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2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights

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It will come as no surprise to the readers of this blog that the ongoing COVID-19 pandemic has had a significant impact on international arbitration (see blog coverage here). In this post, we take a look back at 2020 to consider the intersection of the pandemic, investment, and human rights. In February 2020, one of us took a look back at 2019 specifically in the context of international investment agreements (IIAs) and human rights. This post follows in that tradition, while seeking to further understand how the COVID-19 pandemic is likely to shape the intersection of international arbitration and human rights.

This post first considers the ongoing effects of the pandemic on investment and human rights in 2020. Second, it considers the degree to which human rights considerations have been specifically reflected in IIAs signed in 2020. Notably, it does not address disputes because 2020 was a quiet year for investment treaty arbitration decisions that substantively engage with human rights considerations. Third, and finally, it looks ahead to consider the potential trajectory of the intersection of investment and human rights in 2021.

Downward Pressure on Both Investment and Human Rights Protections as a Result of COVID-19

UNCTAD's 2020 World Investment Report notes that the pandemic has caused a severe drop in foreign direct investment (FDI), falling well below the trough reached during the 2008 global financial crisis, with a disproportionate impact on low- and middle-income countries (LMICs). Altogether, this implies that countries, particularly LMICs, will likely compete for limited available FDI. In this environment, countries may be willing to forego human rights and other sustainable development considerations in an attempt to attract FDI.

The COVID-19 pandemic has also had severe human rights implications. The pandemic has exacerbated human rights challenges globally, which the UN High Commissioner notes will "create even wider inequalities." Alarmingly, Amnesty International has

noted that the pandemic is "being exploited as a pretext for oppression in nearly every region of the world." In response, UN Secretary General Guterres has called for human rights to be placed "front and center" of any pandemic response.

Finally, as UNCTAD has noted, governments all around the world have taken measures in response to the pandemic. Some of these measures could be challenged by foreign investors for breaching obligations under IIAs. For example, after proposing an emergency measure that would suspend the collection of toll fees on its roads, investors warned Peru of potential ICSID claims in response.

While such cases have not yet emerged, it remains to be seen what impact such cases may have on the landscape of depleting FDI. Indeed, prominent organizations like the Columbia Center for Sustainable Investment have called for a "Moratorium" on ISDS disputes during the pandemic, noting that ISDS awards can "represent sizable percentages of governments' budgets" and that governments must ensure that ISDS does not "deepen the inevitable fiscal crisis." A similar call has been made by the International Institute for Sustainable Development, which has argued that governments must either suspend the application of ISDS claims for all pandemic-related measures or clarify how international law defenses will apply for this "extraordinary" situation. Until governments or international organizations adopt any such measures, the dual realities of declining foreign investment and downward pressure on human rights and other sustainable development considerations are likely to result in individual governments lowering standards to attract foreign investment.

Few Notable Developments in New IIAs in 2020

2020 was a relatively quiet year for new IIAs. According to UNCTAD, only six new IIAs were signed in 2020, five of which have publicly available texts. Regarding human rights-related issues, these IIAs contain fairly standard preambular text (Table 1). The Fiji–US TIFA is a notable exception, both for its specific mention of several environmental-specific concerns and its recognition that "enhancing opportunities for women to participate in civic and economic life contributes to the economic empowerment of women and to prosperity". Interestingly, we do not yet see a concerted effort to address pandemic-like situations in the future. Following the cases involving tobacco regulation, there was an increase in provisions that sought to exclude tobacco-related measures. We have not seen a concerted effort to address pandemic-like situations expressly yet.

Table 1 – Preambular Text

	Preambular text regarding human rights (Yes/No)
Japan–Morocco BIT	Yes (mentions public health, environment, natural resources)
Brazil–India CFIA	No
Fiji–US TIFA	Yes (mentions labor, environment, marine litter, illegal logging, illegal fishing, gender)

Investment Chapter (Chapter 10) of the RCEP	Yes (mentions sustainable development)
Hungary–Kyrgyzstan BIT	Yes (mentions health, environment, human rights, labor, corporate social responsibility)

These IIAs likewise contain fairly standard operative provisions addressing human rights-related issues (Table 2). Consistent with prior trends, these operative provisions generally do not establish direct obligations on multi-national enterprises and, where they do, are couched in aspirational language (e.g., Art. 12.2 of the Brazil–India CFIA).

Table 2 – Operative Provisions

	Prevent and combat corruption	**Corporate social responsibility**	**Non-lowering of standards**	**General exception for health**	**Seeking to preserve regulatory autonomy**	**FET standard**
Japan–Morocco BIT	Art. 7 (aspirational language)	None	Art. 19	Art. 21	None	Art. 4 (includes access to courts and due process)
Brazil–India CFIA	Art. 10 (requires the adoption of measures)	Art. 12 (directed to investors, but in aspirational language)	Art. 22	Art. 23	Art. 22	Art. 4 (includes denial of justice, due process, and "targeted discrimination, such as gender, race or religious belief")
Fiji–US TIFA	None	None	None	None	None	None
Investment Chapter (Chapter 10) of the RCEP	None	None	None	None	None	Art. 10 (includes denial of justice)
Hungary–Kyrgyzstan BIT	None	None	Art. 2	None	Art. 3	Art. 2 (includes denial of justice, due process, and "targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief")

Finally, although not explicitly related to human rights, exceptions and even so-called war clauses may also be relevant for claims arising out of the pandemic, including

directly vis-à-vis human rights, based on reference to a state of emergency. Both the Brazil–India CFIA and Hungary–Kyrgyzstan BIT contain such clauses—specifically, as compensation-for-loss clauses—but any reliance by investors will be highly fact-dependent.

Two Additional International Agreements Likely to Impact Human Rights and Investment in 2021

Separately, two other international agreements may have subsequent ramifications for human rights in 2021.

First, following Brexit, the recently released draft of the EU–UK TCA contains preambular text recognizing the importance of human rights and generally recognizes the importance of sustainable development in Title XI. However, it largely does not address human rights considerations specifically impacting trade and investment. At present, the draft only provides for State-to-State dispute resolution.

Second, the Agreement Establishing the African Continental Free Trade Area (AfCFTA), which went into effect on January 1, 2021, provides in the preamble that the State parties recognize "the importance of . . . democracy, human rights, gender equality and the rule of law" and reaffirm the state parties' regulatory powers in areas like "public health, safety, environment, public morals and the promotion and protection of cultural diversity." This agreement is remarkable because it creates the largest free trade areas since the WTO. As has been previously noted, AfCFTA has not addressed ISDS so far, providing only for State-to-State dispute resolution.

While efforts have been made to establish guiding principles on investment via the G20, these two agreements do not at present fully reflect such principles. In particular, principles VI (reaffirming the right to regulate) and VIII (encouraging responsible business conduct) could serve as a conceptual model for framing core obligations in such agreements.

Key Considerations for 2021

Looking ahead, we see two key considerations for the intersection of investment and human rights, and the future trajectory of ISDS.

First, as we have previously written, ongoing ISDS reform efforts offer a crucial opportunity to revisit the role of human rights considerations in the ISDS system. While such ongoing efforts have primarily focused on procedural rights (e.g., due process), opportunities to address substantive rights, such as social, economic, and cultural rights within the ISDS system could better recognize the shared fate of foreign investment and society.

Second, States are able to satisfy their direct obligations regarding human rights on the international plane by exercising their regulatory autonomy. Efforts to push back

against the so-called regulatory chill, therefore, will remain crucial. This is particularly the case as States continue to enact domestic measures aimed at combatting the effects of the ongoing pandemic. States could correspondingly focus on strengthening operative provisions in new IIAs. As one of us has written, Model Agreements, such as the 2019 Netherlands Model BIT, can offer instructive examples of progressive approaches to drafting new operative provisions.

The views expressed herein are personal and do not reflect the views of the authors' employers or their clients. The authors reserve the right to change the positions stated herein.

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