Kluwer Arbitration Blog

2021 in Review: Continued Movement at the Intersection of International Arbitration and Human Rights

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This is the third consecutive year that we, either together or separately, have reported on trends at the intersection of human rights and international arbitration from the prior year (see prior Blog coverage here and here). As we emphasized last year, the effects of the COVID-19 pandemic on this intersection are likely to remain a dominant theme in the years ahead, particularly in the context of State regulatory measures to protect the health, safety, and welfare of their citizens.

Looking back on 2021, we identify four trend areas: 1) drafting of new IIAs; 2) updates to the binding treaty on business and human rights; 3) key investment arbitration cases; and 4) ISDS reform efforts. Overall, across these four foci, 2021 was a continuation of the directional trends from prior years. We conclude with thoughts on what this could mean for the years ahead.

Limited Information on IIA Drafting Trends in 2021

As of January 2022, UNCTAD reports that 9 new IIAs were signed in 2021, none of which are yet in force. Of these 9 new IIAs, the text of 3 are publicly available. It should be mentioned that only 1 of 3 new and publicly available IIAs, the Georgia–Japan BIT, is an investment treaty. The other 2 IIAs are both trade-focused interim agreements between the UK and Ghana and the UK and Cameroon, neither of which include investment chapters. As such, analysis is limited at this time; however, the other 6 IIAs are all investment treaties and, once publicly released, should provide a fuller picture of emerging trends over the year vis-à-vis the inclusion of human rights clauses in IIAs.

The Georgia–Japan BIT follows similar trends from prior years. For example, its preamble recognizes the importance of achieving shared investment goals without relaxing, *inter alia*, health-related measures. Article 11(4) excepts "legitimate public welfare objectives, such as health . . . ." from the definition of expropriation. Notably, paragraph (5) excepts compulsory licenses via the TRIPS Agreement, which has of course received attention during the pandemic. Article 15(1) seeks to preserve regulatory autonomy for, *inter alia*, health-related measures. Finally, Article 20 reflects prototypical language for a non-lowering of standards provision.

Acknowledging the limited availability of sources at this time, it must still be queried whether and when IIA drafting trends may bend towards more direct and robust inclusion of human rights

considerations. While there have been a couple notable inclusions of gender-related norms in recent IIAs, such as the 2020 Fiji–US TIFA, drafting trends have otherwise remained constant. Direct mention of specific human rights instruments, not to say anything of specific norms, remain relatively rare. Rarer still are robust operative provisions addressing corporate social responsibility that establish any obligations, not to say anything of direct obligations, for multi-national enterprises.

Developments in the Binding Treaty on Business and Human Rights

Since 2014, efforts have been underway 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"). These developments have been discussed elsewhere by one of us. Following release of the Zero Draft of the BHR Treaty in 2018, the Revised Draft in 2019, and the Second Revised Draft in 2020, a Third Revised Draft was released in August 2021.

The Third Revised Draft makes only minor modifications to the Second Revised Draft. While the BHR Treaty continues to move towards closer alignment with the UN Guiding Principles on Business and Human Rights (UNGPs), notable gaps persist. For example, as has been an issue since the early drafting discussions, the Third Revised Draft still does not clearly establish binding obligations for TNCs/OBEs. Although the Third Revised Draft expanded the scope of the instrument (Article 3) relative to earlier drafts, its scope remains tethered to human rights obligations binding on States only. In contrast, the UNGPs obligate businesses to respect all internationally recognized human rights.

Nonetheless, the Third Revised Draft marks an important step in the iterative process underway since 2014 towards defining the applicability and scope of human rights obligations on businesses on the international legal plane. The UN open-ended intergovernmental working group (IGWG) held discussions on the Third Revised Draft in late October 2021. Among other topics, the IGWG discussed the scope of the instrument, technical points on which rights to include (e.g., right to a clean, healthy, and sustainable environment) and the definition of 'business activities', whether and how to strengthen provisions on remedies and liability, and the need for political will to significantly advance the instrument moving forward.

Key Cases at the Intersection of Human Rights and Investment Arbitration

The tribunal's decision in *Eco Oro v. Colombia* on September 9, 2021, has attracted considerable attention. The investor had entered into a mining concession in 2007 that overlapped with a vulnerable wetland, described in the award as "environmental jewels", that also provided "water to around 2.5 million people in 68 surrounding municipalities." There were a series of actions by Colombian authorities that prohibited mining activities in the Páramo region, resulting in the arbitration pursuant to the Canada–Colombia FTA.

A majority of the Tribunal found that Colombia had violated the minimum standard of treatment. Of particular significance is the "General Exceptions" clause under Article 2201(3) which, *inter alia*, excepts measures

> "necessary . . . (a) To protect human, animal or plant life or health, which the Parties understand to include environmental measures necessary to protect human, animal or plant life and health; [. . .](c) For the conservation of living or non-living exhaustible natural resources."

Both Colombia and Canada (through a non-disputing party submission; see prior Blog coverage here) argued that if a general exception (including environmental measures) applied, "there can be no violation of the FTA and thus no state liability and, consequently, payment of compensation would not be required." The tribunal, however, did not accept the interpretation and concluded that while a state may adopt or enforce environmental measures "without finding itself in breach of the FTA," this "does not prevent an investment claiming under the [Investment Chapter] that such a measure entitles it to the payment of compensation." In other words, even if a State is not liable under an FTA, they can still be liable for compensation.

Many have criticized the finding of the tribunal (e.g., here and here). The decision highlights the tension between human rights law and international investment law that has been the subject of a prior post here. It remains to be seen how future tribunals will grapple with this issue. General exceptions provisions are generally viewed as supporting regulatory autonomy; however, if liability is bifurcated from such provisions, as in *Eco Oro*, States will need to carefully consider the introduction of new measures and, where applicable, their disputes strategy.

Developments at the Institutional Level

On November 12, 2021, ICSID released its sixth and final Working Paper on proposed amendments to the procedural rules to resolve investment disputes. Even though the proposals do not touch upon the substance of investment agreements, there are several innovations that would support human rights norms.

For example, the amended rules require, *inter alia*, greater transparency in the conduct and outcome of proceedings by permitting submissions of non-disputing parties (Rule 67), participation of non-disputing treaty parties (Rule 68), publications of orders and decisions (Rule 63), and publication of documents filed in the proceeding (Rule 64). Such efforts will promote human rights values by allowing greater scrutiny into and consideration of multiple voices in the dispute resolution process, as well as broadly support due process and access to justice.

Similarly, on September 22, 2021, ICSID and UNCITRAL issued an updated third version on the Code of Conduct for Adjudicators in International Investment Disputes. The latest version emphasizes the goals of "independence" and "impartiality" for adjudicators (Article 3), while presenting three options to prevent the "double hatting" problem: (i) full prohibition, (ii) modified prohibition, or (iii) full disclosure with an option to challenge (Article 4). Article 10 emphasizes greater transparency through "disclosure obligations" in relation to "any interest, relationship or matter that may, in the eyes of the disputing parties, give rise to doubts as to their independence or impartiality." Such efforts again seek to promote human rights goals of transparency and greater access to information.

Looking Ahead

Overall, 2021 was a continuation of the directional trends from prior years. This is perhaps unsurprising. It is likely too soon to observe, in concrete ways, the effects of the pandemic across these four foci, not least because the pandemic is still ongoing. Indeed, the wheels of international law, as a general matter, turn slowly.

Looking ahead, it is interesting to reflect on the *convergence* of these four foci. Notably, they are comprehensive, as they encompass concrete changes to both the procedural and substantive dimensions of the intersection of human rights and international arbitration. For the BHR Treaty, in particular, the potential future establishment of new norms—whether direct and binding, or otherwise—would have ripple effects across IIA drafting trends and disputes.

This year, we are hopeful—on a personal note—to see the pandemic subside, as well as continued attention on the intersection of human rights and international arbitration, so as to harmonize efforts towards share sustainable investment and development goals.

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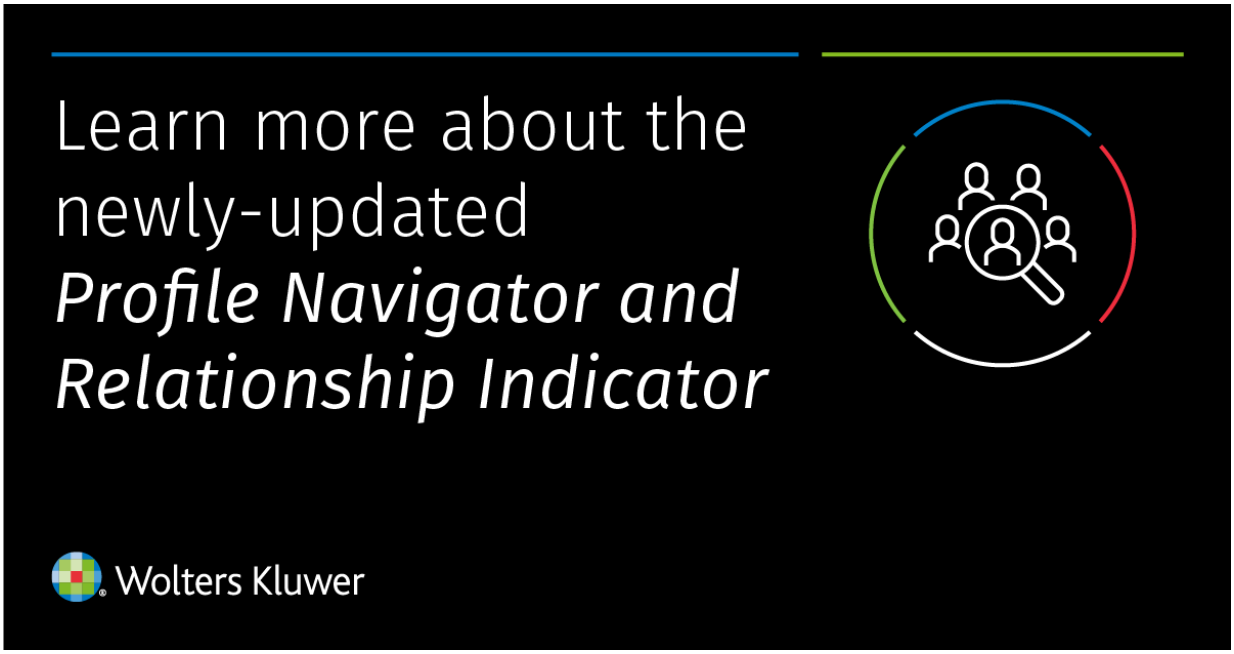

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