Kluwer Arbitration Blog

Angel Samuel Seda and Others v Colombia: New Pathways in the Application of Security Exceptions?

Kilian Wagner (University of Vienna) · Monday, October 7th, 2024

One of the most contentious issues in investor-state dispute settlement ("ISDS"), leading to an extensive scholarly debate, and yet one of the least decided legal questions in arbitral practice is the functioning and effect of security exceptions. One of the reasons for that is the relatively low number of investment treaties that include such provisions (according to the UNCTAD Investment Policy Hub, 408 out of 2592 mapped treaties include a security exception). The underlying rationale is that a treaty shall not preclude measures (necessary) for the protection of the state's security interests.

The first arbitral awards over the matter arising out of the Argentine financial crisis 2001/2002 are prominent for their contradictory outcome (see in particular *CMS v Argentina*, *Sempra v Argentina*, *Enron v Argentina* on the one hand, and *LG&E v Argentina* on the other hand). The most critical issues of security exceptions concerned their distinction from the state of necessity, an allegedly self-judging character, and the effect of a successful invocation. The clarification by *ad hoc* Committees (see the annulment decisions in *CMS v Argentina* and *Sempra v Argentina*) has somewhat solidified the application of such clauses in recent cases (*Deutsche Telekom v India*, *CC/Devas v India*). In that sense, security exceptions operate as derogations rather than an affirmative defence. Yet, this is not the end of the story and the most recent decision in *Samuel Seda v Colombia* is different in several aspects. This relates to the facts of the case, the Respondent's litigation strategy and, most importantly, the invoked security exception clause in Article 22.2 of the US-Colombia Trade Promotion Agreement (TPA) itself, which reads in its relevant parts as follows:

> "Nothing in this Agreement shall be construed:
>
> […]
>
> (b) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests." (Emphasis added)

It is the first publicly known award in which the tribunal had to deal with a security exception

including the so-called self-judging terminology "*it considers necessary*". Even more striking is the attached footnote that suggests a barrier to judicial review: "if a Party invokes Article 22.2 in an arbitral proceeding […] the tribunal or panel hearing the matter shall find that the exception applies". After a brief overview of the facts, this blog post will address the timeliness of such a defence, its self-judging character and the standard of review.

Criminal Prosecution and Security Interests

Not only the design of the relevant security exception varied in contrast to previous cases, also the underlying factual circumstances differ significantly. So far, tribunals had to evaluate emergency measures (see the cases arising out of the Argentine financial crisis) or decisions presumably related to military objectives (see *Deutsche Telekom v India, CC/Devas v India*) under security exceptions. To the contrary, the case at hand concerned domestic asset forfeiture proceedings related to organized crime and drug-trafficking. The investor, a US national, had invested in luxury real estate development projects in the vicinity of Medellín. Despite the state's official assurance that the property was unencumbered, Mr. Seda faced legal issues. The presumably previous owner entered the stage, claiming that he had been extorted from the property by local cartels. As a result, Colombian prosecutors attached the property as a precautionary measure under Colombian Asset Forfeiture Law. With judicial review of Mr. Seda's challenge of this action still pending, he initiated arbitral proceedings under the US-Colombia TPA claiming a violation of investment protection standards.

Never too Late to Defend Security Interests

As Colombia had only invoked the security exception in its Rejoinder, the tribunal first had to deal with the Claimants objection that this "new defence" was belated. The Claimant argued that the Respondent should have already identified the security interest at stake when adopting the contested measures. Nevertheless, the tribunal swiftly cleared the way forward in its Procedural Order No. 9. It found that the clause does not impose any temporal limit, since the footnote solely referred to an invocation "in an arbitral proceeding". As Colombia utilized the exception as a jurisdictional objection, the tribunal emphasized that it has the competence to "consider its jurisdiction […] at any time during the proceedings". It added that several rounds of submissions and an additional hearing preserved the claimant's right to be heard.

The Protection of Security Interests – A Matter of (Non-)justiciability, Jurisdiction or Merits?

Colombia has not only invoked the security exception at an advanced stage of the proceedings but also developed its litigation strategy. Firstly, Colombia claimed that the clause is non-justiciable, *i.e.* that a tribunal has no power to review its invocation but must dismiss the case entirely. This argument is based on the footnote added to the clause and was supported by the US non-disputing party submission. Secondly, Colombia asserted in a modified argument that a successful invocation would deprive the tribunal of its jurisdiction. Thirdly, and in the alternative, it argued that the self-judging character of the clause limits a substantive review.

The most significant question is to what extent a tribunal can review the invocation of a security exception, if at all. While the tribunal accepted that the terms "it considers necessary" imply a self-judging character, such an effect is highly disputed. Especially the first argument of non-justiciability has been advocated extensively in recent WTO cases on behalf of the US (see the *United States – Certain Measures on Steel and Aluminium Products* cases with China, Norway, Switzerland and Türkiye and *United States – Origin Marking Requirement*). Hitherto, all panels have denied such an effect for Article XXI GATT. Despite the ominous footnote ostensibly requiring a tribunal to "find that the exception applies", the tribunal likewise rejected such an effect. In particular, it distinguished it from exceptions in other treaties that expressly adopt the notion of non-justiciability. Consequently, the tribunal prevented an unbridled use of this defence, which could undermine the treaty's very objectives of legal certainty and predictability. Although the contracting parties can delineate the scope of the ISDS mechanism, it is doubtful that a security exception can overrule any dispute by its mere invocation.

This led to the question to what extent the tribunal can actually review the contested measures. While arbitral tribunals and the ICJ (see *Military and Paramilitary Activities in and against Nicaragua* and the *Oil Platforms* cases) have uniformly confirmed that the notion "it considers necessary" entails a self-judging effect, the tribunal in *Seda v Colombia* is the first to apply such a security exception. In line with previous cases, the tribunal accepted a wide margin of appreciation for the state in defining its security interests only limited to good faith. To define this standard of good faith, the tribunal took recourse to the plausibility test established in recent WTO panel reports (see *e.g. Russia – Measures Concerning Traffic in Transit*, *Saudi Arabia – Measures Concerning the Protection of Intellectual Property Rights*). This means that a plausible relation between the contested measures and the asserted security objective is necessary. As to the outer boundaries of the notion of security, the tribunal distinguished the clause from Article XXI GATT, which arguably limits the permissible security interest *via* its sub-paragraphs to (i) fissionable materials, (ii) traffic in arms and (iii) situations of "war or other emergency in international relations". The tribunal concluded that the asset forfeiture proceedings were plausibly connected to the security interest of fighting organized crime, including drug trafficking and money laundering. Hence, it found the security exception to be applicable and dismissed the claims. While certain guidance by the recent WTO panel reports is not surprising, the tribunal was also mindful of the systemic differences between trade and investment law. Thus, it remains to be seen if future tribunals will take this route further. A novelty is the approach to the notion of security interests. Previous tribunals required an emergency exceeding a certain threshold (see the cases arising out of the Argentine financial crisis), a (para-)military objective of a measure (*CC/Devas v India*), or demanded a threat of national dimension (see *Michael Lee-Chin v Dominican Republic*) for a security exception to apply.

What to Expect for Future Cases?

The award is a further step in getting a clearer picture over the powerful tool of security exception clauses, while leaving several issues open. Firstly, it strongly rejects a non-justiciable effect of security exceptions, even where the treaty texts hints in that direction. Secondly, it consolidates the line of reasoning that distinguishes security exceptions as derogations from the state of necessity as an affirmative defence. Thirdly, it adopts a first interpretation of security exception clauses including self-judging language relying on a plausible relation between the contested measure and the asserted security interest. As the clause is distinct from exceptions modelled after Article XXI

GATT, the award does not tell us how a tribunal would approach such a provision. Consequently, a case-by-case assessment of security exceptions is required.

This entry was posted on Monday, October 7th, 2024 at 8:26 am and is filed under Arbitral Award, Colombia, Money Laundering, Non-justiciability, Security Exceptions, Self-judging clauses
You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.