The Full Protection and Security Standard in Practice

Kluwer Arbitration Blog
April 16, 2009

Jeffery Commission (Freshfields Bruckhaus Deringer LLP)

Please refer to this post as: Jeffery Commission, 'The Full Protection and Security Standard in Practice', Kluwer Arbitration Blog, April 16 2009, http://arbitrationblog.kluwerarbitration.com/2009/04/16/the-full-protection-and-security-standard-in-practice/

In the early 1990's, then World Bank Senior Vice President and General Counsel, Ibrahim Shihata, and then ICSID Legal Advisor, Antonio Parra, observed that there "was hardly any case law" on the full protection and security standard. In so doing, Messrs. Shihata and Parra also posited that "[a]rbitrators in future cases will undoubtedly have the task of further elucidating this and other international law standards." Now, close to twenty years since the first investment treaty award on the full protection and security award, *Asian Agricultural Products Ltd (AAPL) v. Republic of Sri Lanka* (the first ever investment treaty award rendered by an ICSID tribunal), there is a growing corpus of case law on the full protection and security standard.

Whether articulated as "full protection and security", "constant protection and security" or "continuous protection and security", this standard of treatment is now in the midst of a full blown resurgence. A review of international investment law jurisprudence reveals that while there were only six leading awards relating to this standard from 1990 until 2004, there were twenty-four such awards in the last five years, and more are looming on the horizon.

Background

Variations. There are a variety of formulations of the full protection and security standard reflected in bilateral investment treaties that exist today. In the main, the standard is most often expressed using some combination of the words "full", "constant", "complete", "continuous" and "protection" and "security", oftentimes

with a reference to the standard required by international law.

Content. In the abstract, it is difficult, if not impossible, to give much meaning to the content of the full protection and security standard of treatment. Rather, its scope is perhaps best be "illustrated by reference to its practical application".

The Awards

A review of international investment law jurisprudence in the period from 1990 until 2009 reveals that there were thirty leading awards addressing alleged breaches of the full protection and security standard. These awards, it should be noted, do not include awards where a full protection and security claim was initiated but later withdrawn, awards that are the result of consent agreement, or other awards that did not fully scrutinize the merits of a full protection and security claim.

Timing of Awards. While there was a relatively slow accumulation of such awards in the fourteen years after *AAPL*, there have been 24 in the last five years. The breakdown of leading awards on the full protection and security standard by year is as follows: 1990 – 1, 1997 – 1, 2000 – 1, 2001 – 2, 2003 – 1, 2004 – 2, 2005 – 3, 2006 – 3, 2007 – 9, and 2008 – 7.

Arbitrators. The leading awards were all issued in cases with three-person arbitral tribunals, except for one that was decided by a sole arbitrator. In total, 63 different individuals have acted as arbitrators across the thirty awards on the full protection and security standard. While the majority of arbitrators only served in one such decision, a handful of arbitrators, fourteen in total, have served multiple times in tribunals across the 30 awards – three have each served 4 times, five have served 3 times and six have served 2 times. The remaining arbitrators each served once.

Extent of Treatment. Across the leading awards, there was a wide divergence in terms of the degree to which the full protection and security standard was comprehensively analyzed in the text of the award. In some instances, only a sentence or two in an award was dedicated to the claim, while in other awards, tribunals spent pages comprehensively addressing the claim.

Outcomes. Of the thirty awards, claimants were successful in 14 in establishing breaches of the full protection and security standard. In other words, aside from the cases withdrawn, settled, or otherwise disposed of, there is a success rate of 46% with respect to full protection and security claims brought over the last twenty years. Of the 14 awards where the full protection and security claim was successful, all of these awards either also included findings that the fair and equitable treatment standards was violated, or did not include alleged violations of the fair and equitable treatment standard.

Beyond Physical Protection

Perhaps the most contested issue with respect to the standard of full protection and security at present is whether or not it extends beyond situations where the physical security of the investor or its investment is compromised. The two approaches taken by tribunals on this issue could not be further apart.

The awards in *Saluka* and *Azurix* are instructive in representing the degree to which tribunals have taken divergent views. In *Saluka*, the tribunal stated that "the 'full security and protection' clause it not meant to cover just any kind of impairment of an investor's investment, but to protect more specifically the physical integrity of an investment against interference by use of force." While in *Azurix*, the tribunal held that "it is not only a matter of physical security; the stability afforded by a secure environment is as important from an investor's point of view."

This divergence in opinion has become even further pronounced through the presence of common arbitrators across tribunals rendering purportedly contradictory or inconsistent holdings on the scope of the full protection and security standard.

BG Group/National Grid. In December 2007, the tribunal in *BG Group v. Argentina* held that it was "inappropriate to depart from the originally understood standard of 'protection and constant security'". While acknowledging that "other tribunals have found that the standard of 'protection and constant security'" extends beyond situations where the physical security of the investor or its investment, the tribunal found it inappropriate to do so. One year later, the tribunal in *National Grid v. Argentina* held that "the phrase 'protection and constant security' as related to the subject matter of the Treaty does not carry with it the implication that this protection is inherently limited to protection and security of physical assets." An arbitrator sitting on both the *BG* and *National Grid* tribunals, involving the same bilateral investment treaty, same respondent, and similar factual backgrounds, reached opposite holdings within a year, without explanation.

Biwater/Rumeli. There was also a common arbitrator that sat on the panels in both *Biwater* and *Rumeli*, each of which had different holdings with respect to the scope of the full protection and security standard. In *Biwater*, the tribunal followed the holding in *Azurix*, stating that "when the terms 'protection' and 'security' are qualified by 'full', the content of the standard may extend to matters other than physical security." In contrast, in the award in *Rumeli*, rendered days after the award in *Biwater*, the tribunal held that it agreed with Kazakhstan that "the full

protection and security standard in Article II(2) of the UK-Kazakhstan BIT must be construed in accordance with the accepted rules of treaty interpretation", and adopted a limited scope to the full protection and security standard. The *Rumeli* tribunal held that the standard "obliges the State to provide a certain level of protection to foreign investment from physical damage."

Observations

Now, close to twenty years since the decision in AAPL, it is plainly no longer possible to say that there is hardly any case law on the full protection and security standard. In light of a success rate of 46% with respect to full protection and security claims brought over the last twenty years, it is likely that the number of claims (and awards) will continue to increase markedly.

There remains, however, a stark divergence amongst tribunals, and particular arbitrators, on the issue of whether or not the standard extends beyond physical protection. In the near term, it is possible that this issue may be the source of challenges to arbitrators or applications for annulment or review, and in the longer term, it raises difficult questions about the inherent coherence of the system.