

The Full Protection and Security Standard Comes of Age:

Yet another challenge for states in investment treaty arbitration?

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November 2011

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Published by the International Institute for Sustainable Development.

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The author is grateful for the research assistance provided by Diogo Ribeiro in preparing this paper and for the comments of Nathalie Bernasconi-Osterwalder.

Table of Contents

1.0 Introduction.....	1
2.0 Formulation of the Protection and Security Standard in Treaties	2
3.0 Interpretations by Arbitral Tribunals of the Full Protection and Security Obligation	5
A Standard Limited to Physical Security	6
The Consequences of Extending the Full Protection and Security Standard Beyond Physical Security	7
Is the Full Protection and Security Standard a Reflection of the Minimum Standard for the Treatment of Aliens in Customary International Law?	9
What Standard of Liability Does the Full Protection and Security Standard Impose upon States?	10
4.0 Options for States	11
5.0 References	13

1.0 Introduction

The full protection and security standard has maintained a low profile in international investment law circles in comparison with its more controversial sibling, the fair and equitable treatment provision. This is despite the vast number of international investment treaties that contain the protection and security provision, often in the same clause as the fair and equitable treatment guarantee. In fact, in the early 1990s, Ibrahim Shihata, World Bank senior vice president and general counsel, and Antonio Parra, legal advisor with the International Centre for Settlement of Investment Disputes, were reported as observing that there was “hardly any case law” on the full protection and security standard. However, the two predicted that “arbitrators in future cases will undoubtedly have the task of further elucidating this and other international law standards.”

In view of the large number of recent cases involving this provision, in particular those that have interpreted the standard broadly to go beyond physical security, Shihata and Parra have been proven right. A review revealed that while there were only six leading awards relating to this standard from 1990 until 2004, there were 24 such awards between 2004 and 2009, and more are likely to emerge (Commission, 2009). At least 40 published investment treaty awards have considered the protection and security standard. The recent political storms in the Arab world, particularly in Libya and Egypt, will provide a fertile opportunity for more claims.

These are good tidings for investors, who will herald the coming-of-age of the protection and security standard as it transforms into a swan from a humble duckling. On the other hand, it may be no fairy tale for states, but more akin to the creation of a Frankenstein requiring restraint. The stakes for developing states found liable for breach of treaty obligations are particularly high.

The seemingly innocuous and obvious treaty promise to accord full protection and security to investments can impose an onerous level of liability on states with scarce resources. Investment treaties formulate the standard of full protection and security in a broad manner, and tribunals have taken this at face value, thus interpreting the obligation as imposing a duty upon states to prevent harm to the investment from the acts of government and non-government actors.

The level of diligence required by states—that is, whether the standard is a strict liability¹ standard or limited to the customary international standard for the treatment of aliens—has triggered much debate before investment treaty tribunals. Moreover, recent tribunals have extended this standard to accord all types of protection, including legal and physical security. For example, the tribunal in *Biwater v. Tanzania* (2008) stated that full protection and security “implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal” (par. 729). This raises concerns for states that have limited resources to spend to ensure that investments receive international standards of protection and security. The relevance of a state’s development level in interpreting this standard has also been raised in recent cases. Tribunals have ruled upon these very issues in widely conflicting ways, making it difficult to understand precisely what this promise to provide protection can mean for developing states. It is also likely to cause concern for developed states, as they face the risks of terrorism and natural calamities.

This paper traces the development of the protection and security provision as it emerges from anonymity into a potent tool for investor protection. I first identify the common formulations of this standard found in international investment treaties, then discuss the key arbitral rulings in relation to the standard. I conclude by identifying options for states in managing their exposure to liability under this standard.

¹ Strict liability does not require the finding of intent, negligence or fault. Liability arises from the fact of the act or omission itself.

2.0 Formulation of the Protection and Security Standard in Treaties

The most common expression of this standard is in the form of “full protection and security.” However, different variants are also found, such as “constant protection and security,” “protection and security” or “physical protection and security.” The standard can be found in the blueprint for the typical European bilateral investment treaty (BIT) template, the Abs-Shawcross Convention (1960), as follows:

Article I

Each Party shall at all times ensure fair and equitable treatment to the property of the nationals of the other Parties. Such property shall be accorded the most constant protection and security within the territories shall not in any way be impaired by unreasonable or discriminatory measures. (pp. 115-118)

This is echoed nearly 40 years later in Article 10 of the Energy Charter Treaty (1994), whose membership is largely European, in the following terms:

10(1) Each Contracting Party shall, in accordance with the provisions of this Treaty, encourage and create stable, equitable, favourable and transparent conditions for Investors of other Contracting Parties to make Investments in its Area. Such conditions shall include a commitment to accord at all times to Investments of Investors of other Contracting Parties fair and equitable treatment. 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. (Energy Charter Secretariat, 2004, p. 53)

Although the “most constant protection and security” provision is found in a number of treaties, the typical language used is “full protection and security.” Article 2(2) of the United Kingdom-Vietnam BIT (UNCTAD, 2002) reflects the most common formulation of the standard: “Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party.”

The importance of adjectives such as “constant” or “full” in defining the scope of this standard will be seen from the discussion below of arbitral rulings. However, whether couched as “most constant” or “full protection and security,” the obligation appears in the vast majority of BITs, without any reference to the standard to be applied in interpreting it. The lack of reference to a standard has led to a debate on whether the obligation should be interpreted as reflecting the minimum standard of treatment for aliens in customary international law, or whether it is in fact a higher, independent treaty standard. The investor-state arbitrations under Chapter 11 of the North American Free Trade Agreement (NAFTA, 1992) prompted the NAFTA parties to clarify what they had meant by full protection and security in their treaty.

Article 1105(1) of NAFTA (1992) contained broad language providing that the parties “shall accord to investments of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security.” In 2001 the NAFTA Free Trade Commission issued an interpretive statement confirming that 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 the customary international law minimum standard of aliens” (NAFTA Free Trade Commission, 2001). The U.S. and Canadian model BITs now expressly define the limits of the full protection and security standard.

Article 5 of the U.S. Model BIT (U.S. State Department, 2004) states:

Article 5: Minimum Standard of Treatment²

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. 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:

(a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.

The US Model BIT (2004) is explicit in two ways. First, it pegs the full protection and security standard to the minimum standard of customary international law for the treatment of aliens, and second, it refers only to the level of police protection. The latter also helps clarify the debate in recent cases on the application of this standard beyond police protection.

Article 5 of the Canadian Model Foreign Investment Promotion and Protection Agreement (Foreign Affairs and International Trade Canada, 2004) is broader, as it does not limit full protection and security to only police protection, as does the U.S. Model BIT. However, it does peg the standard to customary international law:

1. Each Party shall accord to covered investments treatment in accordance with the customary international law minimum standard of treatment of aliens, including fair and equitable treatment and full protection and security.

2. The concepts of “fair and equitable treatment” and “full protection and security” in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.³

The recent Association of Southeast East Asian Nations (ASEAN) Investment Agreement (2009) does not expressly refer to the standard of customary international law, as in the North American approach, but it does note that full protection and security require member states to take such measures as may be reasonably necessary to ensure the protection and security of covered investments. Thus, it clarifies in the treaty itself that the standard does not impose strict liability, but a duty to take reasonable measures.

² Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A. Annex A Customary International Law: The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

³ Canadian Model FIPA, available on Foreign Affairs and International Trade Canada website.

It provides as follows:

Article 11 Treatment of Investment

1. Each Member State shall accord to covered investment of investors of any other Member State, fair and equitable treatment and full protection and security.

2. For greater certainty:

(a) fair and equitable treatment requires each Member State not to deny justice in any legal or administrative proceedings in accordance with the principle of due process; and

(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.

Finally, some investment treaties simply omit the full protection and security standard. The omission of this standard in the two key African regional investment treaties, Annex 1 (Investment) of the Southern African Development Community Finance and Investment Protocol (2006)⁴ and the Investment Agreement for the Common Market for Eastern and Southern Africa Common Investment Area (COMESA, 2007), reflects the growing concern among developing countries about this standard. It remains to be seen, however, if countries will follow this regional approach in their bilateral investment treaties, particularly when negotiating with a partner that insists otherwise.

The vast stock of investment treaties use the term “full protection and security” without any reference to the standard to be applied. This provides arbitral tribunals with broad discretion to impose a high duty on states to prevent harm to investments.

⁴ The SADC Protocol on Finance and Investment (“the SADC FIP”), was signed on August 18, 2006 and, according to the SADC Secretariat, entered into force on April 16, 2010

3.0 Interpretations by Arbitral Tribunals of the Full Protection and Security Obligation

The rulings of arbitral tribunals emphasize the importance of managing states' exposure under this standard. As the investor argued in the first known investment treaty arbitration, *Asian Agricultural Products Ltd (AAPL) v. Sri Lanka* (1990), a promise to provide full protection and security can mean an absolute standard imposing strict liability. Fortunately for governments, arbitral tribunals have so far refused to hold states to an absolute standard. However, the next tribunal ruling on this provision may well consider that the ordinary meaning of this phrase does indeed provide a strict and absolute guarantee. Even though arbitral tribunals have not imposed a strict liability standard, the degree of diligence expected of states is high, and it is not necessarily proportionate to the resources available. Further, the expansion of this standard to commercial and legal security raises a whole host of new issues for governments.

The early cases involving the full protection and security standards were set in conflict situations, creating the presumption that this standard applied to the exercise of the host state's police powers and was limited to the physical security of investments. The full protection and security standard played a key role in the first known investment treaty case, decided in 1990: *AAPL v. Sri Lanka*. This case involved the dramatic battle between the Sri Lankan security forces and insurgents who destroyed the investor's shrimp farm and killed more than 20 of its employees during the Tamil insurrection (*AAPL v. Sri Lanka*, 1990, par. 79). Neither the investor nor the government could prove whether insurgents or security forces had caused the damage.

On the basis of the full protection and security clause in the United Kingdom–Sri Lanka BIT, the tribunal held that Sri Lanka had violated its obligation by not taking "all" possible measures to prevent the killings and destruction of investment. The investor argued that the treaty language created a strict liability standard. Sri Lanka counter-argued that the obligation was limited to invoking the standard of due diligence in customary international law. The tribunal held that an independent treaty standard was applicable and found Sri Lanka liable for its failure to take precautionary measures to prevent harm to the investment.

The tribunal found there was no need to establish malice or even negligence, but that "the mere lack or want of diligence" would be sufficient. It went on to say 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." (*AAPL v. Sri Lanka*, 1990, par. 18, emphasis added).

The second case to consider this standard was *AMT v. Zaire* (1997), which involved a similar conflict scenario. The tribunal had found that Zaire had taken no action whatsoever to protect the claimant's property during riots in Kinshasa. It found that it was of little or no consequence whether the acts complained of were committed by a member of the Zairian armed forces or a common burglar, because Zaire had an "obligation of vigilance," and accordingly its responsibility was invoked for failure to provide full protection and security and for losses owing to riots or acts of violence (par. 6.05).

Recent cases have tested the perception that full protection and security is restricted to situations of physical security. This issue has divided arbitral tribunals. While one set of decisions is clear that this standard applies only to physical security and thus limits the state's duty to protect the investor from violence caused by state actors or private parties, the other set of awards is firm in finding that this standard applies to physical, legal and commercial security. The vast majority of decisions in the last couple of years have opted for the latter school of thought, and it appears that the trend is toward an expansive interpretation rather than a narrow one restricted to physical security only.

A Standard Limited to Physical Security

Even in its restrictive guise, the duty to protect against actions of private parties, typically rioters or demonstrators, may make this an onerous standard for developing countries. The tribunals in *Rumeli v. Kazakhstan* (2008) and *Saluka v. Czech Republic* (2006) take the approach that the provision is limited to physical security. The tribunal in *Rumeli v. Kazakhstan* (2008) said: “The Arbitral Tribunal agrees with Respondent that the full protection and security standard. . . obliges the State to provide a certain level of protection to foreign investment from physical damage” (par. 668.).

Similarly, the tribunal in *Saluka Investments v. Czech Republic* (2006) noted:

The “full protection and security” standard applies essentially when the foreign investment has been affected by civil strife and physical violence... the “full security and protection” clause is 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. (pars. 483, 484)

The tribunal in *BG Group v. Argentina* (2007, par. 324) also found that protection and security was restricted to physical violence and damage.

In *Eastern Sugar v. Czech Republic* (2007), the tribunal stated that the standard protected investors against violence stemming from third parties, as follows:

As the Tribunal understands it, the criterion in Art. 3(2) of the [Czech-Netherlands] BIT concerns the obligation of the host state to protect the investor from third parties in the cases cited by the Parties, mobs, insurgents, rented thugs and others engaged in physical violence against the investor in violation of the state monopoly of physical force. Thus, where a host state fails to grant full protection and security, it fails to act to prevent actions by third parties that it is required to prevent. (par. 203)

The standard of response governments must exhibit in tackling third parties raises an important issue of capacity.

The well-known case of *Wena Hotels v. Egypt* (2002) involved the forcible seizure of two hotels by employees of an Egyptian state entity with whom the investor had contractual relations. Although government officials did not participate in the forcible seizure, the tribunal found Egypt had violated the standard because the police and other authorities took no effective measures to prevent or redress the seizure (par. 84).

The tribunals in *Tecmed v. Mexico* (2004) and *Noble Ventures v. Romania* (2005) were more emphatic of the government’s conduct in dealing with violent third-party acts. In *Tecmed v. Mexico* (par. 177), the tribunal found that there was insufficient evidence to prove that the Mexican authorities had encouraged, fostered or contributed to the acts of the demonstrators. Further, it found that there was no evidence to suggest that the authorities had not reacted reasonably, in accordance with the parameters inherent in a democratic state, to “the direct action movements.”⁵

Noble Ventures v. Romania also involved demonstrations and protests by employees. The tribunal rejected the investor’s allegation of full protection and security, finding that it was difficult to identify any specific failure on the part of Romania to exercise due diligence in protecting the claimant (par. 166).

⁵ The term “direct action” is used to refer to activity undertaken by individuals or groups to achieve political, economic, or social goals outside of normal social/political channels. This can include non-violent and violent activities that target people, groups or property deemed offensive to the direct action participant. Examples of direct action can include strikes, workplace occupations or sit-ins.

The recent ruling in *Pantechniki v. Albania* (2009, pars. 71–84), provides a glimmer of hope for states. The sole arbitrator in that case found that the extent of a state’s duty under this provision depended to some extent on the resources available to the host State. The tribunal concluded that Albanian authorities were unable to control the magnitude of the social unrest they had been confronted with. However, the tribunal also acknowledged that the standard extended to legal security and that the level of development was immaterial to claims relating to denial of justice (par. 77).

The Consequences of Extending the Full Protection and Security Standard Beyond Physical Security

Some scholars and institutions have avoided taking the view that full protection and security are somehow limited to physical protection and security only (UN Conference on Trade and Development, 2005). One author, in his writings about the Energy Charter Treaty, which promises “most constant protection and security,” stated, for instance, that this standard would also include economic regulatory powers. He said:

This obligation would not only be breached by active and abusive exercise of State powers but also by 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. . . a duty, enforceable by investment arbitration, to use the powers of government to ensure the foreign investment can function properly on a level playing field, unhindered and not harassed by the political and economic domestic powers that be. (Walde, 2004, pp. 390–391)

While recent cases such as *Biwater v. Tanzania* (2008) appear to echo this view, the extension of full protection and security to a regulatory exercise of state powers had been established in *CME v. Czech Republic* in 2001. In this case the Czech Media Council, a regulatory body, was found to have created a legal situation that enabled the investor’s local partner to terminate the contract on which the investment depended. The tribunal found that the Czech Republic had breached the obligation in the Czech-Netherlands BIT to accord full protection and security. It stated:

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 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. (*Biwater v. Tanzania*, 2008, par. 613)

The tribunal in *Azurix v. Argentina* (2006) confirmed that “full protection and security may be breached even if no physical violence or damage occurs” (par. 406). In *Siemens v. Argentina* (2007, pars. 286, 308), the tribunal found additional authority for the proposition that “full protection and security” goes beyond physical security from the fact that the applicable BIT’s definition of investment applied also to intangible assets. The tribunal concluded that the initiation of renegotiations for the sole purpose of reducing costs for the host state, unsupported by any declaration of public interest, affected the legal security of Siemens’ investment.

The tribunal in *Compañía de Aguas and Vivendi v. Argentina* (2007) was also clear in its rejection of the argument that the protection and security standard was limited to physical interference (Dolzer & Stevens, 1995, p. 61).⁶ It stated as follows:

⁶ See also Dolzer and Schreuer (2008), pp. 149, 150.

If the parties to the BIT had intended to limit the obligation to “physical interferences,” they could have done so by including words to that effect in the section. In the absence of such words of limitation, the scope of the Article 5(1) protection should be interpreted to apply to reach any act or measure which deprives an investor’s investment of protection and full security, providing, in accordance with the Treaty’s specific wording, the act or measure also constitutes unfair and inequitable treatment. Such actions or measures need not threaten physical possession or the legally protected terms of operation of the investment. Thus protection and full security (sometimes full protection and security) can apply to more than physical security of an investor or its property, because either could be subject to harassment without being physically harmed or seized. (par. 7.4.12)

The statement of the Vivendi tribunal contains an importance message for states. If states choose to draft their obligations toward investors using broad language such as “full protection and security” without expressly limiting its scope, then a tribunal can give these words their ordinary (and expansive) meaning.

The *Biwater v. Tanzania* (2008) tribunal follows the approach in *Vivendi v. Argentina* (2007) and *Azurix v. Argentina* (2006). The tribunal stated:

The Arbitral Tribunal adheres to the *Azurix* holding that when the terms “protection” and “security” are qualified by “full,” the content of the standard may extend to matters other than physical security. It implies a State’s guarantee of stability in a secure environment, both physical, commercial and legal. It would in the Arbitral Tribunal’s view be unduly artificial to confine the notion of “full security” only to one aspect of security, particularly in light of the use of this term in a BIT, directed at the protection of commercial and financial investments. (*Biwater Gauff v. Tanzania*, 2008, par. 729)

This was followed also by *National Grid v. Argentina* (2008, par. 189), in which the tribunal concluded that the phrase “protection and constant security” as related to the subject matter of the Treaty did not carry with it the implication that this protection is inherently limited to protection and security of physical assets.

More recently, in *Siag v. Egypt* (2009, par. 448), the tribunal found the Egyptian authorities’ failure to follow Egyptian court decisions breached the duty of protection and security, thus confirming that the duty of protection and security can be found to include the need to provide a legal framework that offers legal protection to investors.

The duty to have a well-functioning system of courts and legal remedies available to the investor was also recently confirmed in *Frontier v. Czech Republic* (2010). However, the tribunal ultimately ruled that the respondent had not breached the standard. The tribunal noted that that the obligation of states is to provide a functioning system of courts and legal remedies available to the investor, but carved out this obligation carefully by stating as follows:

Even a decision that in the eyes of an outside observer, such as an international tribunal, is wrong, would 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. (par. 273)

The impact of regulatory interference also leads to a further challenge. In the recent case of *AES v. Hungary* (2010), the claimant argued that the standard was breached when Hungary failed to ensure the legal security of the investments through the implementation of various regulations. The tribunal acknowledged that the standard does extend beyond physical security, but was clear in noting that it “does not protect against a state’s right [as was the case here] to legislate or regulate in a manner which may negatively affect a claimant’s investment, provided that the state acts reasonably in the circumstances with a view to achieving objectively rational public policy goals.” The duty is no more than to provide a “reasonable measure of prevention which a well-administered government could be expected to exercise under similar circumstances” (pars. 13.3.1-13.3.3).

Is the Full Protection and Security Standard a Reflection of the Minimum Standard for the Treatment of Aliens in Customary International Law?

The NAFTA interpretive statement of 2001 (NAFTA Free Trade Commission, 2001) sought to clarify this issue by clarifying that the full protection and security standard did not provide protection beyond what was stated in customary international law. The Canadian and U.S. texts contain this clarification in their treaties. While NAFTA tribunals have followed the interpretive statement by applying the customary international law standard, non-NAFTA tribunals have found that the broad full protection and security standard is not limited to the customary international law test but creates an independent treaty standard. For example, the first tribunal to rule on the provision in *AAPL v. Sri Lanka* (1990) rejected the state’s argument that this obligation should be limited to such a standard (par. 9). Even earlier, in the case of *ELSI (United States v. Italy, 1989)*, a Chamber of the International Court of Justice found that the standard of constant protection and security in a friendship, commerce and navigation treaty went further than the customary international law position (par. 109).

On the other hand, the tribunal in *Noble v. Romania* (2005) was inclined to find that the full protection and security standard should be limited to the security for aliens under customary international law. It said:

With regard to the Claimant’s argument that the Respondent breached Art. II (2)(a) of the BIT which stipulates that the “Investment shall ... enjoy full protection and security,” the Tribunal notes: that it seems doubtful whether that provision can be understood as being wider in scope than the general duty to provide for protection and security of foreign nationals found in the customary international law of aliens. The latter is not a strict standard, but one requiring due diligence to be exercised by the State. (par. 164)

The bulk of authority suggests that arbitral tribunals will not necessarily apply a customary international law standard unless states express this standard in their treaties. The argument for not doing so is strengthened in relation to recent treaties: tribunals are likely to assume an intention to provide a broad degree of protection because the options to define this obligation narrowly are now well-known, and so they may assume that a state made a deliberate choice by using a broader formulation.

What Standard of Liability Does the Full Protection and Security Standard Impose upon States?

The tribunal in *AAPL v. Sri Lanka* (1990) rejected the argument that the full protection and security standard creates absolute liability.⁷ On the other hand, it also rejected the state's proposition that the standard was limited to customary international law. Instead, it proceeded to interpret the standard as an independent treaty standard. This independent treaty standard has been described as that of due diligence, that is, a reasonable degree of vigilance. Dolzer and Stevens (1995) have stated:

The standard provides a general obligation for the host State to exercise due diligence in the protection of foreign investment as opposed to creating 'strict liability' which would render a host State liable for any destruction of the investment even if caused by persons whose acts could not be attributed to the State. (pp. 149, 150)

In the *ELSI* case (*United States v. Italy*, 1989), a chamber of the International Court of Justice said, "The reference. . . to the provision of 'constant protection and security' cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed" (par. 108).

However, tribunals often speak of a state's duty to take all measures to prevent damage (*AAPL v. Sri Lanka*, 1990) and have emphasized that there is no need to prove negligence or bad faith for a state to be liable (*AAPL v. Sri Lanka*, 1990, par. 77). Tribunals have typically not taken account of a state's level of development or stability in determining the level of due diligence to be expected.

Recently, the tribunal in *Pantechniki v. Albania* (2009) distinguished between situations involving physical violence and situations relating to a denial of justice. The tribunal found that no proportionality factor taking into account a country's resources was to be applied with respect to denial of justice, whereas it ought to be considered in relation to a situation involving public violence (*Pantechniki v. Albania*, 2009, par. 76). In this case the sole arbitrator dismissed the claim of the Greek construction company, Pantechniki, for losses arising out of civil unrest in Albania during the late 1990s. The sole arbitrator dismissed the full protection and security claim on the grounds that Albania had not acted negligently in failing to prevent the damage that the claimant suffered, and found that the authorities were "powerless" given the scope of the unrest in the country.

The sole arbitrator distinguished the claims arising out of civil strife from denial of justice claims. He indicated that the degree of "due diligence" required under the full protection and security standard in relation to the former circumstances might vary depending on the host state's level of development and on socioeconomic or political conditions prevailing at the time of the investment.

However, the *Pantechniki v. Albania* (2009) tribunal is the exception rather than the norm, and tribunals have usually applied the test of what a well-administered government would do in the same circumstances when assessing the behaviour of developing states, even those emerging from or in conflict (see, for example, *AMT v. Zaire*, 1997; *AAPL v. Sri Lanka*, 1990, par. 77).

⁷ This approach was followed by the tribunals in *Tecmed v. Mexico* (2004) and *Noble v. Romania* (2005).

4.0 Options for States

The first public decision by a tribunal on the full protection and security standard, *AAPL v. Sri Lanka* (1990), is now 21 years old. Since then, over 40 tribunals have had the opportunity to examine its scope. The success rate of 46 per cent for investors with respect to full protection and security claims brought over the last 21 years shows that this standard can be an onerous one for states, particularly those with limited resources.⁸ A number of concerns arise from the perspective of a developing country.

First, what is the extent of this standard when applied beyond physical security? The rulings of tribunals are divergent. For example, while the tribunals in *Saluka v. Czech Republic* (2006, pars. 483, 484) and *BG Group v. Argentina* (2007, par. 324) chose not to extend the standard beyond physical protection, the decisions in *National Grid v. Argentina* (2008, par. 189) and *Biwater v. Tanzania* (par. 729) are clear in recognizing that the scope extends to legal as well as commercial security. In *Azurix v. Argentina* (2006), 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” (par. 408).

On the other hand, the tribunal in *BG Group v. Argentina* (2007) 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 involving the physical security of the investor or its investment, the tribunal found it inappropriate to extend the standard in *BG Group v. Argentina* (par. 326).

Second, what is the standard of liability for host states? So far, tribunals have shied away from imposing a strict or absolute liability standard. However, tribunals have not typically restricted themselves to the standard of customary international law unless the treaty constrains or caps the obligation using the reference to customary international law. The vast majority of treaties do not refer to customary international law. Tribunals have therefore assumed an independent treaty standard that imposes a high degree of diligence in what is expected from a well-administered government. Having said that, recently tribunals like the one in *Pantechniki v. Albania* (2009) have suggested that host state circumstances should be taken into account when applying this standard to situations involving civil strife, but not in denial-of-justice claims (par. 76).

Although “fair and equitable treatment” and “full protection and security” often appear in the same phrase, and some arbitral tribunals have found that the two are indistinguishable, the majority approach is to keep the standards separate. While much concern has been expressed in relation to the expansive arbitral ruling on fair and equitable treatment, similar debate will likely occur on the full protection and security provision, as it raises similar, if not greater, concerns. While fair and equitable treatment requires states not to act in an unfair or inequitable manner, the full protection and security promise imposes upon states a duty to act in a manner that protects the investment from adverse interference. Thus, the onus may well be even greater on states with limited resources in conflict scenarios.

⁸ 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 per cent with respect to full protection and security claims brought over the last 21 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 standard was violated, or did not include alleged violations of the fair and equitable treatment standard (Commission, 2009).

If states choose to retain the classically formulated full protection and security provision in their investment treaties, then they could be undertaking a duty to act in a manner that will protect the investment in accordance with international standards, and not just in line with national treatment standards, irrespective of the resources available to them. In view of the recent rulings on the full protection and security standard, states may wish to consider the following options.

First, they can avoid including an obligation to provide protection and security in their treaties. This approach has been used recently in the Common Market for Eastern and Southern Africa (COMESA, 2007) and Southern African Development Community investment treaties (SADC, 2006).

Second, if states decide to include a protection and security obligation, then it is important to define the standard with care, in particular stating clearly whether it applies only to physical protection (for example, as the U.S. Model BIT (U.S. State Department, 2004) does in relation to police protection). Leaving it undefined and broad will allow arbitral tribunals to include legal, commercial and regulatory security, as they have indeed done in recent awards.

Third, states may choose to limit the scope of the standard to national or most-favoured-nation treatment. This will peg the standard of obligation to the treatment given to nationals or other foreign investors.

Finally, if states wish to provide protection and security pursuant to an international standard, incorporating a reference to the standard of customary international law for the treatment of aliens lends some clarity. However, the customary international law standard itself is an evolving one, and therefore an arbitral tribunal may well find that the “modern” interpretation of this obligation is higher than states may have thought was in the case in its more classical form.

The recent arbitral awards show that the standard can be onerous for states to meet, particularly states with limited resources. However, the controls to a large extent are in the hands of the states, which can take steps to minimize their exposure under this treaty obligation. With respect to existing investment treaties, states retain the option to delete this standard or to define it narrowly through an amendment of the treaty. The amendment would require the consent of both parties to the treaty. If an amendment is not possible, states can also issue an interpretive statement, as the NAFTA parties did in 2001 (if this can be accomplished with the consent of the other party). In the event that the other treaty party is not willing to make a joint statement, states may wish to issue a unilateral interpretive statement, which could have some influence over tribunals interpreting future disputes. If states do not take control, then tribunals will decide what this standard means for them. This may lead to unpleasant and costly surprises in investment treaty awards, in the form of hefty damages.

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Published by the International Institute for Sustainable Development.

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