdom may obtain multiple levels of protection, covering different geographical areas.[28] Because designs are typically consumed across the globe, it is common[29] for European fashion brands to seek either EU-wide or international trademark protection.[30] To protect themselves in EU member countries,[31] United Kingdom registrants may file a European Union Trade Mark ("EUTM") through the EU Intellectual Property Office.[32] Registrants must file applications online and pay a €850 fee.[33] The EU Intellectual Property

design protection in the fashion industry).

25. *Trademarks*, WIPO, http://www.wipo.int/trademarks/en/ (last visited Sept. 30, 2017) (defining the term "trademark").

26. *See IP and Business: Intellectual Property in the Fashion Industry*, WIPO (May 2005) [hereinafter *IP and Business*], http://www.wipo.int/wipo_magazine/en/2005/03/article_0009.html (emphasizing the importance of trademark in the fashion industry to dissuade counterfeiting and establish a brand that is known on an international scale).

27. *See* Phil Wahba, *Burberry Accuses J.C. Penney of Ripping Off its Check Pattern*, FORTUNE (Feb. 9, 2016), http://fortune.com/2016/02/09/burberry-penney/ (explaining the history of the well-known Burberry check pattern and the many instances of infringement based on similar patterns); *IP and Business*, *supra* note 26 (addressing counterfeiting concerns linked to the need for intellectual property protection).

28. *See generally* Gauss et al., *supra* note 12 (explaining the differences in protection on a United Kingdom-wide level and a EU-wide level).

29. *See id.* (highlighting trademark and design protection as common forms of intellectual property protection, especially in the Italian fashion industry).

30. *See id.* (contrasting the United Kingdom and EU regimes by explaining that only the latter provides designers with a 12-month "grace period" to show that its design has traction and before enforcing the registration fee and only the EU regime protects designers across all EU member states).

31. *See Countries*, EUROPA, https://europa.eu/european-union/about-eu/countries_en (last updated Aug. 9, 2017) (listing member countries of the EU as Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malta, Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Sweden, and the United Kingdom).

32. *Trade Marks in the EU*, EUIPO, https://euipo.europa.eu/ohimportal/en/trade-marks-in-the-european-union (last updated Feb. 2, 2016).

33. *See id.* (adding that those who successfully register can renew their trademark

Office examines EUTM applications and automatically grants protection in all twenty-eight member countries once the company's registration is approved.[34]

Once a United Kingdom trademark registrant has filed an application in the United Kingdom or EU, the registrant may then apply for international protection through WIPO.[35] WIPO's international trademark protection is facilitated through the Madrid System—a system born out of two treaties: the Madrid Agreement ("Agreement") of 1891 and the Madrid Protocol relating to the Agreement as implemented in 1989.[36] As of 2017, one hundred member entities participate in the Madrid System, and trademarks registered therein may be protected in each participating territory.[37] To register through the Madrid Protocol, registrants designate specific member countries it would like to obtain protection in, and each country separately examines an applicant's proposed trademark in accordance with their national trademark laws.[38] Registrants may designate multiple countries for trademark protection at any given time, and one country's refusal does not affect the registrants' success in other countries.[39] The United Kingdom and the EU are separately designated contracting parties to the Madrid Protocol, meaning that registrants from the United Kingdom do not have to apply using

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indefinitely every ten years).

34. *See generally Overseas Trade Mark Protection,* DEHNS, http://www.dehns.com/cms/document/Overseas_Trade_Mark_Protection_EUTM.pdf (last updated Feb. 2017) (providing general information on the EUTM and the Madrid Protocol systems as two options for trademark applicants from the United Kingdom pursuing overseas protection).

35. *How to File Your International Application: Form and Content*, WIPO, http://www.wipo.int/madrid/en/how_to/file/file.html (last visited Oct. 27, 2017) [hereinafter *How to File Your International Application*] ("Once you have applied for or registered a domestic mark with your Office of origin (in other words, once you have obtained a 'basic mark'), you can file an international application under the Madrid System.").

36. *Summary of the Madrid Agreement Concerning the International Registration of Marks (1891) and the Protocol Relating to that Agreement (1989)*, WIPO, http://www.wipo.int/treaties/en/registration/madrid/summary_madrid_marks.html (last visited Nov. 12, 2017) (noting that the Protocol aims "to make the Madrid system more flexible and more compatible with the domestic legislation of certain countries or intergovernmental organizations that had not been able to accede to the Agreement").

37. *See Madrid – The International Trademark System*, WIPO, http://www.wipo.int/madrid/en/ (last visited Sept. 30, 2017) (including most European countries, the EU itself, the United States, China, Japan, South Korea, India and Australia); *see also Members of the Madrid Union*, WIPO, http://www.wipo.int/madrid/en/members/ (last visited Oct. 27, 2017) (stating that "[t]he Madrid Union currently has 100 members, covering 116 countries," meaning that multiple countries may be represented as one solitary member).

38. *Overseas Trade Mark Protection*, *supra* note 34.

39. *See id.*

any EU designations.[40]

B. Intellectual Property in British Fashion as Part of the EU: Designs

Design rights are another form of intellectual property protection for fashion designers.[41] Protectable designs generally consist of ornamental or aesthetic aspects of garments, including shapes, patterns, or color.[42] In the United Kingdom, design rights are conferred automatically, thereby negating any registration requirements.[43] Nonetheless, unregistered design protection only lasts for up to three years, while registered designs remain protected for up to twenty-five years.[44] As with trademarks, designs may be protected in the United Kingdom, EU-wide, and internationally through specific online registrations.[45] It is common for fashion companies in the United Kingdom to register for protection through the EU rather than the national system because the companies usually conduct business outside of the United Kingdom.[46] The registration process through the EU system includes an online application and fee payment, after which a design receives protection in each of the EU member countries for up to twenty-five years.[47]

Registrants may apply for international design protection through WIPO using the Hague System.[48] The Hague System, established after the Hague Agreement, was created in 1925 to "simplify and streamlin[e] overall

40. *See Protecting Your Trade Mark Abroad,* GOV.UK, https://www.gov.uk/government/publications/protecting-your-uk-intellectual-property-abroad/protecting-your-trade-mark-abroad (last updated Sept. 26, 2016) (identifying methods for international intellectual property protection within Europe).

41. *Designs in the EU*, EUIPO, https://euipo.europa.eu/ohimportal/en/designs-in-the-european-union (last updated Feb. 19, 2016) (detailing design registration procedures within the various EU intellectual property agencies).

42. *See Design Definition*, EUIPO, https://euipo.europa.eu/ohimportal/en/design-definition (last updated July 14, 2015) (providing examples of designs).

43. *See What Is My Automatic Design Right?*, BRITISH LIBR., https://www.bl.uk/business-and-ip-centre/articles/what-is-my-automatic-design-right (last visited Sept. 30, 2017) (stating that there is automatic protection for designs that you create which last either ten years after the first sale or fifteen years after the design's creation, whichever comes first).

44. *See id.*

45. *See Protecting Your Trade Mark Abroad*, *supra* note 40 (providing instructions for online registration).

46. *See* Gauss et al., *supra* note 12 (asserting that the EU is more popular because of the wider scope of protection it offers).

47. *See id.*

48. *See Summary of the Hague Agreement Concerning the International Registration of Industrial Designs (1925)*, WIPO, http://www.wipo.int/treaties/en/registration/hague/summary_hague.html (last visited Sept. 30, 2017) [hereinafter *Summary of the Hague Agreement*] (explaining the purpose and benefits of the Hague System).

administration of the international design registration system."[49] Pre-Brexit, unlike with the Madrid Protocol, registrants from the United Kingdom may only apply for protection through an EU designation because the United Kingdom is not a separate contracting party to the Hague Agreement.[50] The EU designation itself costs sixty-seven Swiss francs per design, together with the basic registration fee, which starts at 387 Swiss francs.[51] British designers typically do not register through the Hague System, with only an average of thirty applications filed annually in recent years as opposed Germany filing around an average of 3,600 applications annually in those years.[52]

C. The Current Trade Regime in the United Kingdom

Trade is essential to the fashion industry because it dictates how garments and textiles are marketed to different locations, namely locations where fashion companies can establish a distribution presence.[53] The United Kingdom's Department of International Trade is responsible for "developing and negotiating free trade agreements and market access deals with non-EU countries."[54] However, with respect to countries within the EU, the United Kingdom pre-Brexit operates under a separate system referred to as the "Single Market," a system largely integrated with the EU's various trade

49. *Id.* (discussing the establishment of the Hague System).

50. *See How to File Your International Application*, *supra* note 35; *see also Questions on the Registration of International Marks (Madrid Protocol)*, EUIPO, https://euipo.europa.eu/ohimportal/en/madrid-protocol (last updated June 27, 2016) (explaining how EUIPO plays a role in this process).

51. *Individual Fees Under the Hague Agreement*, WIPO, http://www.wipo.int/hague/en/fees/individ-fee.html (last updated July 2016) (listing individual fees for geographical designations in design registrations); *see also Schedule of Fees*, WIPO, http://www.wipo.int/hague/en/fees/sched.htm (last visited Sept. 30, 2017) (listing the schedule of fees for the international registration of designs).

52. *UK Accession to the Hague Agreement for Industrial Designs*, INTELL. PROP. OFF. 9 (2015) (hereinafter *UK Accession to the Hague Agreement*], https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/491584/summary_of_responses_accession_to_the_Hague_Agreement_for_Industrial_Designs.pdf (highlighting the highest users of the Hague System based on growth data calculated from 2013 to 2014).

53. Hildegunn Kyvik Nordås, *The Global Textile and Clothing Industry Post the Agreement on Textiles and Clothing*, WTO 1 (2004), https://www.wto.org/english/res_e/booksp_e/discussion_papers5_e.pdf (explaining the impact of trade on the location and technological advances).

54. *See* Elisabeth O'Leary, *Britain Appoints New Zealander to Senior Trade Role*, CNBC (June 16, 2017, 5:00 PM), https://www.cnbc.com/2017/06/16/reuters-america-britain-appoints-new-zealander-to-senior-trade-role.html (describing the role of the United Kingdom's chief advisor on trade talks).

sectors."[55] Trade integration within the EU itself is generally determined by how much access a country has to the EU's markets, along with compliance of EU law, and financial contributions.[56] Pre-Brexit, the United Kingdom had full access to the EU's Single Market, and was required to abide by EU directives regarding trade, and pay membership fees.[57] Additionally, the United Kingdom was able to impact the decision-making process for new laws and regulations within the EU's Single Market because the United Kingdom's was fully integrated.[58]

Just as countries can adopt international agreements regarding intellectual property through WIPO,[59] European countries can equally adopt trade procedures through the World Trade Organization ("WTO"), thereby forgoing integration with the EU, altogether.[60] For goods, member countries of the WTO-only model must apply tariffs to all countries unless a Free Trade Agreement exists; such as in Switzerland.[61] For services, EU member countries follow the WTO General Agreement on Trade in Services, which only allows access to certain overseas markets.[62] For the fashion industry specifically, the United Kingdom's full access to the Single Market means that goods, such as textiles and garments, can move freely throughout the EU without tariffs.[63] The United Kingdom's pre-Brexit integration allows for retailers to provide services and establish locations in any member state without restriction.[64]

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55. *See* Luis Gonzalez Garcia, *Brexit: Challenges for the UK in Negotiating an FTA with the EU (a Trade Negotiator's Perspective)*, MATRIX CHAMBERS (Feb. 8, 2016), https://www.matrixlaw.co.uk/resource/brexit-challenges-uk-negotiating-fta-eu-trade-negotiators-perspective-luis-gonzalez-garcia/ (outlining the United Kingdom's trade policy goals with the EU following Brexit, the challenges it faces in reaching those goals, and proposing two options: the single market model or the free market model).

56. *See* Robyn Munro & Hannah White, *Brexit Brief: Options for the UK's Future Trade Relationship with the EU*, INST. FOR GOV'T (July 6, 2016), https://www.instituteforgovernment.org.uk/sites/default/files/publications/Brexit%20Options%20A3%20final.pdf (charting the United Kingdom's options for trade relationships with the EU).

57. *See id.*

58. *See id.* (demonstrating that the laws and regulations of the Single Market affect the U.K.).

59. *See How to File Your International Application*, *supra* note 35; *Summary of the Hague Agreement*, *supra* note 48.

60. *See Alternatives to Membership*, *supra* note 14, at 35 (stating that using the WTO rules would provide the "most definitive break with the EU").

61. *See id.* at 27 (discussing that Switzerland maintains trade agreements with non-European countries because it is outside the Customs Union).

62. Munro & White, *supra* note 56.

63. *See id.* (presuming the United Kingdom still follows common rules and regulations).

64. *Id.*

D. Model Country for Intellectual Property Protection: Switzerland

According to the World Economic Forum, Switzerland currently ranks third in the world for intellectual property protection and first for innovation.[65] The system through which Switzerland implements its intellectual property laws is distinct because of its centralized management procedures.[66] The centralized system enables rights holders to readily transfer intellectual property, access and maintain an intellectual property portfolio, and navigate administrative processes.[67] Moreover, rights holders often have the ability to protect their work within three months of filing an application.[68]

Switzerland has established systems and procedures for both national and international protection of intellectual property that apply to the fashion industry.[69] With respect to the protection of trademarks and designs, Switzerland, like the EU, is an independent contracting party to the Madrid Protocol and the Hague Agreement.[70] On a national level, Switzerland offers a comprehensive registration system through the Swiss Federal Institute of Intellectual Property, protecting intellectual property within Swiss borders.[71] Within the EU, Swiss companies are eligible to apply for intellectual property protection even though Switzerland is not a member country.[72] Swiss registrants must apply through a qualified representative[73] domiciled

65. *The Global Competitiveness Report 2015-2016*, WORLD ECON. F. 336-37 (2015), http://www3.weforum.org/docs/gcr/2015-2016/CHE.pdf (providing Switzerland's rankings in global competitiveness, including its ranking for innovation at number one).

66. *Switzerland – Your Design and Branding Hub*, SWITZ. GLOBAL ENTERPRISE, https://www.s-ge.com/sites/default/files/cserver/publication/free/factsheet-design-and-branding-s-ge.pdf (last visited Oct. 1, 2017) (attributing Switzerland's successful structure to its strong brand recognition, high number of applicants, and data protection).

67. *See id.* (listing the reasons why patent holders would choose Switzerland).

68. *Monitor Your Competition*, SWISS FED. INST. OF INTELL. PROP., https://www.ige.ch/index.php?id=7960&L=3 (last visited Oct. 1, 2017).

69. *See National or International Protection?*, SWISS FED. INST. OF INTELL. PROP., https://www.ige.ch/index.php?id=7381&L=3 (last visited Oct. 1, 2017) (describing the intellectual property protection options available to Swiss registrants).

70. *See id.* (elucidating the importance of bilateral trade agreements).

71. *Id.*

72. *See id.* (allowing registrants to apply for protection through EUIPO or the Madrid system).

73. *Representation Before EUIPO*, EUIPO, https://euipo.europa.eu/ohimportal/en/representation-before-the-office#4.5 (last updated June 27, 2016) (defining a qualified representative of a design registrant outside the EU as a "natural person" who is a national of a EU member state, has a place of business or employment in a EU member state, and who is entitled to represent individuals before a "central property office" within a EU member state).

in the EU and apply directly to the EU Intellectual Property Office.[74] It is common for designers seeking to expand their brands registration through the Hague System to maintain international protection.[75] In fact, over the past few years, Switzerland is the country most likely to use the Hague System with an annual average of 3,189 designs filed for application.[76]

Through bilateral agreements, Switzerland currently employs an international trade model that consists of partial integration with the EU.[77] For purposes of trading goods, Switzerland is a member of the European Free Trade Association, which allows access to certain goods in the EU Single Market through bilateral deals.[78] For services, Switzerland has adopted a series of bilateral agreements, which provide access to trade in services for some, but not all, industry sectors.[79] Currently, Switzerland's trade relationship with the EU does not mandate financial contributions; however Switzerland is not represented in the decision-making process of any EU trade laws.[80] Moreover, Switzerland is only required to abide by EU laws and regulations that govern the trade sectors included in its bilateral agreements with the EU.[81] Notably, Switzerland's trade relationship with the EU is the product of years of lengthy negotiations and legislative enactments.[82]

The charts below identify the design and trademark systems within which the United Kingdom, EU, and Switzerland are members[83]:

74. *National or International Protection*, *supra* note 69.

75. *UK Accession to the Hague Agreement for Industrial Designs*, INTELL. PROP. OFF. 10 (Sept. 15, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460790/Consultation_UK_Accession_to_the_Hague_Agreement.pdf (highlighting the highest users of The Hague System based on growth data calculated from 2013 to 2014, and noting that Switzerland ranks second).

76. *See id.* (listing the number of design applications filed through the Hague System by Swiss registrants).

77. *Alternatives to Membership*, *supra* note 14, at 27, 35.

78. *See id*. at 26 (explaining that Switzerland has the "most access to trade in goods" through bilateral agreements that "reduce practical barriers to cross-border trade," and also noting that no agreements pre-Brexit cover access to agricultural goods).

79. *See id*. (noting that Switzerland has "limited access to trade in services," with partial access in professional service sectors such as accountancy, auditing, and legal services, and no "general access" in the banking and finance sectors).

80. Munro & White, *supra* note 56.

81. *Id.*

82. *Alternatives to Membership*, *supra* note 14, at 28-29.

83. Figures 1 and 2 below were created by the author to consolidate the relevant information in an easily understandable format. The sources for the information in the chart are contained in footnote 84. *See infra* note 84.

Figure 1: Membership to International Treaties and Systems[84]			
	The Hague System for Designs	**The Madrid Protocol for Trademarks**	**European Trademark/Design Systems**
United Kingdom	Not a member (Current membership through the EU)	Member	Member (For now, then once Brexit occurs will lose protection within UK borders)
EU	Member	Member	Member
Switzerland	Member	Member	Not a member (Must register through a domiciled representative within EU borders)

84. *See* WIPO, *Members of the Hague Union*, http://www.wipo.int/hague/en/members (last visited Oct. 26, 2017) (listing members of the Hague System); WIPO, *Members of the Madrid Union*, http://www.wipo.int/export/sites/www/treaties/en/documents/pdf/madrid_marks.pdf (last visited Oct. 26, 2017) (listing members of the Madrid Protocol); *IP and BREXIT: The Facts*, GOV.UK, https://www.gov.uk/government/news/ip-and-brexit-the-facts (last visited Oct. 26, 2017). The British government states that EU trade marks will remain valid while the UK is part of the EU, and that the marks will remain valid in the remaining members states once Brexit occurs. *Id.* Implicitly, the British government is stating that its current plan is to withdraw protection for EU trade marks after Brexit occurs. *Id.*; s*ee also Intellectual Property*, EUROPEAN COMMISSION, http://ec.europa.eu/growth/industry/intellectual-property_en (last visited Oct. 1, 2017).

Figure 2: Price and Coverage Comparison for International, EU, and National Trademark and Design Rights[85]		
	Geographical Coverage	**Basic Registration Fee**[86]
The Madrid Protocol for Trademarks	98 Country Territories	653 Swiss Francs basic fee (527.55 British Pound)
The Hague System for Designs	66 Country Territories	397 Swiss Francs basic fee (320.73 British Pound)
European Trademark System	28 Member Countries (until Brexit, which would make it 27)	850 Euro basic fee (732.16 British Pound)
European Design System	28 Member Countries	350 Euro basic fee (301.48 British Pound)
United Kingdom National Trademark System	1 Country	170 British Pound basic fee

85. *See supra*, notes 82-83 and accompanying text.

86. "Basic registration fee" means the price to register one design or one trademark. In fashion, it is likely that companies would register more than one of each type, especially designs. Each system provides "bulk" pricing where you can register subsequent designs for a substantially smaller fee than the first.

United Kingdom National Design System	1 Country	50 British Pound basic fee

III. APPLYING SWISS TRADE AND INTELLECTUAL PROPERTY MODELS TO THE UNITED KINGDOM

After withdrawing from the EU, the United Kingdom will be positioned to implement new intellectual property and trade laws. Given the fashion industry's increasingly important fixture in the British economy, intellectual property and trade systems that benefit fashion companies are likely to be adopted.[87] To predict the ways in which the United Kingdom can alter its intellectual property and trade structures, Swiss models, as indicated above, should be applied as Switzerland is not a member of the EU, but still maintains a presence in the EU's trade system.[88]

A. International Intellectual Property Protection: Updated Registration Mechanisms

Post-Brexit, many intellectual property registrants, including fashion designers, will lose trademark and design protection afforded to them under the EU system.[89] Going forward, it is possible and prudent to shift the United Kingdom's intellectual property registration mechanisms away from their reliance on EU membership.[90] Rather than have its citizens register nationally and through the EU systems to achieve EU-wide protection, the United Kingdom could prompt its citizens to register through the WIPO-administered treaty systems for international protection, like Switzerland.[91] Moving to a Swiss system would create issues of domicile, geographical breadth of imports and exports, and new registration procedures for fashion

87. *See* Gauss et al., *supra* note 12.

88. *See Alternatives to Membership*, *supra* note 14, at 28 (describing the suitability of the Swiss trade model for the United Kingdom).

89. *See* Jo Joyce, *Less Harmony, More Divergence? Intellectual Property Rights and Enforcement in a Post-Brexit UK*, TAYLOR WESSING (June 2016), https://united-kingdom.taylorwessing.com/download/article-brexit-intellectual-property.html (explaining that certain existing registered trademarks and designs will not be valid in the United Kingdom after Brexit because the United Kingdom "would no longer be a party to the [r]egulations creating those rights").

90. *See id.* (highlighting the United Kingdom's "new reliance" upon national protection in the context of intellectual property post-Brexit).

91. *Alternatives to Membership*, *supra* note 14, at 26.

designers.[92]

In terms of trademark registration, the United Kingdom could maintain its reliance on EUTM application procedures, considering that the United Kingdom would no longer be in the geographical area of the EU, marks would not be protected nationally.[93] Additionally, the United Kingdom would likely have to require registrants to apply for EUTM's through a domiciled representative and to also apply through the United Kingdom-specific system for national protection.[94] Given the fee structure of both systems, registrants would likely have to pay two fees and fill out two separate applications, which may result in lengthier application periods and delayed registration.[95]

Conversely, the United Kingdom could adopt Switzerland's model and shift toward wider geographical protection coverage, urging its citizens to apply through the Madrid Protocol.[96] Considering that the United Kingdom is already its own individual entity as a contracting party to the Madrid Protocol, this method would ensure that its citizens do not have to consult any EU-based authority for trademark protection.[97] One central body would examine each application through the United Kingdom and EUTM systems, while applications through the Madrid Protocol would be examined individually by each member country.[98]

Furthermore, for design protection, the United Kingdom could either apply for EU protections through the pre-Brexit EU system or through

92. *See* Khwaja, *supra* note 11 (listing aspects of the United Kingdom's fashion sector that will be affected by Brexit, including production and supply chains, retail environments, employee eligibility, and intellectual property).

93. *See* Joyce, *supra* note 89 ("Existing [trademark and design] registrations that have only, or primarily, been used in the UK, could be at risk of revocation for non-use post Brexit, since their owners would not be able to demonstrate use in a substantial part of the EU.").

94. *See id*. (predicting that the United Kingdom's intellectual property office would allow trademark owners to "convert" their EUTMs to national marks upon fee payment).

95. *See id*. (noting that "an important area of concern will be the practical management of their portfolios of registrations," which includes the coordination of applications).

96. *See* John M. Murphy, *Demystifying the Madrid Protocol*, 2 NW. J. TECH. & INTELL. PROP. 240, 241 (2004) ("[T]he Madrid Agreement and the Madrid Protocol create a centralized filing system which simplifies the process of obtaining and maintaining national trademark registrations in the member countries of the Madrid Union.").

97. *See id*. at 254-56 (listing the United Kingdom as a contracting party to the Madrid Protocol).

98. *See Overseas Trade Mark Protection*, *supra* note 34 (providing general information by virtue of a law firm report on the EUTM and the Madrid Protocol systems as two options for trademark applicants from the United Kingdom pursuing overseas protection).

WIPO, meaning a company would not necessarily have to use the EU system at all. In order to ensure protection within the United Kingdom, registrants would have to apply for protection through the national system because registered designs will no longer be through the EU's system.[99] On the other hand, unregistered designs may remain unaffected because both the EU and the United Kingdom offer protection to unregistered designs.[100] Alternatively, the United Kingdom could opt for international protection under the Hague System and circumvent the geographical limits of registering only in the EU or the United Kingdom.[101] Comparable to the Madrid Protocol, design applications through the Hague System are individually examined and granted or denied protection by each designated country.[102] The United Kingdom could become its own contracting party to the Hague Agreement, allowing its citizens to apply for design protection through the WIPO-administered system.[103] Further, registrants from the United Kingdom would be able to obtain protection in the EU without utilizing its procedures.[104]

99. *See* Khwaja, *supra* note 11 (recommending that businesses retain national United Kingdom intellectual property rights due to the uncertainty of solely retaining EU-wide intellectual property rights).

100. *Designs in the EU*, *supra* note 41 (explaining the difference between intellectual property protection for registered and unregistered designs within the EU); *see also UK & EU Registered Designs – the Basics*, MEWBURN ELLIS (June 2017), http://mewburn.com/wp-content/uploads/2017/06/UK-EU-Unregistered-Designs-The-Basics.pdf (stating that protection of unregistered designs in the United Kingdom exists "automatically upon creation").

101. *See* Christopher Benson & Jo Joyce, *UK Set to Accede to the Hague Agreement in 2016*, TAYLOR WESSING (Jan. 28, 2016), https://united-kingdom.taylorwessing.com/en/uk-set-to-accede-to-the-hague-agreement-in-2016 (noting that the United Kingdom could join the Hague Agreement in its individual capacity and "target their resources more efficiently to those countries where they actually do business," rather than having to designate the entire EU).

102. *See Frequently Asked Questions: Hague System*, WIPO, http://www.wipo.int/hague/en/faqs.html (last visited Oct. 1, 2017) (stating that the "conditions for the grant of protection are provided for in the national/regional legislations" of each designated country in a Hague System design application).

103. *See* Benson & Joyce, *supra* note 101 (stating that the United Kingdom's government would "restrict the filing of applications through the [Hague] Agreement to direct filings with WIPO" in the event that the country joins the Hague Agreement in an individual capacity).

104. *See id.* (noting that the United Kingdom's government could give intellectual property rights holders the option to obtain protection in the EU solely through WIPO and not any other agency, since the Hague Agreement "enables applicants to register their designs in any contracting state").

B. Application of the Swiss Model to the United Kingdom's Trade Structure

If the United Kingdom adopts the Swiss model, many aspects of its trade infrastructure would drastically change. The primary difference would be the level of integration between the United Kingdom and the EU, which determines its access to the Single Market.[105] The Swiss model calls for considerably less integration with the EU.[106] Therefore, it is necessary for the United Kingdom to adopt a series of bilateral agreements covering important aspects and sectors of the Single Market.[107] Moreover, to address the trade relationship between the EU and the United Kingdom, the Swiss model would require the United Kingdom to enter into a European Free Trade Agreement ("EFTA") with the EU.[108] Although the United Kingdom would no longer be represented in the decision-making process of applicable trade laws, it would in turn, not be bound by financially or through general trade directives that the United Kingdom was governed by previously.[109]

For goods utilized in fashion, including garments and textiles, the United Kingdom would be able to maintain free trade with the EU if it agreed to a free trade agreement like Switzerland currently has in place.[110] If a trade agreement was reached, fashion companies would be able to export their finished products and import materials from the EU member countries.[111]

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105. *See Alternatives to Membership*, *supra* note 14, at 11 (stating that "none of the alternative relationships to full EU membership," including the Swiss model alternative, "offer full access to the Single Market").

106. *See id.* at 8, 27 (observing that the United Kingdom currently has "special status" in the EU with "full voting rights, a full voice at the table and a full say over the rules of the Single Market," while Switzerland "Switzerland has no representation in the EU's institutions and no role in the EU's legislative processes").

107. *See Switzerland*, EUROPEAN COMM'N, http://ec.europa.eu/trade/policy/countries-and-regions/countries/switzerland/ (last updated Feb. 22, 2017) (explaining that Switzerland's trading relationship with the EU is governed through bilateral deals that cover sectors including commercial services and goods such as "chemicals and medicinal products, machinery, instruments and watches").

108. *See EFTA at a Glance*, EUROPEAN FREE TRADE ASS'N (Sept. 2016), http://www.efta.int/sites/default/files/publications/fact-sheets/General-EFTA-fact-sheets/efta-at-a-glance-september-2016.pdf (describing EFTA's as providing a legal framework for facilitating trade relations between the EU and EFTA member states, which includes Switzerland).

109. *See, e.g.*, Munro & White, *supra* note 56 (citing that Switzerland is not required to contribute to the EU trading budget outside of the programs it actively participates in and noting that Switzerland is not bound by rulings from the European Court of Justice while pre-Brexit the United Kingdom is).

110. *See id.* (referencing Switzerland's EFTA membership and agreement with the EU which "allows access to the Single Market in all non-agricultural goods").

111. Chu, *Brexit: True Cost of UK Leaving EU Without Trade Deal Revealed*, INDEP. (Sept. 23, 2016, 3:31 PM), ("[L]eaving the EU with no free trade deal would mean the UK would also fall out of the coverage of the more than 50 free trade in goods deals the

Additionally, the United Kingdom would have the autonomy to enter into other agreements with non-EU countries.[112]

If the United Kingdom adopted the Swiss model, services, such as manufacturing, would be only partially integrated with the EU's Single Market.[113] Rather than the EFTA governing the operation of services in the United Kingdom, the services would be governed by supplemental bilateral agreements with the EU.[114] Accordingly, the United Kingdom would have limited access to certain services, analogous to how Switzerland does not presently have access to financial services in the EU.[115] By negotiating a bilateral agreement with the EU that covers retail services, the United Kingdom could facilitate the free trade movement of the goods and services with particular attention to its fashion companies throughout multiple countries.[116]

C. Options for British-Bred Fashion Companies

To further examine the effects that adopting the Swiss models in intellectual property and trade could have on the post-Brexit United Kingdom it is necessary to apply a synthesized hypothetical structure to current fashion companies.

1. The Asos Example

If the United Kingdom adopted the Swiss model, Asos would face unique implications.[117] After Brexit, Asos will be able to maintain national intellectual property protection because the company has active trademarks registered with the United Kingdom's Intellectual Property Office.[118] With

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EU has concluded with other countries including significant markets such as Korea, Switzerland and Mexico.").

112. *See Alternatives to Membership*, *supra* note 14 at 9, 27 (stating that Switzerland "can conclude its own trade agreements with other parts of the world," while the United Kingdom may only follow trade agreements and tariff structures of the EU).

113. Munro & White, *supra* note 56 (categorizing Switzerland as being partially integrated with the EU's Single Market in the "access to trade in services").

114. *See id.* ("Switzerland has supplemented the EFTA agreement with a series of bilateral deals securing access to some other areas of the Single Market.").

115. *See id.* (stating that Switzerland has established bilateral agreements with the EU that provide "limited access to trade in services, but some sectors – including financial services – are not covered").

116. *See id.* (describing that companies in the United Kingdom could provide their services to other member states).

117. *See generally* Chambers, *supra* note 17 ("Asos Plc, Britain's largest online-only fashion retailer, plans to double its U.K. manufacturing as the pound's post-Brexit plunge makes domestic production more affordable.").

118. *See id.* (identifying Asos as a British fashion retailer).

its secured national trademarks,[119] Asos could then apply for international protection for its trademarks through the Madrid Protocol.[120] In practice, the process for registering its trademarks nationally and through the Madrid Protocol would be almost equal in cost to registering with just the EU System for Trademarks.[121] For protection of designs, Asos's process of obtaining protection would hinge on whether the United Kingdom becomes a contracting party to the Hague System before the Brexit withdrawal is completed.[122] If the United Kingdom does not become a Hague member before Brexit, Asos would need to apply through both the EU system for international design protection and the national system as well.[123] Initially, Asos would be paying high registration fees for its intellectual property through national and WIPO channels, but its rights would likely be protected across a greater number of countries.[124] With the option for protection in a large number of countries, Asos could better enforce its rights and prevent counterfeiting and infringement occurring beyond just the EU.[125]

Asos's plans to eventually perform all of its manufacturing within the United Kingdom's borders would be greatly impacted by post-Brexit reorganization.[126] Moving to the Swiss model would allow for free trade in

119. Gauss et al., *supra* note 12 ("[T]rademarks and designs coexist with national registrations that holders make in different European countries, both for trademarks and designs.").

120. *See How to File Your International Application*, *supra* note 35 (explaining that for an entity to apply for intellectual property protection through the Madrid Protocol, it must "be domiciled, have an industrial or commercial establishment in, or be a citizen of one of the 115 countries covered by the Madrid System's 99 members").

121. *See* Gauss et al., *supra* note 12 (suggesting that fashion designers prefer a wider geographical scope of protection due to cost concerns).

122. Benson & Joyce, *supra* note 101 ("The Intellectual Property Act 2014 anticipated the possibility of the UK joining the Hague Agreement in its own right, providing legal framework for its implementation.").

123. *See id.* (noting the distinction between the all-encompassing Hague Agreement system and the piecemeal system of registering both with the EU and the United Kingdom separately after Brexit).

124. *See id.* (noting that utilizing WIPO registration channels would assist companies in "target[ing] their resources more efficiently to those countries where they actually do business").

125. James Whymark, et. al, *IP Enforcement in the Fashion Industry*, WORLD TRADEMARK REV. (2015), http://www.worldtrademarkreview.com/Intelligence/Anti-counterfeiting/2015 (emphasizing how fashion companies should plan for "future expansion" of their brand and secure protections in as many jurisdictions as possible to avoid infringement from "trademark pirates").

126. Chambers, *supra* note 17 ("The company [Asos], which sells own-brand fashions alongside wares from the likes of Abercrombie & Fitch Co. and Calvin Klein Inc., will open more plants in Britain over the next three to four years to support its expansion plans . . . .").

the EU through a well-negotiated EFTA, meaning Asos could likely export to neighboring countries easily without the financial burden of tariffs or duties.[127] Moreover, Asos could freely import textiles from the EU to use in the manufacture of its products.[128] Considering its business model is primarily online, restrictions imposed on providing services on an international scale would likely not apply to Asos.[129]

2. Zara: Brexit Implications on a Global Fashion Conglomerate

In the United Kingdom's adoption of the Swiss model, Zara, a global retail conglomerate, would face comparatively different implications than Asos.[130] Unlike Asos, the United Kingdom is only a portion of Zara's retail breadth, and the United Kingdom does not house the majority of Zara's operations.[131] Moreover, Zara pre-Brexit has registered trademarks in the United Kingdom associated with its brand, thus the company would not lose protection post-Brexit.[132] Since Zara is based in Spain and operates its manufacturing production in countries other than the United Kingdom, it would likely not need to adopt any new intellectual property protection through the Madrid Protocol or the Hague Agreement.[133]

If the United Kingdom adopts the Swiss model, Zara may face roadblocks in its import and export industries. While Zara's garments and textiles would likely be protected as part of the EFTA, the services industry would not necessarily allow the same flexibility.[134] Zara's ability to provide services

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127. *See Alternatives to Membership*, *supra* note 14, at 26-27 (noting how Switzerland negotiated favorable bilateral and free trade deals in conjunction to being an EFTA state).

128. *See* Chu, *supra* note 13 (explaining the potential of maintaining a free trade deal between the EU and United Kingdom to avoid high import costs).

129. *See* Chambers, *supra* note 17 (designating Asos as "Britain's largest online-only fashion retailer").

130. Suzy Hansen, *supra* note 20 ("Inditex [Zara's parent company] now makes 840 million garments a year and has around 5,900 stores in 85 countries, though that number is always changing because Inditex has in recent years opened more than a store a day, or about 500 stores a year.").

131. *See id.* (noting that the corporate headquarters, factories and major distribution center are all located in Arteixo, Spain, and more than half of the company's manufacturing takes place in factories around Europe and North Africa).

132. *EU000112755*, INTELL. PROP. OFF., https://trademarks.ipo.gov.uk/ipo-tmcase/page/Results/4/EU000112755 (last visited Jan. 5, 2018).

133. *See generally* Joyce, *supra* note 89 (suggesting that the effects of Brexit on intellectual property registration will more likely be endured by United Kingdom-based companies).

134. *See, e.g.*, *Alternatives to Membership*, supra note 14, at 27 (highlighting Switzerland's limitations on negotiating trade agreements with other countries that adequately address import and export specifications).

within the United Kingdom would be contingent upon the United Kingdom's bilateral agreement with the EU. These bilateral agreements would have to specify the types of services the United Kingdom would be allowed to access.[135] Further, if British retail services are not allowed access to the EU's Single Market, Zara would be barred from operating retail locations in the United Kingdom.[136] For Zara to continue doing business in the EU, a bilateral agreement regarding services between the United Kingdom and the EU would need to stipulate that retail services can operate freely among the United Kingdom and EU member countries.[137] Overall, when Brexit comes to fruition, the use of the Swiss model in the United Kingdom would sufficiently protect intellectual property and trade for the fashion industry.

IV. THE UNITED KINGDOM SHOULD FOLLOW SWISS MODELS IN STRATEGIZING POST-BREXIT INTELLECTUAL PROPERTY AND TRADE APPROACHES

The British fashion industry would benefit from the United Kingdom's adoption of the Swiss model for international trade and intellectual property protection.[138] Implementing strategies that decrease reliance on the EU would allow the United Kingdom to create a strong independent fashion identity, which may ultimately benefit the nation's culture.[139] To ensure that fashion designers can safely distribute their products to a larger consumer base, the United Kingdom must sign on to agreements that will afford international intellectual property protection beyond the EU.[140] Moreover,

135. *Cf.* Munro & White, *supra* note 56 (noting that non-agricultural goods are accessible via Switzerland's status as an EFTA state, however there is limited access to services).

136. *See Alternatives to Membership*, *supra* note 14, at 26 (mentioning that the United Kingdom would have to make bilateral agreements with the EU on access to financial services and possibly other sectors if it adopts the Swiss model).

137. *See id.*

138. *See* Becky Knott, *Op-Ed: Brexit's Impact on The Fashion Industry Is Not Necessarily a Bad Thing*, FASHION L. (Mar. 24, 2017), http://www.thefashionlaw.com/home/brexits-impact-on-the-fashion-industry-is-not-necessarily-a-bad-thing.

139. *See id.* (quoting Prime Minister Theresa May as saying: "British fashion is of huge importance to our country, contributing £28bn to the UK economy and supporting nearly 900,000 jobs . . . From our home grown start-ups to international fashion houses – every business in the industry will play a major role in ensuring we make a success of Brexit. By taking advantage of the opportunities that leaving the EU gives us and playing to our strengths as a great trading nation – we can build a fairer economy that works for all, not just the privileged few.").

140. *See UK Accession to the Hague Agreement*, *supra* note 52, at 3 (Sept. 15, 2015), https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/460790/Consultation_UK_Accession_to_the_Hague_Agreement.pdf (stating that the United Kingdom's use of WIPO-administered registration systems would provide businesses

the United Kingdom's adoption of bilateral agreements with the EU, specifically regarding garments, textiles, and retail services, would ensure that the fashion industry maintains its current trading relationships without the United Kingdom's full integration with the EU's Single Market.[141] The United Kingdom should implement portions of the Swiss model for handling issues of international trade and intellectual property registration to ensure the continued success of the fashion industry.[142]

A. Encouraging Intellectual Property Registration Through WIPO

In a post-Brexit climate, the British government should protect its citizens and industries from adverse consequences. Designers could enjoy intellectual property protection within Europe and overseas if the United Kingdom becomes a contracting party to both the Madrid Protocol and the Hague System.[143] Not only is this method cost-effective,[144] but it also accounts for the unpredictable nature of the fashion industry.[145] For example, by registering Asos's trademarks and designs through WIPO systems, it would ensure that Asos products are protected regardless of what countries it distributes to.[146]

Individually examining proposed trademarks and designs under the WIPO systems by each designated member country may be advantageous to fashion companies.[147] First, fashion companies may list the EU as one of the many member "countries" where it would like to obtain protection.[148] Second, if a

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with a "simpler, more cost-effective method for managing their rights" on an international scale).

141. *See Alternatives to Membership*, *supra* note 14, at 27 (explaining how the United Kingdom may engage in bilateral agreements with the EU that target specific goods and services).

142. *See generally* Khwaja, *supra* note 11 ("[F]or the fashion sector, much will turn on the details of the arrangements negotiated for the UK during the two-year exit period before Brexit.").

143. *See* Joyce, *supra* note 89 (opining that the British government will streamline intellectual property registration in favor of a WIPO-based system).

144. *See Overseas Trade Mark Protection*, *supra* note 34 ("[T]he Madrid Protocol provides a very cost-effective, efficient way to obtain trade mark protection in a range of countries.").

145. *See* Chambers, *supra* note 17 (illustrating how Asos represents an increasingly web-based fashion industry dynamic and how the company is capitalizing from Brexit's perceived business setbacks).

146. *See generally UK Accession to the Hague Agreement*, *supra* note 52, at 3 (explaining the expansion of intellectual property protection through WIPO-administered systems).

147. *See Overseas Trade Mark Protection*, *supra* note 34 (defining the country-by-country examination process of international intellectual property registration).

148. *The BFC's 'Future of Fashion'*, *supra* note 4 (linking British-made products to

member country rejects a fashion company's trademark or design application, the company could review its consumer presence in that specific country and tailor its business so that it is more widely accessible.[149] Given the fashion industry's reliance on international trends and consumer preference, feedback on applications could serve to enhance a company's business strategy.[150] Increasing the United Kingdom's collaboration with other countries, separate from the EU, would be beneficial to companies looking to bolster their international presence in fashion.[151]

B. Creating Bilateral Trade Agreements Specifically for Textiles and Garments

Complete disassociation from the EU's Single Market could be detrimental to the United Kingdom because it would require multiple negotiations of bilateral agreements, which could take years.[152] Business and legal professionals in the fashion industry should be proactive in ensuring that designers and companies are not negatively impacted by post-Brexit policies.[153] Accordingly, the United Kingdom should negotiate bilateral agreements with the EU that secure the free trade of textiles and garments so fashion companies can maintain the same access to goods as it enjoyed prior to Brexit.[154] Further, to allow fashion companies to open or maintain previously established branch locations in neighboring countries of the EU, the United Kingdom should ensure that retail services are also covered by bilateral agreements.[155]

By initiating negotiations of bilateral agreements at an early stage of Brexit, the fashion industry's trade considerations could be protected regardless of what model the United Kingdom chooses to follow.[156]

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a positive consumer response within the U.K.).

149. *See generally Overseas Trade Mark Protection*, *supra* note 34.

150. *See* Joyce, *supra* note 89 (relaying the benefits of targeting specific countries to register intellectual property in for businesses).

151. *See id.* (noting that the reliance on WIPO-administered registration systems is "likely to be welcomed by overseas companies looking for design protection in the UK market, without wishing to incur the delay or expense of seeking it across the whole European Community").

152. *Alternatives to Membership*, *supra* note 14, at 28–29.

153. *See* Chu, *supra* note 13 (emphasizing the importance of the EU and the United Kingdom reaching a trade deal in an expeditious manner to avoid costly implications).

154. *See generally id*.

155. *See id.* (emphasizing the importance of clearly designating covered services in any trade deal the United Kingdom makes with the EU after Brexit).

156. Patrick Wintour, *UK Officials Seek Draft Agreements with EU Before Triggering Article 50*, GUARDIAN (July 22, 2016), https://www.theguardian.com/politics/2016/jul/22/brexit-talks-uk-limbo-sequence-negotiations-eu (addressing how it is critical to

Moreover, bilateral agreements regarding textiles, garments, and retail services may be quicker and easier to negotiate because they would only cover a small portion of the complex trading relationship between the United Kingdom and the EU.[157] Conversely, these agreements may be used as a bargaining chip for bigger trade agreements. In negotiating bilateral agreements for all trading sectors, this strategy does not have the same latitude as the Swiss model, but it nevertheless addresses significant trade concerns within the fashion industry.[158] Regardless, it is important for the British fashion industry to respond swiftly and proactively to the dynamic changes occurring in the United Kingdom.[159]

V. CONCLUSION

Brexit will impact the fashion industry in many ways that could incentivize innovation. In establishing updated intellectual property and trade regimes, the United Kingdom can independently create stronger mechanisms for business development. The fashion industry thrives when all artists can fairly enter the marketplace and equally obtain protection. Adopting aspects of Switzerland's approach will sufficiently protect the interests of the fashion industry and allow it to excel in a post-Brexit world.

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negotiate Brexit-related agreements at early stages).

157. *See id.*

158. *Alternatives to Membership*, *supra* note 14, at 26 (addressing Switzerland's latitude in trade sectors per bilateral agreements with the EU).

159. *See* Wintour, *supra* note 156 (discussing the many different industry representative who participate in Brexit talks).

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HEY ALEXA: WAS IT THE BUTLER, IN THE FOYER, WITH THE CANDLESTICK? UNDERSTANDING AMAZON'S ECHO AND WHETHER THE GOVERNMENT CAN RETRIEVE ITS DATA

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I. INTRODUCTION

"In my mind, as well as the minds of a lot of other privacy experts, the Echo has been a ticking constitutional time bomb, along with a lot of other features of smart homes and the internet of things."[1] As of June 2016, more than 1.6 million homes use the Amazon Echo ("Echo"),[2] a device capable of providing extensive information at the user's command.[3] For instance, "Alexa," the Echo's personal voice assistant, updates users about the latest football scores, prepares daily agendas, and may even resolve murders.[4] In November 2016, Bentonville, Arkansas, police officers discovered the dead body of Victor Collins.[5] After conducting an investigation, the police ruled his death a homicide.[6] In Collins' home, police specifically uncovered a plethora of "smart" devices,[7] including an Echo.[8] Police seized the Echo and served Amazon with a warrant alleging that Amazon held records related to Collins' murder.[9] Although requesting this data seemingly imposes an uncomfortable burden on the Echo user's right to privacy,[10] little data is

1. Iman Smith, *Amazon Releases Echo Data in Murder Case, Dropping First Amendment Argument*, PBS NEWSHOUR: THE RUNDOWN (Mar. 8, 2017, 2:38 PM), http://www.pbs.org/newshour/rundown/amazon-releases-echo-data-murder-case-dropping-first-amendment-argument/ (quoting Carrie Leonetti, Associate Law Professor, Criminal and Constitutional Law, University of Oregon).

2. BI Intelligence, *How Many Amazon Echo Smart Home Devices Have Been Installed?*, BUS. INSIDER (June 7, 2016, 8:00 PM), http://www.businessinsider.com/how-many-amazon-echo-smart-home-devices-have-been-installed-2016-6.

3. Grant Clauser, *What Is Alexa? What Is the Amazon Echo, and Should You Get One?*, WIRECUTTER, http://thewirecutter.com/reviews/what-is-alexa-what-is-the-amazon-echo-and-should-you-get-one (last updated Sept. 5, 2017) (identifying Amazon's Alexa-controlled Echo speaker as a speaker capable of using only voice command, searching the Web, controlling household appliances like dimming the lights, and communicating with third-party services, all while never having to interact with a screen).

4. *See* Amy B. Wang, *Can Alexa Help Solve a Murder? Police Think So – but Amazon Won't Give Up Her Data.*, WASH. POST (Dec. 28, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/12/28/can-alexa-help-solve-a-murder-police-think-so-but-amazon-wont-give-up-her-data/?utm_term=.1920722036a9. *See generally* Britta O'Boyle, *Amazon Echo: What Can Alexa Do and What Services Are Compatible?*, POCKET-LINT (July 10, 2017), http://www.pocket-lint.com/news/138846-amazon-echo-what-can-alexa-do-and-what-services-are-compatible (providing details on the Echo's capabilities).

5. *See* Wang, *supra* note 4.

6. *Id.*

7. *Smart Device*, TECHNOPEDIA (Nov. 12, 2017), https://www.techopedia.com/definition/31463/smart-device (defining a smart device as "[a]n electronic gadget that is able to connect, share and interact with its user and other smart devices").

8. *See* Wang, *supra* note 4.

9. *Id.*

10. *See* Russell Brandom, *How Much Can Police Find Out from a Murderer's*

stored on the actual device. Rather, most of the data is stored on the Internet and/or smart phones by way of the user's Amazon account.[11] Nonetheless, the recordings are time stamped, thereby providing the police or government officials insight into a person's statements and/or general presence within a particular space.[12]

The debate over data accessibility, namely *what* government agents should access and *how* they can access such data emerges when courts are forced to resolve conflicts between one's right to privacy and society's reliance on electronic communication. For instance, between 2015 and 2016, the Federal Bureau of Investigation ("FBI") requested that Apple Inc. ("Apple") provide an all-access key to investigate iPhone-stored data, including the data stored on the iPhone owned and operated by Syed Rizwan Farook and Tashfeen Malik, the married couple responsible for the San Bernardino shooting[13]—Apple refused.[14] Jeffrey Bezos, Amazon's Chief Executive Officer ("CEO"), aligned with Apple, noting that consumer privacy is a highly important issue and that the conflict between privacy and national security is an "issue of our age."[15] "Privacy" is integral to the consumer-retailer relationship.[16] Specifically, should consumers believe that their information is private, they are more inclined to purchase goods that advance said privacy.[17] If, however, consumers believe that their information is

Echo?, VERGE (Jan. 6, 2017, 9:05 AM), http://www.theverge.com/2017/1/6/14189384/amazon-echo-murder-evidence-surveillance-data.

11. *See id.*; *see also* Mehau Kulyk, *Alexa and Google Home Record What You Say. But What Happens to that Data?*, WIRED (Dec. 5, 2016, 9:00 AM), https://www.wired.com/2016/12/alexa-and-google-record-your-voice/ (demonstrating how the Echo constantly "listens" for commands, then records and streams the clip of what the user says to their account on either the Internet or phone, storing data on the user's Amazon account until he or she decides to delete it).

12. *See* Brandom, *supra* note 10.

13. *See* Arjun Kharpal, *Apple vs FBI: All You Need to Know*, CNBC, (Mar. 29, 2016, 6:34 AM), http://www.cnbc.com/2016/03/29/apple-vs-fbi-all-you-need-to-know.html.

14. *See id.*

15. *See* Hayley Tsukayama, *Amazon CEO Jeffrey Bezos: Debate Between Privacy and Security Is 'Issue of Our Age'*, WASH. POST (May 18, 2016), https://www.washingtonpost.com/news/the-switch/wp/2016/05/18/amazon-ceo-jeffrey-bezos-debate-between-privacy-and-security-is-issue-of-our-age/?tid=a_inl&utm_term=.54e4e0f1ab91.

16. *See also* Walter Loeb, *Privacy and Consumer Faith on Retailers' 2014 List of Worries*, FORBES, (Jan. 17, 2014, 7:43 AM), https://www.forbes.com/sites/walterloeb/2014/01/17/the-top-two-worries-retailers-have-right-now/#2e7456db1adf (identifying consumers' privacy as one of the paramount responsibilities of the retailer).

17. *See* Andrew Meola, *How the Internet of Things Will Affect Security & Privacy*, BUS. INSIDER, (Dec. 19, 2016, 2:43 PM), http://www.businessinsider.com/internet-of-things-security-privacy-2016-8 (pointing to consumers' higher levels of privacy concerns as a source of hesitation to purchase items).

freely accessible to third parties, including the government, they hesitate to purchase goods.[18]

This Comment will begin by reviewing the jurisprudence surrounding the search and seizure of electronic data under the Fourth Amendment, the third-party doctrine, the Electronic Communications Privacy Act ("ECPA"), and the Stored Communications Act ("SCA"). This discussion requires an understanding of search and seizure law as applied to both people and intangible items, such as data on electronic storage units, and also how search and seizure law has evolved to envelope data stored on electronic mediums. Part III will analyze the case law surrounding electronically stored data and will apply said law to the Echo's recording process. In doing so, this Comment will reveal the outdated nature of the SCA, and further expose government officials' overreliance on the third-party doctrine. Part IV will additionally recommend that the SCA be appropriately modified and that the third-party doctrine be expanded to include a categorization requirement to best meet the consumers' privacy needs and business' desire to sell. Part V concludes by summarizing the necessary changes to current legal standards to ensure privacy while also upholding the appropriate legal standard.

II. THE LAWS IMPLICATING ACCESS TO ELECTRONIC DATA

A. The Fourth Amendment

Although the United States Supreme Court interprets the Fourth Amendment to protect people, not places, from unreasonable searches and seizures,[19] the language of the Fourth Amendment ostensibly contemplates only physical searches and seizures.[20] The Court's Fourth Amendment jurisprudence is thus the starting point in any Fourth Amendment analysis, as it identifies what categories of information should be protected and how to guarantee enforcement of that protection.[21]

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18. *See* Elliot C. McLaughlin & Keith Allen, *Alexa, Can You Help with this Murder Case?*, CNN, (Dec. 28, 2016, 8:48 PM), http://www.cnn.com/2016/12/28/tech/amazon-echo-alexa-bentonville-arkansas-murder-case-trnd/ ("It is unreasonable to expect consumers to monitor their every word in front of their home electronics. It is also genuinely creepy.").

19. *See* Katz v. United States, 389 U.S. 347, 351 (1967) (noting that Fourth Amendment protections apply to people, not places).

20. *See* U.S. CONST. amend. IV (emphasis added) ("The right of the people to be secure in their *persons*, *houses*, *papers*, and *effects*.").

21. *See* Alexander Scolnik, Note, *Protections for Electronic Communications: The Stored Communications Act and the Fourth Amendment*, 78 FORDHAM L. REV. 349, 351-52 (2009) (surmising that the Framers could neither anticipate technology, nor the concept of online communications, and how courts' have tried to expand the Fourth Amendment to protect privacy rights in an increasingly technological world).

The intersection between the Fourth Amendment and technology first emerged in *Olmstead v. United States*.[22] In this case, the Court determined that wiretapping did not constitute a search or seizure under the Fourth Amendment even when the government wire-tapped Olmstead's phones.[23] Approximately thirty years later, the Court overruled *Olmstead* in *Katz v. United States*.[24] In *Katz*, the Government wire-tapped a public phone booth and introduced statements acquired therein as evidence against Katz.[25] Rather than following *Olmstead*, the Court determined that even if there is no physical invasion on one's privacy, the Fourth Amendment proscribes unlawful non-physical invasions of privacy committed by the government.[26] In its analysis, the Court established a two-step test for Fourth Amendment cases.[27] The test requires courts to evaluate whether the individual alleging harm maintained a reasonable or subjective expectation of privacy given the circumstances and whether society, as a whole, is prepared to recognize the individual's expectation of privacy as reasonable.[28] Additionally, the Court expanded the Fourth Amendment's protections to the curtilage of a person's home.[29] Curtilage breaks down into three factors: (1) a connection with the home; (2) the proximity a court would regard as curtilage of the home (regardless of the home's enclosure); and (3) use of the space for private or personal means.[30] In one such case, police used drug-sniffing dogs to search

22. Olmstead v. United States, 277 U.S. 438, 455 (1928) (presiding over a case about agents wiretapping one's private telephone conversation).

23. *See generally id.* at 466 (explaining that evidence obtained by virtue of wire-tapping should not be protected because it was not a physical search or seizure as contemplated by the Fourth Amendment).

24. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (noting that a person's expectation of privacy is violated, even in a public phonebooth, where the government wiretaps his personal conversation).

25. *Id.* at 348.

26. *Id.* at 360-61 (Harlan, J., concurring) ("[A]n enclosed telephone booth is an area where, like a home . . . and unlike a field . . . a person has a constitutionally protected reasonable expectation of privacy . . . [and] that electronic as well as physical intrusion into a place that is in this sense private may constitute a violation of the Fourth Amendment.").

27. *Id.* at 361 (Harlan, J., concurring).

28. *Id.* (noting that a person must first demonstrated an actual expectation of privacy and also that society recognizes said expectation as reasonable); *see also* Ann K. Wooster, *Expecation of Privacy in and Discovery of Social Networking Web Site Postings and Communications*, 88 A.L.R.6th 319 (highlighting the case law governing expectations of privacy with respect to different types of Internet communications).

29. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013) (citing Oliver v. United States, 466 U.S. 170, 180 (1984)) (defining "curtilage" as "the area 'immediately surrounding and associated with the home'" and acknowledging that the Fourth Amendment protects the curtilage).

30. *See id.*

the curtilage of a suspected dealer's home.[31] The suspected dealer claimed that the search of the area around his home, while not inside the home, still warranted Fourth Amendment protection because it was unreasonable—the Court agreed.[32] Additionally, the concept of "curtilage" can be expanded to include what Andrew Guthrie Ferguson calls "digital curtilage" or the area in which data and stored communications exist.[33] The concept of digital curtilage enhances consumers' reasonable expectations of privacy with respect to the varied technology in their homes.[34] Given the Court's interpretation of the Fourth Amendment, constitutionally-protected individuals can withdraw to their home, wherein they maintain a heightened expectation of privacy from unreasonable government intrusion.[35] Without this protection, police could stand directly outside a suspected criminal's window, lurking about for evidence.[36]

The scope of the Fourth Amendment, or more precisely the Court's interpretation of its protections, expanded as technology has evolved. Specifically, in *Kyllo v. United States*,[37] police aimed a thermal-imaging device at the petitioner's home.[38] The Court found that this constituted an unreasonable search because the thermal-imaging device explores details of a home in a manner not unlike a physical intrusion, and that the device itself is one not typically available to the public.[39] *Kyllo* clearly demonstrates the

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31. *Id.* at 4.

32. *Id.* at 4, 8 ("As it is undisputed that the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home, the only questions is whether he had given his leave . . . for them to do so. He had not.").

33. Andrew Guthrie Ferguson, *The Internet of Things and the Fourth Amendment of Effects*, 104 CAL. L. REV. 805, 809 (2016) (proposing the theory of "digital curtilage" to protect electronic data that "(1) [is] closely associated with the effect; (2) [has] been marked out and claimed as secure from others; and (3) [is] used to promote personal autonomy, family, self-expression, and association").

34. *See id.* at 866 (describing the need for heightened expectations of privacy with respect to evolving technologies).

35. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (equating a public phonebooth to one's home, where the expectation of privacy reaches its apogee); *see also* Silverman v. United States, 365 U.S. 505, 511 (1961) (noting "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion").

36. *See Jardines*, 560 U.S. at 6 (explaining that without some protection around one's home, the right to withdraw would be rendered useless as police could simply stand outside one's window).

37. Kyllo v. United States, 533 U.S. 29 (2001).

38. *See id.* at 29 (noting that the case involved a thermal-imaging device utilized to detect the amount of heat within the defendant's home).

39. *Id.* at 34 ("[O]btaining by sense-enhancing technology any information regarding the interior of the home that could not otherwise have been obtained without physical

Court's willingness to expand Fourth Amendment protections in conjunction with evolving technology.[40]

Notwithstanding the Court's willingness to expand Fourth Amendment protections to ever-evolving technologies, the question remains: will the Court protect the user's right to privacy when the Government introduces evidence acquired from stored data communications devices, such as the Echo? By way of background, the Echo is a home audio speaker that responds to the name "Alexa", the Echo's personal voice assistant.[41] The Echo constantly listens for sound, connects to the user's Wi-Fi and home network, accesses cloud services, and uses Bluetooth streaming technology.[42] As indicated earlier, most of the Echo's data is stored on the user's Amazon account.[43] For police to access the Echo's data transmitted to a user's Amazon account, the data itself must be intercepted from the wireless network in which the Echo operates.[44] The U.S. District Court for the Northern District of California attempted to resolve this issue in *In re Google Inc. Street View Electronic Communications Litigation.*[45] Here, the plaintiffs filed a lawsuit upon learning that Google Street View[46] accessed their wireless communications through Wi-Fi networks and obtained information from their respective computers allegedly in violation of the 1968 Wiretap Act ("Wiretap Act").[47] The court attempted to determine whether the Wiretap Act, at the time it was enacted, encompassed the

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'intrusion into a constitutionally protected area' . . . constitutes a search—at least where . . . the technology in question is not in general public use.").

40. *See generally id.* (concluding that the Fourth Amendment protects against warrantless invasions of a person's home utilizing advanced technology not readily available to the public).

41. Marie Black, *What Is Amazon Echo?*, TECH ADVISOR (Sept. 28, 2017), http://www.pcadvisor.co.uk/new-product/audio/what-is-amazon-echo-3584881/.

42. *Id.* (explaining that the Echo functions upon hearing the user say, "Alexa", at which point the Echo awakes and listens for the user's specific commands).

43. *See* Brandom, *supra* note 10.

44. *See* In re Google Inc. St. View Elec. Commc'ns. Litig., 794 F. Supp. 2d 1067, 1082 (N.D. Cal. 2011) (discussing the use of technology to intercept wireless transmissions).

45. *See generally id.* (finding that the plaintiffs pled sufficient facts to claim a violation of the Wiretap Act where the defendant (Google) created, approved of, and implemented a highly-technical design software into Google Street View vehicles to intercept plaintiffs' "data packets").

46. *See id.* at 1070-71 (describing Google Street View as a feature within Google Maps offering various positions and views using photos taken from "a fleet of specially adapted vehicles commonly known as Google Street View vehicles").

47. *Id.* at 1070-72 (noting that Google intentionally implemented a data collection system on Google Street View vehicles).

concept of Wi-Fi.[48] The court concluded that when Congress enacted the Wiretap Act, it did not contemplate the concept of Wi-Fi.[49] Specifically, the court determined that the Wiretap Act's definition of "radio communications" should not be expanded to include Wi-Fi.[50] As such, the court explored the legislative intent behind radio communications, concluding that "interpreting 'radio communication' broadly would contravene congressional intent to provide protection for technology like cellular phones, which use radio waves to transmit communications, but are architected in such a way as to be private."[51]

B. The Third-Party Doctrine

The third-party doctrine permits the government to collect "any information given to a third party by a criminal suspect, without running afoul of the Fourth Amendment."[52] In establishing the third-party doctrine, the Court acknowledged that an individual's expectation of privacy is diminished when private information is shared with a third party.[53] In *United States v. Jones*,[54] however, the Court recognized that the third-party doctrine could not be maintained in its current form; yet the Court offered no alternative.[55] In particular, Justice Sonya Sotomayor said "[i]t may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties."[56]

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48. *See id.* at 1082 (explaining that although the plaintiffs' Wi-Fi network was organized such that the public could access it and transmit electronic communications, the network was set up to protect those transmissions absent the use of advanced technology (i.e., the technology used by Google), and thus, the Wiretap Act applied).

49. *See id.* at 1076 (stating that "[t]he drafting of [ECPA] provisions predated the spread of wireless internet technologies").

50. *See id.* ("[T]he usage of 'radio communication' throughout the [ECPA] does not lend itself to a broad interpretation of the term.").

51. *Id.* at 1081.

52. *See* Lucas Issacharoff & Kyle Wirshba, *Restoring Reason to the Third Party Doctrine*, 100 MINN. L. REV. 985, 985 (2016).

53. *See* Scolnik, *supra* note 21, at 354 (explaining that the Supreme Court believes people have a reduced expectation of privacy when items/information is voluntarily exposed to "public view").

54. United States v. Jones, 565 U.S. 400 (2012).

55. *See id.* at 417 (Sotomayor, J., concurring) (noting that the third-party doctrine is "ill suited [sic] to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks"); *see also id.* at 413 (finding that the FBI, which placed a Global Positioning System ("GPS") on Jones's car to track his movements, violated the Fourth Amendment).

56. *See id.* at 417.

The scope of the third-party doctrine was refined in *Riley v. California*.[57] In this case, the Court refused to extend the Fourth Amendment's search incident to arrest exception[58] to a cellphone.[59] Although the Government argued that cellphones are "materially indistinguishable" from certain items, such as wallets or purses, the comparison did not persuade the Court.[60] In fact, the Court explicitly stated that the cellphone, albeit a modern device, "implicate[s] privacy concerns far beyond those implicated by the search of . . . a wallet, or a purse."[61] With respect to the third-party doctrine, the Government and California simultaneously argued that information on cell phones can be destroyed by remote wiping conducted by third parties, a process in which "a phone, connected to a wireless network, receives a signal that erases stored data."[62] While the Court acknowledged the possibility of third parties destroying data remotely, it nonetheless determined that said third parties should be of little concern because they are not *present* at the scene of the arrest.[63] As such, *Riley* represents the Court's willingness to protect electronic communications vulnerable to third-party destruction.

Additionally, in *United States v. Warshak*,[64] government agents compelled an Internet Service Provider ("ISP")[65] to share a defendant's incriminating emails without first obtaining a warrant pursuant to the Fourth Amendment.[66] Instead, the agents relied on the SCA, which permits government agents to obtain emails otherwise protected by the Fourth Amendment.[67] The U.S. Court of Appeals for the Sixth Circuit acknowledged that the SCA provides

57. Riley v. California, 134 S. Ct. 2473 (2014).

58. Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381 (2001) (affording police the power to search anyone subsequent to that individual's arrest without first obtaining a search warrant from a neutral magistrate).

59. *Riley*, 134 S. Ct. 2494-95 ("[T]he search incident to arrest exception does not apply to cell phones . . . .").

60. *See id.* at 2488-89 (differentiating between physical items on the arrestee's person and digital data, noting that cell phones "differ in both a quantitative and qualitative sense from other objects that might be kept on an arrestee's person").

61. *Id.* at 2489.

62. *Id.* at 2486.

63. *Id.*

64. United States v. Warshak, 631 F.3d 266 (6th Cir. 2010).

65. *See Internet Service Provider (ISP): What Exactly Does an Internet Service Provider Do?*, LIFEWIRE, https://www.lifewire.com/internet-service-provider-isp-2625924 (last updated Dec. 1, 2017) ("Your Internet Service Provider (ISP) is the company you pay a fee to for access to the internet.").

66. *See Warshak*, 631 F.3d at 266.

67. *See generally id.* (finding that the government violated the defendant's Fourth Amendment rights, but relied in good-faith on the SCA).

three options for the government to acquire communications stored with a service provider: (1) obtain a warrant; (2) utilize administrative subpoenas; or (3) acquire court orders under section 2703(d).[68] Regardless, the court concluded that the similarities between email and traditional forms of communication justifies expanding the scope of the Fourth Amendment to protect email correspondence containing "confidential communications."[69] Although the third-party doctrine is certainly implicated in the context of remotely stored electronic communications, the court determined that "the mere *ability* of a third-party intermediary to access the contents of a communication cannot be sufficient to extinguish a reasonable expectation of privacy."[70] Additionally, the court held that the Fourth Amendment's exclusionary rule did not apply because the government relied on the good faith exception[71] listed in sections 2703(b) and 2703(d) of the SCA.[72]

C. The Electronic Communications Privacy Act and the Stored Communications Act

The Wiretap Act enabled Government officials to intercept electronic communications in several circumstances, including those made during (1) the ordinary course of business for common carriers, or those (2) interceptions assisting permitted law enforcement investigations.[73] The Wiretap Act also allowed persons acting as government agents under the law to intercept communications with one party's consent.[74] As computer systems became more affordable, more individuals had access to electronic forms of communication, such as email.[75] Concerned that existing laws did

68. *See id.* at 283.

69. *Id.* at 285-86, 288.

70. *Id.* at 286. *But see* United States v. Miller, 425 U.S. 435, 443 (1976) (noting that the "Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities").

71. *See generally* United States v. Leon, 468 U.S. 897 (1984) (finding that evidence should not be barred from admission when the evidence seized was done so reasonably based on a good faith reliance on a search warrant that was subsequently found defective).

72. *See Warshak*, 631 F.3d at 292 (noting that the government violated the Fourth Amendment, but properly relied upon the SCA's good faith exception).

73. *See* Amy McCann Roller, Note, *From Ship-to-Shore Telegraphs to Wi-Fi Packets: Using Section 705(a) to Protect Wireless Communications*, 68 FED. COMMS. L.J. 525, 534 (2016) (explaining that the Wiretap Act permits interceptions in certain instances).

74. *Id.* ("[The Wiretap Act] allowed persons acting under the color of law to intercept communications with one party's consent.").

75. Melissa Medina, Note, *The Stored Communications Act: An Old Statute for Modern Times*, 63 AM. U. L. REV. 267, 268-69 (2013) (stating that manufacturers, including IBM and Apple, released more cost-effective computers, thereby initiating the

not adequately protect the privacy of a citizen's electronic communication, Congress enacted the ECPA in 1986.[76] Title II of the ECPA encompasses the SCA,[77] which protects electronic communications.[78] The ECPA and SCA, further govern and define two types of service providers, respectively: electronic communication services ("ECS")[79] and remote computing services ("RCS").[80] The application of the SCA to a particular case depends on whether electronic communication can be classified as an ECS or RCS, specifically in the context of liability.[81]

1. ECS

The term "ECS" refers to a service providing its users the ability to receive and transmit electronic communications.[82] The SCA proscribes ECS providers from divulging information contained within its electronic storage.[83] Courts have struggled to adopt a uniform definition for ECS

"creation of novel and now widely used methods of communication").

76. *Id.* at 269.

77. 18 U.S.C. §§ 2701-2712 (2012); *see also* Medina, *supra* note 75, at 269 (noting that Congress passed the SCA as part of the ECPA).

78. *See* Medina, *supra* note 75, at 269 (explaining that the SCA protects electronic communications by providing a private cause of action against anyone who acquires stored communications, and regulating when service providers can disclose user communication).

79. 18 U.S.C. § 2510(14) (defining ECS as "any wire, radio, electromagnetic, photooptical [sic] or photoelectronic [sic] facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications").

80. 18 U.S.C. § 2711(2) (defining RCS as "the provision to the public of computer storage or processing services by means of an electronic communications system").

81. *See* Medina, *supra* note 75, at 278-79 ("[T]he scope of the SCA depends on whether an electronic communication is held by an ECS or RCS provider and whether the communication is in electronic storage.").

82. *See In re* JetBlue Airways Corp. Privacy Litig., 379 F. Supp. 2d 299, 306 (E.D.N.Y. 2005) (noting that under the SCA, ECS providers enable users to receive and transmit wire or electronic communications).

83. *See* Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 972 (C.D. Cal. 2010) (quoting 18 U.S.C. § 2702(a)(2)) (noting that ECS providers may not "knowingly divulg[e] to any person or entity the contents of a communication while in electronic storage by that service"); *see also* 18 U.S.C. § 2510(17)(A)-(B) (defining electronic storage as "any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and any storage of such communication by an electronic communication service for purposes of backup protection of such communication").

providers.[84] In *Konop v. Hawaiian Airlines, Inc.*,[85] the U.S. Court of Appeals for the Ninth Circuit concluded that a secure website was an ECS because when users viewed the website and initiated electronic communication, said communication was sent from the website owner to the users.[86] Additionally, the court determined that once the user has access to the website through which the data is transmitted, the website qualifies as an ECS.[87] Further, in *Kaufman v. Nest Seekers*, *LLC,* [88] the plaintiff brought a lawsuit under Title II of the ECPA (i.e., the SCA), alleging unlawful access to stored communications on a website that purportedly acted as an ECS.[89] The U.S. District Court for the Southern District of New York concluded that the website at issue, which acted like an electronic bulletin board,[90] facilitated electronic communication as an ECS provider.[91] Although the court determined that it was "premature" to find the website, at the pleadings stage, to be an ECS provider, it nonetheless concluded that a website permitting users to engage "in private electronic communications with third-parties" may act as an ECS provider.[92]

Conversely, in *United States v. Steiger*,[93] the U.S. Court of Appeals for the Eleventh Circuit concluded that the SCA did not apply to a home computer because it did not operate like an ECS provider.[94] As the court indicated, the "SCA . . . generally prohibits an entity providing an [ECS] to the public from disclosing information absent an applicable exception," but in this case, Steiger's home computer did not provide an ECS for which the SCA could

84. *Compare* Konop v. Hawaiian Airlines, Inc., 302 F.3d. 868, 879 (9th Cir. 2002) (qualifying Konop's secure website bulletins as an ECS), *with In re JetBlue*, 379 F. Supp. 2d at 308-09 (explaining that JetBlue's website, alone, could not make the company an ECS provider).

85. *Konop*, 302 F.3d at 879 (explaining that the website at-issue is an ECS provider).

86. *See id.* at 874-75 (explaining that the Inter enables users to exchange electronic communication worldwide, and that websites, like Konop's, receives, transmits, and stores electronic communications akin to an ECS provider).

87. *Id.* at 875-76 (defining and concluding Konop's website as an ECS).

88. No. 05-CV-6782 (GBD), 2006 WL 2807177, at *1 (S.D.N.Y. Sept. 27, 2006).

89. *Id.*

90. *Id.* (quoting United States v. Riggs, 739 F. Supp. 414, 417 n.4 (N.D. Ill. 1990)) ("A[n] [electronic bulletin board] system is a computer program that simulates an actual bulletin board by allowing computer users who access a particular computer to post messages, read existing messages, and delete messages.").

91. *See id.* at *5 ("An electronic bulletin board fits within the definition of an electronic communication service provider.").

92. *See id.* at *6 (acknowledging that an on-line business, like the one at-issue, that allows users to receive and transmit electronic communications acts as an ECS provider).

93. 318 F.3d 1039 (11th Cir. 2003).

94. *Id.* at 1049 (noting that there is "no evidence to suggest that Steiger's computer maintained any 'electronic communication service'").

apply.[95] Additionally, in *In re JetBlue Airways Corp. Privacy Litigation*, the U.S District Court for the Eastern District of New York determined that JetBlue Airways Corporation ("JetBlue"), which operated a website enabling it to communicate with customers in the ordinary course of business, did not automatically transform into an ECS provider by virtue of operating that type of website.[96] Even though JetBlue controlled the website in-question, the court found that JetBlue was never the provider of electronic communication services as contemplated by the SCA because it did not allow information to be transmitted over the Internet.[97] As such, the information disclosed did not violate the law.[98] Likewise, in *Crowley v. CyberSource Corp.*,[99] the U.S. District Court for the Northern District of California determined that Amazon's website did not qualify as an ECS.[100] Crowley sued Amazon after it divulged Crowley's personal information to CyberSource Corporation to verify Crowley's credit card information.[101] In assessing Amazon's liability for improper disclosure under section 2702(a)(1),[102] the court determined that Amazon must have "provide[d] either electronic communication service or remote computing service."[103] Although Amazon received emails from Crowley, the court held that it was not an ECS.[104] The court further noted that to hold otherwise would make the ECS definition over inclusive, unnecessarily equating users with providers—a distinction explicitly

95. *Id.* (explaining that the SCA does not apply in this case, but that the SCA may apply "to the extent the source accessed and retrieved any information stored with Steiger's Internet service provider").

96. *See In re* JetBlue Airways Corp. Privacy Litig., 379 F. Supp. 2d 299, 307 (E.D.N.Y. 2005) (explaining that JetBlue controls a website that enables the receipt and transmission of electronic communications, but in a manner not akin to an ECS provider).

97. *See id.* ("Rather, JetBlue is more appropriately characterized as a provider of air travel services and a consumer of electronic communication services.").

98. *See id.* at 306-07 (noting that JetBlue's Passenger Reservation System was merely a website operated by JetBlue and did not convert JetBlue into an ECS provider); *see also* Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263 (N.D. Cal. 2001) (finding the website at-issue to be user of, rather than a provider of ECS).

99. 166 F. Supp. 2d at 1263.

100. *See id.* at 1270 (noting that Amazon, which receives emails from users, is not an ECS provider as contemplated by the SCA).

101. *See id.* at 1265 (alleging that Amazon shared identifiable information without consent to a third party after a user purchased goods through Amazon's website).

102. 18 U.S.C. § 2702(a)(1) (2012) ("[A] person or entity providing an electronic communication service to the public shall not knowingly divulge to any person or entity the contents of a communication while in electronic storage by that service.").

103. *Crowley*, 166 F. Supp. 2d at 1270.

104. *Id.* (noting that to hold Amazon as an ECS provider would unnecessarily equate a "user with a provider" in conflict with the SCA).

referenced in section 2701(c) of the ECPA.[105]

2. RCS

To qualify as an RCS, the provider's electronic storage must be available to the public through an electronic communications system, meaning "any wire, radio, electromagnetic, photooptical [sic] or photoelectronic facilities for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications."[106] Loosely put, an RCS is maintained through another computer, which stores and processes data subject to future retrieval.[107] The term "electronic communication" encompasses many forms of communication, including signs, signals, images, and data by wire, radio, electromagnetic, photoelectronic or photo-optical system affecting interstate or foreign commerce;[108] however, Wi-Fi does not appear in section 2510(12) of the ECPA. Unlike ECS providers, the SCA prevents RCS providers from disclosing any communication carried or maintained by the provider for the sole purpose of storage or computer processing services.[109] Additionally, should the provider's services remain available only to a select few, not the public at-large, courts are reluctant to find liability based on the provider's existence as an RCS.[110] In fact, the U.S. District Court for the Northern District of Illinois determined that an internal email system available only to select staffers, or those with a special relationship to the provider, constituted a system restricted to the community at-large and, thus, the provider was not

105. *Id.*; *see* 18 U.S.C. § 2701(c) (defining providers and users in separate subsections).

106. *See* 18 U.S.C. § 2711(2) ("[T]he provision to the public of computer storage or processing services by means of an electronic communications system."); *see also ECPA Definitions*, CYBER TELECOM, http://www.cybertelecom.org/security/ecpanutshell.htm (last updated Mar. 1, 2017, 11:21 PM).

107. *See generally* S. REP. NO. 99-541 (1986) (delineating opinions and understandings regarding information under the ECPA).

108. *See* 18 U.S.C. § 2510(12); *see also* United States v. Herring, 993 F.2d 784, 787 (11th Cir. 1993) (suggesting that "electronic communication" is a broad, all-encompassing term).

109. *See* Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 973 (C.D. Cal. 2010) (noting that RCS providers cannot disclose information it receives, maintains, or stores, if the RCS provider is not permitted to access "the contents of [the] communications for purposes of providing . . . services other than storage or computer processing").

110. *See* Andersen Consulting LLP v. UOP, 991 F. Supp. 1041, 1043 (N.D. Ill. 1998) (indicating that gaining access to an internal email system does not fall under the statutory definition of "to the public" because the individual who gained access was not "any member of the community at large").

an RCS under the ECPA/SCA.[111]

III. THE ECHO UNDER FOURTH AMENDMENT, THIRD-PARTY DOCTRINE, AND ECPA/SCA JURISPRUDENCE

A. Accessing Data on the Echo Using the Fourth Amendment and the Third-Party Doctrine

Government agents seeking to intercept or access data stored on the Echo without a warrant do so in clear violation of the Fourth Amendment.[112] As such, agents conducting warrantless searches with respect to data must demonstrate that one of the Fourth Amendment's exceptions, such as the third-party doctrine, apply.[113] Compelling disclosure of data stored on the Echo, specifically electronic communications reasonably transmitted in confidence, violates that user's subjective expectation of privacy under the Fourth Amendment.[114] Applying the Court's analysis in *Katz* to governmental searches involving the Echo, it becomes evident that in conducting searches, even those touching only electronic communications, agents must satisfy the two-step test announced in *Katz*.[115] To that end, the Echo user maintains an expectation of privacy because his relationship with the device itself, including each Echo-specific command, presumably occurs in the confines of his home, wherein he maintains a heightened expectation of privacy.[116] While the user's interaction with the Echo unlikely involves

111. *Id.* at 1043 (concluding that the plaintiff acted as the defendant's employee rather than a member of the community at-large, and further, the mere fact that the email server could communicate with the public did not transform the defendant into an ECS provider).

112. *See* Katz v. United States, 389 U.S. 347, 360 (1967) (Harlan, J., concurring) (explaining that warrantless governmental searches in constitutionally protected areas are "presumptively unreasonable").

113. *See id*. at 362 (noting that warrants are generally required, but agents can nevertheless conduct warrantless searches when one of the Fourth Amendment's exceptions apply).

114. *See* Medina, *supra* note 75, at 294-95 (noting that Fourth Amendment privacy protections focus on necessity and expectation, and that electronic communications should be similarly analyzed).

115. *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (clarifying the Court's two-prong inquiry for searches, noting that the first prong focuses on the individual's subjective expectation of privacy, and that the second prong addresses whether society accepts the individual's expectation as reasonable).

116. *See id.* at 360 (implying that the home is a place, albeit the most important place, where individuals maintain the most constitutionally protected expectation of privacy*); see also* Ferguson, *supra* note 33, at 837 ("The Fourth Amendment protects houses and effects . . . [and] [i]f police entered the house without a warrant, you would have a physical invasion of the home.").

the consistent dissemination of highly-confidential or revealing information, the user, who is more likely to confide intimate details of his life in his own home, might nevertheless disclose confidential information to the Echo that is protected by the Fourth Amendment.[117] Furthermore, the user's subjective expectation of privacy when interacting with the Echo is likely one that society deems reasonable.[118] Because technology pervades society and most people have access to smart devices, the total diminution of privacy with respect to technological advancements is simply unfathomable, albeit from society's perspective.[119]

Additionally, the Court has proscribed governmental searches within the curtilage of a person's home.[120] Indeed, the Court's understanding of one's curtilage is ambiguous at best; however, the Court makes fairly clear that the concept of curtilage is familiar enough that it is comprehensible from daily experiences.[121] If curtilage entails "the area 'immediately surrounding and associated with the home'" and remains "'part of the home itself for Fourth Amendment purposes,'"[122] it seems likely that the user's expectation of privacy with respect to each command aimed at the Echo in his home falls under the protection of the Fourth Amendment.[123] Listening for or attempting to access conversations carried out in the user's home, even conversations converted to data via the Echo, violates the Fourth Amendment, as well as one's right to privacy, and therefore, constitutes an

117. *See* Ferguson, *supra* note 33, at 862 (noting that the Fourth Amendment "embraces both a preservation of personal autonomy and a protection against arbitrary or unreasonable intrusions. Whether conceived of as the right to be left alone, or a space for intimate activities, or other protections of personal autonomy").

118. *See Katz*, 389 U.S. at 361-62 (Harlan, J., concurring) ("the expectation [must] be one that society is prepared to recognize as 'reasonable.').

119. *See* Ferguson, *supra* note 33, at 807-08 (explaining that the advent of emerging technologies "poses a problem for a Fourth Amendment protecting 'persons, houses, papers, and *effects*' from unreasonable searches and seizures"); *see also* Bill Wasik Gear, *In The Programmable World, All Our Objects Will Act as One*, WIRED (May 14, 2013, 6:30 AM), https://www.wired.com/2013/05/internet-of-things-2/ (predicting that "smart," interconnected objects will expand in number, reaching at minimum fifty billion objects by 2020).

120. *See* Florida v. Jardines, 569 U.S. 1, 6 (2013) (noting that the right to withdraw in one's home would be of little value if agents could stand within the curtilage of that home to obtain evidence).

121. *See id.* at 4 (emphasis added) (internal quotations omitted) (quoting Cal. v. Ciraolo, 476 U.S. 207, 213 (1986)) (explaining that the curtilage is an "area around the home intimately linked to the home, both *physically* and *psychologically*").

122. *Jardines*, 569 U.S. at 6.

123. *See* Ferguson, *supra* note 33, at 837-38 (acknowledging that the interception of non-tangible data poses Fourth Amendment problems, but "[u]nder a reasonable expectation of privacy test . . . this type of high-acquisition of information" would violate the individual's reasonable expectation of privacy).

unreasonable search and seizure.[124]

In addition to the Court's definition of traditional curtilage, the notion of digital curtilage is particularly important in today's world.[125] Digital curtilage requires various factors, including "first, a connection with the home; second, a claimed and marked space to exclude others . . . and third, the use of this space which relates to personal or family activities."[126] Digital curtilage—a concept that recognizes the advanced nature of today's technology—embraces the fact that confidential communication can occur both in one's home and beyond its walls.[127] By expanding the protectability of the user's electronic communications beyond his home to include areas where digital information is accessible, digital curtilage enhances the user's ability to enjoy technology with the same expectation of privacy as in his home.[128] Additionally, the notion of digital curtilage provides sufficient guidance for those seeking the data itself (i.e., government agents), particularly in instances where third parties are compelled to disclose seemingly protected information.[129] Digital curtilage arguably prevents government agents from over relying on exceptions, such as the SCA's good-faith exception, in accessing electronic communications, and instead, compels agents to abide by boundaries, albeit loose ones, established to protect information otherwise beyond the traditional curtilage of one's home.[130]

Furthermore, as indicated above, in *Kyllo* and *In re Google*, when government agents conduct a search utilizing technology generally unavailable to the public, courts are more inclined to believe that the search

124. *See* Kyllo v. United States, 533 U.S. 27, 40 (2001) (noting that where advanced technology not in general public use is used to conduct a search, the search itself is unreasonable without a warrant); *see also In re* Google Inc. St. View Elec. Commc'ns Litig., 794 F. Supp. 2d 1067, 1082 (N.D. Cal. 2011) (implying that advanced technologies, such as wireless sniffers, pose a threat to one's privacy where information intended to be confidential is involuntarily shared with a third party).

125. *See generally* Ferguson, *supra* note 33, at 809 (proposing the theory of digital curtilage, a concept born out of the Court's notion of "physical curtilage," to resolve privacy issues introduced by emerging technologies).

126. *Id.* at 866

127. *Id.* ("Traditional curtilage recognizes that while many of our most private activities take place inside the home, they can also occur beyond the four walls of the actual homestead . . . [which] also deserves a heightened level of protection.").

128. *See id.* (noting that digital curtilage should come with a heightened expectation of privacy akin to physical curtilage).

129. *See id.* (noting that digital curtilage provides a useful framework for situations involving technology that implicate the Fourth Amendment).

130. *See* In re Google Inc. v. St. View Elec. Commc'ns Litig., 794 F. Supp. 2d 1067, 1071 (N.D. Cal. 2011) (preventing access to data transmitted over wireless networks).

itself violates the Fourth Amendment.[131] Regarding the Echo, intercepting its data transmitted over Wi-Fi requires advanced technology, specifically highly-technical data collection systems, such as the packet analyzer or wireless sniffer employed in *In re Google*.[132] As the court in *In re Google* acknowledged, the wireless sniffer "secretly captures data packets . . . [and these] data packets are not readable by the general public absent . . . sophisticated decoding and processing technology."[133] Given the Court's disdain for governmental searches reliant upon advanced technology not in general public use,[134] searches involving highly-technical data collection systems, including those capable of intercepting data transmitted via the Echo, violate the Fourth Amendment as unreasonable searches akin to physical intrusions.[135] As such, the Government must possess a warrant to reasonably intercept, decode, and analyze data transmissions via the Wi-Fi network in which the Echo device exists.[136]

B. The SCA's Applicability in the Echo Context

1. Is the Echo an ECS?

To access data electronically stored on the user's Amazon account, government agents must adhere to the SCA, which requires (1) a warrant, (2) an administrative subpoena, or (3) a court order pursuant to section 2703(d) of the SCA.[137] However, as indicated above, the government can only compel service providers identified as either an ECS or RCS to disclose

131. *See id.* (describing Google's data collection system utilized to collect, decode, and analyze data transmitted through Wi-Fi); *see also* Kyllo v. United States, 533 U.S. 27, 33-34 (2001) (noting that a thermal-imaging device was used in violation of the Fourth Amendment to acquired evidence).

132. *See generally In re Google*, 794 F. Supp. 2d at 1070-71 (using advanced technology to access a consumer's Wi-Fi network).

133. *Id.* at 1071.

134. *See Kyllo*, 533 U.S. at 39 (holding that where the Government uses a device not in general public use, it has conducted an unreasonable search in violation of the Fourth Amendment).

135. *See id*. (concluding that a thermal-imaging device, one not in general public use, enabled agents to acquire information that would have been unavailable without a physical invasion of privacy, and therefore, the search was unreasonable under the Fourth Amendment).

136. *See id.* (indicating that a search reliant on thermal-imaging technology was unreasonable without a warrant).

137. *See* 18 U.S.C. § 2703 (2012) (noting that compelled disclosure of electronic information is permitted in certain situations); *see also* United States v. Warshak, 631 F.3d 266, 283 (6th Cir. 2010) (noting that the Government can access emails with a warrant, an administrative subpoena, or an SCA-approved court order).

electronic communications under exceptions included in the SCA.[138] To classify the Echo as an ECS, the device must enable its user to transmit or receive wire or electronic communications.[139]

The Echo, or more precisely Amazon, is not an ECS for several reasons. First, the Echo uses, rather than provides, electronic communications with Amazon. Like *In re JetBlue*, where the court determined that a website with mere Internet access and the ability to transmit and receive information to and from its users did not automatically make the provider an ECS,[140] Amazon similarly uses its online platform to advertise goods without acting an Internet provider, and, as the court in *Crowley* recognized, the mere fact that Amazon transmits and receives data to and from its users does not make it an ECS provider under the SCA.[141] Additionally, Amazon, like the company Andersen Consulting LLP, is a company that purchases Internet services, rather than providing Internet services, rendering it nothing more than an ECS-user.[142]

Because Amazon is likely not an ECS, government agents cannot access information stored on the Echo pursuant to the SCA. Nonetheless, like the secure website in *Konop*, Amazon also includes a username and password component for individuals holding Amazon accounts.[143] As the court in *Konop* acknowledged, the "nature of the Internet . . . is such that if a user enters the appropriate information . . . it is nearly impossible to verify the

138. *See Warshak*, 631 F.3d at 282 (internal quotations omitted) ("The Stored Communications Act . . . permits a governmental entity to compel a service provider to disclose the contents of [electronic] communications in certain circumstances."); *see also* United States v. Steiger, 318 F.3d at 1039, 1049 (11th Cir. 2003) (noting that electronic communications are protected so long as they remain in electronic storage).

139. *See* 18 U.S.C. § 2510(15); *see also Steiger*, 318 F.3d at 1049 (noting that the SCA covers information stored with the following ECS providers: 1) a phone company; 2) ISPs; or 3) electronic bulletin boards).

140. *See In re* JetBlue Airways Corp. Privacy Litig., 379 F. Supp. 2d 299, 307 (E.D.N.Y. 2005) (noting that JetBlue does not provide internet access, "just as the use of a telephone to accept telephone reservations does not transform the company into a provider of telephone service").

141. *See* Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263, 1270 (N.D. Cal. 2001) ("[The court] rejects the argument that because Amazon receives e-mails from [plaintiff] it provides an electronic communication service. Additionally, such a definition would equate a user with a provider . . . .").

142. *See In re JetBlue Airways Corp.*, 379 F. Supp. 2d at 308 (citing Andersen Consulting LLP v. UOP, 991 F. Supp. 1041, 1043 (N.D. Ill. 1998)) (distinguishing between companies that purchase Internet services and companies that provide Internet services).

143. *See* AMAZON, https://www.amazon.com/ (last visited Oct. 18, 2017); *see also* Konop v. Hawaiian Airlines, Inc., 302 F.3d. 868, 875 (9th Cir. 2002) ("While most websites are public, many, such as Konop's, are restricted. For instance, some websites are password-protected . . . .").

true identity of that user."[144] Notwithstanding this concern, data transmitted by the Echo qualifies as electronic communication under section 2510(12) of the Wiretap Act.[145] Therefore, as indicated by the court in *Konop*, any interception, or "acquisition of the contents of any wire, *electronic*, or oral *communication* through the use of any electronic, mechanical, or other device,"[146] acquired during transmission violates the Wiretap Act.[147] As such, should a court conclude that Amazon is an ECS, government actors seeking to intercept data transmitted as electronic communication through the Echo cannot do so during transmission without running afoul of the Wiretap Act.[148]

2. Is the Echo an RCS?

The Echo is also likely not an RCS provider simply because it relates to Amazon's website. Again, to qualify as an RCS provider, the data transmitted by the Echo must be available to the public and not the product of a special relationship, such as an employer-employee relationship.[149] Amazon's website qualifies as publically available because it is available to any member of the general population who complies with requisite procedures.[150]

Nevertheless, Amazon's website, with respect to Echo users, is the product of a special relationship between the Echo, or Amazon generally, and its user. Therefore, Amazon is not an RCS in the Echo context. Using Andersen Consulting LLP as an example, where the court found that mere

144. *Konop*, 302 F.3d at 875.

145. *See* 18 U.S.C. § 2510(12) (2012) (noting that electronic communication entails sounds, data, or intelligence of any nature transmitted by a "wire, radio, electromagnetic, photoelectronic or photooptical [sic] system"); *see also Konop*, 302 F.3d at 876 (noting that Konop's website fits the definition of electronic communication because information is transferred from the website to the user through one the mediums specified in the Wiretap Act).

146. 18 U.S.C. § 2510(4) (emphasis added).

147. *See Konop*, 302 F.3d at 876, 878 (noting that Congress intended the definition of "Intercept" to be narrow).

148. *See id.* at 878 (noting that website interception violates the Wiretap Act if it occurs during transmission, not while it is in electronic storage). *But see* Crispin v. Christian Audigier, Inc., 717 F. Supp. 2d 965, 972 (C.D. Cal. 2010) (noting that ECS providers, under the SCA, may not "knowingly divulg[e] to any person or entity the contents of a communication while in electronic storage by that service").

149. *See generally* 18 U.S.C. §§ 2510(16); 2711(2); Andersen Consulting LLP v. UOP, 991 F. Supp. 1041, 1043 (N.D. Ill. 1998) (noting that simply providing an employee access to the company's email system does not equate to providing email services to the public).

150. *See ECPA Definitions*, CYBER TELECOM (Sept. 26, 2016), http://www.cybertelecom.org/security/ecpanutshell.htm.

access to an employer's internal email system (i.e., its database) did not constitute the employer as an RCS provider, the relationship between Amazon and Echo users is better understood.[151] A special relationship between a site and its users, as noted by the court in that case, undermines publicly available services, even if said site is available to the public at-large.[152] With respect to Amazon and Echo users, the mere fact that Amazon's site offers public services, namely in the form of ordering goods,[153] the Echo, likely operated within the confines of one's home, is privately maintained. Specifically, when the user commands his Echo, such commands are likely made pursuant to a reasonable expectation of privacy,[154] and as such, a court would likely find that the commands (i.e., speech) are unavailable to the public and the product of a special relationship between the user and Amazon by way of the Echo, undermining the argument that Amazon is an RCS provider.[155]

IV. MODIFYING CURRENT LAWS TO ENCOMPASS EVOLVING TECHNOLOGY

To keep up with technological advancements, it is essential to modify the Fourth Amendment, the third-party doctrine, and the SCA. Such modifications are necessary to ensure that Amazon is not forced to divulge confidential information transmitted through the Echo.[156] With respect to the third party doctrine, should government agents request data transmitted by the Echo and/or stored on the user's Amazon account, courts should remove third parties from the SCA's purview entirely.[157] Although *Warshak* held that government agents can acquire information under the SCA despite violating the Fourth Amendment, the SCA's good faith exception does not comport with Fourth Amendment jurisprudence.[158] In holding that the SCA's good faith exception might trump the Fourth Amendment, namely a person's reasonable expectation of privacy, the court in *Warshak*

151. *See Andersen Consulting LLP*, 991 F. Supp. at 1043.

152. *See id.* at 1042.

153. *See also id.* at 1041.

154. *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) ("[A] man's home is, for most purposes, a place where he expects privacy . . . .").

155. *See Andersen Consulting LLP*, 991 F. Supp. at 1043 (finding special relationships cannot constitute an RCS).

156. *See* Tsukayama, *supra* note 15.

157. *See* United States v. Warshak, 631 F.3d 266, 292 (6th Cir. 2010) (noting that the contents of one's emails, stored with an ISP, are accessible pursuant to the SCA even if obtained in violation of the Fourth Amendment).

158. *See id.*; *see also* Ferguson, *supra* note 33, at 870 (noting that a better definition of digital curtilage could refine what government intrusion means should Fourth Amendment jurisprudence creep into technological issues).

unnecessarily complicated an already complex problem.[159]

Additionally, to protect confidential electronic communications from third parties, the third-party doctrine must be modified.[160] Because roughly eighty percent of Americans rely on the Internet,[161] it is simply unreasonable to maintain the third-party doctrine in its current form.[162] To counteract this problem, courts should implement a categorization requirement for the third-party doctrine itself.[163] In doing so, courts should implement a reasonableness test before admitting information under the third-party doctrine, wherein government agents must demonstrate that there was at least a reasonable suspicion that information could be obtained from the third party in a reasonable manner.[164]

Additionally, Congress should amend the SCA to include data stored via a voice command center, such as the Echo. Absent such a revision, the SCA, as it currently reads, does not adequately protect a vast majority of emerging technologies, including voice command centers, from governmental intrusion.[165] Additionally, Congress should expand the SCA to include more than merely ECS and RCS providers to include protections for electronic communication involuntarily shared with third parties.[166] Further, Congress should articulate what constitutes online communication and whether the SCA applies to online communication through the current RCS or ECS definitions—if at all.[167] There is currently no consistent or universal understanding of what technological or online communicating means,

159. *See* Smith, *supra* note 1 (noting that the Echo is a "ticking constitutional time bomb").

160. *See* United States v. Jones, 565 U.S. 400, 417-20 (2012).

161. Matthew Tokson, *Automation and the Fourth Amendment*, 96 IOWA L. REV. 581, 588 (2011).

162. *See id.* at 581 (noting that the controversial third-party doctrine has become "increasingly problematic in an age where a large proportion of personal communications and transactions are carried out over the Internet").

163. *See* Issacharoff & Wirshba, *supra* note 52, at 1003 (identifying certain categories of information that are particularly ripe for exemption from the third-party doctrine).

164. *See id.* at 1034 (depicting a test where first, an officer can point to reasonable suspicion that the search of the third party will turn up relevant information and, second, the search should be reasonable).

165. *See* William Jeremy Robinson, Note, *Free at What Cost?: Cloud Computing Privacy Under the Stored Communications Act*, 98 GEO. L.J. 1195, 1235 (2010) ("The SCA already provides some quantum of privacy in online communications and content, but as society embraces new technologies, including cloud computing, the balance of the [SCA] struck more than two decades ago may no longer be appropriate.").

166. *See* 18 U.S.C. §§ 2701-12 (2012); *see also* Medina, *supra* note 75, at 277.

167. *See In re* JetBlue Airways Corp. Privacy Litig., 379 F. Supp. 2d 299, 308 (E.D.N.Y. 2005).

particularly with respect to the Echo.[168] To that end, without additional clarification from either Congress or the judiciary, albeit both, it is unclear whether the Echo would be defined as an ECS, RCS, or nothing at all.[169]

V. CONCLUSION

The advent of smart technology has created several social and legal dilemmas. Given the popularity of smart devices, smartphones, computers, and voice command centers alike, the majority of people using them presumably do not understand the sacrifice to privacy incurred by way of smart technology. Additionally, the law has repeatedly failed to keep up with the rapid pace of this evolving technology. As such, it is essential, as argued above, to expand the SCA to encompass emerging technologies, such as voice command centers (i.e., the Echo), to modernize Fourth Amendment jurisprudence surrounding the third-party doctrine, and to expand the term "curtilage" to include digital forms of communication in the Fourth Amendment context. Doing so ensures that the privacy expectations of each consumer are upheld in an ever-shrinking world.

168. *See* O'Boyle, *supra* note 4 (noting that when the Echo permits a person to order items, it effectively creates an in-the-air billboard: if the user knows what he or she is buying, the advertisement stands).

169. *Compare* Konop v. Hawaiian Airlines, Inc., 302 F.3d. 868 (9th Cir. 2002) (confirming an employee's private, personal website as an ECS), *and* Becker v. Toca, No. 07-7202, 2008 WL 4443050, at *1, *4 (E.D. La. Sept. 26, 2008) (permitting classification of an online business or retailer as an ECS provider if the business operates a website offering customers the ability to send and receive electronic communications with third parties), *with* Crowley v. CyberSource Corp., 166 F. Supp. 2d 1263, 1263 (N.D. Cal. 2001), *and* United States v. Steiger, 318 F.3d 1039, 1049 (11th Cir. 2003) (concluding that a home computer, merely connected to the Internet, is not an ECS).

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ADEA DISPARATE-IMPACT CLAIMS: HOW THE THIRD CIRCUIT AGE-PROOFED COMPARATORS

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I. INTRODUCTION

Today, Americans age sixty-five and older continue to join the workforce.[1] According to the Pew Research Center, as of 2016, more than

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1. Drew Desilver, *More Older Americans Are Working and Working More, Than They Used To*, PEW RES. CTR. (June 20, 2016), http://www.pewresearch.org/fact-tank/2016/06/20/more-older-americans-are-working-and-working-more-than-they-used-to/.

eighteen percent of this age group was employed.[2] Although they are known as the "Baby Boomer generation," older workers nevertheless seem reluctant to retire.[3] This generation is still dealing with the ramifications from the economic crisis, and many Baby Boomers want to make more money before they retire.[4] On the one hand, businesses benefit from the experience that older workers can provide them.[5] As AARP's Senior Vice President Jean Setzfand noted, "older workers frequently bring traits that are highly sought after in the workplace: experience, maturity, professionalism, a strong work ethic, loyalty, reliability, knowledge, strong communication skills and the ability to serve as mentors."[6] Nonetheless, more businesses are laying off older workers.[7] For instance, Fidelity Investments recently bought-out 3,000 employees, all of whom were at least fifty-five years old.[8] The company, however, is not the only one to take this action, and it is likely that more employers will also buyout older employees.[9]

Although states have enacted employment discrimination laws, federal laws also address workforce discrimination.[10] The Age Discrimination in Employment Act ("ADEA") currently protects employees forty years old or older from discriminatory employment policies.[11] Employees can challenge these policies on the basis of two different theories: disparate-treatment and/or disparate-impact.[12] For purposes of disparate-treatment claims, the

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2. *Id.*

3. *See generally* Ben Steverman, *'I'll Never Retire': Americans Break Record for Working Past 65*, BLOOMBERG (May 13, 2016, 5:57 AM), https://www.bloomberg.com/news/articles/2016-05-13/-i-ll-never-retire-americans-break-record-for-working-past-65 (discussing reasons why Baby Boomers delay retirement, including financial and health considerations).

4. *Id.*

5. *See* Steverman, *supra* note 3*; see also* Richard Eisenberg, *Fidelity Latest to Offer Worker Buyouts: Double-Edged Sword?*, FORBES (Mar. 1, 2017, 4:48 PM), https://www.forbes.com/sites/nextavenue/2017/03/01/fidelity-latest-to-offer-older-worker-buyouts-double-edge-sword/#c9cf9a06f6ff.

6. Eisenberg, *supra* note 5.

7. *See id.* (noting some of the companies that have bought out employees and predicting that more companies will undergo voluntary terminations).

8. *See generally id.* (discussing the extent to which voluntary terminations are lawful under the Age Discrimination in Employment Act).

9. *See id.* (explaining that UPMC, Blue Cross and Blue Shield of Illinois, and the Philadelphia Media Network are examples of companies that have offered buyouts to older workers).

10. *See e.g.,* Age Discrimination in Employment Act, 29 U.S.C. § 621 (2012); 42 U.S.C. § 2000e-2(a) (2012); N.Y. EXEC. LAW § 296(a) (Consol. 1951); CAL. PROHIBITED § 129409(a) (Deering 1980).

11. 29 U.S.C. § 631(a).

12. *Id.* § 623(a)(1)-(2); *see also* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61,

United States Supreme Court has said that "the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost out because of his age."[13] In *Karlo v. Pittsburgh Glass Works*, *LLC*, the U.S. Court of Appeals for the Third Circuit found that employees may use subgroup comparators[14] for ADEA disparate-impact claims.[15] Should Pittsburgh Glass Works ("PGW") appeal, the Third Circuit's decision, which created a conspicuous circuit split, provides an opportunity for the Court to clarify its ADEA disparate-impact jurisprudence.[16]

This Comment argues that, if PGW appeals the Third Circuit's decision in *Karlo* to the Supreme Court, the Court will likely affirm the Third Circuit's decision.[17] This Comment will first discuss disparate-impact jurisprudence, including the theory's scope under the ADEA.[18] Specifically, it will focus on disparate-impact theory under Title VII of the Civil Rights Act, its extension to the ADEA by way of Supreme Court jurisprudence, and the Court's interpretation of the ADEA itself.[19] Next, this Comment will analyze the ways in which U.S. circuit courts interpret disparate-impact theory and the ADEA, thereby demonstrating why the Third Circuit's reasoning prevails.[20] It further recommends that the Court resolve the circuit split by

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69 (3d Cir. 2017).

13. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996).

14. *See generally* Patrick Dorrian, *Older Workers Can Sue for Age Bias Even If Comparators Are 40-Plus*, BLOOMBERG L. (Jan. 11, 2017), https://www.bna.com/older-workers-sue-n73014449636/ (defining comparator as a term used for the group you are using to compare the subgroup with).

15. *Karlo*, 849 F.3d at 67-68.

16. *See id.* at 69 (allowing ADEA subgroup disparate-impact claims, "so long as that evidence meets the usual standards for admissibility"); *see also* Dorrian, *supra* note 14 (noting reactions on the likelihood of Pittsburgh Glass Works appealing the Third Circuit's decision to the Supreme Court).

17. *See Karlo*, 849 F.3d at 68.

18. *See* 29 U.S.C. § 623(a)(2) (2012) (providing that employees can challenge employment practices that affect the employee "because of such individual's age"); *see also* Smith v. City of Jackson, 544 U.S. 228, 236 (2005); Griggs v. Duke Power Co., 401 U.S. 424, 431 (1970) (prohibiting facially neutral employment practices that benefit a particular group).

19. *See* 29 U.S.C. § 623(a)(1)-(2) (barring age discrimination); 42 U.S.C. § 2000e-2(a) (1964) (listing "race, color, religion, sex, or national origin" as its protected classes); *see also Smith*, 544 U.S. at 240; *Griggs,* 401 U.S. at 430-31. *See generally* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308 (1996).

20. *See generally Karlo*, 849 F.3d 61 n.7 (justifying it's "compelling basis" for creating this circuit split by highlighting three factors: "(1) the Second Circuit and Sixth Circuit cases predate . . . *O'Connor* and *Smith*; (2) the Sixth Circuit case is non-precedential; and (3) the Eighth Circuit case predates *Smith*"); EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999); Smith v. TVA, 924 F.2d 1059 (6th Cir.

upholding the Third Circuit's interpretation of ADEA sections 623(a)(1) and 623(a)(2).[21] Lastly, it concludes that the Third Circuit's ruling is indeed consistent with the ADEA, and that, if PGW appeals to the Supreme Court, the Court will likely uphold the Third Circuit's decision on subgroup disparate-impact claims.[22]

II. THE RISE OF AGE DISCRIMINATION JURISPRUDENCE AND THE DISPARATE-IMPACT THEORY

Discrimination claims ordinarily contend that a plaintiff has suffered disparate-treatment and/or disparate-impact.[23] Intentional discriminatory acts against an employee constitute disparate-treatment.[24] Conversely, disparate-impact claims challenge policies lacking discriminatory intent, but nonetheless benefit a particular group.[25]

A. Supreme Court Title VII Case Law

In *Griggs v. Duke Power Co.*,[26] African American employees challenged Duke Power Company's standardized testing employment policy under Title VII of the Civil Rights Act, which provides that:

> it shall be an unlawful employment practice for an employer -
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,

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1991); Barnes v. GenCorp, 896 F.2d 1457 (6th Cir. 1990); Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989).

21. *See Karlo*, 849 F.3d at 71-73.

22. *See id.* at 76-78.

23. *See id.* at 69; *see also Griggs,* 401 U.S. at 441; *Filing a Charge of Discrimination*, EEOC, https://www.eeoc.gov/employees/charge.cfm (last visited Dec. 20, 2017) (outlining procedural grounds for discrimination claims pursuant to federal law).

24. *See Karlo,* 849 F.3d at 71*; see also Consol. Coin Caterers Corp.*, 517 U.S. at 312 (applying the *prima facie* case in *McDonnell Douglas Corp.* to ADEA disparate-treatment claims); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing the *prima facie* case for discrimination under Title VII).

25. *See Griggs,* 401 U.S. at 429-30; *see also Karlo,* 849 F.3d at 69.

26. 401 U.S. at 424.

> religion, sex, or national origin.[27]

The Court used this case to establish the disparate-impact theory for claims under Title VII of the Civil Rights Act.[28] Notably, the Court stated that "[u]nder the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[29] The Court further explained that Title VII does not require employers to hire individuals because they may fall under a protected class, but rather, that employers refrain from engaging in discriminatory policies that favor a particular group.[30] Thereafter, the disparate-impact analysis has encompassed challenges to "practices that are fair in form, but discriminatory in operation."[31] However, whether the employer intended for the policy to be discriminatory is irrelevant.[32]

Following its decision in *Griggs*, the Court applied a similar reasoning in *McDonnell Douglas Corp. v. Green*.[33] In this case, the McDonnell Douglass Corporation terminated an employee as part of a reduction-in-force.[34] The Court reaffirmed the notion that under Title VII, employers cannot engage in discriminatory practices.[35] As such, if a plaintiff wishes to challenge an employer's policy under Title VII disparate-treatment grounds, the plaintiff must meet the *prima facie* elements from *McDonnell*.[36] The Court declared:

> This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.[37]

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27. 42 U.S.C. 2000e-2(a) (2012).

28. *See Griggs*, 401 U.S. at 430-31; *Karlo*, 849 F.2d at 69.

29. *Griggs*, 401 U.S. at 430.

30. *Id.* at 430-31.

31. *Id.* at 431.

32. *See id.* at 430-32 ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability."); *see also* Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 987 (1988) (justifying the disparate-impact theory on grounds that an employer may discriminate against an employee even where the employer did not intend to do so).

33. 411 U.S. 792, 800 (1973).

34. *Id.* at 794.

35. *See id.* at 802.

36. *See id*.

37. *Id.* at 802.

Once the plaintiff demonstrates a *prima facie* case for discrimination, the employer will only prevail if the policy was based on a "legitimate, nondiscriminatory reason."[38] In contrast, a *prima facie* case for disparate-impact claims require "isolating and identifying the specific employment practices that are allegedly responsible for any observed statistical disparities."[39] The distinctions indicated above reveal that lacking intent does not negate a finding of discrimination.[40]

In *Connecticut v. Teal*,[41] the Court assessed an employer's "bottom-line" defense to a Title VII disparate-impact claim.[42] The State of Connecticut carried out a hiring process among employees seeking positions as permanent supervisors, and as such, the State required said employees to take a written exam.[43] The process disparately impacted four employees; however, a year after the examination, petitioners promoted over twenty percent of the African American candidates and more than thirteen percent of its white candidates.[44] In highlighting the supposed balance, Connecticut attempted to justify a policy that disparately impacted certain employees, because "the 'bottom-line' result of the promotional process [achieved] an appropriate racial balance."[45] The Court rejected Connecticut's justification, noting that the disparate-impact analysis prohibits practices that affect an individual's employment regardless of potential positive results or outcomes of specific employment practices.[46]

Then in *Watson v. Fort Worth Bank and Trust*,[47] the Court noted that a *prima facie* case for disparate-impact requires that the plaintiff show "causation" with respect to the new employment practice.[48] In doing so, the Court acknowledged that a plaintiff meets this requirement if he or she can

38. *See id.*; *see also* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 69-70 (3d Cir. 2017) (distinguishing the "business necessity" defense for Title VII claims from the "reasonable factor other than age" defense for ADEA claims).

39. Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 994 (1988); *see also* Smith v. City of Jackson, 544 U.S. 228, 241 (2005) (applying the aforementioned *prima facie* standard for ADEA disparate-impact claims).

40. *See Watson,* 487 U.S. at 987 (rejecting that disparate-treatment and disparate-impact involve different "legal issues").

41. 457 U.S. 440, 442 (1982).

42. *Id.*

43. *Id.* at 442-43.

44. *See id.* at 443-44 (noting that more white candidates passed the written exam compared to African American candidates).

45. *See id.* at 442-44 (highlighting Connecticut's defense that they ultimately hired more African American candidates).

46. *See id.* at 450.

47. Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 994 (1988).

48. *Id.*

show that the employment practice disparately impacted him or her because the person falls under the protected class.[49]

B. The Age Discrimination in Employment Act of 1967

As stated above, the ADEA precludes employers from engaging in discriminatory measures against employees forty years old or older.[50] Specifically, the Act provides that:

> It shall be unlawful for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age.[51]

Disparate-impact claims fall under section 623(a)(2) of the ADEA.[52] For a plaintiff to succeed under section 623(a)(2), the plaintiff must meet the Court's causation standard established in *Watson*.[53] To do so, "the plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."[54] Nonetheless, pursuant to the ADEA, an employer may ultimately prevail if an employer can successfully show that its determination involved a "reasonable factor other than age."[55] For instance, in *Smith v. City of Jackson*,[56] the Court evaluated whether a group of ADEA-covered employees could bring a disparate-impact claim pursuant to the ADEA to

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49. *See id.* ("[T]he plaintiff must offer statistical evidence of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership of a protected class.").

50. 29 U.S.C. § 621 (2012).

51. *Id.* § 623(a)(1)-(2). *See generally* Zombro v. Balt. City Police Dep't, 868 F.2d 1364, 1369 (4th Cir. 1989) (citing Platt v. Burroughs Corp., 424 F. Supp. 1329, 1340 (E.D. Pa. 1976)) (finding that age discrimination claims are only permissible under ADEA).

52. *See* 29 U.S.C. § 623(a)(2); *see also* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 69 (3d Cir. 2017) (citing Smith v. City of Jackson, 544 U.S. 228, 235 (2005)).

53. *See Smith*, 544 U.S. at 241 (quoting *Watson*, 487 U.S. at 994).

54. *Watson*, 487 U.S. at 994.

55. *See* 29 U.S.C. § 623(f)(1) (noting that considering "reasonable factors other than age" would justify practices that would be "otherwise prohibited"); *see also Karlo*, 849 F.3d at 80 (describing this requirement as a "light burden").

56. 544 U.S. at 228.

challenge the city's pay raise plan.[57] Specifically, the Court found that the city could lawfully give its police officers a higher raise.[58] In recognizing disparate-impact claims under the ADEA, *Smith* extended the concept of the disparate-impact *prima facie* case, as described in *Watson*, to ADEA claims.[59]

Furthermore, in *Smith*, the Court said that "when Congress uses the same language in two statutes having similar purposes . . . it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[60] Consequently, the Court found that both the ADEA and Title VII provide for disparate-impact claims because (1) the language in the statutes only differs in its protected classes, and (2) they both proscribe discrimination in the workforce.[61] Moreover, the Court compared the ADEA's applicability in disparate-treatment and disparate-impact, specifically finding that the discriminatory policies trigger the ADEA.[62] Where the employer's policy is not related to the employee's age, the employer is not liable for disparate-treatment.[63]

However, in *Meacham v. Knolls Atomic Power Laboratory*,[64] the Court clarified that if an employer invokes section 623(f)(1) of the ADEA as an affirmative defense to an ADEA disparate-impact claim, the employer "must not only produce evidence raising the defense, but also persuade the factfinder of its merit."[65] The Court noted that section 623(f)(1) serves as a defense to disparate-impact claims because but for the fact that an employer may prove the policy was based on a "reasonable factor other than age," the employer would be liable for discriminating against ADEA-covered employees.[66]

Finally, disparate-treatment claims fall under section 623(a)(1).[67] The

57. *Id.* at 230-31.

58. *See id.* at 242 ("Reliance on seniority and rank is unquestionably reasonable given the City's goal of raising employees' salaries to match those in surrounding communities."); *see also* 29 U.S.C. § 623(f)(2)(A) (allowing employers to implement "seniority systems").

59. *See Smith*, 544 U.S. at 241 (noting that merely challenging the city's plan did not suffice to allege disparate-impact); *see also Watson*, 487 U.S. at 994.

60. *See Smith*, 544 U.S. at 233 (citation omitted).

61. *See id.* at 232-34. *Compare* 42 U.S.C. § 2000e-2(a) (2012), *with* 29 U.S.C. § 623(a)(1).

62. *Smith*, 544 U.S. at 238-39.

63. *Id.* at 238.

64. 554 U.S. 84 (2008).

65. *Id.* at 87, 96.

66. *See id.* at 94-95 (explaining that ADEA "refers to an excuse or justification for behavior that, standing alone, violates the statute's prohibition").

67. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 310-12 (1996)

Court examined a *prima facie* case for ADEA disparate-treatment claims in *O'Connor v. Consolidated Coin Caterers Corp*.[68] Specifically, O'Connor sued his former employer after the employer terminated him when he was fifty-six years old and replaced him with a forty-year-old.[69] The Court held that whether the plaintiff was replaced by an employee not covered by the ADEA is "utterly irrelevant"[70] to a *prima facie* case of discrimination under the ADEA.[71] Consequently, the Court recognized that "the fact that one person in the protected class has lost out to another person in the protected class is thus irrelevant, so long as he has lost *because of his age*."[72] Rather than focusing on whether the newly hired employee is also covered by the ADEA, the Court said an assessment of age discrimination claims must instead consider the age gap between the plaintiff discriminated against and the newly hired employee.[73]

C. The Karlo Decision

The Third Circuit's recent holding in *Karlo*, namely that employees may bring subgroup disparate-impact claims, stands in stark contrast to that of its sister courts.[74] The 2008 automobile industry crisis affected PGW, a Pennsylvania-based automotive glass manufacturing company, especially with sales.[75] PGW ultimately implemented reductions-in-force, and in the process, gave its directors permission to fire employees in their respective divisions.[76] PGW eventually fired about 100 employees.[77] Seven of the terminated employees, all fifty years old or older, filed charges against PGW before the Equal Employment Opportunity Commission ("EEOC"), but their attempt to challenge PGW's reductions-in-force failed.[78] The group also filed a class action in the U.S. District Court for the Western District of Pennsylvania, alleging age discrimination on disparate-impact and disparate-

(extending the *prima facie case* to ADEA disparate-treatment claims).

68. *Id.* at 312.

69. *Id.* at 309-10.

70. *Id.*

71. *Id.* at 311-12.

72. *Id*.

73. *See id.* at 313 (recognizing the probative value of a plaintiff showing that the newly hired employee is "substantially younger" as opposed to showing that the ADEA does not extend to the newly hired employee).

74. Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 68-69 (3d Cir. 2017).

75. *Id.* at 66.

76. *Id.*

77. *Id.*

78. *See id.*

treatment grounds.[79] The Third Circuit found ADEA subgroup disparate-impact evidence permissible, "so long as that evidence meets the usual standards for admissibility."[80] According to the Third Circuit, holding otherwise would prevent challenges to policies contemplated by the ADEA.[81]

i. Circuit Split Jurisprudential History

The U.S. Court of Appeals for the Second Circuit addressed subgroup claims in *Lowe v. Commack Union Free School District*.[82] In *Lowe*, most of appellee's newly hired employees were over forty years old even though most of the applicant pool was comprised of candidates under forty years old.[83] The court determined that if a policy resulted in more employees being covered by the ADEA, getting hired could not be considered a claim of disparate-impact.[84] Thus, the court found that the Commack Union Free School District failed to establish a *prima facie* case for disparate-impact because their statistical evidence did not show that their employer's actions benefitted employees under forty years old.[85] In other words, in the Second Circuit, a plaintiff alleging disparate-impact must show that the employer's policy disparately impacted the plaintiff because the plaintiff is a member of the ADEA's class of employees ages forty-and-over.[86]

The Second Circuit recognized that employees may bring disparate-treatment and/or disparate-impact claims pursuant to the ADEA precisely because of the similarities in the texts of Title VII and the ADEA.[87] However, the court relied on *Watson* to explain that the Supreme Court assessed disparate-impact discrimination claims on the extent to which employer's policy affected the employee's protected class.[88] In doing so, the

79. *Id.* at 66-67.

80. *Id.* at 68-69.

81. *See id.* at 69 ("A contrary rule would ignore significant age-based disparities. Where such disparities exist, they must be justified pursuant to the ADEA's relatively broad defenses.").

82. 886 F.2d 1364, 1370-71 (2d Cir. 1989).

83. *See id.* at 1371 (finding that this policy gave preference for ADEA covered employees).

84. *See id.* (noting that two-thirds of the candidates that the appellee hired were covered by the ADEA).

85. *Id.*

86. *See id.* at 1370-71 (quoting Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 994 (1988)) ("Lowe and Delisi failed to demonstrate that any of defendants' hiring practices 'caused the exclusion of applicants for jobs . . . because of their membership in a protected group.'").

87. *See id.* at 1369 (citation omitted).

88. *See id.* at 1371, 1373 (citing *Watson*, 487 U.S. at 997).

Second Circuit views *Watson* to say that plaintiffs can only recover under the ADEA where the evidence shows that the employer discriminated against them for being a part of the ADEA's class.[89]

Further, the Second Circuit reasoned that because the ADEA considers employees forty-and-over a protected group, for plaintiffs to meet the disparate-impact *prima facie* standard, plaintiffs have to show statistics that the policy favored employees not protected by the ADEA.[90] Consequently, the Second Circuit rejects disparate-impact where employers ultimately hire more forty-and-older employees.[91] Notably, the Second Circuit distinguished the plaintiff's age discrimination claim from *Teal*, even though *Teal* explicitly rejected the "bottom-line" defense.[92] Thus, in rejecting subgroup disparate-impact claims, the court noted that holding otherwise would mean that "any plaintiff can take his or her own age as the lower end of a 'sub-protected group' and argue that said 'sub-group' is disparately impacted."[93] However, the court upheld disparate-treatment subgroup claims.[94]

Comparatively, the U.S. Court of Appeals for the Sixth Circuit has addressed disparate-impact subgroup claims twice. First, in *Barnes v. GenCorp*, the court recognized that "an employer violates [the] ADEA when preference is given to a younger employee even if the younger employee is within the protected class of persons age forty-and-over."[95] However, the court further found that such reasoning simply does not extend to disparate-impact claims.[96] Additionally, the court held that subgroup comparators enable courts to presume that discrimination occurred.[97] To this end, the Sixth Circuit noted that policies benefiting younger employees covered by the ADEA can trigger ADEA liability.[98] The court's reasoning focused on the probative value of statistical evidence, and as such, the court explained that where the evidence shows a tendency to terminate older individuals,

89. *See id*. at 1370-71 (ruling against the plaintiffs because they failed to meet the *Watson* standard).

90. *See id.* at 1371.

91. *Id.*

92. *See id.* at 1371; *see also* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 76 (3d Cir. 2017) (applying the *Teal* standard in the ADEA subgroup context).

93. *Lowe*, 886 F.2d at 1373.

94. *See id.* at 1374.

95. 896 F.2d 1457, 1466 (6th Cir. 1990) (quoting McCorstin v. U.S. Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980)).

96. *Id.* at 1467 n.12.

97. *See id.* at 1466 (rejecting "that the only valid statistics would necessarily divide the employees into groups age 40-and-over and those under 40").

98. *Id.*

such evidence would demonstrate disparate-treatment.[99]

The Sixth Circuit revisited subgroup disparate-impact claims in *Smith v. Tennessee Valley Authority*.[100] In this case, the court held that a plaintiff meets the *prima facie* case on a disparate-impact claim where the employer's actions allow the employer to hire more employees thirty-nine-and-under.[101] The court aligned with the employer,[102] finding no applicable disparate-impact because the defendant had retained employees aged forty-and-over.[103] In *Smith*, the Sixth Circuit relied on the Second Circuit's reasoning in *Lowe*,[104] noting that the plaintiff failed to show a *prima facie* disparate-impact case because "the fact that all six terminated employees were within the protected range does not support a finding of disparate impact when four of the six retained employees as ACSs were also within the protected age group."[105] Consequently, the Sixth Circuit reasoned that where the evidence shows that other ADEA covered employees benefitted from the employer's policy, the plaintiff cannot meet the *prima facie* case for disparate-impact.[106]

Like the Second Circuit, the U.S. Court of Appeals for the Eighth Circuit requires plaintiffs to be discriminated against "because of their membership in a protected group" to demonstrate disparate-impact.[107] In *EEOC v. McDonnell Douglas Corp.,*[108] the court precluded disparate-impact subgroup claims and opined that because the *O'Connor* Court addressed the *prima facie case* for disparate-treatment claims, the Court's rationale did not extend to disparate-impact claims. The Eighth Circuit relies on *Watson* in similar cases, noting that plaintiffs can only show disparate-impact where the evidence reveals that they were discriminated against as protected employees

99. *See id.* at 1467.

100. *See generally* No. 90-5396, 1991 U.S. App. LEXIS 1754 (6th Cir. Feb. 4, 1991).

101. *See id.* at *11 (citing Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364, 1371 (2d Cir. 1989)).

102. *Id.* at *11-12.

103. *See id.* at *12 ("A plaintiff cannot succeed under a disparate impact theory by showing that younger members of the protected class were preferred over older members of the protected class.").

104. *Id.* at *11-12.

105. *See id. But see* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 78 (3d Cir. 2017) ("*Teal* held that a plaintiff *can* succeed under a disparate-impact theory if other members of the protected class were preferred . . . .").

106. *TVA*, 1991 U.S. App. LEXIS 1754, at *11-12.

107. *See* EEOC v. McDonnell Douglas Corp., 191 F.3d 948, 950 (8th Cir. 1999) (quoting Watson v. Fort Worth Bank and Trust, 487 U.S. 977, 994 (1988)).

108. *See id.* at 950-51 ("The Court in *O'Connor* did not address disparate-impact claims under the ADEA, and thus we do not think that *O'Connor* has any relevance to our analysis here.").

under the ADEA.[109] Although the Eighth Circuit rejected subgroup claims, the court recognized that allowing subgroup claims would not ordinarily mean that all plaintiffs would be able to show that the employers' policy disparately impacted them.[110] Rather, the Eighth Circuit noted that disparate-impact subgroup claims are impermissible because (1) employers would be liable for reductions-in-force disparately impacting its employees even when they benefit other employees covered by the ADEA, and (2) recognizing subgroup evidence means that age would become a factor in deciding whether to terminate an employee.[111]

III. WHY *KARLO* HAS PAVED THE WAY FOR ADEA SUBGROUP DISPARATE-IMPACT CLAIMS

The Third Circuit's decision in *Karlo* created a circuit split with respect to subgroup disparate-impact claims.[112] The court specifically found that subgroup claims constituted a "compelling basis" to create a circuit split.[113] The court acknowledged that while the employees indeed showed disparate-impact, requiring them to compare effects of PGW's firing policies on the employees with its effects on employees forty-and-over would disregard the disparate impact suffered by the plaintiffs.[114]

A. The Third Circuit's Reading of Section 623 of the ADEA

The Third Circuit's interpretation of sections 623(a)(1) and 623(a)(2) of the ADEA is the most important factor in considering subgroup claims under section 623(a)(2).[115] *Karlo* recognizes that these subsections refer to different theories of discrimination.[116] Despite their differences, the court

109. *See id.* at 950 (precluding ADEA disparate-impact subgroup evidence).

110. *See id.* (rejecting the lower court's finding that plaintiffs would always succeed in ADEA subgroup disparate-impact claims).

111. *Id.* at 951.

112. *See* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 75 (3d Cir. 2017) (rejecting the other circuit court decisions because "they are contradicted by *O'Connor* and *Teal*, confuse evidentiary concerns with statutory interpretation, and incorrectly assume that recognizing subgroups will proliferate liability for reasonable employment practices").

113. *See id.* at 75 n.7 (citing Wagner v. PennWest Farm Credit, ACA, 109 F.3d 909, 912 (3d Cir. 1997)) (noting the court's reluctance to create circuit splits absent a 'compelling basis' to do so).

114. *See id.* at 68, 72 (identifying this as the result of the policy prioritizing ADEA covered employees under fifty years of age).

115. *See id.* at 69 ("Disparate treatment is governed by § 623(a)(1); disparate impact is governed by § 623(a)(2).").

116. *Id.* at 71. (explaining that the similarities between each subsection mandated that the "interpretation of [the disparate-impact subsection] . . . be consistent with our

reasoned that the subsections were analogous because they prohibit discrimination "because of [an] individual's age."[117] The court noted that the language in these subsections shows that the challenger's age, rather than the ADEA's protected class, is indicative of disparate impact.[118]

The Third Circuit's explanation of the ADEA should bewilder no one considering the Court's understanding of Title VII and the ADEA in both *O'Connor* and *Smith*.[119] In *O'Connor*, the Court first had to determine whether the *prima facie* case in *McDonnell*, a Title VII case, also applied to ADEA discrimination claims—the Court answered affirmatively.[120] While the Third Circuit merely cited *Smith* to compare the language in Title VII, the ADEA, and to explain the employer's burden under section 631(a), the Court's interpretation of the ADEA and Title VII in that case confirmed that Title VII principles indeed apply to the ADEA.[121]

The Third Circuit's interpretation of sections 623(a)(1) and 623(a)(2) of the ADEA further demonstrates that the court correctly applied *O'Connor* in deciding for Karlo.[122] In *O'Connor,* the Court explained that a *prima facie* case permits courts to assume that employers discriminated against employees.[123] However, the Court also held that requiring employees to prove that they were replaced with someone not covered by the ADEA would not necessarily prove discrimination.[124]

The Third Circuit specifically relied on *Watson* to justify *O'Connor*'s scope in disparate-impact subgroup claims.[125] Recall that in *Watson*, the Court reasoned that although disparate-impact and disparate-treatment have

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interpretation of the disparate-treatment provision").

117. *Id.*

118. *See id.* ("Thus, 'adversely affect . . . because of such individual's age' must mean adversely affect based on *age*, not adversely affect based on forty-and-older status.").

119. *See generally* Smith v. City of Jackson, 544 U.S. 228-41 (2005) (confirming that Title VII principles sometimes apply in the ADEA context); O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308-11 (1996) (assuming that Title VII principles apply in the ADEA context).

120. *See O'Connor*, 517 U.S. at 311 ("We have never had the occasion to decide whether that application of the Title VII rule to the ADEA context is correct, but since the parties do not contest that point, we shall assume it.").

121. *See Smith*, 544 U.S. at 240 (explaining that disparate-impact theory, under Title VII, is not "categorically unavailable under the ADEA").

122. *See Karlo*, 849 F.3d at 71.

123. *See O'Connor*, 517 U.S. at 311-12 (assuming that Title VII principles apply in the ADEA context).

124. *See id.* at 312 ("[T]here can be no greater inference of *age* discrimination (as opposed to '40 and over' discrimination) when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old.").

125. *See Karlo*, 849 F.3d at 69.

two different *prima facie* requirements, the "ultimate legal issue" remains the same[126] and that the disparate-impact theory recognizes that employment practices can be discriminatory even where they lack intent.[127] Accordingly, the fact that *O'Connor* focuses on disparate-treatment, as acknowledged by the Third Circuit, does not matter as section 623(a)(1) and section 623(a)(2) of the ADEA require courts to determine whether an employer is liable for age discrimination.[128] The Third Circuit's interpretation of the ADEA is thus consistent with *Watson*'s reasoning of the disparate-impact theory.[129]

Finally, the underlying reasoning behind the disparate-impact theory also applies to the Third Circuit's reasoning.[130] In *Griggs*, the Court recognized the disparate-impact theory because the Court found that Congress wanted employers to refrain from practices that would otherwise allow them to discriminate against their employees.[131] The Court also vehemently noted that Title VII is a safeguard against policies that favor a particular group.[132] Furthermore, the Court noted that Title VII required employers to show that their practices are indeed employment related.[133] But most importantly, the Court said that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation."[134] Therefore, as the Third Circuit found, subgroup evidence can still show disparate-impact.[135]

B. ADEA: Protected Class or the Challenger?

While anyone falling under any of Title VII's protected classes can allege disparate-impact or disparate-treatment, the ADEA only protects those who are forty years old or older.[136] In *Watson*, the Court acknowledged that

126. *See* Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 987 (1988) (noting that "distinguishing features of factual issues that typically dominate in disparate impact cases do not imply that the ultimate legal issue is different than in cases where disparate treatment analysis is used").

127. *See id.*

128. *See Karlo*, 849 F.3d at 69-70.

129. *See id*. at 71-72 (quoting *Watson*, 487 U.S. at 987) (noting that "a disparate impact 'may in operation be functionally equivalent to intentional discrimination'").

130. *See generally* Griggs v. Duke Power Co., 401 U.S. 424-30 (1971).

131. *See id.* at 429-30. (explaining that Title VII requires employers to not engage in discriminatory practices).

132. *See id.* (noting that in enacting Title VII, Congress intended "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees").

133. *See id*. at 429-31 (requiring the employer to demonstrate a nexus between its practice and job performance, i.e., job-relatedness).

134. *Id.* at 432 (emphasis added).

135. *See* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 72 (3d Cir. 2017).

136. *See id.* at 71 ("[T]he ADEA protects a class of individuals at least forty years old

disparate-impact recovery also depended on the extent to which the alleged disparate-impact itself relates to the fact that the employee is entitled to Title VII protection.[137] The Third Circuit, however, found that the ADEA, rather than protecting a particular class, protects the individuals in the forty-and-over class contemplated by the ADEA.[138]

The Third Circuit's reasoning follows from the Court's decision in *O'Connor*.[139] In *O'Connor*, the Court said that the ADEA contemplates a forty-plus class because discrimination under the ADEA is related to the employer's age requirements, not the fact that the employee falls under the ADEA.[140] That the ADEA happens to embrace an age requirement merely limits whom is entitled to ADEA protection.[141]

The Third Circuit also relied on *Teal* to find that section 623(a)(2) refers to the employee's rights.[142] Moreover, the Third Circuit's opinion also proscribed a "bottom-line defense" to disparate-impact claims in the ADEA context.[143] In *Teal*, the Court interpreted section 703(a)(2) to relate to the effects of the employment practice at issue on the individual.[144] This analysis ultimately led the Court to reject the "bottom-line defense."[145] Specifically, the Court found that in enacting Title VII, Congress certainly did not want employers to be able to justify discriminating against their employees by showing that their policies benefitted the employee's protected trait.[146] The

. . . ."). *Compare* 42 U.S.C. § 2000e-2(a)(1)-(2) (2012) (prohibiting discrimination "because of such individual's race, color, religion, sex, or national origin"), *with* 29 U.S.C. § 631(a) (2012) ("The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age.").

137. *See* Watson v. Fort Worth Bank and Tr., 487 U.S. 977, 994 (1988) (explaining that upon establishing a discriminatory practice, the plaintiff must further demonstrate that the practice "has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group").

138. *Karlo,* 849 F.3d at 71 (noting that the ADEA contemplates age, not a distinct protected class).

139. *See id.* (deriving a "key insight" from *O'Connor*).

140. *See* O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996).

141. *See Karlo*, 849 F.3d at 74.

142. *See id.* at 71 ("The key insight from *O'Connor* is that the forty-and-older line drawn by [section] 631(a) constrains the ADEA's general scope . . . .").

143. *See id.* at 72 (noting that bottom-line statistical arguments cannot overcome inherently discriminatory practices).

144. *See* Connecticut v. Teal, 457 U.S. 440, 450-51 (1982) (rejecting the "bottom-line" defense by finding that employees must be able to "compete equally" under Title VII).

145. *See id.* at 451 (explaining that Title VII precludes policies that discriminate against individuals).

146. *See id.* at 455 ("It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because

Third Circuit applied the facts in *Teal* to *Karlo* to find for the plaintiffs.[147] Specifically, the court said that like the "bottom-line defense," which allows plaintiffs to recover for disparate-impact, subgroup evidence also serves this purpose.[148] Therefore, whether other employees covered by the ADEA benefited from this employer's policy should not be dispositive of subgroup claims.[149]

C. PGW's Probable Appeal

Much speculation revolves around the nature of the Third Circuit's decision in *Karlo*, namely whether PGW will take this issue to the Court.[150] As such, if PGW does appeal, presumably highlighting the aforementioned circuit split, the Court will likely affirm the Third Circuit's decision in *Karlo*.[151] Specifically, the Court should interpret section 623(a)(2) as analogous to section 623(a)(1).[152] Indeed, as the Court previously recognized, age discrimination will always involve employers terminating employees because of the notion that an employee's age will affect performance.[153] Thus, the ADEA is, and should continue to be a safeguard for the specific employee challenging the employer's putative discriminatory policy.[154] The Court noted in *Smith* that the correlation between age and productivity could be used to explain why Congress limited the ADEA's scope to individuals forty and older.[155] Therefore, the Court might also take into account the underlying notion that the ADEA protects those employees

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he favorably treats other members of the employees' group.").

147. *See Karlo*, 849 F.3d at 72 (explaining that an employer's policy might favor younger members of the ADEA-protected group is irrelevant in determining whether the employer's oldest employees were disparately affected due to their age).

148. *See id.*

149. *See id.* at 73.

150. *See* Dorrian, *supra* note 14.

151. *See generally Karlo,* 849 F.3d at 68-86 (ruling in favor of ADEA subgroup disparate-impact claims).

152. *See* 29 U.S.C. § 623(a)(1)-(2) (2012); *see also Karlo*, 849 F.3d at 71 (comparing the language in both § 623(a)(1) and § 623(a)(2) in determining that "'adversely affect . . . because of such individual's age' must mean adversely affected based on *age*, not adversely affect based on forty-and-older status").

153. *See* Hazen Paper Co. v. Biggings, 507 U.S. 604, 610 (1993) ("It is the very essence of age discrimination for an older employee to be fired because the employer believes that productivity and competence decline with old age."); *see also* Smith v. City of Jackson, 544 U.S. 228, 240 (2005).

154. *See Karlo,* 849 F.3d at 72-73 (concluding that courts can allow subgroup evidence and still find disparate-impact).

155. *See Smith*, 544 U.S. at 240 (noting that "Congress' decision to limit the coverage of the ADEA . . . is consistent with the fact that age . . . not uncommonly has relevance to an individual's capacity to engage in certain types of employment").

whom, at some point in their careers, were in a better position because of their experience.[156]

Nonetheless, the Third Circuit's decision also shows that even if this circuit split is resolved by allowing subgroup claims, the ADEA will continue to side with businesses that indeed identify a reasonable justification for terminating employees.[157] Therefore, permitting subgroup claims does not affect the employer's burden of proof under section 623(f)(1).[158]

IV. ADEA DISPARATE-IMPACT CLAIMS IN THE MIDST OF A CIRCUIT SPLIT

The Supreme Court gave the lower courts "the proper solution" to assess ADEA claims and the probative value of the challenger's evidence.[159] *O'Connor* explains that to determine whether the employer discriminated against the employee, courts should compare the age difference between the former employee and the newly hired employee, rather than the extent to which the newly hired employee falls under the ADEA's protected class.[160] Therefore, the Court should uphold the Third Circuit's position.[161]

A. What Businesses Should Consider Before Laying off Employees

With more businesses undergoing reductions, it is imperative that the business community becomes more aware of the ADEA's requirements.[162] The reality is that businesses have, and will continue, to undergo

156. *See* GEORGE RUTHERGLEN, EMPLOYMENT DISCRIMINATION LAW: VISIONS OF EQUALITY IN THEORY AND DOCTRINE 208 (3d ed. 2010); *see also Karlo*, 849 F.3d at 74 (illustrating how precluding subgroup claims would limit the older workers' chances of bringing disparate-impact claims compared to younger individuals).

157. *See Karlo,* 849 F.3d at 80.

158. *See* 29 U.S.C. § 623(f)(1) (2012); *see also Karlo,* 849 F.3d at 69 (explaining that employers can rebut a *prima facie* case by "arguing that the challenged practice was based on 'reasonable factors other than age'"). *But see* Dorrian, *supra* note 14 (noting a concern that allowing subgroup claims will result in "statistical manipulation").

159. O'Connor v. Consol. Coin Caterers Corp., 517 U.S. 308, 312 (1996) (quoting Teamsters v. United States, 431 U.S. 324, 358 (1977)) (recognizing that a *prima facie* case "requires '*evidence adequate to create an inference that an employment decision was based on a[n] [illegal] discriminatory criterion*'").

160. *See O'Connor*, 517 U.S. at 312-13 (noting that courts use different approaches in assessing statistical evidence, but finding that "the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class").

161. *See also Karlo*, 849 F.3d at 68 (holding that subgroup disparate-impact claims are "cognizable under the ADEA").

162. *See* 29 U.S.C. §§ 621-34; *see also* Eisenberg, *supra* note 5 (noting that more businesses could undergo voluntary terminations).

employment reductions to compensate for issues such as financial crises and/or operational costs.[163] Typically, businesses terminate employees to lower the costs of their employees' salaries and benefits.[164] Once businesses undergo employment reductions, they can simply eliminate those positions occupied by their former employees.[165] Most importantly, at least in the ADEA context, older employees generally garner higher wages than younger employees.[166] While employers should disregard any plan to terminate older employees simply because hiring younger employees would cut down costs, the Third Circuit's opinion certainly recognizes that employment practices may always impact certain employees disparately.[167]

V. CONCLUSION

Although PGW has yet to appeal its case, the company will likely do so given the current circuit split. The Second, Sixth, and Eighth Circuits all precluded ADEA subgroup disparate-impact claims; nonetheless, the Third Circuit's thorough overview of the ADEA and Title VII makes *Karlo* the most persuasive decision among the circuit courts. The Third Circuit's decision in *Karlo* is indeed the most consistent with the Court's interpretation of the ADEA. As the Third Circuit noted, the jurisprudence should not focus on whether subgroup claims may lead to more litigation. Rather, disparate-impact jurisprudence must recognize that precluding subgroup claims would limit a plaintiff's ability to challenge discriminatory policies pursuant to ADEA. Thus, if PGW appeals to the Court, the Court should uphold the Third Circuit's decision in *Karlo* and rule in favor of subgroup claims.

163. *See generally* Eisenberg, *supra* note 5.

164. Michael L. Rosen, *Tips for Planning Reductions in Force*, FOLEY HOAG LLP 2 (2009), http://www.foleyhoag.com/-/media/files/foley%20hoag/publications/ebooks%20and%20whitepapers/2013/rosen_tips_for_planning_reductions_in_force.ashx?la=en ("The typical objective in a layoff is to reduce expenses through the paring down of payroll and benefits-related costs.").

165. *See* Barnes v. GenCorp, 896 F.2d 1457, 1465 (6th Cir. 1990) ("A work force reduction situation occurs when business considerations cause an employer to eliminate one or more positions within the company.").

166. RUTHERGLEN, *supra* note 156, at 214.

167. *See* Karlo v. Pittsburgh Glass Works, LLC, 849 F.3d 61, 79 (3d Cir. 2017); *see also* RUTHERGLEN, *supra* note 156, at 214 ("Instead of allowing age-based discharges because of the higher pay generally received by older workers, the ADEA allow employers to take account of the declining productivity of such workers through an exception for voluntary retirement plans.").

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Volume 7, Issue 1 AMERICAN UNIVERSITY BUSINESS LAW REVIEW Pages 1–197 2018