David Aven v. Costa Rica: An Aftershock of Urbaser v. Argentina?

Kluwer Arbitration Blog
December 12, 2018

Andreea Nica

Please refer to this post as: Andreea Nica, 'David Aven v. Costa Rica: An Aftershock of Urbaser v. Argentina?', Kluwer Arbitration Blog, December 12 2018, http://arbitrationblog.kluwerarbitration.com/2018/12/12/david-aven-v-costa-rica-an-aftershock-of-urbaser-v-argentina/

Introduction

The assessment of human rights within an investment arbitration framework, typical for the investor-state dispute resolution (ISDS) mechanism, is one of the topics which has gained significant momentum in the past years, and has led even to the establishment of a Working Group on International Arbitration of Business and Human Rights. Arbitral tribunals often find it difficult to hold an investor accountable for breach of human rights during the operation of an investment because traditionally only States are considered to have the responsibility for their observance and enforcement. Although the idea of individuals and corporations acting as holders of rights on the international plane has been long accepted, no multilateral convention has yet recognized private entities' general obligation to respect human rights.

Investors' obligation to respect human rights – *quo vadis*?

The increased role and impact transnational investments play support the creation of a system of investor due diligence obligations at the international level, subject, of course, to the practical obstacles and the political will. A first step in this direction could be found in the 2014 initiative of the Human Rights Council entrusted to the Open-ended Intergovernmental Working Group on transnational corporations and other business enterprises with respect to human rights. Paragraph 4 of the concept note proposed by the Ecuadorian chair of the group expressly acknowledged that "the international legal system reflects an asymmetry between rights and obligations of transnational corporations (TNCs); while TNCs are granted rights through hard law instruments, such as bilateral investment treaties and investment rules in free trade agreements, and have access to a system of investor-state dispute settlement, there are no hard law instruments that address the obligations of corporations to respect human rights". Although far from imposing direct international obligations upon investors in its current form, this initiative has the potential of being developed into a powerful instrument, with echoes into the ISDS arena as well.

The current state of affairs seems to suggest that, in lack of specific language inserted in international investment agreements (IIAs), a tribunal has its hands tied when it comes to asserting an investor's liability for breach of human rights. Even when such language exists, the range thereof might differ, as a mere preamble statement[fn] The preamble of the Norwegian Model BIT (2015) encourages Sates to "*reaffir[m] their commitment to democracy, the rule of law, human rights and fundamental*

freedoms in accordance with their obligations under international law, including the principles set out in the United Nations Charter and the Universal Declaration of Human Rights". [/fn] or a corporate social responsibility clause[fn] Article 810 [Corporate Social Responsibility] of the Canada-Peru Free Trade Agreement states: *"[e]ach Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labor, the environment, human rights, community relations and anti-corruption. The Parties therefore remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies*". [/fn] might not be as effective as the incorporation of specific human-rights-related obligations.[fn] Article 15(1) [Minimum Standards for Human Rights, Environment and Labour] of the SADC Model BIT states: "*Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife*". [/fn] New generation IIAs seem to follow the latter approach but, as explained in another post, a number of issues relating to the enforcement of such obligations remain open.

Urbaser v. Argentina – the first earthquake

As elaborated here, investment arbitration tribunals have dealt with issues relating to human rights in different ways. The most controversial and impactful one is represented by the formulation of a counterclaim by the host State for breach of human rights by the investor. Notwithstanding that this issue might entail several procedural hurdles – particularly in terms of asserting jurisdiction – tribunals seem to have become quite innovative in overcoming them considering the salience of human rights in sensitive matters, such as environmental protection. As discussed in a previous post, there are numerous perspectives from which jurisdiction over a counterclaim can be assessed, but this post focuses on probably the most problematic one: the scenario in which consent must be derived from the general wording of the IIA.

The landmark decision rendered in *Urbaser v. Argentina*[fn] Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. The Argentine Republic, ICSID Case No. ARB/07/26, Award dated 8 December 2016 (Urbaser v. Argentina) [/fn] was the first one to shake the investment arbitration community on this topic. The investor unsuccessfully claimed that its concession for the supply water and sewerage services in Buenos Aires was adversely impacted by Argentina's emergency measures adopted in the aftermath of the 2001 financial crisis. Argentina filed a counterclaim alleging that the concessionaire's failure to provide the necessary level of investment in the concession led to violations of the human right to water, which consequently affected the population's health and the environment in that region. Quite unsurprisingly, the tribunal dismissed the counterclaim, noting that the investor's obligation to perform contractual water services had its source in domestic law, and not in general international law, and there was no legal ground under the latter to circumstantiate a claim or the corresponding compensation from a group of individuals for performance of services formulated against a private entity. However, the situation would be different if an obligation to abstain – such as a prohibition to commit acts violating human rights – would be at stake, as this would be of immediate application, not only upon States, but equally on individuals and other private parties (§§1210, 1220). Thus, by numerous *obiter dicta*, the tribunal proclaimed a revolutionary approach towards the role of human rights in investment arbitration. After being the first tribunal to assert jurisdiction over a human rights counterclaim, it also became the first to declare that non-State actors are under a negative obligation "not to engage in activity aimed at

destroying" (§1199) human rights. Stressing upon the integrated nature of the two regimes, the decision signalled that investment tribunals are ready to account for and enforce human rights obligations.

David Aven v. Costa Rica – A new shock?

The recent decision in *David Aven v. Costa Rica*[fn] David R. Aven and others v. Republic of Costa Rica, ICSID Case No. UNCT/15/3, Award dated 18 September 2018 (David Aven v. Costa Rica) [/fn] suggests that an earthquake is almost never an isolated occurrence.[fn] In Burlington Resources Inc. v. Republic of Ecuador, ICSID Case No. ARB/08/5, Decision on Counterclaims dated 7 February 2017, the Tribunal granted almost EUR 40 million for environmental damage concerning pit and non-pit soil remediation, groundwater remediation, and well abandonment causing mud pits following Ecuador's counterclaim. However, jurisdiction was not disputed, as the parties had concluded an agreement by which Burlington accepted jurisdiction over the counterclaims. Also, in Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador), ICSID Case No. ARB/08/6, where a similar counterclaim was brought but the cases were not joined because of Ecuador's opposition, the jurisdiction was never challenged by the investor. [/fn] The tribunal empanelled to hear the dispute had to decide if it had jurisdiction over a counterclaim in relation to the environmental damage caused to undisclosed wetlands during the operation of a real estate project. This was looked at from three stances: (1) the language of the relevant IIA, (2) the investment arbitration case law and (3) procedural economy and efficiency.

First, the relevant treaty environmental language,[fn] *E.g.,* Article 10.9.3.c and Article 10.11 of DR-CAFTA. [/fn] rather general in nature, was interpreted as representing a source for the investors' obligation to comply with the environmental domestic laws and regulations, and any corresponding measures adopted by the host State for the implementation of such norms; any breach thereof would amount to a violation of domestic and international law and would trigger liability for the damages caused (§734). The tribunal courageously held that, although the enforcement of environmental law is primarily on the States, it cannot be accepted that a foreign investor could not be subjected to international law obligations in this field (§737).

Second, citing the approach adopted in *Urbaser v. Argentina,* the tribunal proclaimed that "it can no longer be admitted that investors operating internationally are immune from becoming subjects of international law (…) particularly when it comes to rights and obligations that are the concern of all States, as it happens in the protection of the environment" (§737). Consequently, it found no substantive reasons to exempt an investor from the scope of claims, and interpreted "an investment dispute" as covering disputes giving rise to counterclaims, asserting *prima facie* jurisdiction for additional reasons of procedural economy and efficiency (§§740-742).

Costa Rica's environmental counterclaim was ultimately dismissed for non-observance of the procedural requirements set forth under Article 20 and 21 of the UNCITRAL Arbitration Rules governing the proceeding(§§744-747). Also, the tribunal noted in passing and, somewhat contradictory to previous reasoning, that the treaty language did not actually "impose any affirmative obligations upon investors" nor supported a counterclaim for violation of state-enacted environmental regulation (§743). Still, the window opened by *Urbaser v. Argentina* seems to have been widened with this case. If one decision might be viewed as unique reasoning, two can at least signal the incipience of a trend. Indeed, the assertion of a more tenable link between human rights, on one side, and business and IIAs, on the other side, is just one step forward in the overall movement towards a more balanced approach in the ISDS system, which may also ensure its survival in these times characterized by a legitimacy crisis