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2023 Year in Review: Human Rights and ISDS – Same Play, Different Actors

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This is the fifth 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**, **here**, and **here**).

As we emphasized last year, developments at this intersection continue directional trends from prior years, but also the aperture for human rights considerations in Investor-State Dispute Settlement ("ISDS") did appear to widen, given consistent annual developments across procedural and substantive dimensions, as well as numerous adjacent developments with the potential for meaningful impact in subsequent years. However, we cautioned that fundamental questions concerning the often strained relationship between international investment law and international human rights law remain inconsistently unaddressed, if at all.

Looking back on 2023, we identify two trend areas: 1) drafting of new International Investment Agreements ("IIAs") and model agreements; and 2) cases (including with *amicus* submissions) at the intersection of human rights and ISDS. We conclude with thoughts on what this could mean for the years ahead.

IIAs and Model Agreement Drafting Trends

As of January 2024, UNCTAD reports 21 IIAs (encompassing both investment treaties and investment chapters in free trade agreements) were signed in 2023; 10 currently have publicly available texts. None are currently in force.

According to UNCTAD, only one model agreement was released in 2023. The European Commission released a "non-paper" with model clauses for negotiation or re-negotiation of IIAs between Member States and third countries.

Altogether, in 2023, IIA drafting trends regarding human rights considerations continue themes from prior years, as summarized in Table 1 below. Consistent with prior years, there remains a preference for establishing nonbinding obligations regarding human rights, despite frequent calls by advocates to "harden" such obligations. Notably, the inclusion of provisions regarding anti-corruption, although framed as involuntary, applies only at the domestic legal level, thus avoiding

broader discussions around internationalizing binding anti-corruption measures.

Moreover, provisions regarding, for example, non-lowering of standards and the right to regulate, continue to lack specificity regarding human rights, consistent with prior years. In practice, open-textured language in such provisions results in a lack of interpretative precision, which in turn will limit their practical relevance for human rights issues that arise in the investment context.

For the curious reader, we have elsewhere contextualized such trends for IIAs and for model agreements.

Table 1: IIAs signed in 2023 (with publicly available texts as of January 2024)

	Preamble Mentioning Human Rights	Non-Lowering of Standards	Corporate Social Responsibility	Right to Regulate
Angola – European Union SIFA	Yes	Yes (but only for environmental and labor laws)	Yes (involuntary, but only regarding promoting the uptake of, supporting the dissemination of, and exchanging information regarding CSR and related instruments)	Yes
ACP (African, Caribbean and Pacific Group of States) – EU Samoa Agreement	Yes	No	Yes (involuntary, but only regarding promoting CSR practices)	Yes
Canada – Ukraine Modernized FTA	Yes	Yes	Yes (voluntary)	Yes
Angola – Japan BIT	No	Yes	Yes (involuntary, but only regarding compliance with domestic anti-corruption laws)	No
EU – New Zealand FTA	Yes	No	No	Yes (but only in the preamble)
EFTA (European Free Trade Association) – Moldova FTA	Yes	Yes	Yes (voluntary)	Yes
China – Ecuador FTA	No	No	Yes (involuntary, but only regarding compliance with anti-corruption laws; otherwise, voluntary)	No

Türkiye – United Arab Emirates CEPA	No	No	No	Yes
Colombia – Venezuela, Bolivarian Republic of BIT	No	Yes (both in the preamble and an operative provision)	No	No
Belarus – Zimbabwe BIT	No	Yes	Yes (involuntary, but only regarding compliance with domestic anti-corruption laws)	No
EU Non-Paper (Model Clauses)	Yes	Yes (but only for environmental and labor laws)	Yes (involuntary, but only regarding promoting the uptake of, supporting the dissemination of, and exchanging information regarding CSR and related instruments)	Yes

Key Cases at the Intersection of Human Rights and ISDS

In 2023, we saw greater engagement with international arbitration and human rights issues in various fields of international law. In particular, we saw key developments involving amicus curiae submissions.

First, in *Gabriel Resources v. Romania*, two non-profit organizations—Greenpeace Romania and the Independent Center for the Development of Environmental Resources—sought to jointly file an *amicus* submission. *Amici* stated that they had:

> "direct knowledge of judicial and administrative processes (and underlying legal arguments) undertaken by them and other NGOs in Romania that resulted in the annulment of permits, archaeological discharge certificates, and other acts required for the mine proposal." (para.11.)

The Tribunal noted that, to permit an amicus submission, five non-exhaustive conditions must be met: (1) "Assisting a tribunal", (2) "Addressing a matter within the scope of the dispute", (3) "Significant interest in the arbitration", (4) "Public interest in the arbitration", and (5) "The integrity of the proceedings, i.e., no disrupting of proceedings, undue burden or unfair prejudice." In dismissing the petition, the Tribunal observed in bare reasoning that the facts in question are already "on the record" and "it does not believe that further argument or information on these issues will assist the Tribunal in its decision-making at this stage, which is almost complete."

Second, the issue of amicus submissions in the context of alleged corruption assumed particular significance in 2023, especially compared with prior years. In *Eni v. Nigeria*, three

organizations—ReCommon (Italy), the Human and Environmental Development Agenda (Nigeria) and Corner House Research (UK)—expressed their interest to participate as *amici* in the proceedings. These organizations stated that they were independent with a "stated mandate to promote human rights, accountability, transparency, democracy, good governance and sustainable use of resources." In particular, they stated that the issue of corruption in the underlying arbitration "is of particular interest to Nigerians." Therefore, they sought leave to participate in the arbitration and gain access to certain documents in the record.

The Tribunal acknowledged that ICSID Rule 37(2) permitted the Tribunal discretion to "permit NDP participation through the filing of a written submission", but is nonetheless silent on access to documents. Regarding participation, the Tribunal noted the Petitioners had been conducting their own investigations on corruption since 2012 and 2013 and were responsible for filing complaints that eventually resulted in prosecutions in these jurisdictions. The Tribunal, therefore, concluded that "the Petitioners' input might assist it in better understanding certain factual aspects of the present dispute" (paragraph 54). Regarding access to documents, the Tribunal noted that the rules are silent and there is "limited precedent," but to assist the petitioners the Tribunal concluded that "it is preferable that the Petitioners are aware of some information that has already been submitted to the Tribunal" (para. 62). As several of the documents relating to the corruption allegations were already in the "public domain, it is sufficient to provide the Petitioners with the consolidated list of factual exhibits submitted by each Party" (para. 63).

Finally, the issue of corruption in international arbitration had another significant development. In the landmark case of *Nigeria v. P&ID*, the U.K. High Court set aside an approximately 11 billion dollar decision by an arbitral tribunal. Justice Knowles examined the facts and concluded that P&ID had paid bribes to a former legal director at the Ministry of Petroleum. However, "the Arbitration was a shell that got nowhere near the truth" and "a tribunal of the greatest experience and expertise is not enough" (paras. 580, 583). The failure to do so caused "substantial injustice" to Nigeria (para. 511). Justice Knowles further opined that the Tribunal should have "allowed time where it felt it could and applied pressure where it felt it should" in relation to arguments of corruption but that did not happen since the Tribunal adopted a very "traditional approach" that was non-interventionist (para. 588). He also remarked that "the 'open court principle' keeps judges up to the mark" and "[a]n open process allows the chance for the public and press to call out what is not right" (para. 589).

Looking Ahead

Altogether, 2023 was largely a continuation of trends from prior years. IIA and model agreement drafting trends continued themes from prior years. As a result, the continued reliance on open-textured language and nonbinding obligations regarding human rights means that the relevance of human rights in the foreign investment and dispute arenas remains primarily a matter of interpretation. It is, therefore, likely that misalignment will continue to persist.

However, at the macro level, attention remains on the potential effects of ISDS on human rights. In 2023, the UN Special Rapporteur on the issue of human rights obligations relating to the enjoyment of a safe, clean, healthy, and sustainable environment, David R. Boyd, strongly condemned the ISDS system for its alleged negative effects on the environment and human rights. Said plainly, the Special Rapporteur concluded that:

> "The ISDS system, with its roots in colonialism and extractivism, is not fit for purpose in the twenty-first century because it prioritizes the interests of foreign investors over the rights of States, human rights and the environment."

The statements of the Special Rapporteur as well as the UK Supreme Court in the P&ID case call into question the efficacy of arbitration in addressing broader environmental and human rights concerns. But we do believe that there remains space for productive dialogue on these issues. We are hopeful that 2024 will provide such space, even if prior years have not.

The views expressed herein are the authors' personal views, and do not necessarily reflect the views of the authors' affiliated institutions or clients.

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