

Business And Human Rights Movement Spurs New Initiatives

Law360, New York (March 5, 2017, 9:08 PM EST) -- The protection of human rights has been traditionally considered a state obligation, but in the last 20 years, there has been a movement to recognize a responsibility by business enterprises to respect human rights in the conduct of their economic activity and to hold business accountable for human rights impacts that do occur.

In this emerging area, the endorsement of the United Nations Guiding Principles on Business and Human Rights (UNGPs) by the U.N. Human Rights Council five years ago marked a watershed event. While the UNGPs do not have the force of law and are nonbinding, as noted in the recently published IBA Practical Guide on Business and Human Rights for Business Lawyers, they "are increasingly reflected in public policy, in law and regulation, in commercial agreement, in international standards that influence business behavior, in the advocacy of civil society organisations, and in the policies and processes of companies worldwide."

The UNGPs consist of three stated pillars, summarized as "Protect," "Respect" and "Remedy." Specifically, they recognize: (1) the state's obligation to protect against human rights abuse, (2) the responsibility of business enterprises to respect human rights, and (3) the need for access to effective remedies for human rights abuses.

With respect to the third pillar, Principle 25 of the UNGPs envisions that remedies may include "apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions ... as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition." As to the mechanism for obtaining such remedies, a range of divergent proposals have been advanced, largely independent of one another. We discuss trends in this area below.

State-Based Judicial Remedies

In keeping with the obligation of the state to protect against human rights violations, Principle 26 of the UNGPs instructs that states should take "appropriate steps to ensure effectiveness of domestic judicial mechanisms," and posits that "[e]ffective judicial mechanisms are at the core of ensuring access to remedy."

Nevertheless, national courts in the state where an alleged violation occurs may be



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plagued by limited resources, corruption, or a lack of independence such they are not capable of providing an effective remedy. At the same time, other national courts have restricted claims by citizens (or groups of citizens) concerning personal injuries and/or violations of basic human rights, particularly where the violation did not occur in the state where redress is sought.

The recent trend in the United States has been to limit the ability of parties to invoke the protections of U.S. courts in lawsuits arising out of alleged tortious activity occurring in another country. In particular, in *Kiobel v. Royal Dutch Petroleum Co.*, the U.S. Supreme Court held that the Alien Tort Claims Act did not have extraterritorial application, and it upheld the dismissal of claims alleging that certain corporations aided and abetted an African government's human rights violations. Similarly, the U.S. Supreme Court in *Daimler AG v. Baumann* rejected an attempt by individuals alleging they were victims of human rights violations in South America to bring claims against corporate affiliates of one of the alleged actors in the United States. The court found that the corporate affiliates could not be sued in the United States, and in doing so, it significantly narrowed the standards for establishing general jurisdiction over a business entity in the U.S. courts.

In addition to the developments in the United States, some commentators and advocates have cited other obstacles in various judicial systems impeding the pursuit of a remedy for business-related human rights violations. These perceived obstacles include the doctrine of forum non conveniens, cost-shifting rules, time limitations, legal standing requirements, difficulties in evidence gathering, and the structure of corporate groups.

Non-Judicial Mechanisms

Limitations on the availability of judicial remedies have led to increased consideration of alternative non-judicial solutions, and a number of non-judicial mechanisms for addressing business and human rights issues, both state-based and private, are being explored.

Guiding Principle 31 of the UNCPS sets forth a number of criteria to "provide a benchmark for designing, revising or assess a non-judicial grievance mechanism to help to ensure that it is effective in practice." To be effective, Guiding Principle 31 discusses how the non-judicial grievance procedure should be legitimate, accessible, predictable, equitable, transparent, rights-compatible, and a source of continuous learning.

Private Grievance Mechanisms

Private grievance mechanisms may include operational-level grievance procedures allowing affected parties to engage with representatives of the business enterprise. Some companies have also sponsored remediation plans, but such programs have been criticized in some quarters as not being fully independent or not fully addressing the grievances of local communities. For such grievance procedures to be effective, Guiding Principle 31 recommends that "engaging affected stakeholder groups about its design and performance can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success."

Another proposal calls for the creation of a private international arbitration system to address disputes relating to alleged business-related human rights violations. This system, which would be similar to the one currently used for international commercial business disputes, would potentially include an International Arbitration Tribunal on Business and Human Rights created by the Permanent Court of Arbitration, which is headquartered in the Hague. Such a tribunal would, among other things, adjudicate claims brought against multinational business enterprises by human rights nongovernmental organizations on behalf of victims.

The proponents of a private arbitration system cite as advantages that (1) proceedings,

mutually agreed upon by the parties, could be held throughout the world in a neutral location, before a neutral tribunal with expertise in business and human rights issues; (2) disputes would be resolved in a shorter time frame than available through many national court proceedings and would result in arbitration awards widely enforceable throughout the world; and (3) the parties would have the ability to craft procedures tailored to the needs of the dispute. Submission of a human rights dispute to the tribunal would, however, require consent of both the business enterprise and the NGO, and proponents recognize that it may take time for both sides to accept such a forum.

State-Based Non-Judicial Mechanisms

State-based non-judicial mechanisms also take many different forms. One example is the National Contact Points (NCP) system set up under the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprise. The OECD guidelines "provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards." According to the OECD, the "Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting." The NCP system has been heralded as a "global forum for remedy for corporate human rights abuses" in a June/July 2016 IBA Global Insights article.

Under the NCP system, in place in more than 40 nations, the NCP for a particular country may accept complaints, provide an opportunity for parties to undergo a mediation process, investigate the allegations and issue final statements at the end of the process. However, a lack of consistency across the NCP system has been reported, resulting in varying degrees of success. In addition, a number of countries, such as China and India, are not participating members of the NCP system.

Human Rights Treaty

In July 2014, the U.N. Human Rights Council established an intergovernmental working group (IGWG) to develop a binding treaty to address corporate responsibility for human rights abuses. The IGWG held sessions in 2015 and 2016 to consider the content and nature of a possible treaty.

This effort has generated much controversy and debate, and its future remains uncertain. Among the concerns raised are: (1) whether a treaty allowing corporations to be held directly liable will enable states to evade or excuse their own failures to protect human rights; (2) the scope of the treaty and whether a single treaty can address the multitude of human rights or whether it instead will result in diluted standards; (3) the focus on transnational corporations to the exclusion of domestic ones; and (4) attempts by some involved in the negotiations to exclude corporate stakeholders from participating. Whether these issues can be overcome remains to be seen.

In the meantime, the UNGPs may well become increasingly influential, and many states, corporate actors and private parties will continue to search for an enforcement mechanism that satisfies all interested parties.

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