Kluwer Arbitration Blog

The Intersection of International Arbitration and Sustainable Development: Perspectives from Sarajevo

Fahira Brodlija (Arbitrator Intelligence), Nevena Jevremovi? (University of Aberdeen), and Amina Hasanovi? (University of Zenica) · Wednesday, June 8th, 2022

On 18 March 2022, academics and arbitration practitioners convened in Sarajevo (Bosnia & Herzegovina) for an international conference dedicated to cutting-edge topics related to the intersection of international arbitration and sustainable development. This post outlines some of the highlights of a rich discussion that was part of a broader effort to engage the legal and academic communities in Bosnia and Herzegovina in the international reform processes in this area.

The conference was part of the annual training and a Willem C. Vis Pre-Moot, co-organized by the U.S. Department of Commerce Commercial Law Development Program (CLDP), the Faculty of Law of the University of Zenica, GIZ, Association ARBITRI and the American Chamber of Commerce Bosnia and Herzegovina Sarajevo. A diverse audience of Willem C. Vis Moot teams (from Azerbaijan, Bosnia and Herzegovina, Georgia, Germany, Kosovo and Saudi Arabia), representatives of the business sector and practitioners contributed to the richness of the discussions. Following the welcome address and introduction by CLDP representatives, the U.S. Embassy in Bosnia and Herzegovina and AmCham, the conference unfolded through two keynote speeches, two panels and an interactive presentation.

The two keynote speeches were dedicated to the law applicable to the arbitration agreement, and delivered by Mr. Steven Finizio (Wilmer Hale, London) and Prof. Dr. Helmut Ruessmann (Saarland University). In final session of the conference, Ms. Amanda Lee (Costigan King) and Honorable Virginia M. Covington (District Court Judge, Middle District of Florida) shared tips and best practices for a career in international arbitration. The session was moderated by Ms. Amina Hasanovi? (University of Zenica, Faculty of Law). The panels of the conference focussed upon the intersection between international arbitration and sustainable development and form the focus of this post.

Arbitrating for a Greener Future: How SDG Disputes are Changing the Landscape of International Arbitration

Ms. Nevena Jevremovi? (University of Aberdeen) opened the discussion by discussing the implications of the Sustainable Development Goals (SDGs) on trade and investment. Although the international arbitration jurisprudence is yet to see the first awards related to SDGs (including

climate change), international instruments and procedural reforms are taking place on parallel tracks to prepare for the anticipated increase in caseload in this field. Given the fast pace and ambitious goals of the energy transition and adoption of green policies worldwide, many challenges lie on the horizon for policymakers and arbitration practitioners alike. More broadly, the need for accountability for adverse social, environmental, and human rights impacts of trade and investment is only increasing.

While States have taken steps to address these challenges – from the Paris Agreement to the UN 2030 Agenda to numerous soft law instruments – developing and capital importing countries are struggling to put in place a policy framework compliant with these international obligations while retaining foreign investments. KAB readers will be familiar with the concept of "regulatory chill", which presents one of the main hindrances for adopting meaningful SDG legislation and measures. States are hesitant to disrupt their foreign investment protection regime for fear of facing lengthy and expensive investment arbitrations. While it is difficult to measure the extent and real effects of "regulatory chill", it is a growing concern that modern investment protection treaties aim to address by expressly safeguarding the States' right to regulate in the public interest.

Ms. Jevremovi? then reflected on SDG interactions and global value chains (GVCs), explained the existing international and national regulatory framework, and laid the groundwork for discussing the implications of SDG considerations for Investor-State Dispute Settlement (ISDS). She concluded with an example of a recent groundbreaking decision of The Hague District Court – *Milieudefensie et al. v. Royal Dutch Shell* – where the court ruled that the Shell group is responsible for its CO2 emissions and those of its suppliers. The court in that case further held that Shell must cut its CO2 emissions by 45% compared to 2019 levels. In its reasoning, the court heavily relied on scientific research and reporting on the effects of climate change and also various international instruments, primarily the UN Guiding Principles on Business and Human Rights, to interpret and apply the Dutch standard duty of care standard.

The decision is particularly noteworthy for two reasons. First, it embraces a broad, and some may say bold, take on the scope of responsibility carbon majors have in their supply chains for adverse climate change effects. Second, the decision builds on the famous *Urgenda* decision. On 20 December 2019, the Dutch Supreme Court ruled that the Dutch government has obligations to reduce emissions urgently and significantly in line with its human rights obligations. More specifically, it ordered the Dutch State to reduce greenhouse gas emissions by at least 25% as of late 2020 relative to 1990 levels.

The Dutch experience in *Urgenda* and with climate change policy more broadly illustrates certain of the concerns associated with regulatory chill noted above. The Dutch Climate Act entered into force on 1 September 2019, setting a framework for the development of policy geared towards a permanent and gradual reduction of greenhouse gas emissions in the Netherlands to a level that will be 95% lower in 2050 than in 1990, to curb global warming and climate change. However, in response to the Climate Act, RWE filed a claim against the Kingdom of Netherlands under the Energy Charter Treaty requesting compensation for banning the use of coal in electricity generation from 2030. One can expect the connecting points between liability for adverse climate change, social, human rights, and environmental impacts, the ISDS system, and climate change litigation to multiply going forward.

Dr. Kabir Duggal (Arnold & Porter) addressed the changing landscape of ISDS and the tension between investors' rights and States' rights to regulate in the public interest. He reflected on the

high stakes of ISDS proceedings for less developed states and the role of human rights and environmental concerns in ISDS. Turning to the ongoing reform processes in ISDS, Dr. Duggal commented on the focus on procedural reforms in ISDS, particularly the reform options deliberated and developed in the UNCITRAL Working Group III (ISDS Reform). Considering that the mandate of WG III is limited to concerns and reforms associated with dispute resolution (such as the consistency of awards, costs and duration of the proceedings and ethical rules for ISDS adjudicators), the discussion of substantive issues, including SDG concerns, remains off the table of international bodies, at least for the foreseeable future. This isolated process cannot effectively resolve the most problematic issues concerning the States' ability to regulate in the public interest while maintaining an attractive investment environment. Therefore, there is a risk of the reform process being another missed opportunity to bring about meaningful change in the field.

Shifting the Paradigm of Investment Arbitration: State Rights and Investor Obligations

Following the discussion about the changing landscape of global business and trade and ISDS, the second panel turned to explore the evolving positions of States and foreign investors in ISDS. Ms. Fahira Brodlija (GIZ) opened the discussion by highlighting the trajectory of the development of the existing ISDS system. Initially, bilateral investment treaties (BITs) and the ISDS clauses served a dual role: on the one hand, they were a safeguard for foreign investors from developed States venturing into developing States, while developing States used them as a tool to attract foreign investment. The European Union, which is now the main advocate for the abandonment of ISDS and the establishment of a standing Multilateral Investment Court, once encouraged the conclusion of BITs among its Member States "as a means of establishing a favorable climate for private investment." She noted the reversal in the attitude of States towards investment arbitration as a feature of their investment protection framework, and the growing tendency of states to safeguard their regulatory space, to the exclusion of direct recourse of foreign investors against States. This opens the door for the paradigm shift in the roles of investors and States in ISDS.

Mr. Arne Fuchs (McDermott Will & Emery) identified several approaches that could be applied to soften the tension between investment treaties and State rights to regulate. States have already started lowering investment protection standards, by exempting certain measures from the scope of investment treaty protection and judicial review. Mr. Fuchs noted that this may raise inconsistencies in practice and that a much better approach would be to change the perspective on the traditional investment protection standards and to engage directly with investors when adopting significant policies of public interest. In addition, Mr. Fuchs reflected on the possibility of using investment treaties to enforce States' international obligations (e.g., in relation to the environment). As the notions of investment treaties as instruments of investment protection shift to a purpose od investment facilitation, the understanding of investor obligations and the State's duties to comply with global environmental obligations will likely impact the outcomes of future investment arbitration cases.

Prof. Catherine Rogers (Arbitrator Intelligence) laid out the prospects of States acting as Claimants, rather than as Respondents as is the norm in ISDS. To illustrate the nature and implications of such actions by States, Prof. Rogers presented some prominent examples from US case law, where States acted as claimants – including an action by 40 US States against tobacco companies in the courts that resulted in a US$365 billion settlement. Prof. Rogers also highlighted the role of contingency fee arrangements in claims brought by States against private companies, as

well as the high settlement rate of such cases. Finally, Prof. Rogers commented on the importance of international adjudication in any form and the prospects of increasing rates of State claims and counterclaims as an incentive for settlement.

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It is undeniable that the world of international arbitration cannot exist in a vacuum and that it will have to tune into the challenging landscape of ESG regulations and disputes in the near future. The conference laid the groundwork for future debates in this field among policy makers, practitioners and academics in Bosnia and Herzegovina, many of whom were among the Vis Moot participants who were in attendance. The full recording of the program is available online.

This entry was posted on Wednesday, June 8th, 2022 at 8:41 am and is filed under Arbitration, Development, Investor duties, Sustainability
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