

A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends



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On 29 May 2020, the President of the Human Rights Council of the United Nations ('UN') made a statement stressing that States bear the primary responsibility of respecting, protecting and fulfilling human rights and fundamental freedoms, and calling on them to ensure that all human rights are respected, protected and fulfilled while combatting the pandemic.¹

Similarly, the UN High Commissioner for Human Rights has indicated that the COVID-19 pandemic has been a test for societies, governments, communities and individuals, and that respect for human rights by States² across the spectrum – including not only civil and political rights, but also economic and social rights – will be fundamental to the success of the public health response.³

Therefore, the fight against the potentially negative impact of COVID-19 on human rights has been a concern for the UN across all aspects of society.⁴ Indeed, the UN has taken different measures (such as special measures against gender-based

¹ 'Human rights implications of the COVID-19 pandemic, Human Rights Council, Forty-third session, Agenda item 1, Organisational and procedural matters, UN General Assembly A/HRC/PRST/43/1 (2 June 2020) <<http://undocs.org/A/HRC/PRST/43/1>> accessed 17 February 2022.

² '[E]mergency powers should not be a weapon governments can wield to quash dissent, control the population, and even perpetuate their time in power' the High Commissioner warned. '[T]hey should be used to cope effectively with the pandemic – nothing more, nothing less'. To help States in their response to COVID-19, the UN Human Rights Office issued a policy guidance document on emergency and exceptional measures, available at <https://www.ohchr.org/Documents/Events/EmergencyMeasures_COVID19.pdf> accessed 17 February 2022.

³ 'COVID-19 and its human rights dimensions, <<https://www.ohchr.org/EN/NewsEvents/Pages/COVID-19.aspx>> accessed 17 February 2022.

⁴ The President of the Human Rights Council of the UN requested the High Commissioner to give an oral update to the Human Rights Council. Member States were invited to submit brief inputs sharing all measures they have taken in compliance with international human rights obligations. Several States have filed their voluntary submissions (among others, Spain), which are available at <<https://www.ohchr.org/EN/NewsEvents/Pages/CoronaVirusContext.aspx>> accessed 17 February 2022.

[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)



violence or measures to protect disadvantaged groups during the crisis) to ensure that all Member States are aware that human rights have been seriously affected due to this global crisis.

Warning about human rights in investment arbitration: the 2020 and 2021 UNCTAD World Investment Reports and the 2021 Report on human rights-compatible BITs

The fight against COVID-19 has even reached economic agreements between States such as bilateral investment treaties ('BITs'). Although these agreements create opportunities for States, they can also affect the domestic policy of governments. For example, the terms of BITs may limit the States' ability to fully implement new human rights regulations, or put such States at risk of facing international arbitrations if they

do so. States should therefore ensure that they retain adequate policy and regulatory capacity to protect human rights under the terms of such BITs, while still providing the necessary protection to investors.

This concern for the protection of human rights in the context of investments has been a constant for the UN, which has been analysing the matter for years. In 2011 the UN issued the Guiding Principles on Business and Human Rights ('UN Guiding Principles') which address human rights in the context of transnational corporations and other business enterprises.⁵ Principle 9 of these Guidelines establishes that 'States should

⁵ These Guiding Principles apply to all States and business enterprises, both transnational and otherwise, regardless of their size, sector, location, ownership, and structure. More information about the Guiding Principles is available at <https://www.ituc-csi.org/IMG/pdf/12-04-23_ruggie_background_fd.pdf> accessed 17 February 2022.

The COVID-19 crisis has only increased the concern about human rights in the context of investments

maintain adequate domestic policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.⁶

The COVID-19 crisis has only increased the concern about human rights in the context of investments. After the hardest months of the pandemic, the UN Conference on Trade and Development ('UNCTAD') issued the World Investment Report 2020, entitled 'International Production Beyond the Pandemic'.⁷ The report focused on how the pandemic caused a serious decrease in foreign direct investment, similar to the 2008 global financial crisis. The report warned that this environment could lead to States compromising human rights in an attempt to attract foreign direct investment.⁸

Similarly, UN's Working Group on business and human rights ('Working

⁶ The Working Group invited States and all other stakeholders to submit relevant information to help prepare the report. Spain submitted its contribution, available at <<https://view.officeapps.live.com/op/view.aspx?src=https%3A%2F%2Fwww.ohchr.org%2FDocuments%2FIssues%2FBusiness%2FWG%2FSubmissions%2FStates%2FSpain.docx&wdOrigin=BROWSELINK>> accessed 17 February 2022.

⁷ 'World Investment Report 2020' <https://unctad.org/system/files/official-document/wir2020_en.pdf> accessed 17 February 2022.

⁸ N. J. Diamond and K. A. N. Duggal, '2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights' (23 January 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/01/23/2020-in-review-the-pandemic-investment-treaty-arbitration-and-human-rights/>> accessed 17 February 2022.

Group') has organised several sessions at the annual UN Forum on Business and Human Rights to foster discussion on challenges and emerging good practices to manage those challenges in the context of BITs and human rights.⁹

As a consequence of the latest forum, on 27 July 2021 the Working Group presented a report to the UN General Assembly on the issue of human rights and transnational corporations and other business enterprises¹⁰ (the 'Business and HR Report'), analysing the implications of Principle 9 of the UN Guiding Principles in the context of negotiating new BITs or reforming old agreements. According to the Business and HR Report, BITs must be compatible with the States' duty to respect, protect and fulfil human rights under international law.¹¹

⁹ On 16 November 2020 the 9th Forum on business and human rights analysed the elements necessary in BITs to preserve the regulatory space needed by States to respect, protect and fulfil human rights under international human rights laws and examined how BITs can promote respect for human rights on the part of businesses.

¹⁰ More information on the report is available at <<https://2020unforumbhr.sched.com/event/fD0y/harnessing-international-investment-agreements-to-prevent-human-rights-abuses?linkback=grid>> accessed 17 February 2022.

¹¹ The term 'international investment agreements' includes these agreements as well as other treaties with investment provisions negotiated in a bilateral, regional or international setting. The term 'human rights' is interpreted in accordance with principle 12 of the Guiding Principles: all 'internationally recognised human rights – understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labour Organization's Declaration on Fundamental Principles and Rights at Work.'

[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)

All international investment agreements 'concluded in 2020 contain reform-oriented provisions aimed at preserving regulatory space and promoting sustainable investment'

The Business and HR Report considers that existing BITs reflect an imbalance between the rights and obligations of investors that may have the unintended effect of facilitating irresponsible conduct by investors or making it more difficult for States to regulate such conduct. Therefore, it recommends that States ensure that all existing and future BITs are consistent with their international human rights obligations. States should also invoke BITs to encourage responsible business conduct by investors and hold them accountable if and when they abuse internationally recognised human rights.

According to the Business and HR Report, there are three different areas of concern regarding BITs: regulatory constraints, investors having rights without obligations, and investors having privileged access to remedies. These concerns can be linked to, respectively, the 'protect, 'respect' and 'remedy' pillars of the UN Guiding Principles.

In 2021, UNCTAD issued its 2021 World Investment Report on Investing in

Sustainable Recovery.¹² The main focus of this new report is the recovery process after the crisis provoked by COVID-19. The report not only studies how to reignite the economy, but also how to make this recovery more sustainable in a manner that preserves human rights.¹³

According to the report, a new generation of more balanced international investment agreements has started to emerge. Specifically, the report states that all international investment agreements 'concluded in 2020 contain reform-oriented provisions aimed at preserving regulatory space and promoting sustainable investment'.¹⁴ These new types of agreements include provisions related not only to human rights but also corporate social responsibility and

¹² 'World Investment Report 2021 on Investing in Sustainable Recovery' <https://unctad.org/system/files/official-document/wir2021_en.pdf> accessed 17 February 2022.

¹³ This report analyses the investment priorities for the recovery phase after the COVID-19 crisis and asserts that developing productive capacity is a helpful guide to set investment priorities and show where international investment can contribute most.

¹⁴ For example, the Brazil-India BIT, the Hungary-Kyrgyzstan BIT and the Canada-United Kingdom Trade Continuity Agreement, among others. More examples available at UNCTAD, 'World Investment Report 2021, p 131.

sustainable development.¹⁵ We turn to one of them in the following section.

The Sustainable Investment Facilitation & Cooperation Agreement

This interplay between human rights and investment arbitration has already yielded fruit for developing countries. The Sustainable Investment Facilitation and Cooperation Agreement ('SIFCA'), a 'next-generation' model bilateral investment treaty, has recently surfaced

¹⁵ B. Choudhury, 'Investor obligations for human rights' (2020) vol 35, ICSID Review, 82, pp 88-92; and I. Seif, 'Business and human rights in international investment law: empirical evidence' in J. Chaisse, L. Choukroune and S. Jusoh (eds.), *Handbook of International Investment Law and Policy* (Springer: 2021), pp 6-17 <https://doi.org/10.1007/978-981-13-5744-2_26-1> accessed 17 February 2022.

as a relevant development in the field of investment treaty negotiations.¹⁶

SIFCA is a novel tool specifically developed for The Gambia in the context of State-to-State investment treaty negotiations and it has gone beyond other BITs that have tackled the issue of human rights and corporate social responsibility directly¹⁷ or in a more indirect way

¹⁶ R. L. Houston, R. Bose and C. Brown, 'Notes From Practice: Announcing The SIFCA Framework — Is The Confluence of Investment Protection With Business And Human Rights The Future Of Investment Treaties?' (26 November 2021) <<http://arbitrationblog.kluwerarbitration.com/2021/11/26/notes-from-practice-announcing-the-sifca-framework-is-the-confluence-of-investment-protection-with-business-and-human-rights-the-future-of-investment-treaties/>> accessed 22 February 2022.

¹⁷ Such is the case of the 2016 Nigeria-Morocco BIT <<https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5409/download>> e.g.



[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)

(through best efforts obligations¹⁸ or in connection with limitations to State liability through, for example, non-precluded measures provisions),¹⁹

The main feature of this new model investment treaty is that it does not gravitate towards investment promotion and protection from the investor's

Art 15: 'Investment, Labour and Human Rights Protection'; Art 15.5: 'Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall arrive to continue to improve these law and regulations' Art 15.6: 'All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party'. Art 24: 'Corporate Social Responsibility. 1) In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices. 2) Investors should apply the LO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist. 3) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards'. Additionally, some model BITs such as the 2019 Netherlands BIT (Art 7(1)), the 2019 Morocco Model BIT (Art 20.4) and the Draft Pan-African Investment Code, establish direct human rights-related investor obligations. 18 Annex II of the 2015 Brazil-Angola BIT establishes that investors must make their 'best efforts' to respect human rights: '[R]esponsabilidade Social Corporativa. Os investidores e seus investimentos desenvolverão os seus melhores esforços para observar os seguintes princípios voluntários e padrões para uma conduta empresarial responsável e consistente com as leis adotadas pelo Estado Parte receptor do investimento: i. Respeitar a proteção do meio ambiente e o desenvolvimento sustentável e encorajar a utilização de tecnologias que não agridam o meio ambiente, de acordo com as políticas nacionais das Partes, de modo a incentivar o progresso econômico, social e ambiental; ii. Respeitar os direitos humanos daqueles envolvidos nas atividades destas empresas, em conformidade com as obrigações e os compromissos internacionais da Parte receptora'. 19 Canada-Cameroon BIT 2014, Art 17.

standpoint, as it is the case in the classic conception of these international law instruments. Instead, SIFCA puts human rights concerns and the notion of 'risk sharing' between host States and investors rights at its core.²⁰

In response to the usual criticism that investor-State dispute settlement has generated in recent years, SIFCA has tried to strike a balance between all the stakeholders involved in negotiating and implementing a bilateral investment treaty.

More specifically, SIFCA pivots on three main goals: (i) balancing risk sharing among host States and investors, (ii) effectively creating human rights-related obligations for investors and liability limitations for host States in that regard and (iii) creating a level playing field in investor-State dispute settlement.

To achieve such goals, SIFCA has introduced the following key innovations:

20 As mentioned, this is not to say that human rights concerns are alien to less recent investment treaties and investor-state arbitrations. For example, the 2012 US Model BIT could be read as referring to a specific human right (e.g. access to justice as defined by Arts 8 and 10 of the United Nations Declaration on Human Rights) when defining the host State's obligations under the fair and equitable treatment standard under Art 5(2) of the 2012 US Model BIT: 'fair and equitable treatment includes the obligation to not deny justice in criminal, civil, or administrative adjudicatory proceeding in accordance with the principle of due process embodied in the principal legal systems of the world'. As for investor-State arbitrations, international tribunals in the *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v The Argentine Republic*, ICSID Case No ARB/07/26, Award (8 December 2016), and *Biloune and Marine Drive Complex Ltd. v Ghana, UNCITRAL*, Award on Jurisdiction and Liability (27 October 1989) cases have analysed the possibility of bringing human rights claims on both the host State and the investor's side with different outcomes.

The Sustainable Investment Facilitation and Cooperation Agreement ('SIFCA'), a 'next-generation' model bilateral investment treaty, has recently surfaced as a relevant development in the field of investment treaty negotiations

- i. Investors must submit a declaration of compliance with both SIFCA and the UN Guiding Principles before they can file for arbitration against a State.
- ii. In particular, when filing for arbitration, investors must recognise that for jurisdiction purposes (including under ICSID) human rights, environmental protection, sustainability and investment protection are interrelated concepts arising out of an investment.
- iii. Investors must consent (for jurisdiction purposes) to the possibility of having third-party claims brought against them by individuals who have suffered a violation of recognised human rights as a result of the investment.
- iv. Investors' claims may be inadmissible if: (i) the abovementioned declaration is found not to be true, or (ii) the claim is filed more than five years after the alleged damage.
- v. Investors must cover all deposits during the proceedings.
- vi. The parties may avail themselves of the Hague Rules on Business and Human Rights Arbitration²¹ as an alternative to ICSID arbitration.
- vii. Even where the parties choose to arbitrate under the ICSID Convention and Rules, the procedural aspects of the arbitration must be agreed upon based on the UNCITRAL Rules on Transparency in treaty-based investor-State arbitration.²²

21 Hague Rules on Business and Human Rights Arbitration (Centre for International Legal Cooperation), <https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> (accessed on 23 February 2022). [P]reamble: 1. The Hague Rules on Business and Human Rights Arbitration (the 'Rules') provide a set of procedures for the arbitration of disputes related to the human rights impacts of business activities. 2. In particular, arbitration under the Rules can provide: (a) For the possibility of a remedy for those affected by the human rights impacts of business activities, as set forth in Pillar III of the United Nations Guiding Principles on Business and Human Rights (the 'UN Guiding Principles'), serving as a grievance mechanism consistent with Principle 31 of the UN Guiding Principles; and (b) Businesses with a mechanism for addressing adverse human rights impacts with which they are involved, as set forth in Pillar II and Principles 11 and 13 of the UN Guiding Principles.

22 L. Montoya, 'Transparency' WikiNotes: Jsumundi (15 February 2022) <<https://jsumundi.com/en/document/wiki/en-transparency>> accessed on 23 February 2022, provide for the publication of benchmark information of treaty-based investor-State cases, the parties' and non-disputing parties' submissions, witness statements, expert

[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)

SIFCA puts human rights concerns and the notion of 'risk sharing' between host States and investors rights at its core



viii. States will be expressly entitled to file counterclaims.

ix. The degree of compliance (by investors) with the OECD Guidelines for Multinational Enterprises,²³ the UN Guiding Principles and other related instruments must be taken into account when awarding compensation under SIFCA.

Conclusion

The practice of including potentially binding human rights obligations and references to more favourable procedural rules for States in investment treaties is destined to stay. Time will tell how international arbitration tribunals assess and implement these obligations in practice (both on the merits and from a procedural standpoint) and also how these innovations can affect the treaties' original purpose of promoting and protecting foreign investment.

reports, transcripts, and all decisions rendered by the tribunal. They also provide for public hearings [...]: '[T]he UNCITRAL Rules on Transparency apply to all cases initiated under the UNCITRAL Arbitration Rules pursuant to investment treaties concluded on or after 1 April 2014, unless the parties to the treaty opt-out. Their application to disputes concerning investment treaties concluded before that date is contingent on the agreement of the treaty or disputing parties. Where the UNCITRAL Rules on Transparency are indeed applicable further to the consent of the treaty parties, the disputing parties in principle may not derogate from their content. Otherwise, the disputing parties may adjust the content of the Rules as they deem appropriate. In all circumstances, the arbitral tribunal retains discretionary authority to adapt the requirements of any specific provision in the Rules to the extent it is necessary yet consistent with their transparency objective.'

²³ OECD Guidelines for Multinational Enterprises <<https://www.oecd.org/daf/inv/mne/48004323.pdf>> (accessed on 23 February 2022). Foreword: '[T]he OECD Guidelines for Multinational Enterprises are recommendations addressed by governments to multinational enterprises operating in or from adhering countries. They provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognised standards. The Guidelines are the only multilaterally agreed and comprehensive code of responsible business conduct that governments have committed to promoting.'



[Home](#)

[Editorial](#)

[Insight](#)

[A Human Rights Perspective on Investment Arbitration after COVID-19: current issues and future trends](#)

[Global Briefing](#)

[EU State Aid Law: further EU challenges to investment arbitration](#)

[Interim Measures and Emergency Arbitration in Chile](#)

[Insolvency and Arbitration Agreements in Spain: new decision overrules judgment 255/2020 of 30 October 2020 and lifts the arbitration clause's suspension](#)

[In Focus](#)

[Remote Hearings in International Arbitration during the Pandemic](#)

[A Guide to the New Bilateral Investment Treaty between the Kingdom of Spain and the Republic of Colombia](#)

[Investment Arbitration: Contact Lawyers](#)