Full Protection and Security in International Investment Law
Contents

1 Introduction ................................................................. 1

Part I Formation of the Standard: The Long Path to Customary International Law

2 ‘Full Protection and Security’ in Historical Perspective:
The Challenge of the Sources ........................................... 17
  2.1 Introductory Remarks ............................................. 17
  2.2 Obstacles Posed by Historical Sources ....................... 21
    2.2.1 Diversity of Intellectual and Political Agendas ........ 21
    2.2.2 The Scope of the Jurisdiction Exercised by Mixed Claims Commissions ........................................... 24
    2.2.3 Overlapping Causes of Action and All-Encompassing Definitions of Denial of Justice ...................... 28
    2.2.4 The Distinction Between Primary and Secondary Rules of International Law. The Limits of a Contemporary Notion .................................................. 31
  2.3 Overcoming the Obstacles ........................................ 34

3 The Origins of ‘Full Protection and Security’. From Medieval Reprisals to the Age of Enlightenment ......................... 39
  3.1 Preliminary Issue. Determining the Starting Point ........... 39
  3.2 The Beginnings. The Medieval Practice of Private Reprisals .... 44
  3.3 The Rationalization of the Protection Obligation. Christian von Wolff and the Theory of the Tacit Agreement ........... 49
  3.4 The Reception of Wolff’s Theory of the Tacit Agreement in the Works of Emer de Vattel ................................. 57
3.5 From *Presumed Consent* to *Actual Consent*. The 'Customary'
Duty upon the Host State to Protect Foreign Citizens ................. 62
3.5.1 The First Steps. Johann Jakob Moser and the Positive
Law of Aliens ................................................................. 64
3.5.2 The Consolidation of the Classical Approach to the
Law of Aliens. Georg Friedrich von Martens
and Classic Positivism .................................................. 67
3.6 The Influence of Eighteenth-Century Legal Scholarship in the
Between Theory and Practice ........................................... 74

4 A Battle of Gunboats and Books: 'Full Protection and Security'
and the Minimum Standard of Treatment in Historical
Perspective ................................................................. 83
4.1 Preliminary Remarks .................................................. 83
4.2 Gunboats from the North. The Minimum Standard of
Treatment, the Gunboat Diplomacy and the Security
Obligation ................................................................. 85
4.3 Books from the South. The Doctrine of Equality and the
Security Obligation .................................................... 96
4.3.1 The Doctrine of Equality Before Carlos Calvo .......... 97
4.3.2 The New Guise of an Old Idea: The Calvo Doctrine
and the Security Obligation ........................................ 104
4.3.3 The Long Lasting Debate About the Calvo Doctrine
and the Extent of the Security Obligation ......................... 110

5 The Calm After the Storm: 'Full Protection and Security' as
an Element of the Minimum Standard of Treatment .................. 117
5.1 Preliminary Remarks .................................................. 117
5.2 The Minimum Standard of Treatment as a Customary Rule
of Contemporary International Law ................................ 119
5.3 The Unsettled Content of the International Minimum Standard
of Treatment .......................................................... 133
5.4 The Significance of the 'Standard of Civilization' for the
Determination of the Scope of Application of the Customary
Security Obligation ..................................................... 140

Part II Scope of the Customary Standard

6 Scope of Application of the Customary Standard: Conceptual
Framework ............................................................. 145
6.1 Preliminary Remarks .................................................. 145
6.2 The Notion of Standard and the Formal Structure of 'Full
Protection and Security' ............................................... 146
6.3 The Semantics of Security and the Scope of Application
of 'Full Protection and Security' in Customary International
Law ................................................................. 154
Contents

7 Subjective Scope of Application of the Customary Standard of 'Full Protection and Security' ............................................................... 165
  7.1 Preliminary Remarks ................................................................. 165
  7.2 The Beneficiary of Security. The Foreign National ......................... 167
    7.2.1 The Foreignness Requirement ........................................... 167
    7.2.2 Natural and Juristic Persons ............................................. 176
  7.3 The Provider of Security. The Host State and the Case of Other Internationally Accountable Entities .................. 184

8 Objective Scope of Application: Protected Interests and Covered Risks ........................................................................................................ 197
  8.1 Preliminary Remarks ................................................................. 197
  8.2 First Element. Protected Interests; The Notion of 'Acquired Values' ......................................................................................... 198
  8.3 Second Element. Covered Risks .......................................................... 206
    8.3.1 The Heart of the Standard. Protection Against Private Violence ......................................................................................... 207
    8.3.2 The Private-Public Divide. Some Grey Areas .............................. 224
      8.3.2.1 Successful Revolutions ................................................... 225
      8.3.2.2 Acts of Other States in the Territory of the Host State ................................................................. 233
      8.3.2.3 Acts of International Organizations .................................. 242
      8.3.2.4 Private Violence Actively Supported by State Agents .......... 245
      8.3.2.5 Conduct of Soldiers ......................................................... 248
      8.3.2.6 Risk of Private Violence Materializing in a Public Injury .......... 254
    8.3.3 Beyond the Public-Private Divide .............................................. 256
      8.3.3.1 Public Collateral Damages ............................................... 259
      8.3.3.2 Natural Disasters and the Risk of Natural Hazards .................. 263

9 Objective Scope of Application: Irrelevance of the Distinction Between Physical and Nonphysical Harm .......................... 269
  9.1 Preliminary Remarks ................................................................. 269
  9.2 Physical Security and Nonphysical Security: The Debate at a Glance ......................................................................................... 270
  9.3 The Notion of Legal Security and the Customary Security Obligation. Taking Down the House of Cards .................. 279
    9.3.1 The Extensive Understanding of the Security Obligation. The Caveats of Relevant Arbitral Practice ........................................... 280
    9.3.2 The Extensive Understanding of the Security Obligation. Critique of a Misleading Notion .................. 284
  9.4 The Customary Protection Obligation; Protection Beyond Physical Harm ................................................................. 289
10 The Temporal Scope of Application of the Customary Standard of 'Full Protection and Security' .............................................................. 297
10.1 Preliminary Remarks .............................................................. 297
10.2 The Preventive Functional Dimension. The Duty to Prevent Injuries to Aliens .............................................................. 303
10.3 The Repressive Functional Dimension. The Duty to Provide Adequate Means for the Redress of Injuries to Aliens ............ 307
10.4 The Relationship Between the Obligation to Prevent and the Obligation of Redress .............................................................. 315

Part III Content of the Standard

11 The Characterization of the Obligation to Provide 'Full Protection and Security' .............................................................. 327
11.1 Preliminary Remarks .............................................................. 327
11.2 'Full Protection and Security' and the Distinction Between Obligations of Conduct and Result .............................................................. 331
11.2.1 The Concept of Obligations of Conduct and Result: From René Demogue to Roberto Ago .............................................................. 332
11.2.2 'Full Protection and Security': Obligation of Conduct or Obligation of Result? A Dichotomy That Never Was .............................................................. 335
11.2.2.1 First Possible Approach: 'Full Protection and Security' as an Obligation of Conduct .............................................................. 336
11.2.2.2 Second Possible Approach: 'Full Protection and Security' as a Negative Obligation of Result. The ILC and the Notion of 'Obligations of Event' .............................................................. 339
11.2.3 'Full Protection and Security': Obligation of Conduct or Obligation of Result? Intermediate Approaches .............................................................. 348
11.2.3.1 The Application of Different Standards of Liability Depending on the Source of Risk .............................................................. 349
11.2.3.2 The Distinction Between the Existence and the Use of the Host State's Municipal Legal, Administrative and Judicial System .............................................................. 353
11.2.4 The sui generis Character of the Standard of 'Full Protection and Security' .............................................................. 367
11.3 The Distinction Between Positive and Negative International Obligations. 'Full Protection and Security' as a Delict of Omission .............................................................. 368
### 12 Due Diligence in the International Law of Aliens: Conceptual Framework

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>12.1</td>
<td>Preliminary Remarks</td>
<td>375</td>
</tr>
<tr>
<td>12.2</td>
<td>Due Diligence: Between Collective Responsibility and Non-responsibility</td>
<td>377</td>
</tr>
<tr>
<td>12.3</td>
<td>Due Diligence and the Problem of Fault in the Law of State Responsibility for Injuries to Aliens</td>
<td>383</td>
</tr>
<tr>
<td>12.3.1</td>
<td>Hugo Grotius and the Concept of Fault</td>
<td>386</td>
</tr>
<tr>
<td>12.3.2</td>
<td>Subsequent Theories of Fault</td>
<td>388</td>
</tr>
<tr>
<td>12.3.2.1</td>
<td>Conservative ‘Grotian’ Approaches</td>
<td>389</td>
</tr>
<tr>
<td>12.3.2.2</td>
<td>Objectivist Approaches</td>
<td>396</td>
</tr>
<tr>
<td>12.3.3</td>
<td>Responsibility Without Fault. The ‘Objective Turn’ in the International Law of State Responsibility</td>
<td>400</td>
</tr>
<tr>
<td>12.4</td>
<td>The Indirect or Direct Character of State Responsibility for Private Injuries to Aliens</td>
<td>405</td>
</tr>
<tr>
<td>12.4.1</td>
<td>The Theories of ‘Indirect’ Responsibility</td>
<td>406</td>
</tr>
<tr>
<td>12.4.2</td>
<td>The Theories of ‘Direct’ Responsibility</td>
<td>408</td>
</tr>
<tr>
<td>12.4.3</td>
<td>The ‘Separate Delict’ Theory</td>
<td>411</td>
</tr>
</tbody>
</table>

### 13 Due Diligence in the Context of ‘Full Protection and Security’ Claims

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Pages</th>
</tr>
</thead>
<tbody>
<tr>
<td>13.1</td>
<td>Introductory Remarks</td>
<td>421</td>
</tr>
<tr>
<td>13.2</td>
<td>The Distribution of the Burden of Proof</td>
<td>422</td>
</tr>
<tr>
<td>13.3</td>
<td>The Subjective or Objective Character of Due Diligence</td>
<td>432</td>
</tr>
<tr>
<td>13.3.1</td>
<td>The ‘Subjective’ Standard of Due Diligence</td>
<td>433</td>
</tr>
<tr>
<td>13.3.2</td>
<td>The ‘Objective’ Standard of Due Diligence</td>
<td>436</td>
</tr>
<tr>
<td>13.3.3</td>
<td>The Contemporary Guises of the Objective Standard of Due Diligence</td>
<td>440</td>
</tr>
<tr>
<td>13.3.3.1</td>
<td>Due Diligence as ‘Reasonableness’</td>
<td>441</td>
</tr>
<tr>
<td>13.3.3.2</td>
<td>Due Diligence and the Notions of Prudent, Appropriate or Necessary Measures</td>
<td>445</td>
</tr>
<tr>
<td>13.3.3.3</td>
<td>The ‘Modified’ Objective Standard of Due Diligence</td>
<td>449</td>
</tr>
<tr>
<td>13.4</td>
<td>Factual Circumstances Relevant for the Assessment of Due Diligence</td>
<td>456</td>
</tr>
<tr>
<td>13.4.1</td>
<td>Material Opportunity for Positive Action</td>
<td>457</td>
</tr>
<tr>
<td>13.4.2</td>
<td>Awareness About the Risk</td>
<td>459</td>
</tr>
<tr>
<td>13.4.3</td>
<td>Certainty as to the Legitimacy of the Investor’s Rights and Interests</td>
<td>466</td>
</tr>
<tr>
<td>13.4.4</td>
<td>Seriousness of the Situation of Risk</td>
<td>469</td>
</tr>
<tr>
<td>13.4.5</td>
<td>Conduct of the Investor</td>
<td>471</td>
</tr>
<tr>
<td>13.4.6</td>
<td>Differences in the Protection Afforded to Different Groups of Persons</td>
<td>477</td>
</tr>
<tr>
<td>13.4.7</td>
<td>Public Support to Private Wrongdoers</td>
<td>478</td>
</tr>
</tbody>
</table>
13.4.8 Balance Between Private Interests and the Public Interest .................................................. 482
13.4.9 Compliance with Relevant Municipal Law ................................................................. 485
13.4.10 Compliance with Other Due Diligence Obligations Under International Law .......... 487

Part IV ‘Full Protection and Security’ Clauses in International Investment Agreements

14 ‘Protection and Security’ Clauses in Investment Treaties:
A Typology .......................................................................................................................... 495
14.1 Preliminary Remarks ................................................................................................. 495
14.2 References to Customary Law and General International Law in Protection and Security Clauses ................................................................. 498
  14.2.1 Protection and Security Clauses Making Express Reference to Customary Law or General International Law ......................................... 499
     14.2.1.1 Treaties Defining the Protection and Security Obligation by Reference to Customary Law .......................................................... 499
     14.2.1.2 Other References to Customary International Law ................................................. 505
  14.2.2 Protection and Security Clauses Making No Express Reference to Customary Law or General International Law .................................................. 508
  14.3 References to Domestic Law in Protection and Security Clauses ........................................... 512
  14.4 Qualifying Adjectives in Protection and Security Clauses ............................................. 516
    14.4.1 The Adjective Full ................................................................................................. 516
        14.4.1.1 Full Security as Legal Security ................................................................. 520
        14.4.1.2 Full Security as Physical Security .......................................................... 523
        14.4.1.3 Full Security as the Object and Purpose of Other Treaty Provisions .......... 525
        14.4.1.4 Full Security as a Reference to the Customary Protection Obligation ........ 526
    14.4.2 The Guarantee of Constant Protection and Security ................................................................... 532
        14.4.2.1 The Choice Between a Broad and a Narrow Interpretation of Constant Security Clauses .......................................................... 534
        14.4.2.2 Constant Security Clauses and Other Formulations of the Protection Obligation ................................................................. 540
  14.4.3 The Guarantee of Legal Protection and Security ............................................................. 542
  14.4.4 Protection and Security Clauses Using No Qualifying Adjectives ................................ 549