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2024 Year in Review: Human Rights and ISDS—Continued Convergence of Human Rights and the Environment

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

As we emphasized last year, developments at this intersection continue directional trends from prior years. In particular, 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, suggesting persistent misalignment.

Looking back on 2024, we identify two trend areas: 1) drafting of new International Investment Agreements ("IIAs"); and 2) cases (including with *amicus* submissions) at the intersection of human rights, the environment (especially climate change), and investor-State dispute settlement ("ISDS"). We conclude with thoughts on what this could mean for the years ahead.

IIAs and Model Agreement Drafting Trends

As of January 2025, the United Nations Conference on Trade and Development ("UNCTAD") reports that twenty-one IIAs were signed in 2024 encompassing both investment treaties and investment chapters in free trade agreements, as well as an economic framework agreement under the auspices of the Indo-Pacific Economic Framework ("IPEF"). Nine IIAs currently have publicly available texts. Two are currently in force. According to UNCTAD, no model agreements were released in 2024.

Altogether, in 2024 IIA drafting trends regarding human rights considerations mostly 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. However, unlike prior years, more such matters are only addressed in the preamble, rather than in operative provisions, which further weakens their impact. Moreover, unlike prior years, none of the 2024 IIAs with publicly available texts have non-lowering of standards provisions.

This year we have likewise captured environmental considerations, due to their thematic relevance. Putting aside the IPEF Clean Economy Agreement, which is entirely focused on environmental considerations, IIA drafting trends regarding environmental considerations reflect a broad array of issues in both preambles and operative provisions. While certain drafting trends are commonplace in IIAs, such as the inclusion of environmental considerations in general exceptions provisions, it is notable that certain IIAs specifically include environmental considerations within an operative provision regarding the right to regulate and broadly address environmental issues (including climate change) in across both binding and nonbinding operative provisions.

Table 1: IIAs signed in 2024 (with publicly available texts as of January 2025)

	Preamble Mentioning Human Rights	**Non-Lowering of Standards**	**Corporate Social Responsibility**	**Right to Regulate**	**Environmental Considerations**
Hong Kong, China SAR–Peru FTA (investment chapter)	No	No	No	Yes (both in the preamble and an operative provision)	Yes (included within operative provision regarding the right to regulate)
Australia–United Arab Emirates BIT	No	No	Yes (voluntary)	Yes (but only in the preamble)	Yes (preamble; general exceptions; expropriation)
Australia–United Arab Emirates CEPA (investment chapter)	Yes (but only regarding labor rights)	No	Yes (but only in the preamble and regarding corruption and bribery)	Yes (but only in the preamble)	Yes (but only voluntary promotion of applicable investments)
EU–Kyrgyzstan EPCA (trade / investment chapters only)	Yes (including specific mention of several international human rights instruments)	Yes (but only specific to “environmental law”)	Yes (but only in the preamble and regarding corruption)	Yes (both in the preamble and an operative provision)	Yes (preamble; various operative provisions, including on climate change)
IPEF Clean Economy Agreement*	Yes	No	No	No	Yes (preamble; various mandatory and voluntary operative provisions)
EFTA–India TEPA(investment chapter)	Yes (including specific mention of several international human rights instruments)	No	Yes (voluntary, but only in the preamble)	No	Yes (but only in the preamble)

India–United Arab Emirates BIT*	No	No	Yes (voluntary)	Yes	Yes (included within operative provision regarding the right to regulate; expropriation; included within operative provision regarding CSR)
Sri Lanka–Thailand FTA (investment chapter)	No	No	Yes (voluntary)	No	Yes (general exceptions)
Bahrain–Hong Kong, China SAR BIT	No	No	No	No	Yes (preamble; general exceptions)

***** In force

Key Cases at the Intersection of Environment, Climate Change, and ISDS

Recalling the United Nations ("UN") General Assembly's historic resolution in 2022 regarding the human right to a clean, healthy, and sustainable environment and related ongoing work by the Special Rapporteur with respect specifically to business enterprises, we acknowledge the continued convergence of human rights and environment matters in the ISDS context. In particular, environmental and climate change concerns have emerged as a recurring theme before several international fora. Indeed, even the UN noted that the world is "way off target" in tackling climate change. As discussed here, in April 2024, the European Court of Human Rights in *Schweiz v. Switzerland* ruled that there was a "critical lacunae in the Swiss authorities' process of putting in place the relevant domestic regulatory framework" to deal with emission reduction targets resulting in a breach of Article 8 of the European Convention on Human Rights (*i.e.*, respect for private and family life) (Award, para. 573).

In *Gabriel Resources v. Romania*, environmental concerns played a very active role in the Tribunal's decision highlighting the tension between investment rights and broader societal rights. The case concerned the Ro?ia Montan? mining project in the Transylvania region in Romania. The Claimant alleged it invested over US$650 million to undertake mining activity following a license issued by Romania in 1999. However, the Claimant argued that the acts of Romania, including "unjustified administrative delays" have "blocked and prevent implementation of the Project," including through failures to provide the necessary permits (Request, paras. 6–7). The Tribunal noted that there was a "negative public perception" due to the impact of the mining activity and, in particular, "there were concerns about cyanide pollution" (Award, para. 783). Further, in July 2021, the Ro?ia Montan? Mining Cultural Landscape was inscribed on UNESCO's World Heritage List and simultaneously on the List of World Heritage in Danger because of the "threats posed by plans to resume mining," thereby additionally complicating the situation (Award, para. 1293).

In 2018, three NGOs submitted *amicus curiae* submissions: Alburnus Maior, a non-profit, non-governmental organization based in Ro?ia Montan?, Greenpeace Romania, part of Green Peace

Central and Eastern Europe, and Independent Center for the Development of Environmental Resources ("ICDER"), a non-profit, non-governmental organization based in the town of Cluj-Napoca. In support of their application, the *amici* stated that there were "serious environmental and health risks, particularly for local communities living adjacent to cyanide mining" (Procedural Order No. 19, para. 21).

The majority did not find any breach of the Romania–UK or Romania–Canada BITs. In particular, the majority did not find any abuse of process or other wrongful conduct on the part of Romania in dealing with the permit issue. The Claimant had argued that the failure of Romania to adopt a "Draft Law" that was prepared following negotiations of the parties violated the BITs. The majority noted that the final vote in Parliament was "undoubtedly a political decision" but "that is just how democracy works, for better or worse" (Award, para. 1144). The question therefore was whether this final vote was "the result of illegitimate government influence;" however, the majority concluded that there was "no evidence on the record that leads to this conclusion" (Award, para. 1144). All claims were ultimately dismissed by the majority. The majority also required the Claimant to reimburse Romania for its arbitration costs (USD 1,437,574.01) and for half of its legal costs (EUR 1,154,774.34, RON 30,284,053.32, and USD 928,641.70) (Award, para. 1357).

The dissenting arbitrator, on the other hand, observed that "political considerations adversely affecting the granting of the environmental permit" proved to be the "decisive factor" impacting Romania's decision not to issue permits (Dissent, para. 51). For the dissenting arbitrator, the failure to pass the Draft Law was a violation of fair and equitable treatment because Romania prevented the Claimant "from relying on the normal permitting procedures to obtain an environmental permit under the existing legal system" (Dissent, para. 61).

The involvement of *amici* assumed significance in another mining case in *Glencore v. Colombia*. This dispute related to the expansion of a mine in northern Colombia that was suspended by a decision of the Colombian Supreme Court. According to the Court, the expansion of the mine may impact the local communities' fundamental rights to water, food, and health. In the arbitration, three indigenous Wayuu communities of La Gran Parada and Paradero and Colectivo de Abogados y Abogadas José Alvear Restrepo ("CAJAR"), an organization that defends human rights, filed a request to be recognized as non-disputing parties ("NDPs") in the arbitration. They sought to address questions of fact, questions of law, while also seeking access to the arbitration documents and the right to participate at the hearing.

The Tribunal permitted the communities as NDPs, but not CAJAR. However, the scope of the report by the communities was restricted only to factual issues dealing with the impact of the project and the scope and implementation of the Colombian judgment. In particular, the Tribunal noted that the communities have a "close cultural and spiritual connection" with the creek (Procedural Order No. 3, para. 67). CAJAR, on the other hand, did not have a significant interest because, even though it was engaged in protecting human rights of the communities, "something more is needed to show a 'significant interest' beyond the general interest" (Procedural Order No. 3, para. 68). Since the communities were making limited factual submissions, the Tribunal did not consider it necessary to allow them access to the main arbitration documents. However, the Tribunal did consider it useful for them to have access to the exhibit lists. The Tribunal did not permit the communities to provide legal opinions "the rationale being that the disputing legal teams are best suited to address legal issues" (Procedural Order No. 3, para. 61).

Looking Ahead

Altogether, 2024 reminds us of the old saying, everything old is new again. To be sure, IIA draft trends regarding human rights considerations largely follow prior years—perhaps even signaling a subtle move in the opposite direction of enhanced protections for human rights considerations relating to covered investments. More notably, however, is the continued convergence of human rights and the environment in the ISDS context, where we observe familiar issues, such as the involvement of *amici* in environmental disputes, tracking with themes from prior years concerning broader human rights matters. Assuming that environmental matters continue to surface in disputes moving forward (and we would speculate that they will), this might be an occasion to revisit broader human rights themes in ISDS from the past.

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