



## **Response to the Call for Inputs by the UN Special Rapporteur on human rights and the environment**

**“Should the interests of foreign investors trump the human right to a clean, healthy and sustainable environment?”**

**South Centre**

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### **Background**

The human right to a clean, healthy and sustainable environment was recently recognised by the UN General Assembly and marks an important landmark for the international community. It can help catalyse efforts towards combating the triple planetary crisis, as well as to support States in fulfilling their human rights obligations on environmental matters and achieve national development objectives.

The 2030 Agenda for Sustainable Development recognises that “private business activity, investment and innovation are major drivers of productivity, inclusive economic growth and job creation”<sup>1</sup>. Foreign direct investment (FDI) may, in particular, play an important role in respect of transfer of technology, industrialization and digital transformation, if aligned with the national development objectives and conditions of the host country. Yet, the current regime governing foreign investment does not meet the needs and realities of recipient countries, particularly host States located in the Global South.

FDI should be responsible, sustainable, aligned with the national development objectives of the host State, and support efforts towards fulfilling their human rights obligations. Aligning inward FDI flows with national development priorities requires a major reform of the international investment regime, based on a broad and holistic approach<sup>2</sup>. A critical aspect of such reform is the need to promote the respect of human rights as well as environmental protection by foreign investors. There is an

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<sup>1</sup> UN, Transforming our World: The 2030 Agenda for Sustainable Development, A/RES/70/1, para. 67. <https://sustainabledevelopment.un.org/content/documents/21252030%20Agenda%20for%20Sustainable%20Development%20web.pdf>

<sup>2</sup> Nicolás M. Perrone, The ISDS Reform Process: The missing development agenda, South Centre Investment Policy Brief 19, March 2020. <https://www.southcentre.int/investment-policy-brief-19-march-2020/>

increasing recognition that private parties, such as investors and corporations, have an obligation to respond to climate change impacts and protect the environment<sup>3</sup>, including by taking actions that prevent their involvement in activities that harm people and the planet, and to provide effective remedies in case harm occurs<sup>4</sup>.

### **The impacts of investor-state dispute settlement mechanisms on measures to advance the right to a clean, healthy and sustainable environment**

Most international investment agreements (IIAs) include dispute settlement provisions that allow foreign investors to bring claims against measures taken by States that affects investments even when they pursue legitimate public policy objectives. These provisions make use of the international investor-State dispute settlement (ISDS) mechanism and are known to have also been used by foreign investors in a way that undermines compliance with international obligations of host States<sup>5</sup>.

Developing and least developed countries, which are among those most affected by environmental degradation and climate change, have been at the receiving end of many ISDS claims from foreign investors against their regulatory measures, including environmental and climate measures<sup>6</sup>. The high cost of defending against such claims and facing arbitral awards running into millions of dollars adds pressure to their already fragile financial systems and also complicates efforts towards sovereign debt restructuring<sup>7</sup>. For instance, some foreign investors have alleged that the legitimate regulatory actions by countries, including environmental and human rights related measures, have had the effect of expropriating their investment, and claimed millions of dollars in compensation<sup>8</sup>.

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<sup>3</sup> Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentina, ICSID Case No. ARB/07/26 (Award of 8 December 2016), para. 1194

<sup>4</sup> “Just transition: Make it work, Towards decent and high quality work in a green economy”, G7 Employment Ministerial Meeting Communiqué (Wolfsburg, 24 May 2022), p. 1. <https://www.bundesregierung.de/resource/blob/998440/2049588/9a352fb23d51b70e92545cb2220fe030/2022-05-24-g7-employment-ministerial-meeting-communiqu%c3%a9-en-data.pdf?download=1>.

<sup>5</sup> See for instance, Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7, where the investor challenged Uruguayan laws which sought to implement the obligations under the World Health Organization’s (WHO) Framework Convention on Tobacco Control.

<sup>6</sup> Examples of ISDS claims against environmental and climate change policies include RWE v. Netherlands (ICSID Case No. ARB/21/4); Eco Oro v. Colombia (ICSID Case No. ARB/16/41); Bear Creek Mining v. Peru (ICSID Case No. ARB/14/21), among others.

<sup>7</sup> Yuefen Li, How international investment agreements have made debt restructuring even more difficult and costly, South Centre Investment Policy Brief 10, February 2018.

<https://www.southcentre.int/investment-policy-brief-10-february-2018/>

<sup>8</sup> Daniel Uribe and Danish, Investment Policy Options for Facing COVID-19 Related ISDS Claims, Investment Policy Brief 22, June 2021, <https://www.southcentre.int/investment-policy-brief-22-june-2021/>

One telling example is the dispute in *Eco Oro v. Colombia*<sup>9</sup>, where the host State acted in accordance with the decision of its Constitutional Court to protect its high-mountain ecosystems known as *páramos*, which are the main source of the country's freshwater supply and key to its climate change mitigation efforts. However, despite the existence of a specific exception for environmental protection in the underlying IIA, the arbitral tribunal held Colombia liable. It found that while Colombia's actions did not amount to an unlawful expropriation, it had violated the international law minimum standard of treatment<sup>10</sup>.

Likewise, in *Alamos Gold v. Turkey*<sup>11</sup>, the investor halted work on a mining lease in Turkey's northwestern region, after the government did not renew the investor's mining licenses. The project had drawn widespread protests as locals feared it would badly damage the natural habitat in the forests where the excavation was taking place<sup>12</sup>. There were also concerns the use of cyanide to extract gold would end up contaminating the soil and waters of a nearby dam<sup>13</sup>. In this case, the investor has now filed a \$1 billion claim against the host State<sup>14</sup> alleging illegal expropriation of their investment.

Some arbitral tribunals have considered environmental damage caused by investors in their decisions, but these have been very rare. In *Burlington v. Ecuador*<sup>15</sup>, the host State had filed a counterclaim alleging breach of its national environmental law. The tribunal found that "certain sites displayed soil contamination for which Burlington was held liable. Some mud pits were held to have been poorly constructed by the consortium, with leaks in certain cases. Meanwhile, exceedances of chemicals were found in groundwater at some sites, with no evidence allowing Burlington to rebut the presumption that it was liable for these"<sup>16</sup>. Upholding the counterclaim, the tribunal then awarded Ecuador \$41.7 million; while simultaneously awarding the investor \$379.80 million for its claims for damages.

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<sup>9</sup> *Eco Oro Minerals Corp. v. Republic of Colombia* (ICSID Case No. ARB/16/41)

<sup>10</sup> Jimena Sierra, Is the Arbitral Award in the *Eco Oro v Colombia* Dispute "Bad Law"?, *AfronomicsLaw*, 11 November 2021. <https://www.afronomicslaw.org/category/analysis/arbitral-award-eco-oro-v-colombia-dispute-bad-law>

<sup>11</sup> *Alamos Gold Holdings Coöperatief U.A. and Alamos Gold Holdings B.V. v. Republic of Turkey* (ICSID Case No. ARB/21/33)

<sup>12</sup> Fatıma Taşkömür, Saad Hasan, Turkey is the latest victim of a billion-dollar corporate heist, *TRTWorld*. <https://www.trtworld.com/magazine/turkey-is-the-latest-victim-of-a-billion-dollar-corporate-heist-46121>

<sup>13</sup> *Alamos Gold halts construction at Turkish project amid protests*, *Reuters*, 14 October 2019. <https://www.reuters.com/article/instant-article/idUKKBN1WT1TT>

<sup>14</sup> UNCTAD, Investment Policy Hub. <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1119/alamos-gold-v-turkey>

<sup>15</sup> *Burlington Resources, Inc. v. Republic of Ecuador* (ICSID Case No. ARB/08/5)

<sup>16</sup> Jarrod Hepburn, Analysis: Successful counterclaim in *Burlington v. Ecuador* breaks new ground, as tribunal has to evaluate quantum of environmental damage, *IAReporter*, 13 Feb 2017. <https://www.iareporter.com/articles/analysis-successful-counterclaim-in-burlington-v-ecuador-breaks-new-ground/>

## **The effects of ‘regulatory chill’ on State’s right to regulate**

The current framework for ISDS increases the risk that States will face expensive litigation related to their environmental protection and climate change actions, which will not only affect the implementation of their Nationally Determined Contributions (NDCs) but might also curtail the resources available for the realization of human rights<sup>17</sup>. Therefore, the impact that IIAs and ISDS might have on financial resource mobilization is critical, particularly when developing countries are struggling with the triple planetary crises, exacerbated by the negative impacts of the COVID-19 pandemic<sup>18</sup>.

As Perrone notes, “Foreign investors may resist the changes of regulations through diplomatic and legal strategies. If the changes are finally implemented, moreover, investors may initiate an ISDS case requesting the review of the new regulation”<sup>19</sup>. Such (mis)use of ISDS by foreign investors has resulted in disproportionate and exorbitant compensations being awarded by several arbitral tribunals against States. It also increases the risk of ‘regulatory chill’ which hampers the ability of States to design and adopt policies for promoting the public interest, achieving the Sustainable Development Goals (SDGs), meeting their climate commitments, or ensuring the protection of human rights<sup>20</sup>.

Under these circumstances, the risk of regulatory chill is increasingly becoming an obstacle for ensuring a clean energy transition and mitigating the worst impacts of climate change, as new policy measures addressing these issues can affect investors’ operations and profitability<sup>21</sup>.

## **Responding to ‘regulatory chill’ and safeguarding States’ regulatory space**

The risks created by abusive investors’ claims and the ensuing ‘regulatory chill’ *de facto* limit the States’ capacity to adopt the necessary measures to respond to current crises. In most ISDS cases, linkages between investment agreements and States international obligations on human rights, environment protection and climate change are simply not considered by arbitral tribunals, with some notable exceptions.

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<sup>17</sup> Report of the Special Rapporteur on the right to development, A/76/154, 15 July 2021.

[https://www.ohchr.org/Documents/Issues/Development/SR/Policy\\_Brief\\_RTDClimate\\_Action.pdf](https://www.ohchr.org/Documents/Issues/Development/SR/Policy_Brief_RTDClimate_Action.pdf) p. 16

<sup>18</sup> Daniel Uribe Teran and Luis Fernando Rosales, Analysing Intersections between Climate Change and Human Rights, South Centre Research Paper 167, 27 October 2022.

<https://www.southcentre.int/research-paper-167-27-october-2022/>

<sup>19</sup> Nicolás M. Perrone, The ISDS Reform Process: The missing development agenda, South Centre Investment Policy Brief 19, March 2020. <https://www.southcentre.int/investment-policy-brief-19-march-2020/>

<sup>20</sup> See Lorenzo Cotula, “Rethinking investment treaties to advance human rights”, International Institute for Environment and Development Briefing, September 2016. <https://www.iied.org/17376iied>

<sup>21</sup> Roslyn Ng’eno, Preserving Regulatory Space for Sustainable Development in Africa, SouthViews No. 246, 5 April 2023. <https://www.southcentre.int/southviews-no-246-5-april-2023/>

For example, in *Urbaser v. Argentina*<sup>22</sup>, the emergency measures enacted by the host country during its 2001-2002 economic crisis led to alleged breaches of the terms of the concession agreement with the investor. In a counterclaim, Argentina said that the failure of the investor “did not only affect mere contractual provisions, but basic human rights, as well as the health and the environment of thousands of persons, most of which lived in extreme poverty”. The Tribunal however found that no human rights obligation to provide access to water existed on part of the investor when they entered into the concession agreement, and no direct obligation could be placed on it through international human rights law.

In one instance, the investor even sought to claim damages from the host country for its failure to uphold its environmental obligations. For instance, in *Allard v. Barbados*<sup>23</sup>, the investor claimed that Barbados’ alleged failure to abide by local and international environmental obligations, as well as allegedly arbitrary changes made to prior land zoning decisions had ‘destroyed the value’ of their investment, an eco-tourism project located on natural wetlands on the south shore of Barbados<sup>24</sup>.

In the international investment regime, measures adopted to protect the environment or realize human rights are deemed as exceptions to ‘investor protection’, rather than as a matter within the regulatory power of the host State. While references to sustainable development and protection of the environment are often found in preambles of IIAs, they are absent in the substantive and legally binding provisions.

Public participation in these disputes has also been minimal or even non-existent in the vast majority of cases. The fact that most of these arbitration proceedings usually take place in Washington D.C. or The Hague makes it quite expensive and difficult for local communities to make their voice heard<sup>25</sup>, even if they were made aware of the ISDS claim in the first place.

In response to these limitations and gaps, there have been increasing efforts to have investment treaties that are better aligned with environmental protection, sustainable development and international human rights<sup>26</sup>.

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<sup>22</sup> *Urbaser S.A. and Consorcio de Aguas Bilbao Biskaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic* (ICSID Case No. ARB/07/26)

<sup>23</sup> *Peter A. Allard v. The Government of Barbados* (PCA Case No. 2012-06)

<sup>24</sup> Luke Eric Peterson, *Barbados prevails in investment treaty arbitration brought by investor in ecological sanctuary*, *IAReporter*, 27 September 2016. <https://www.iareporter.com/articles/barbados-prevails-in-investment-treaty-arbitration-brought-by-investor-in-ecological-sanctuary/>

<sup>25</sup> Danish, *Could COVID-19 trigger ‘localizing’ of international investment arbitration?*, *Investment Policy Brief 21*, April 2021, <https://www.southcentre.int/investment-policy-brief-21-april-2021/>

<sup>26</sup> South Centre, *Report on Human Rights-Compatible International Investment Agreements*, August 2021. <https://www.southcentre.int/south-centre-report-august-2021/>

Developing countries have been at the forefront of the review of the IIAs, having prompted a wave of reforms<sup>27</sup> that aim to build up a more equitable international investment framework. For instance, at the bilateral level, developing countries have engaged in different reform processes for ISDS, such as allowing only state-to-state arbitration, requiring the express consent of the host State, and adding explicit carve-outs in sensitive areas in which the host state might want to maintain a certain level of control for development purposes<sup>28</sup>, such as climate change, environmental protection, taxation etc.<sup>29</sup> Alternatives models for IIAs, such as the Brazilian Cooperation and Facilitation Investment Agreement (CFIA) which excludes ISDS, have also been emphasised in this context<sup>30</sup>.

Going forward, the inclusion of legally binding obligations for foreign investors and the possibility of counterclaims should also be considered when States engage in the review and modernization of their IIAs<sup>31</sup>. Corporate responsibility has become a critical component of good corporate governance and ethical business conduct in recent years, particularly regarding the respect of human rights and protection of the environment<sup>32</sup>. The need to develop tools and mechanisms for promoting the implementation of international standards related to good corporate conduct<sup>33</sup> has now developed into a solid ‘business case’ for firms and investors to benefit from the opportunities and incentives they stand to gain as model corporate actors<sup>34</sup>.

While UNCITRAL Working Group III is currently undertaking a process to reform ISDS, it has limited itself to only consider ‘procedural aspects’, while many of the critiques of ISDS stem from the substantive content of investment treaties<sup>35</sup>. Given the intertwined

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<sup>27</sup> For example South Africa, India, Indonesia etc.

<sup>28</sup> Omar Chedda, Jamaica’s Perspective on Reform of the Global Investment Regime, SouthViews No. 232, 10 December 2021. <https://www.southcentre.int/southviews-no-232-10-december-2021/>

<sup>29</sup> Daniel Uribe and Manuel F. Montes, Building a Mirage: The Effectiveness of Tax Carve-out Provisions in International Investment Agreements, South Centre Investment Policy Brief 14, March 2019. <https://www.southcentre.int/investment-policy-brief-14-march-2019/>

<sup>30</sup> Felipe Hees, Pedro Mendonça Cavalcante and Pedro Paranhos, The Cooperation and Facilitation Investment Agreement (CFIA) in the context of the discussions on the reform of the ISDS system, South Centre Investment Policy Brief 11, May 2018. <https://www.southcentre.int/investment-policy-brief-11-may-2018/>

<sup>31</sup> Barnali Choudhury, Carving Out a Role for Human Rights in International Investment Law, SouthViews No. 228, 15 October 2021. <https://www.southcentre.int/southviews-no-228-15-october-2021/>

<sup>32</sup> International Corporate Governance Network, “Human rights through a corporate governance lens”, April 2015. Available from <https://www.icgn.org/policy/viewpoints/human-rights>

<sup>33</sup> <https://www.ohchr.org/en/issues/business/pages/internationalstandards.aspx>

<sup>34</sup> Dr. Başak Bağlayan, Ingrid Landau, Marisa McVey and Kebene Wodajo, “Good Business: The Economic Case for Protecting Human Rights”, (BHR Young Researcher Summits, Frank Bold and International Corporate Accountability Roundtable, December 2018). [https://icar.ngo/wp-content/uploads/2020/01/GoodBusinessReport\\_Dec18-2018.pdf](https://icar.ngo/wp-content/uploads/2020/01/GoodBusinessReport_Dec18-2018.pdf)

<sup>35</sup> Lorenzo Cotula and Terrence Neal, UNCITRAL Working Group III: Can Reforming Procedures Rebalance Investor Rights and Obligations? South Centre Investment Policy Brief 15, March 2019 <https://www.southcentre.int/investment-policy-brief-15-march-2019/>

nature of the issues affecting the whole system, procedural reform options should not be considered in isolation from other systemic issues of ISDS, ranging from how substantive provisions are interpreted and how damages are assessed, as well as how the right of States to regulate for fulfilling their legitimate public policy can be preserved<sup>36</sup>.

There are considerable efforts being undertaken by States to ensure that their obligations under existing investment agreements do not undermine or conflict with other international obligations, particularly on human rights<sup>37</sup>. The role for human rights in international investment law should not be underestimated, and States must ensure that sustainable development and protection of human rights continue to be their highest priorities<sup>38</sup>. Experiences from several developing countries show a particular interest in the development of IIAs which include provisions on sustainable development, corporate social responsibility and investor obligations. For example, the recently adopted Protocol on Investment to the African Continental Free Trade Area (AfCFTA)<sup>39</sup> is highly innovative in this regard and includes specific chapters devoted to sustainable development and investor obligations. The Protocol provides a strong and progressive template for modern investment agreements to follow<sup>40</sup>, as it provides a balanced approach to fostering responsible investment and preserving the regulatory space of developing countries<sup>41</sup>.

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<sup>36</sup> Daniel Uribe and Danish, UNCITRAL Working Group III: Moving forward towards consensus or losing balance? South Centre Investment Policy Brief 23, July 2021

<https://www.southcentre.int/investment-policy-brief-23-july-2021/>

<sup>37</sup> See: South Centre Report on Human Rights-Compatible International Investment Agreements, August 2021. Available from <https://www.southcentre.int/south-centre-report-august-2021/#more-16869>

<sup>38</sup> Barnali Choudhury, Carving Out a Role for Human Rights in International Investment Law, SouthViews No. 228, 15 October 2021. Available from <https://www.southcentre.int/southviews-no-228-15-october-2021/#more-17419>

<sup>39</sup> AfCFTA protocol on investment (final draft, Jan 2023), Bilaterals.org. <https://www.bilaterals.org/?afcfta-protocol-on-investment-48215>

<sup>40</sup> Danish, Hamed El-Kady, Makane Moïse Mbengue, Suzy H. Nikiéma & Daniel Uribe, The Protocol on Investment to the Agreement Establishing the African Continental Free Trade Area: What's in it and what's next for the Continent?, IISD, 31 May 2023, <https://www.iisd.org/itn/en/2023/05/31/the-protocol-on-investment-to-the-agreement-establishing-the-african-continental-free-trade-area-whats-in-it-and-whats-next-for-the-continent/>

<sup>41</sup> Roslyn Ng'eno, Preserving Regulatory Space for Sustainable Development in Africa, SouthViews No. 246, 5 April 2023. <https://www.southcentre.int/southviews-no-246-5-april-2023/>