

Kluwer Arbitration Blog

2022 Year in Review: Widening the Human Rights Aperture for ISDS

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This is the fourth consecutive year that we, either together or separately, have reported on trends at the intersection of human rights and international investment arbitration from the prior year (see prior Blog coverage, [here](#), [here](#), and [here](#)). As we emphasized last year, developments at this intersection continue directional trends from prior years, but also converge across both procedural and substantive dimensions, suggesting a greater impact than meets the eye.

Looking back on 2022, we identify four trend areas: 1) drafting of new IIAs and model agreements; 2) notable cases; 3) institutional developments; and 4) adjacent developments. Overall, across these four foci, 2022 was largely a continuation of trends from prior years. We conclude with thoughts on what this could mean for the years ahead.

IIA and Model Agreement Drafting Trends

As of January 2023, UNCTAD [reports](#) 12 investment agreements (encompassing both investment treaties and investment chapters in free trade agreements) were signed in 2022; eight currently have publicly available texts. Only one, the [UAE-India CEPA](#), is currently in force.

According to UNCTAD, one model agreement, the [Italy Model BIT](#), was released in 2022. It contains preambular language regarding human rights, encouraging corporate social responsibility practices, and preserving the right to regulate; notably, there are no corresponding operative provisions regarding these issues.

Altogether, in 2022, IIA and model agreement drafting trends regarding human rights considerations continue themes from prior years, as summarized in Table 1. Overall, there remains a preference for establishing nonbinding obligations regarding human rights. What is more, provisions regarding, for example, non-lowering of standards and the right to regulate, continue to lack specificity regarding human rights, which exacerbates interpretative uncertainty. For the curious reader, we have elsewhere contextualized such trends for [IIAs](#) and for [model agreements](#).

Table 1: IIAs and model agreements signed in 2022 (with publicly available texts as of January 2023)

	Preamble Mentioning Human Rights	Non-Lowering of Standards	Corporate Social Responsibility	Right to Regulate
Bahrain-Japan BIT	No	Yes	No	No
Indonesia-Switzerland BIT	Yes	No	No	Yes
Turkey-Uruguay BIT	No	No	Yes (voluntary)	No
Australia-India ECTA	No	No	Yes (voluntary)	Yes
New Zealand-United Kingdom FTA (Investment Chapter)	No	No	Yes (voluntary)	Yes
India-United Arab Emirates CEPA (Investment Chapter)	No	No	No	No
Hungary-Oman BIT	Yes	Yes	No	Yes
Pacific Alliance- Singapore FTA (Investment Chapter)	No	Yes	Yes (involuntary, but only regarding promoting the uptake of, supporting the dissemination of, and exchanging information regarding CSR and related instruments)	Yes
Italy Model BIT	Yes	Yes (regarding labor)	No (but mentioned in preamble)	No (but mentioned in preamble)

Key Cases at the Intersection of Human Rights and ISDS

In 2022, we saw greater engagement with international arbitration and human rights issues in various fields of international law. For example, the European Court of Human Rights (ECtHR) ruled in *BTS v. Slovakia* that Slovakia violated an investor's right to property because its courts denied the enforcement of a commercial arbitration award against Respondent's National Property Fund. The ECtHR concluded that, while the domestic court denied enforcement by reason of public policy, it did not take into account "the requirements of the protection of the applicant company's fundamental rights and the need for a fair balance to be struck between them and the general interest of the community right."

Amicus curiae submissions also continue to play a role in the introduction and consideration of human rights considerations in disputes. For example, in *Odyssey v. Mexico*, the majority received *amicus* submissions by the Center for International Environmental Law (CIEL) and by the Sociedad Cooperativa de Producción Pesquera Puerto Chale S.C.L. (Cooperativa). Both sought to raise human rights considerations which were dealt with differently in the majority opinion and dissenting opinions.

Cooperativa's *amicus* submission stated that the investor's concessions to develop the project were located "in the same area where the members of Cooperativa hold their fishing concessions." In denying the application, the majority stated that "it does not consider that such insight could bring a perspective that would assist the Tribunal in this arbitration." Similarly, CIEL stated that it had an "interest in ensuring that human rights and international environmental law are fully enforced and, therefore, that it has an interest in this arbitration." In denying the submission, the majority noted that CIEL does have "significant experience and expertise on matters of international environmental law;" however, CIEL has not "demonstrated" that it can "provide assistance on matters not addressed by the parties or that the parties are unable to provide in this arbitration."

Professor Sands dissented with the majority, stating both Cooperativa and CIEL could "bring a unique perspective to the specific perspective" that would assist the Tribunal. Professor Sands stated that the perspective of Cooperativa "relates to the impact that the Claimant's project may have had on the fishing activity of local people" and, by denying the *amicus* submission, the decision would only "serve to undermine perceptions as the legitimacy of these proceedings." Similarly, CIEL "is able to offer a unique perspective due to its ability to place this dispute in the context of broader debates and developments in international law." Further, the *amicus* submissions "would not have unduly burdened the parties, unfairly prejudiced either party or disrupted the arbitral proceedings."

Developments at the Institutional Level

On March 21, 2022, ICSID Member States approved the amendments to the new ICSID Rules and Regulations; they took effect on July 1, 2022. They provide updates that can help improve arbitral processes to respect human rights related to due process, access to justice, and improved dispute resolution. For example, the new rules establish, *inter alia*: a new expedited arbitration procedure; a revised rule on the procedure available to dispose of meritless claims; rules that enhance the transparency of ICSID orders, decisions, and awards; rules creating and tightening deadlines at various stages of arbitration; rules requiring disclosure of third-party funding; and rules concerning costs allocation and provision of security for costs. As we have previously discussed (see prior Blog coverage, [here](#) and [here](#)), the amendments do not touch upon the substance of investment agreements.

The Potential Impact of Adjacent Developments

In prior years, we have reported on adjacent developments – that is, human rights-related developments that may indirectly impact international arbitration – such as the [Hague Rules on Business and Human Rights Arbitration](#) (Hague Rules) and efforts to develop a legally binding instrument to the activities of transnational corporations (TNCs) and other business enterprises (OBEs) regulate under international human rights law (altogether, BHR Treaty).

In 2022, no significant developments occurred regarding the Hague Rules. The notion of human rights-specific arbitration rules remains attractive for rightsholders, but only time will tell if the Hague Rules will be incorporated in transnational commercial agreements and have a wider practical impact. Similarly, in 2022, no significant developments occurred regarding the BHR Treaty. Deliberations regarding the [Third Revised Draft](#), released in 2021, continue, including on

fundamental issues, such as whether the BHR Treaty will indeed clearly establish binding obligations for TNCs/OBEs.

Most notably, in July of 2022, in a historic development, the United Nations General Assembly [recognized](#) a new human right – namely, the human right to a clean, healthy, and sustainable environment. For international arbitration, this new right expands the reach of international human rights law which, in turn, may factor into disputes via the applicable law. What is more, this right in particular is especially likely to arise in disputes, due to its intersection with the commercial projects that have typically been the subject of the intersection of human rights and ISDS, such as mining projects and public utilities. Time will tell whether this new right will arise in disputes, perhaps in the context of counterclaims.

Looking Ahead

Altogether, 2022 was largely a continuation of trends from prior years. However, the aperture for human rights considerations in ISDS does appear to be widening, given consistent annual developments across procedural and substantive dimensions, as well as numerous adjacent developments with the potential for meaningful impact in subsequent years.

Yet this raises at least a couple of fundamental questions for 2023 and beyond. We have previously written on the often strained relationship between international investment law and international human rights law *qua* regimes under the broader umbrella of international law (see prior Blog coverage, [here](#)). Recent trends seem to largely sidestep meaningful discussion of such tensions and, at worst, perhaps even exacerbate them.

What is more, we must observe that global relations – and, indeed, the international legal order – remain in a significant, albeit as yet incomplete, period of transition, the contours of which we cannot hope to address here. What remains clear, however, is the need to weigh whether the trends that we have witnessed in prior years ought to persist unchanged or instead evolve to accommodate what seems to be a new phase of globalization.

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