THE EMERGENCE OF CSR PRINCIPLES IN INTERNATIONAL INVESTMENT ARBITRATION AWARDS

*Earlier this year, the UN Global Compact announced it will recognise company professionals who promote the 17 Sustainable Development Goals ("**SDGs**").*

*As corporate social responsibility ("**CSR**") principles gain in popularity, investors should be aware that failure to abide by these principles might affect their chances of success in international investment disputes.*

LALIVE's Corporate Responsibility Series is part of LALIVE's commitment to the United Nations Global Compact, a voluntary initiative based on CEOs' and companies' pledges to implement sustainability and to take steps in support of the United Nations Sustainable Development Goals.

Some 65 international investment agreements ("**IIAs**") refer to the UN Global Compact, the UN SDGs and/or CSR principles (see our previous newsletter). These provisions, however, remain largely untested and unused in investment arbitration. They have not been much invoked by respondent States, nor, in turn, have they been much relied upon by investment arbitration tribunals.

There are, however, a few notable exceptions, such as the three cases we discuss below.

Copper Mesa v. Ecuador

Following opposition to a mining project, Ecuadorian authorities terminated the concessions on the ground that community consultations had not been carried out. The claimant brought suit under the Canada-Ecuador bilateral investment treaty ("**BIT**").

As part of its defence, Ecuador argued that the claimant had engaged private security forces to attack local opponents to the mining project and

had thereby violated CSR principles and international public policy;[1] accordingly, the tribunal lacked jurisdiction and/or, because the claimants had unclean hands, its claims were inadmissible.

The tribunal upheld its jurisdiction and found the claims admissible. However, it considered the respondent's allegations of claimant misconduct at the merits phase, and found contributory negligence on the part of the claimant. The tribunal reduced the investor's compensation by 30 per cent (USD 3.35 million) due to its "grave" and "violent acts".[2]

Bear Creek Mining v. Peru[3]

Following opposition to the claimant's mining project, the Peruvian Government issued a decree prohibiting mining in the area at issue. The investor commenced arbitration under the Canada-Peru free trade agreement ("**FTA**").

Peru argued that the claim was inadmissible because the claimant had failed to obtain a "social licence" (*i.e.,* consent) from the affected communities.[4]

It noted that, in the FTA, Canada and Peru "remind[ed] those enterprises of the importance of incorporating [internationally recognized standards of corporate social responsibility] in their internal policies" and argued that the claimant could not "claim the protection of the FTA while also claiming that such standards of corporate social responsibility d[id] not apply to it."[5]

Peru argued that those "international standards" require companies to "work as closely and as extensively with the local communities as is

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[1] *Copper Mesa v. Ecuador*, PCA Case No. 2012-2, Award, 15 March 2016, para. 5.29 (including the UN Global Compact, the OECD Guidelines and the Voluntary Principles).

[2] Ibid, paras. 6.99-6.102.

[3] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017.

[4] Ibid, para. 328.

[5] Peru's Post-Hearing Brief dated 15 February 2017, para. 5; Canada-Peru FTA, Art. 810.

necessary to gain their trust and acceptance; otherwise a mining project will never be successful".[6]

The tribunal found that, while the investor engaged in 130 workshops and offered employment to local residents, the investor fell short of its obligations to consult with the relevant communities and did not secure their consent to the project in question. In particular, the investor's presentations were overly technical and poorly translated.[7]

While the tribunal found the claims admissible, it considered the question of the claimant's conduct (and the social licence) relevant to the quantification of damages. It awarded the claimant only its sunk costs – USD 18.2 million[8] (rather than the USD 522 million that the claimant had sought through a DCF calculation) – since there was "little prospect" that the project would have obtained the social licence.[9]

The approach espoused in *Bear Creek Mining* and *Copper Mesa* is in line with that promoted by modern IIAs such as the Dutch Model BIT (2019), which empowers and "expects" tribunals to take into account an investor's "non-compliance with its commitments under the UN Guiding Principles on Business and Human Rights, and the OECD Guidelines for Multinational Enterprises" when deciding compensation.[10]

Urbaser v. Argentina[11]

The investor – a shareholder in a concession providing water and sewage services to the Buenos Aires province – had its concession terminated, following Argentina's economic crisis in 2006.

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[6] Peru's Post-Hearing Brief dated 15 February 2017, para. 5.

[7] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 408.

[8] Together with interest and legal costs, this amounted to USD 30.4 million.

[9] *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 600.

[10] Dutch Model BIT (2019), Art. 23. See also, Iran-Slovakia BIT (2016), Art. 21(2) which empowers arbitral tribunals to "adjust" compensation to "reflect aggravating conduct by an investor", amongst other things.

[11] *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, 8 December 2016.

The investor brought suit under the Argentina-Spain BIT and Argentina counterclaimed for the investor's failure to maintain the concession,[12] arguing that the claimant's failure affected "the health and the environment of thousands of persons, most of which lived in extreme poverty" and violated the human right to water.[13]

While the Argentina-Spain BIT does not refer to human rights or CSR principles, Argentina argued that international law enshrined the right to water as a human right and that "leading companies of the world" had "adopted" this right in the UN Global Compact "as being part of their corporate social responsibility".[14]

The tribunal held that "international law accepts [CSR] as a standard of crucial importance for companies operating in the field of international commerce" and that such companies are no longer "immune from becoming subjects of international law."[15]

However, it found that the BIT did not have the "effect of extending or transferring to the Concessionaire an obligation to perform services complying with the residents' human right to access to water and sewage services."[16] In short, the tribunal could not hold the claimant liable for an alleged failure to provide access to water.

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[12] Ibid, paras. 1156-1166.
[13] Ibid, para. 1156.
[14] Ibid, para. 1161.
[15] Ibid, para. 1195.
[16] Ibid, para. 1207.