Kluwer Arbitration Blog

Washington Arbitration Week: What can Corporate Social Responsibility and Human Rights Assessments Teach to International Arbitration?

Jose Antonio Rivas, Susana Namen (Xtrategy LLP) · Sunday, February 20th, 2022

The second edition of Washington Arbitration Week (WAW) drew attention to areas of synergy between corporate social responsibility ("CSR"), human rights assessments and international arbitration. Consistent with these themes, the panel "What can Corporate Social Responsibility and Human Rights Assessments teach to International Arbitration?" discussed the current legal status of this topic and future developments. The panel was moderated by José Antonio Rivas (Xtrategy LLP/Georgetown Law), with panelists Douglas Cassel (King & Spalding), Rafael Benke (Proactiva), Ursula Kriebaum (University of Vienna) and Motoko Aizawa (Observatory for Sustainable Infrastructure).

Relationship between human rights due diligence ("HRDD") and arbitration disputes

Mr. Cassel focused on the evolving relationship between environmental law and human rights, and how this relationship might have an impact on arbitral proceedings. He referred to the most recent developments concerning the human right to a decent environment, calling attention to the recent resolution 48/13 of the UN Human Rights Council that, for the first time, recognized the right to a clean, healthy and sustainable environment on a global scale. In his view, the lines between human rights and environmental rights are being blurred.

The impact of developments in environmental and human rights on international arbitration and investment disputes, in the view of Mr. Cassel, will be seen in cases related to extractive industries. Cases like *Urbaser v. Argentina* are the current point of reference. The *Urbaser* award recognizes that private entities may have the duty to comply with human rights obligations in general, keeping in mind that investment agreements confer rights to the investor and implying that they are also obligation holders. However, Mr. Cassel recalled that Urbaser was found not to have the positive obligation to provide drinkable water to the Buenos Aires province, as that obligation belonged to the State. The tribunal concluded that companies only hold the negative obligation not to violate human rights.

While *Urbaser* is a landmark decision, Mr. Cassel explained, the tribunal missed an opportunity to evaluate HRDD. He further developed that HRDD reached universal application in 2008, with the UN Framework on Business and Human Rights. In 2011, the UN Guiding Principles ("UNGPs") clarified that companies are required to *respect* human rights under this instrument. Respect entails the active identification of risks to human rights, the adoption of measures to avoid the

materialization of human rights violations or to mitigate a negative impact, and cooperation in remediation.

France led the way in 2017 in mandatory HRDD, enacting its Duty of Vigilance Law. This law requires large French corporations and foreign companies operating in France to engage in HRDD. As explained by Mr. Cassel, those entities are obliged to report their due diligence processes, and if they fail to undertake them adequately or if human rights violations result from their activities despite the HRDD, they might be held responsible.

At the regional level, Mr. Cassel noted that in 2017, the Interamerican Court of Human Rights interpreted the Pact of San José as to require HRDD in relation to environmental rights through Advisory Opinion 23 of 2017. At the global level, in 2021 the UN working group on business and human rights called for mandatory HRDD and announced its interest in developing a treaty on business and human rights.

A practical approach to the UNGPs and expectations for HRDD

Mr. Benke affirmed that international arbitration practitioners have the task of finding ways to reinforce the business and human rights agenda while preventing risks of their violation and enhancing the likelihood of effective remedies.

The system of business and human rights stems from the milestone UNGPs. This instrument has three main pillars involving businesses, rightsholders and the State:

1. Protection: States must protect human rights in their territory.
2. Respect: Businesses must take steps to prevent and mitigate adverse impacts of their operations in a territory.
3. Remedy: Both States and businesses must work together to ensure the existence of effective judicial and non-judicial remedies.

Mr. Benke emphasized that human rights impacts are usually not caused solely by one corporation. Therefore, to achieve compliance with pillars (2) (Respect) and (3) (Remedy), businesses must recognize that they contributed to adverse impacts on human rights and cooperate towards remediation and non-repetition.

Mr. Benke recognized four types of agents that demand the implementation of extensive human rights policies: (i) consumers in search of sustainable products; (ii) other producers in the supply chain that have heightened their risk management plans; (iii) banks and investors that seek to fund responsible companies; and (iv) States with increasingly mandatory regulations. An example of this scrutiny, we add, is shown by the new German supply chain law, which gathered 200,000 signatures for its endorsement in 2020 (see German Supply Chain Act – New Standard for Human Rights and Environmental Due Diligence for Global Supply Chains).

Keeping in mind that HRDD is an ongoing and "person centered" process, Mr. Benke proposed six steps that companies can follow for compliance:

1. Implementing a corporate policy to respect human rights;
2. Conducting risk and impact assessments in the operational environment to identify potential human rights violations;
3. Integrating and acting upon findings from the assessments;

4. Tracking and monitoring the progress made in avoiding or mitigating human rights impact;
5. Communicating and reporting the progress made, which enhances transparency and accountability; and
6. Establishing grievance mechanisms and remedies in case of any adverse results.

The Hague Rules on Business and Human Rights Arbitration

According to Ms. Kriebaum, the responsibility of States to provide access to remedies is precisely what The Hague Rules on Business and Human Rights Arbitration seek to supplement. The Hague Rules modified the 2010 UNCITRAL arbitration rules to adapt them to human rights disputes. They contain features aimed at protecting human rights and granting an effective remedy within the arbitral process (other features of the rules are thoroughly explained in a previous KAB post). The Hague Rules were conceived to promote effective cooperation between States and companies to meet the pillars of the UNGPs. The focus of the Hague Rules is to ensure the right to an *effective remedy* as the third pillar of the UNGPs, given that most national legislations lack such a system. Ms. Kriebaum describes that the rules have a dual function as a forum of remediation and manage risks of businesses.

She also discussed the provisions requiring the tribunal to determine the law applicable to the dispute. As substantive standards were not designed in the Hague Rules, a tribunal might rely on human rights national law, contracts, human rights treaties, and even soft law instruments.

Finally, the tribunal has the duty of evaluating whether the award rendered is compatible with human rights, which would render it nationally enforceable as well. Such compatibility requires the right to an effective remedy that is cumulatively accessible, neutral, impartial, rapid, appropriate and sufficient to repair the damage caused.

Finally, Ms. Kriebaum invoked the Sustainable Investment Facility and Cooperation Agreement (SIFCA, drafted by experts for The Gambia) as the only instrument so far that refers to the Hague Rules as an alternative to human rights dispute settlement. SIFCA is the most innovative model bilateral investment treaty to encourage HRDD, as before a company may initiate ISDS proceedings, it must certify its compliance with the UNGP pillars. Additionally, SIFCA is consistent with Professor Philippe Sands' Partial Dissenting Opinion in *Bear Creek v. Peru*, as compensation awarded in ISDS arbitration under SIFCA must consider any infringement to the UNGPs that may have taken place during the company's operations.

Regulating HRDD through investment contracts

Ms. Aizawa highlighted the importance of including human rights requirements in investment contracts, as they are the most immediate legal regime regulating the relationship between the parties (investor and state) and balancing their needs. She focused on how States may regulate human rights in investment contracts, much like some treaties that have included provisions to preserve the State's ability to regulate for the protection of public welfare, health, and lives. Preservation of the State's regulatory power in the field of environmental and human rights is especially relevant in the contractual sphere where certain States may enter into contracts with stabilization clauses.

The goal is for disputes to be amicably resolved or not even arise at all. Victims would much rather have violations remedied instead of proceeding to litigation or arbitration. As Ms. Aizawa pointed out, the inclusion of detailed human rights provisions in investment contracts increases

transparency and predictability, reducing disputes in a national and international level.

Ms. Aizawa also gave practical tips for contract drafting, such as including specific obligations, rather than vague references to human rights. A process for HRDD should also be pre-established, as it is required throughout the life of the project, and a budget should be pre-approved for this purpose. Finally, periodic evaluation of performance of these policies is recommended.

Conclusion

Although the panel was designed to present a discussion on CSR due diligence, HRDD is a more thorough approach for human rights compliance by investors, as it entails a 360 degree review of all relevant matters related to human rights. The obstacle still lies on the voluntary character of such due diligences. Some States have made efforts to include mandatory CSR due diligence or HRDD for companies and investors at a domestic and international level. In 2016, the Nigeria-Morocco BIT emerged as the first investment treaty requiring it, providing an "unambiguous legal base to apply human rights obligations to private investors" and, as presented by previous KAB posts, The Gambia has gone a step further with SIFCA in 2021. SIFCA demands that investors face human rights challenges and solve them to be entitled to the usual protections they enjoy under international investment law and arbitration, as recognized here. Mandatory HRDD or CSR due diligence would attract qualified investments, promoting sustainable development in the host State and relieving it from some of the burden of being the only actor responsible for protecting and respecting fundamental and human rights.

Still, as pointed out by the moderator Mr. Rivas in his concluding remarks, a few questions remained for future discussion: How to encourage governments and large corporations to adopt these standards as mandatory domestically and internationally? How to disprove the belief that it would discourage investment in a State? After all, as we are reminded by H.E Bruno Simma, the objective is to achieve protection of investors' rights while ensuring compliance with and respect of human rights. While finding a balance between both is an ongoing effort, the panelists agreed that clearer standards on human rights and what is expected from investors would encourage (rather than discourage) foreign qualified investments in host States.

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