Consequences of crisis and the great re-think: COVID-19’s impact on energy investment, sustainability and the future of international investment agreements

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ABSTRACT
The COVID-19 pandemic and its resulting disruptions are having a significant impact on the global economy and international investments. Various State measures to address the pandemic are leading to widespread economic disruptions across several industries, including the energy sector. The current crisis has impacted energy demand, disrupted the global supply chain and created financial uncertainty. The pandemic has exacerbated issues relating to health, the environment, labour and human rights in the energy sector. This article seeks to understand the pandemic’s impact in shaping future human rights policy in international investment law. This article analyses current drafting trends in international investment agreements (IIAs) in 2019–2020, particularly in the context of recent developments in sustainable development and human rights. Although there are some noteworthy developments in recent IIAs, the pandemic has highlighted the need for further treaty reforms. It provides an opportunity for policymakers and corporations alike to address human rights issues and to incorporate the principles of sustainable investment into IIAs. The energy sector in particular plays a significant role in promoting sustainable development and post-COVID policy reforms will be essential for future energy security and global stability. In conclusion, this article considers the future of potential reforms in the post-COVID recovery agenda while keeping in mind energy and climate goals.

‘The best way to predict future is to create it.’
—Peter Drucker

1. INTRODUCTION
The COVID-19 pandemic has been and remains an unprecedented international public health crisis with global impact. In response to this crisis, States enacted several measures to stop or slow the spread of the disease.

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While countries attempt to balance the protection of public health with their economic interests, the pandemic and resulting State measures have led to widespread economic disruption and deeply affected several industries, including the energy sector. It seems likely that this exceptional situation will have significant long-term consequences for the energy industry, energy security and the future of many countries’ clean energy transitions. Similarly, it is likely that the legality and validity of many of the State measures adopted during the pandemic will become a topic of debate and scrutiny in the coming years. One area where this scrutiny is sure to arise is in the context of international investments and investment disputes.

In light of this coming clash between State public health measures and the deep disruption to the energy sector, this article analyses trends and developments in recent bilateral investment treaties and foreign trade agreements with investment chapters, collectively referred to as International Investment Agreements (IIAs), and specifically their provisions on health, the environment, labour and human rights. This article highlights the possible impact of these provisions on energy disputes in light of the pandemic. First, this article briefly describes recent instances where COVID-19-related measures have impacted the energy sector. Secondly, this article discusses the growing presence and importance of health, environmental, labour and human rights provisions in IIAs. Thirdly, this article analyses drafting trends in relation to the energy sector in IIAs signed in 2019–2020, including within model agreements. This article concludes by considering potential reforms in the post-COVID recovery agenda while keeping in mind energy and climate goals.

2. IMPACT OF COVID-19-RELATED STATE MEASURES

To address the COVID-19 pandemic, State governments have imposed and continue to impose several restrictions on social and economic activities, including complete or partial lockdowns; closure of non-essential businesses; and restrictions on travel and public gatherings. The energy sector is a critical part of every nation’s infrastructure, as it provides essential services and utilities to the public and commercial sectors. Therefore, both the ongoing pandemic and State responses to the pandemic are significantly impacting the investments, operations and industries related to the energy sector.

For instance, due to a slowdown in development projects and energy demand, governments are withdrawing incentives for energy projects and canceling auctions. Countries like Brazil, Mexico, Colombia and Argentina are facing a decrease in energy income and investment.1 Mexico has suspended preoperative tests for wind and solar plants affecting new renewable energy projects and plants under construction.2 In Brazil, the Ministry of Mines and Energy decided to postpone all energy auctions planned for 2020.3

The energy industry has been affected financially as energy companies are losing substantial revenues. There has been a sharp decrease in oil and gas prices, with all-time lows in European and Asian markets.4 In Tunisia, oil production fell to its lowest level and the Tunisian national oil company is facing severe financial challenges exacerbated by the pandemic’s economic impacts.5

According to the International Energy Agency (IEA)’s Global Energy Review for 2020, countries in complete lockdown are experiencing an average of 25 per cent decline in energy demand compared to regular

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1 C Salas and M Valderrama, ‘Energy Arbitration in Latin America: Potential State Defences in Future Covid-19-Related Cases’ Global Arbitration Review (13 October 2020) <https://globalarbitrationreview.com/review/the-arbitration-review-of-the-americas/2021/article/energy-arbitration-in-latin-americapotential-state-defences-in-future-covid-19-related-cases> accessed 28 January 2021.
2 C Biekmann, ‘Mexico Indefinitely Halts New Renewable Energy Plans’ Mexico Business (5 April 2020) <https://mexicobusiness.news/energy/news/mexico-indefinitely-halts-new-renewable-energy-plans> accessed 20 January 2021.
3 ‘Spotlight: The Impacts of Brazil’s Decision to Postpone All Electricity Auctions’ Bnamericas (31 March 2020) <www.bnamericas.com/en/analysis/spotlight-the-impacts-of-brazils-decision-to-postpone-all-electricity-auctions> accessed 26 February 2021.
4 International Energy Agency, ‘Global Energy Review 2020’ (2020) IEA <https://www.iea.org/reports/global-energy-review-2020> accessed 20 February 2021.
5 W Heni, ‘Tunisia: Updated Assessment of the Impact of the Coronavirus Pandemic on the Extractive Sector and Resource Governance’ Natural Resource Governance Institute (1 December 2020) <https://resourcegovernance.org/analysis-tools/publications/tunisia-updated-assessment-impact-coronavirus-extractive> accessed 26 February 2021.
levels. A decrease in electricity consumption due to mandatory lockdowns is affecting the operations and earnings of distributors, grid operators and utility companies. To ensure access to public utilities, some countries have suspended the collection of electricity bills and companies’ abilities to disconnect customers from utilities like power and water.\(^6\) Lockdowns are also affecting oil and gas project construction in countries such as Colombia and Chile.\(^7\)

Per the IEA report, the pandemic has also had a significant impact on investment in the energy sector, which raises concerns about energy security. At the same time, several countries have introduced foreign investment screening mechanisms to protect these sectors—including the energy sector—critically important as the crisis continues.\(^8\) The overall decrease in investment activity in the energy sector (ie particularly of foreign direct investment in the sector) is likely to have implications for capital expenditure, the disruption of existing investment projects and for supply chains.\(^9\)

### 3. HEALTH, ENVIRONMENT AND HUMAN RIGHTS PROVISIONS IN INVESTMENT AGREEMENTS

This section discusses the growing presence of health, environmental and human rights provisions in IIAs. The initial intent of IIAs, according to some,\(^10\) was to encourage foreign investment and economic growth between State parties. A subsequent increase in foreign investment across the globe, combined with the growth in the number of IIAs, resulted in a rise in investor-State arbitrations that began in the late 1990s.\(^11\) Due to the increase in arbitrations and imprecise drafting of State commitments in the treaties, arbitrators have played an increasingly large role in interpreting State obligations under IIAs.\(^12\)

The threat of adverse arbitral decisions over the years has changed States’ priorities and their objectives to enter into such IIAs. As jurisprudence has developed, so have concerns about a State’s legitimate ability to act in the public interest. As a result, some States have pushed back, terminating many IIAs and withdrawing from trade agreements. There has been a backlash in certain quarters against investment arbitrations due to the constraints such arbitrations can potentially place on States’ public policy measures and their right to regulate. The issue is further exacerbated by national responses to the pandemic, highlighting the importance of a State’s right to regulate in the context of implementing measures in support of public health goals. More broadly however, government responses to the current crisis may have trained a greater spotlight on the role of government action in support of the public interest more generally, including, for example, in the ongoing battle to limit climate change. This shift in attitude towards a State’s right to regulate has brought the issues

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\(^{6}\) ‘Australian Government Responses to COVID-19 in the Energy Sector’, *Department of Industry, Science, Energy and Resources* (19 February 2021) <https://www.energy.gov.au/covid-19-information/government-responds-covid-19-energy-sector> accessed 26 February 2021; ‘Spain Blocks Utilities from Cutting off Non-paying Customers’ (*Reuters*, 31 March 2020) <https://www.reuters.com/article/health-coronavirus-spain-measures/spain-blocks-utilities-from-cutting-off-non-paying-customers-idUSL8N2BO5YM> accessed 26 February 2021.

\(^{7}\) Salas and Valderrama (n 1).

\(^{8}\) UNCTAD, ‘Investment Policy Responses to the COVID-19 Pandemic’ (May 2020) Special Issue No 4, Investment Policy Monitor 1 <https://unctad.org/system/files/official-document/diaepcbin2020d3_en.pdf> accessed 15 February 2021.

\(^{9}\) International Energy Agency, ‘World Energy Investment 2020’ (2020) IEA 10 <https://www.iea.org/reports/world-energy-investment-2020> accessed 2 March 2021.

\(^{10}\) A Newcombe and L Paradell, *Law and Practice of Investment Treaties* (Kluwer Law International 2009) 49; Megan Wells Sheffer, ‘Bilateral Investment Treaties: A Friend or Foe to Human Rights’ (2011) 39 Denver Journal of International Law and Policy 484 <https://digitalcommons.du.edu/cgi/viewcontent.cgi?article=1189&context=djilp> accessed 26 February 2021.

\(^{11}\) L Mistelis and others, ‘Reforming Investor-state Dispute Settlement and Promotion of Trade and Investment Cooperation’ *G20 Insights* (22 November 2020) <https://www.g20-insights.org/wp-content/uploads/2020/11/reforming-investor-state-dispute-settlement-and-promotion-of-trade-and-investment-cooperation-1606769307.pdf> accessed 26 February 2021. See also UNCTAD, Investment Policy Hub, Investment Dispute Settlement Navigator, <https://investmentpolicy.unctad.org/investment-dispute-settlement?status¼1000> reports that as of 31 July 2020, the total number of known treaty-based ISDS cases has reached 1,061.

\(^{12}\) Mistelis and others, ibid 4 states: ‘The growth in the number of arbitrations and the imprecise expressions of state commitments in treaties have resulted in a shift of responsibility for interpreting state commitments in treaties from the state treaty parties to arbitrators.’
of health, environmental protection, human rights and State measures enacted in the public interest to the forefront of the IIA debate.

IIAs provide certain rights and standards of treatment for investors of a State party; in case of breach of investment treaty obligations, an investor can bring a claim directly against the State party. IIAs generally contain obligations for States to comply with international and domestic laws and lack an express reference to human rights obligations and are typically asymmetrical in terms of rights and obligations of the State and investors. However, despite few IIAs containing express provisions mentioning health, environmental, labour or human rights standards, IIAs and investor-State dispute settlement are promising tools for promotion and enforcement of such rights for both investors and non-State actors.

Recently, public health policy has gained great importance and, crucially, the attention of national governments due to the current pandemic. IIAs usually contain provisions restricting governments’ regulatory measures that may impact public health.13 In the past, public-health-related issues have been subject to investor-State arbitrations, which have raised public policy concerns. The COVID-19 pandemic highlights the need to reform the old-generation IIAs. The numerous State measures implemented to address the pandemic are affecting the operations of foreign investors. IIAs provisions restricting States’ regulatory powers could place constraints on States’ measures and possibly expose governments to arbitration claims by foreign investors under respective IIAs.14 This is more likely if the relevant IIA lacks the necessary carve-outs and exceptions to safeguard policy space. This possibility highlights the importance of safeguarding sufficient regulatory space in IIAs to protect human rights and public health and to minimize the risk of investor–State dispute settlement proceedings as a result of State measures enacted in the public interest.15

Reference to human rights instruments

This section briefly discusses human rights instruments and related soft law standards that are often referred to in IIAs. IIAs generally contain obligations for States to comply with international law and domestic laws. However, there are few express references to human rights obligations.16 This gap in IIAs affects States’ abilities to protect human rights and undermines their regulatory power.17 It is often difficult for States to allege human rights violations in investor-State arbitrations due to lack of jurisdiction or lack of specific obligations set forth in the relevant treaty.

Therefore, some IIAs incorporate soft law standards by reference in their texts which could support or condition the understanding of investor guarantees.18 Soft law instruments can provide guidance for balancing different substantive interests and interpretation of treaty norms alongside vague standards of treatment in IIAs.19 Several international instruments provide guidelines and standards for states and multinational corporations. For instance, the Universal Declaration of Human Rights (UDHR), the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) provide duties for States on human rights-related policy areas.

13 E Sheargold and A Mitchell, ‘Public Health in International Investment Law and Arbitration’ in Julien Chaisse, Leila Choukroune and Sufian Jusoh (eds), Handbook of International Investment Law and Policy (Springer 2019) 3 SSRN <https://ssrn.com/abstract=3397474> accessed 25 February 2021.
14 UNCTAD, ‘International Investment Agreements Reform Accelerator’ (2020) 3 <https://unctad.org/system/files/official-document/diaepcbi2020d8_en.pdf> accessed 23 February 2021.
15 UNCTAD, ‘World Investment Report, 2020: International Production beyond the Pandemic’ (2020) 95 <https://unctad.org/system/files/official-document/wir2020_en.pdf> accessed 25 February 2021.
16 KAN Duggal and NJ Diamond, ‘Human Rights and Investor-State Reform: Fitting a Square Peg into a Round Hole?’ 12 Journal of International Dispute Settlement, 12-13.
17 Sheffer (n 10) 493.
18 JE Alvarez, ‘Reviewing the Use of “Soft Law” in Investment Arbitration’ (2018) Public Law & Legal Theory Research Paper Series Working Paper Series, Working Paper No 18–46, 30 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3258737> accessed 22 February 2021.
19 SW Schill, ‘Sources of International Investment Law: Multilateralization, Arbitral Precedent, Comparativism, Soft Law’ (2017) ACIL Research Paper 2017-16, 16 <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2932159> accessed 22 February 2021.
The UN Guiding Principles on Business and Human Rights\(^{20}\) also provide guidelines for States and companies to prevent, address and remedy human rights abuses committed in business operations. Similar provisions are reflected in the OECD Guidelines for Multinational Enterprise and Global Compact.\(^{21}\) Additionally, the Hague Rules on Business and Human Rights Arbitration aim to establish a new, non-State-based dispute settlement mechanism for disputes related to the human rights impacts of business activities.\(^{22}\) Other soft law instruments establish best practices for certain policy areas. UNCTAD and the OECD, in addition to other organizations, are making significant efforts to suggest IIA reforms pertaining to human rights and sustainable development issues.

Specifically, in the context of the pandemic, UNCTAD has published a Special Investment Monitor on COVID-19 and a World Investment Report which reviews the investment policy responses to the pandemic and highlights the need to safeguard sufficient regulatory space in IIAs. The reports also make recommendations to shield State measures from treaty breach in line with UNCTAD’s Investment Policy Framework for Sustainable Development (2015) and UNCTAD’s Reform Package for the International Investment Regime (2018). In parallel, UNCTAD has launched IIA Reform Accelerator (2020), which provides policy tools and recommends reforms to existing IIAs to better respond to today’s challenges. The Accelerator focuses on specific IIA provisions and proposes ready-to-use model language to reform in line with sustainable development goals and the state’s right to regulate in IIAs.

Impact of the pandemic on the energy sector

This section discusses the pandemic’s impact on environment, health and human rights issues, particularly within the energy sector.

Disputes related to the energy sector are frequently a subject matter of investor-State arbitration. Foreign investment is necessary to keep up with energy demand and for the development of energy resources. To encourage foreign investment, IIAs, including the Energy Charter Treaty (ECT), provide a stable framework with binding obligations and a forum to adjudicate energy disputes.

The energy sector has accounted for a high proportion of recorded investor-State disputes. The ECT remains the most frequently invoked IIA in international arbitration cases, with more than 130 publicly known proceedings.\(^{23}\) At the same time, climate-related litigation is leading to new economic realities. Globally, climate change activism and reforms are on the rise alongside an increase in energy demand, which has led to more disputes. Many recent energy disputes have developed out of climate-related regulatory changes by States designed to promote renewable energy.\(^{24}\)

In 2019, the Energy Charter Conference decided to hold negotiations for the modernization of the ECT. The issues to be addressed include, among others, the right to regulate, sustainable development and corporate social responsibility (CSR).\(^{25}\)

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\(^{20}\) UN Human Rights Council, ‘Guiding Principles on Business and Human Rights: Implementing the United Nations “Protect, Respect and Remedy” Framework’ (2011) HR/PUB/11/04.

\(^{21}\) United Nations Global Compact (1999) <https://www.unglobalcompact.org/what-is-gc/mission/principles> accessed 19 February 2021; OECD Guidelines for Multinational Enterprises (2011) <https://doi.org/10.1787/9789264115415-en> accessed 19 February 2021.

\(^{22}\) Hague Rules on Business and Human Rights Arbitration, Centre for International Legal Cooperation (12 December 2019) <https://www.cilc.nl/cms/wp-content/uploads/2019/12/The-Hague-Rules-on-Business-and-Human-Rights-Arbitration_CILC-digital-version.pdf> accessed 19 February 2021.

\(^{23}\) Energy Charter Secretariat, ‘International Energy Charter, Changing Dynamics of Investment Cases under Energy Charter Treaty (ECT)’ (International Energy Charter, 18 May 2018) <https://energycharter.org/what-we-do/dispute-settlement/cases-up-to-18-may-2018> accessed 19 February 2021.

\(^{24}\) RD Kent, D Morris and R Jacobson, ‘Investment Disputes Arising from Regulatory Changes in Clean Energy’ Wilmer Hale (28 February 2019) <https://www.wilmerhale.com/en/insights/client-alerts/20190228-investment-disputes-arising-from-regulatory-changes-in-clean-energy> accessed 26 February 2021.

\(^{25}\) UNCTAD, ‘The Changing IIA Landscape: New Treaties and Recent Policy Developments’ (July 2020) IIA Issue Notes 4 <https://unctad.org/system/files/official-document/diaepcbinf2018d1_en.pdf> accessed 19 February 2021.
The current pandemic has impacted energy demand, disrupted the global supply chain and created financial uncertainty. As a natural market response, there is a decline in investment activity in the energy sector. According to UNCTAD’s World Investment Report, 2020, there will be a dramatic fall in foreign direct investment (FDI) in 2020 and 2021 due to the pandemic; global FDI flows were forecast to decrease by up to 40 per cent in 2020. As per the IEA World Energy Investment Report, 2020 was expected to see a decline in energy investment by one-fifth, or almost USD 400 billion compared to 2019.

Private sector investment in developing and transition economies in sectors relevant to sustainable development goals (SDGs) was predicted to fall by about one-third in 2020. Greenfield investment in power and renewable energy grew significantly between 2015 and 2019, however greenfield investment announcements declined by one-third in 2020 compared to 2019. Investment activity declined in all SDG sectors including renewable energy, which reduced by one-third of its pre-pandemic level.

The energy industry plays an essential role in providing services to combat the pandemic, such as providing electricity to health facilities and enabling online work for companies and virtual educational systems. Therefore, energy services were considered essential and allowed to operate during the lockdowns. However, the pandemic and resulting decline in investment will impact health, environment and human rights issues within the energy sector. There could be occupational health and safety risks involved due to shortages in personnel. The energy industry also needs to comply and ensure the health and welfare of personnel within their companies. Financial and supply chain disruptions could potentially lead to abuse of labour and environmental laws. The decline in energy investment could affect investments in renewable energies resulting in an impact on sustainable development.

4. ANALYSING RECENT IIAS

According to UNCTAD’s database, there are 2336 BITs and 323 treaties with investment provisions in force. Additionally, many countries have adopted model BITs that serve as a template and are often used to conduct IIA negotiations.

Between 2019 and 2020, 52 IIAs were signed, and 4 model agreements were adopted. Of these, 17 IIAs were signed in 2020 as opposed to 35 IIAs in 2019. This reflects a slowdown in negotiation of IIAs due to the pandemic, as a consequence of postponement and cancellation of IIA negotiation rounds and high-level bilateral summits. UNCTAD’s World Investment Report predicts that 2020 might register the lowest number of IIAs concluded since 1985.

This article studies relevant provisions of 46 IIAs and 3 model agreements concluded and published in 2019 and 2020 that are available in English. Some articles have reviewed past investment agreements and highlighted an increased presence of human rights considerations in international investment law. This

26 World Investment Report, 2020 (n 15) 20.
27 UNCTAD, Investment Trends Monitor (2019), specifies the following 10 SDG investment sectors: power, transport infrastructure, telecommunication, water and sanitation, food and agriculture, climate change mitigation, climate change adaptation, ecosystems and biodiversity, health and education.
28 UNCTAD, ‘International SDG Investment Flows to Developing Economies Down by One Third Due To COVID-19’ (December 2020) SDG Investment Trends Monitor 1 <https://unctad.org/system/files/official-document/diamic2020d3_en.pdf>.
29 UNCTAD, Investment Policy Hub <https://investmentpolicy.unctad.org/international-investment-agreements> accessed 5 March 2021.
30 As per World Investment Report, 2020 (n 15) examples include the postponement of negotiations for a Brazil–Nigeria BIT; delays for the negotiations of the new investment protocol of the African Continental Free Trade Area and the postponement of the EU–UK Free Trade Agreement.
31 World Investment Report, 2020 (n 15) 94.
32 NJ Diamond, ‘2019 in Review: International Investment Agreements and Human Rights’ Kluwer Arbitration Blog (8 February 2020) <http://arbitrationblog.kluwerarbitration.com/2020/02/08/2019-in-review-international-investment-agreements-and-human-rights/> accessed 26 February 2021; NJ Diamond and KA. N. Duggal, ‘2020 in Review: The Pandemic, Investment Treaty Arbitration, and Human Rights’ Kluwer Arbitration Blog (23 January 2021) <http://arbitrationblog.kluwerarbitration.com/2021/01/23/2020-in-review-the-pandemic-investment-treaty-arbitration-and-human-rights/?print=print> accessed 26 February 2021; KAN Duggal and LH van de Ven, ‘With Rights Come Responsibilities: Sustainable Development and Gender Empowerment under the 2019 Netherlands Model BIT’
article specifically highlights (i) preambular references; (ii) State’s right to regulate; (iii) investor obligations and (iv) non-lowering of health, environment and labour standards.

**Preambular references**

Preambles provide a template to the object and purpose of the treaty. Preamble provisions, although not binding, can be helpful in the interpretation of the treaty and the State party’s obligations.

Generally, IIA preambles set out the object of entering into agreement to promote investment and economic growth. However, only a few preambles mention broader policy goals such as the State’s right to regulate and respect for State parties’ laws. Provisions recognizing human rights are also rare in the preamble and substantive treaty provisions. However, recent trends suggest a positive change in this context.

Many IIAs, such as the 2019 Korea–Uzbekistan BIT33 and the 2019 Australia–Uruguay BIT,34 mention broader policy objectives in the preamble and highlight that investment promotion must be consistent with health, labour and environment laws. The Fiji–USA TIFA35 refers to the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work and State parties’ labour and environmental laws. The Myanmar–Singapore BIT36 reaffirms the State’s right to introduce new health and environmental measures. Similarly, the EU–Vietnam IPA37 and the Belgium–Luxembourg Model BIT38 seek to promote investment by being mindful of ‘high levels of environmental and labour protection’.

Some IIA preambles also expressly mention human rights and sustainable development. The CARIFORUM–UK EPA39 refers to ‘human rights, democratic principles and the rule of law’ as essential elements of the agreement and good governance as the fundamental element of the agreement. The preamble further mentions United Nations SDG commitments, labour rights as set out by ILO and environmental protection in line with Johannesburg Declaration. The Slovakia Model BIT40 includes a ‘commitment to democracy, the rule of law, human rights and fundamental freedoms’. The EU–Vietnam IPA41 refers specifically to parties’ commitment to the UDHR.

Similarly, Hungary’s agreements with Cabo Verde, Belarus and Kyrgyzstan seek to ensure that investment is consistent with ‘internationally and domestically recognized human rights, labour rights, and internationally recognized standards of corporate social responsibility’ and that investments contribute to sustainable development.42 The Cabo Verde–Hungary preamble also highlights the need to secure an overall balance of rights and obligations between investors and the host State.43

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33 Agreement between the Government of the Republic of Uzbekistan and the Government of the Republic of Korea for the reciprocal promotion and protection of investments (signed 19 April 2019) preamble (hereafter Korea–Uzbekistan BIT).
34 Agreement between Australia and the Oriental Republic of Uruguay on the promotion and protection of investments (signed 5 April 2019) preamble (hereafter Australia–Uruguay BIT).
35 Trade and Investment Framework Agreement between the Government of the United States of America and the Government of the Republic of Fiji (signed 15 October 2020) preamble (hereafter Fiji–USA TIFA).
36 Agreement between the Government of the Republic of Singapore and the Government of the Republic of the Union of Myanmar on the Promotion and Protection of Investments (signed 24 September 2019) preamble (hereafter Myanmar–Singapore BIT).
37 Investment Protection Agreement between the European Union and its Member States, of the one part, and the Socialist Republic of Vietnam, of the other part (signed 30 June 2019) preamble (hereafter EU–Vietnam IPA).
38 Agreement between the Belgium-Luxembourg Economic Union, on the one hand, and on the other hand, on the Reciprocal Promotion and Protection of Investments. (date of adoption 28 March 2019) preamble (hereafter ‘Belgium-Luxembourg Model BIT’).
39 Economic Partnership Agreement between the CARIFORUM States, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (signed 22 March 2019) preamble (hereafter ‘CARIFORUM-UK EPA’).
40 Agreement between the Slovak Republic and . . . for the Promotion and Reciprocal Protection of Investments (date of adoption 2019) preamble (hereafter ‘Slovakia Model BIT’).
41 EU–Vietnam IPA, preamble.
42 Agreement between the Government of Hungary and the Government of the Republic of Cabo Verde for the Promotion and Reciprocal Protection of Investments (signed 28 March 2019) preamble (hereafter ‘Cabo Verde–Hungary BIT’); Agreement between the Government of the Republic of Belarus and the Government of Hungary for the Promotion and Reciprocal Protection of Investments
The Netherlands Model BIT and Fiji–USA TIFA are also noteworthy, as apart from referring to a commitment to sustainable development and the State’s right to regulate, the preamble also recognizes women’s role in the economy. The Netherlands Model BIT recognizes ‘the importance of equality between men and women when formulating, implementing and reviewing measures within the field of international trade and investment’. The Fiji–USA TIFA and Japan–UK CEPA provide for enhancing women’s opportunities in the economy.

The preamble of the recently released EU–UK TCA also contains language reaffirming the parties’ commitment to the rule of law, human rights and climate change which constitute essential elements of the agreement. Specifically, the agreement recognizes ‘the benefits of trade and investment in energy and raw materials and the importance of supporting the delivery of cost efficient, clean and secure energy supplies’ and ‘the benefits of sustainable energy, renewable energy, in particular offshore generation in the North Sea, and energy efficiency’. Similarly, the UK’s agreements with Moldova and Georgia recognize the importance of renewable energy and acknowledge the need for enhanced energy cooperation.

(signed 14 January 2019) preamble (hereafter ‘Belarus–Hungary BIT’); Agreement between the Government of Hungary and the Government of the Kyrgyz Republic for the Promotion and Reciprocal Protection of Investments (signed 29 September 2020) preamble (hereafter ‘Hungary–Kyrgyzstan BIT’).

43 Cabo Verde–Hungary BIT, preamble.
44 Fiji–USA TIFA, preamble.
45 Agreement on Reciprocal Promotion and Protection of Investments between . . . and the Kingdom of the Netherlands (date of adoption 22 March 2019) preamble (hereafter ‘Netherlands Model BIT’).
46 Fiji–USA TIFA, preamble; Agreement between Japan and the United Kingdom of Great Britain and Northern Ireland for a Comprehensive Economic Partnership (signed 23 October 2020) preamble (hereafter ‘Japan–UK CEPA’).
47 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (signed 30 December 2020) preamble (hereafter ‘EU-UK TCA’).
48 EU-UK TCA, preamble.
49 Strategic Partnership, Trade and Cooperation Agreement between the Republic of Moldova and the United Kingdom of Great Britain and Northern Ireland (signed 24 December 2020) preamble (hereafter ‘Moldova–UK TCA’); Strategic Partnership and Cooperation Agreement between Georgia and the United Kingdom of Great Britain and Northern Ireland (signed 21 October 2019) preamble (hereafter ‘Georgia–UK Partnership and Cooperation Agreement’).
States’ right to regulate

Provisions relating to the preservation of States’ regulatory space in IIAs have gained more importance in recent times. States wish to protect their right to regulate domestic activities and enact legislation to advance economic and public welfare objectives. Preservation of States’ regulatory autonomy is the most frequently seen area of reform in new IIAs.50

Most new IIAs highlight the States’ right to regulate in the treaty’s preamble. The preamble in the Regional Comprehensive Economic Partnership treaty, for example, reaffirms the parties’ right to regulate ‘in pursuit of legitimate public welfare objectives’. Similarly, the preamble in the India–Kyrgyzstan BIT also mentions States’ right to regulate ‘in accordance with their law and policy objectives’.51

The Australia–Hong Kong Investment Agreement recognizes States’ right to regulate and resolves ‘to preserve their flexibility to set legislative and regulatory priorities, safeguard public welfare and protect legitimate public welfare objectives’.52

The preamble in the Japan–Morocco BIT describes a State’s right to regulate as an inherent right and seeks to preserve States’ flexibility to ‘protect legitimate public welfare objectives, such as public health, safety, the environment, the conservation of living or non-living exhaustible natural resources, the integrity and stability of the financial system and public morals’.53 The Australia–Uruguay BIT, Myanmar–Singapore BIT, Belgium Luxembourg Model BIT and Netherlands Model BIT also contain similar language in their preambles.

The Hong Kong China SAR–UAE BIT emphasizes that investor protection objectives shall not override the State’s right to take measures to protect a legitimate public interest with a condition that ‘such measures comply with the customary international law minimum standard of treatment of aliens’.54

Apart from the preamble, certain IIAs, such as the EU–Vietnam IPA, Cabo Verde–Hungary BIT, Belarus–Hungary BIT, Netherlands Model BIT, Slovakia Model BIT, Georgia–UK Partnership and Cooperation Agreement and the EU–UK TCA contain substantive provisions seeking to preserve States’ regulatory space to achieve legitimate policy objectives, such as the protection of public health, safety, environment or public morals.55

The Belgium Luxembourg Model BIT contains elaborate provisions on the right to regulate and levels of protection.56 The provisions emphasize a State party’s right to ‘determine its sustainable development policies and priorities, to establish its own levels of domestic environmental and labour protection, and to adopt or modify its relevant laws and policies accordingly, consistently with the internationally recognised standards and agreements’.57 Similarly, the Georgia–UK Partnership and Cooperation Agreement makes specific reference to internationally recognized labour and environmental standards.58 The provision further provides that State parties shall not only encourage high levels of environmental and labour protection but shall also strive to improve those laws and policies.

50 World Investment Report, 2020 (n 15) 112.
51 Bilateral Investment Treaty between the Government of the Kyrgyz Republic and the Government of the Republic of India (signed 14 June 2019) preamble (hereafter ‘India-Kyrgyzstan BIT’).
52 Investment Agreement between the Government of Australia and the Government of the Hong Kong Special Administrative Region of the People’s Republic of China (signed 26 March 2019) preamble (hereafter ‘Australia-Hong Kong Investment Agreement’).
53 Agreement between the Kingdom of Morocco and Japan for the Promotion and Protection of Investment (signed 8 January 2020) preamble (hereafter ‘Japan–Morocco BIT’).
54 Agreement between the Government of the Hong Kong Special Administrative Region of the People’s Republic of China and the Government of the United Arab Emirates for the Promotion and Reciprocal Protection of Investments (signed 16 June 2019) preamble (hereafter ‘Hong Kong China SAR–UAE BIT’).
55 EU–Vietnam IPA, art 2.2.1; Cabo Verde–Hungary BIT, art 3; Belarus–Hungary BIT, art 3; Netherlands Model BIT, art 2.2; Slovakia Model BIT, art 4; Georgia–UK Partnership and Cooperation Agreement, art 220; EU–UK TCA, preamble, art 1.1.2.
56 Belgium–Luxembourg Model BIT, arts 1.2, 3.3 and 15.
57 ibid, art 15.
58 Georgia–UK Partnership and Cooperation Agreement, arts 220, 221 and 222.
However, the language used in the preamble and operative clauses for regulatory right reflects non-binding affirmations and declaratory nature. Only a few agreements clarify the practical implications or consequences of such provisions. For instance, the Cabo Verde–Hungary BIT, Netherlands Model BIT and Slovakia Model BIT provide that the mere fact that a State regulates in such a way that an investment or investors’ expectation of profits is negatively affected, does not amount to breach of obligation under the agreement.59 The EU–Vietnam IPA clarifies that ‘[f]or greater certainty, this Chapter shall not be interpreted as a commitment from a Party that it will not change its legal and regulatory framework, including in a manner that may negatively affect the operation of investments or the investor’s expectations of profits’.60

Although references to the right to regulate in IIAs are characterized as ‘positive language’ with little enforceability by some scholars, such inclusions may help investment tribunals interpret the objectives of the agreement and promote balance between investors’ rights and States’ sovereignty.61

**Investors’ obligations**

Generally, IIAs have two types of provisions for investor obligations towards health, the environment and human rights—mandatory or voluntary. The majority of provisions are often voluntary. Recent IIAs also reference sustainable development and CSR; most CSR guidelines and codes of conduct are also voluntary and do not provide for enforcement mechanisms. Several IIAs also identify voluntary principles to guide investor conduct.

The Brazil–India BIT includes investor obligation provisions, such as a provision on CSR. However, the use of words such as ‘strive’ and ‘endeavor’ indicates the voluntary nature of the provisions. Article 12.1 provides that investors shall ‘strive to achieve the highest possible level of contribution to the sustainable development’.62 Further, the investors should ‘endeavor’ to comply with voluntary principles and standards for responsible business conduct. The voluntary obligations on investors and their investments include an agreement to respect internationally recognized human rights, contribute towards environment and sustainable development and refrain from seeking exemptions relating to human rights, the environment, health and other issues.63 The provisions also provide for investors to promote good corporate governance principles and practices, including anti-corruption measures.64

The Brazil–UAE BIT provides for similar voluntary investor obligations relating to human rights, environment and health.65 Further, the Brazil–UAE provision makes reference to the OECD Guidelines for Multinational Enterprises while providing that investors shall ‘strive to achieve the highest possible level of contribution to the sustainable development. . .’66 The agreement also obligates investors to comply with State parties’ domestic legislation concerning the investment.67

The CSR provision in the Australia–Indonesia CEPA68 reaffirms the importance of encouraging enterprises to voluntarily follow CSR principles. Instead of directly addressing the investors’ obligation, the Australia–Hong Kong CEPA provides for State parties to encourage enterprises to voluntarily incorporate CSR guidelines.69

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59 Cabo Verde–Hungary BIT, art 3.2; Netherlands Model BIT, art 2.2; Slovakia Model BIT, art 4.2.
60 EU–Vietnam IPA, art 2.2.
61 C Titi, The Right to Regulate in International Investment Law (Hart Publishing 2014) 105, 121.
62 Investment Cooperation and Facilitation Treaty between the Federative Republic of Brazil and the Republic of India (signed 25 January 2020) art 12.1 (hereafter ‘Brazil–India BIT’).
63 Brazil–India BIT, ibid, art 12.2 (b); art 12.2(a); art 12.2 (e).
64 ibid, art 12.2 (f).
65 Cooperation and Facilitation Investment Agreement between the Federative Republic of Brazil and the United Arab Emirates (signed 15 March 2019) art 15.2 (hereafter ‘Brazil–UAE BIT’).
66 Brazil–UAE BIT, ibid, art 15.1.
67 ibid, art 14.
68 Australia Indonesia Comprehensive Economic Partnership Agreement (signed 4 March 2019), art 14.17 (hereafter ‘Australia–Indonesia CEPA’).
Notably, the India–Kyrgyzstan BIT includes stronger wording than that commonly found in investor obligation provisions. The provision uses the word ‘shall’ while obligating investors to comply with all laws of the State relating to investments and tax laws and to refrain from corrupt practices.\(^70\) However, the provision on CSR including labour, environmental and human rights issues is voluntary in nature.\(^71\)

One of the most notable agreements concluded in 2019–2020 in terms of including binding investor obligations is CARIFORUM–UK EPA, which obligates the State parties to ensure compliance of stated investor obligations through measures including domestic legislation. The provision provides that the investors be held liable for acts of corruption; act in accordance with core labour standards as required by the ILO Declaration; do not circumvent international environmental or labour obligations; and establish local community liaison processes, especially in extensive natural resource-based activity projects.\(^72\)

The Belgium Luxembourg Model BIT also includes a provision on CSR and responsible business conduct (RBC). The provision further states that State parties ‘agree to promote CSR and RBC in line with international guidelines and principles, by companies, investors and governments’ and ‘shall make continued and sustained efforts towards adhering to internationally recognised guidelines and principles on CSR and RBC’.\(^73\)

**Health, the environment and labour standards/non-lowering of standards**

Provisions protecting health, the environment and labour standards have assumed greater importance in recent times due to the pandemic. In particular, the relevance of IIA provisions preventing States from lowering regulatory standards relating to environment and labour in order to attract foreign investment has been made clear.

The Australia–Hong Kong Investment Agreement provision on ‘Investment and Environmental, Health and Other Regulatory Objectives’ is broadly worded and provides for the right of State parties to take measures ensuring that investment activity ‘is undertaken in a manner sensitive to environmental, health or other regulatory objectives’.\(^74\)

The CARIFORUM–UK EPA provides that States should ensure that FDI is not encouraged by ‘lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards’.\(^75\) The agreement also includes a separate detailed chapter on sustainable development.\(^76\)

Similarly, the Cabo Verde–Hungary BIT, Belarus–Hungary BIT, Brazil–UAE BIT and Brazil–India BIT prevent States from lowering labour, health and environmental standards and provide for consultations between State parties to avoid such encouragement of investment.\(^77\)

The preamble in the Japan–Morocco BIT recognizes that ‘these objectives can be achieved without relaxing health, safety and environmental measures of general application’.\(^78\) The BIT also addresses public health in general exceptions and provision on non-lowering of standards.\(^79\)

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\(^69\) Australia–Hong Kong Investment Agreement, art 16.
\(^70\) India–Kyrgyzstan BIT, art 11.
\(^71\) ibid, art 12.
\(^72\) CARIFORUM–UK EPA, art 72.
\(^73\) Belgium Luxembourg Model BIT, art 18.
\(^74\) Australia–Hong Kong Investment Agreement, art 15.
\(^75\) CARIFORUM–UK EPA, art 73.
\(^76\) ibid, Pt I.
\(^77\) Cabo Verde–Hungary BIT, art 2; Belarus–Hungary BIT, art 2; Brazil–UAE, art 17.2; Brazil–India BIT, art 22.
\(^78\) Japan–Morocco BIT, preamble.
\(^79\) Japan–Morocco BIT, art 19.
In the Belgium Luxembourg Model BIT, apart from the provision preventing States from lowering environment and labour standards, the agreement provides that State parties shall not fail to effectively enforce its environmental and labour laws as an encouragement for investment.

The Belgium Luxembourg Model agreement also includes separate provisions on labour standards, emphasizing State parties’ obligation to promote and implement core labour standards under ILO instruments. Similarly, the model has a specific provision on environmental standards providing that State parties shall strive to ensure that commitments under multilateral environmental agreements are implemented by domestic legislation and to improve such laws. Notably, the provision highlights the importance of ‘pursuing the objectives of the United Nations Framework Convention on Climate Change (UNFCCC) in order to address the threat of climate change’.

The Netherlands Model BIT also includes an elaborate and detailed provision on the State’s commitments towards sustainable development and CSR. The model makes specific mention of the Paris Agreement, ILO Conventions and UDHR. For CSR, the model refers to the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.

To sum up, Tables 1 and 2 below represent the number of IIAs drafted in 2019–2020 (including model BITs) which include human rights-related provisions and references, respectively.

Table 1. Number of IIAs containing provisions relating to human rights considerations

| PREAMBLE (CONTAINING ENVIRONMENT, LABOUR OR HUMAN RIGHTS RELATED REFERENCES) | IIAs |
|-----------------------------------------------------------------------------|------|
|                                                                             | 25   |

| RIGHT TO REGULATE                                                          | IIAs |
|---------------------------------------------------------------------------|------|
|                                                                             | 29   |

| INVESTOR OBLIGATIONS                                                       | IIAs |
|---------------------------------------------------------------------------|------|
|                                                                             | 8    |

| NON-LOWERING OF STANDARDS                                                 | IIAs |
|---------------------------------------------------------------------------|------|
|                                                                             | 15   |

To cite, Belgium Luxembourg Model BIT, art 15.3.

Ibid, art 15.5.

Ibid, art 16.

Ibid, art 17.

Netherlands Model BIT, art 6.6.

Ibid, art 7.2.
5. CONCLUSION

The pandemic has had a significant impact on public health and the world economy, which has created uncertainties and highlighted vulnerabilities in States’ abilities to implement measures in the public interest.

IIAs continue to play a significant role in resolving investor-State disputes, and it will be interesting to see how tribunals factor the pandemic into their interpretation of the relevant IIA provisions. Additionally, there is an emerging need for consistency in international investment policymaking, in order to provide greater predictability and transparency in terms of a State’s obligations under IIAs. Countries may reassess the role of IIAs in national development and their right to regulate in the public interest. Accordingly, the post-pandemic period could witness reforms in the drafting of future investment treaties.

Policy coherence and systemic integration in the process of interpretation and application of IIAs could help in reconciling private interests with global interests such as human rights, the environment and the fight against climate change. The need for comprehensive IIA reform is particularly imminent in the context of the COVID-19 pandemic since there is a growing concern that legitimate government measures seeking to address the crisis could be challenged under IIAs that were drafted in the past targeting different objectives. The IIA Reform Accelerator suggests that it is important to act now by making IIA reforms a priority in the post-COVID crisis policy agenda.

Although the pandemic has created new challenges for the energy sector, it also presents a unique opportunity to develop a sustainable response that places a greater emphasis on health, environmental, labour and human rights issues. The energy sector plays a significant role in the world’s push for sustainable development.

Table 2. Number of IIAs containing human rights-related references

| IIAs Containing Relevant References | HEALTH | ENVIRONMENT | LABOR | HUMAN RIGHTS | SUSTAINABLE DEVELOPMENT | CORPORATE SOCIAL RESPONSIBILITY |
|------------------------------------|--------|-------------|-------|--------------|-------------------------|--------------------------------|
| IIAs containing relevant references |        |             |       |              |                         |                                |

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88 World Investment Report, 2020 (n 15) 94.
89 Loukas Mistelis and others (n 11) 7, 8.
90 IIA Reform Accelerator (n 14) 3.
91 ibid.
development. This crisis can be a catalyst and an opportunity for increased sustainability conducive to cross-border investment.92

In short, States can use their experience of the current crisis to consider situations similar to COVID-19 in their current and future policymaking. As a result, they are likely to place greater focus to include a comprehensive set of reforms on human rights (eg right to health, protection of the environment, sustainable development and labour rights) in their IIAs. The design by policymakers of post-COVID recovery agendas will be of great interest, on how IIA reforms balance the needs of States’ energy and climate goals. Stay tuned.

92 World Investment Report, 2020 (n 15) iii.