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2019 in Review: International Investment Agreements and Human Rights

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Several developments in 2019 highlighted the increased presence of human rights considerations in international investment law. As [described](#) by our contributors, however, tensions persist.

The [2019 Netherlands Model Agreement](#), released in March, represented a notably progressive approach to reflecting human rights considerations in foreign investment, as [explained](#) by our contributors. This development builds on related drafting considerations for model agreements, as [described](#) by our contributors.

The [revised draft](#) of a legally binding instrument to regulate under international human rights law the activities of transnational corporations and other business enterprises (TCs/OBEs), released in July, marked crucial progress toward evolving investor obligations regarding human rights on the international plane.

Finally, the much-anticipated final text of the [Hague Rules on Business and Human Rights Arbitration](#) was released in December following a public consultation period, as [described](#) by our contributors. The final text created a novel pathway for arbitration of business and human rights disputes, as [explained](#) by our contributors. We learned from our contributors that [challenges remain](#), but [prior experience](#) using arbitration to resolve human rights disputes may offer instructive lessons.

In addition to these developments, several new international investment agreements (IIAs) were signed in 2019, many of which contain preambular text or substantive provisions relevant for human rights. This post provides an overview of these new IIAs, with a focus on their potential implications for human rights considerations in international investment law.

New IIAs

According to the [UNCTAD](#) as of January 2020, 14 new IIAs were signed in 2019, all of which are not yet in force. The texts of 10 of these 14 IIAs are publicly available. Nine of these 14 IIAs—or nine of the 10 IIAs with a publicly available text—contain preambular text or substantive provisions relevant for human rights. Specifically, this

post highlights five categories: (1) preambular text; (2) corporate social responsibility (CSR) provisions; (3) general exceptions provisions; (4) provisions preserving regulatory autonomy; and (5) non-lowering of standards provisions. In some instances, explicit reference is not made to human rights, but the language used is as an interpretative matter nonetheless relevant for human rights.

These developments represent a continuation of trends from prior years. However, 2019 is notable for both the volume of such inclusions across newly signed IIAs and the share of newly signed IIAs in which they appear. As such, these developments both further normalize the presence of human rights considerations in IIAs and advance the broader trend toward reflecting human rights considerations in international investment law.

Preambular Text

The preamble to an IIA informs the general object and purpose of the instrument. Article 31(1) of the [Vienna Convention on the Law of Treaties](#) requires that the provisions of an IIA be interpreted in view of its object and purpose. Two new IIAs signed in 2019 refer to human rights or specific human rights instruments in their preambles. The [CARIFORUM States-United Kingdom EPA](#) broadly refers to the parties' commitment to respect human rights. Additionally, the [EU-Vietnam IPA](#) refers to specific international instruments, affirming the parties' commitment to the Universal Declaration of Human Rights. In isolation, such preambular text has minimal interpretative impact. However, it can play a supplemental role alongside substantive provisions to inform an interpretation of the instrument that supports the relevance of human rights considerations.

Corporate Social Responsibility

IIAs may include substantive provisions regarding CSR that refer to human rights. These provisions are typically nonbinding or directed to State parties, rather than investors. Several new IIAs signed in 2019, such as the [Brazil-UAE BIT](#), refer to the [OECD Guidelines for Multinational Enterprises](#), which captures recommendations from governments to multinational enterprises on responsible business conduct. Moreover, several IIAs also identify voluntary principles to guide investor conduct, such as respecting the internationally recognized human rights of individuals involved in the investor's business activities.

At present, such provisions likely have limited practical impact on investor conduct, owing to their voluntary nature or indirect application to investors. However, considered alongside efforts to establish binding human rights obligations for TCs/OBEs on the international plane, they further evidence an ethos of an evolving foreign investment regime that increasingly recognizes the [close connection](#) between investor conduct and human rights.

General Exceptions

General exceptions provisions permit a State to lawfully undertake actions that would otherwise be inconsistent with its obligations under the IIA. Such provisions often identify public policy objectives which, even if they do not specifically reference human rights, can be interpreted to shield regulatory measures intended to respect, protect, or fulfill the host State's human rights obligations on the international plane. Indeed, such provisions played a critical role in the various investment disputes that arose following the economic crisis in Argentina in the early 2000s, many of which included human rights considerations.

Many of the new IIAs signed in 2019, such as the [Brazil-Morocco BIT](#), except measures taken for the maintenance of "public order" which, if broadly construed under certain factual scenarios, [could be relied upon](#) to justify measures intended to respect, protect, or fulfill human rights obligations. Moreover, several IIAs, such as the [Armenia-Singapore Agreement on Trade in Services and Investment](#), also specifically except measures "necessary to protect human, animal or plant life or health".

Given that such provisions intend to address a spectrum of situations, not just those impacting human rights, their open-textured language is perhaps appropriate. Narrowing such provisions by, as example, including specific human rights references, would risk undercutting their broader purpose, as well as unduly preferencing State interests, which may be more properly addressed through other provisions, such as those preserving regulatory autonomy, below.

Preserving Regulatory Autonomy

Regulatory autonomy, also sometimes called the right to regulate, refers to the "regulatory space" that States enjoy regarding their domestic activities, limited primarily by domestic legal or political constraints. This open-textured authority is particularly relevant for domestic economic activities. It is also the primary way that States provide for the satisfaction of their human rights obligations arising on the international plane.

A few new IIAs signed in 2019, such as the [Australia-Hong Kong Investment Agreement](#), contain preambular text that seeks to preserve regulatory autonomy to "safeguard public welfare, and protect legitimate public welfare objectives", and one specifically refers to public health in this regard. Others contain substantive provisions that seek to preserve regulatory autonomy. The [Brazil-Ecuador BIT](#), for example, even specifically refers to human rights in this regard.

Such provisions, especially where explicitly connected to human rights in the investment context—and, better still, specific human rights instruments—may prove especially relevant in disputes challenging certain State measures. They may, however, create tensions with substantive investor protections regarding, as example, expropriation, the balance between which a tribunal would have to determine under the facts of the dispute.

Non-Lowering of Standards

IAs may contain substantive provisions that preclude States parties from lowering regulatory standards, including with respect to human rights, for purposes of attracting foreign investment. For example, the [CARIFORUM States-United Kingdom EPA](#) precludes State parties from “lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity”. The Brazil-Ecuador BIT contains a similar provision and even specifically refers to human rights in this regard.

Looking Ahead

Human rights considerations increasingly arise in discussions around the evolution of international investment law. IAs continue to play a foundational role in this trend, as noticeably progressed by newly signed IAs in 2019. The extent to which disputes arise under the abovementioned IAs in the coming years, and whether such disputes include human rights considerations, will crucially bear on the trajectory of efforts to gradually align human rights and investment interests.

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