

INVESTMENT POLICY BRIEF

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Advancing Responsible Foreign Investment through a Legally Binding Instrument on Transnational Corporations and Other Business Enterprises*

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ABSTRACT

Foreign Direct Investment (FDI) presents a complex dynamic, offering potential economic growth while posing significant risks of human rights abuses and environmental degradation. This policy brief considers that current voluntary frameworks, such as Economic, Social, and Governance (ESG) and voluntary due diligence standards, are insufficient to protect human rights, as they primarily focus on mitigating investor financial risk rather than preventing actual harm. Furthermore, the international investment regime, particularly the Investor-State Dispute Settlement (ISDS) mechanism, systemically undermines States' sovereign right to regulate in the public interest. ISDS cases often penalise governments for enacting environmental, labour, and human rights protections, creating a "regulatory chill" that prioritises corporate profits over social welfare. The proposed Legally Binding Instrument (LBI) on business and human rights is presented as a necessary response to establish mandatory, enforceable obligations for corporations. This includes robust Human Rights Due Diligence (HRDD) and legal liability mechanisms, thereby rebalancing the system to ensure corporate accountability and align investment with sustainable development goals.

KEYWORDS: Foreign Direct Investment (FDI), Responsible Foreign Investment, Legally Binding Instrument (LBI), Transnational Corporations (TNCs), Other Business Enterprises (OBes), Economic, Social and Governance (ESG) Frameworks, Investor-State Dispute Settlement (ISDS) Mechanism, Human Rights Due Diligence (HRDD), Human Rights, Environmental Protection, Labour Rights, Regulatory Chill, International Investment Agreements (IIAs), Corporate Accountability

Les Investissements Directs Étrangers (IDE) présentent une dynamique complexe, offrant un potentiel de croissance économique tout en comportant des risques importants d'atteintes aux droits humains et de dégradation de l'environnement. Ce rapport sur les politiques considère que les cadres volontaires actuels, tels que les normes Environnementales, Sociales et de Gouvernance (ESG) et les standards volontaires de diligence raisonnable, sont insuffisants pour protéger les droits humains, car ils visent principalement à atténuer les risques financiers pour les

KEY MESSAGES

- "While Economic, Social and Governance (ESG) frameworks are increasingly used to assess corporate social responsibility, they have proven insufficient to protect human rights."
- "Investor-State Dispute Settlement (ISDS) has been used as a mechanism for penalising governments for enacting or reforming laws that prioritise human rights and social welfare above the profits of foreign corporations."
- "By codifying human rights obligations and legal liability provisions for foreign investors and transnational corporations (TNCs) and other business enterprises (OBes) into international law, the Legally Binding Instrument (LBI) would empower States to enforce higher standards and defend their public interest regulations, creating a level playing field for responsible businesses..."

* This policy brief is the product of a collaboration with the Global Campaign to Reclaim Peoples Sovereignty, Dismantle Corporate Power and Stop Impunity, which advocates for the establishment of the United Nations' legally binding treaty on transnational corporations and human rights.

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investisseurs plutôt qu'à prévenir les préjudices réels. En outre, le régime international d'investissement, en le mécanisme de Règlement des Différends entre Investisseurs et États (RDIE / ISDS), porte systématiquement atteinte au droit souverain des États de réglementer dans l'intérêt public. Les affaires RDIE pénalisent souvent les gouvernements qui adoptent des mesures de protection de l'environnement, du travail et des droits humains, créant ainsi un « refroidissement réglementaire » qui privilégie les profits des entreprises au détriment du bien-être social. L'Instrument Juridiquement Contraignant (LBI) sur les entreprises et les droits humains est présenté comme une réponse nécessaire pour établir des obligations contraignantes et exécutoires pour les entreprises. Il comprend des mécanismes solides de Diligence Raisonnable en matière de Droits Humains (HRDD) et de responsabilité juridique, rééquilibrant ainsi le système afin de garantir la responsabilité des entreprises et d'aligner les investissements sur les objectifs de développement durable.

MOTS-CLÉS: Les Investissements Directs Étrangers (IDE), L'investissement étranger responsable, L'Instrument Juridiquement Contraignant (LBI), Les sociétés transnationales, Les autres entreprises commerciales, Les cadres Économiques, Sociaux et de Gouvernance (ESG), Le mécanisme de Règlement des Différends entre Investisseurs et États (RDIE), La Diligence Raisonnable en matière de Droits Humains (HRDD), Les droits humains, La protection de l'environnement, Les droits du travail, Le refroidissement réglementaire, Les accords internationaux d'investissement, La responsabilité des entreprises

La inversión extranjera directa (IED) presenta una dinámica compleja, ya que ofrece un potencial de crecimiento económico, pero al mismo tiempo plantea riesgos significativos de vulneraciones de derechos humanos y degradación ambiental. En este informe sobre políticas se considera que los marcos voluntarios actuales, tales como los de Medioambiental, Social y de Gobernanza (ESG) y los estándares voluntarios de debida diligencia, son insuficientes para proteger los derechos humanos, ya que se centran principalmente en mitigar el riesgo financiero de los inversores en lugar de prevenir daños reales. Además, el régimen internacional de inversiones, en particular el mecanismo de Solución de Controversias Inversionista-Estado (ISDS, por sus siglas en inglés), socava sistemáticamente el derecho soberano de los Estados a regular en interés público. Los casos de ISDS suelen penalizar a los gobiernos por promulgar medidas de protección ambiental, laboral y de derechos humanos, lo que crea un efecto inhibitorio regulatorio que prioriza los beneficios corporativos sobre el bienestar social. El Instrumento Jurídicamente Vinculante (LBI, por sus siglas en inglés) sobre empresas y derechos humanos se presenta como una respuesta necesaria para establecer obligaciones corporativas vinculantes y exigibles, incluyendo una Debida Diligencia en Derechos Humanos (HRDD) sólida y mecanismos de responsabilidad jurídica, con el fin de re-equilibrar el sistema, garantizar la rendición de cuentas empresarial y alinear la inversión con los objetivos de desarrollo sostenible.

PALABRAS CLAVES: La inversión extranjera directa (IED), La inversión extranjera responsable, El Instrumento Jurídicamente Vinculante (LBI), Las empresas transnacionales, Las otras empresas comerciales, Los marcos de Medioambiental, Social y de Gobernanza (ESG), El mecanismo de Solución de Controversias Inversionista-Estado (ISDS), La Debida Diligencia en Derechos Humanos (HRDD), Los derechos humanos, La protección del medio ambiente, Los derechos laborales, El inhibidor regulatorio, Los acuerdos internacionales de inversión, La rendición de cuentas empresarial

Introduction

Foreign Direct Investment (FDI) is usually defined as a cross-border investment made by a resident investor in one economy to obtain a lasting interest in an enterprise resident in another economy.¹ The objective of FDI is twofold: first, the investor receives benefits that often include greater market access, facilitating the reach of new customers and expanded sales, and access to valuable resources to bolster a firm's competitiveness, and second, for the host State, FDI could be a driver of productivity, inclusive economic growth, and job creation.

There is a growing recognition of the need to achieve a balanced approach between the protections provided to investors and the real benefits for the State and local communities. One of the efforts towards accomplishing this balance is strengthening foreign investors' corporate accountability to respect human rights, prevent and be responsible for human rights violations and abuses in their operations and business relationships, which is fundamental for States to fulfil their own obligations under international human rights law.

Although businesses are becoming aware of their responsibilities with respect to human rights, the draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (LBI) discussed in the Human Rights Council aims at establishing a comprehensive international framework for corporate accountability, as well as clarifying and enforcing the duties of States to protect against human rights abuses by businesses, particularly those operating transnationally. The draft instrument also recognises the responsibility of businesses to prevent human rights violations and ensure victims have access to effective remedies and justice, which involves addressing jurisdictional challenges and strengthening international legal cooperation. Such an obligation cannot be transferred to consumers willing to pay a premium for products from companies with 'solid' reputations.²

The role of the State as guarantor of human rights becomes even more critical considering the potential social risks that FDI may pose, which include environmental degradation and resource depletion, labour exploitation, cultural erosion and conflicts with local communities.³ Such costs are often unfairly borne by the host State or the impacted communities themselves, and in extreme cases, they can outweigh the economic benefits that FDI can bring to host countries and hinder long-term sustainable development.

1 Organisation for Economic Co-operation and Development (OECD), Foreign Direct Investment (FDI), Statistics (2024). Available from https://www.oecd-ilibrary.org/finance-and-investment/foreign-direct-investment-fdi/indicator-group/english_9a523b18-en (accessed on 02.09.2024).

2 Daniel Uribe and Danish, "Designing an International Legally Binding Instrument on Business and Human Rights" (Geneva, South Centre, 2020). Available from <https://www.southcentre.int/wp-content/uploads/2020/07/Designing-an-International-Legally-Binding-Instrument-on-Business-and-Human-Rights.pdf> (accessed on 02.09.2024).

3 Yannick T. Wiessner and others, "Towards a More Comprehensive Assessment of FDI's Societal Impact", *Journal of International Business Studies*, Vol. 55 (2024), p. 50.

The 2030 Agenda for Sustainable Development and the Sustainable Development Goals (SDGs) recognise that responsible investment practices should harmonise economic growth with human rights and environmental guarantees.⁴ Therefore, it becomes essential to identify such responsible investment practices, corporate obligations and minimum standards to follow when considering the intricate relationship between FDI and the respect for human rights. Those obligations should be enforced throughout all business operations of transnational corporations (TNCs) and other business enterprises (OBEs), ensuring that FDI aligns with human rights principles and regulations and contributes positively to sustainable development.⁵

The relationship between FDI and human rights is complex; it entails a dynamic interplay between economic benefits and the protection of human rights. While FDI can be a driver of economic growth, job creation, and access to resources, ensuring these gains must be balanced against the imperative of protecting human rights.

FDI has the potential to generate significant economic benefits; however, it can also lead to negative impacts on human rights and the environment, especially in areas where regulatory and corporate accountability frameworks present weaknesses or gaps. In most cases, the costs of human rights violations and environmental harm are unfairly borne by the most vulnerable populations, which undermines the sustainable development goals that the investment should support.

This paper focuses on Foreign Direct Investment (FDI) and its linkages with sustainable development and human rights. Given that TNCs and OBEs engage in various operations such as subcontracting and complex supply chains, the paper mainly discusses FDI as it serves as a key driver for TNCs' activity through subsidiaries, joint ventures, mergers and acquisitions, among others. In addition, FDI is regulated by a unique international legal framework, which includes international investment agreements and their Investor-State Dispute Settlement (ISDS) mechanisms, directly influencing government regulatory authority and corporate accountability.

The paper begins by pointing out the limitations of voluntary standards like Economic, Social and Governance (ESG) frameworks in safeguarding human rights, stressing the importance of enforceable, legally binding mechanisms for prevention and accountability. It then discusses how the draft LBI could serve as a framework to fill these gaps, particularly through its provisions on the prevention of human rights violations and legal accountability. The document also examines the systemic issues in the current international investment regime, focusing on how ISDS cases hamper governments' ability to defend labour rights, environmental protection, climate change action and other public interest objectives. Finally, this policy brief considers that the LBI is necessary to clearly establish corporate responsibilities and fundamentally reform the investment regime, establishing human rights back at the forefront.

4 United Nations, General Assembly, Transforming our World: The 2030 Agenda for Sustainable Development, UN Doc A/RES/70/1 (25 Sept. 2015).

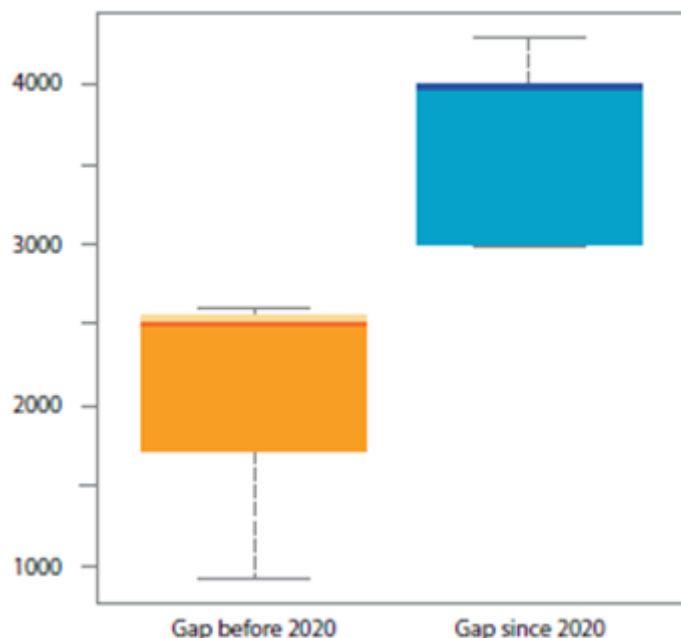
5 Daniel Uribe and Danish (2020).

The Imperative of Preventing Human Rights Violations and Establishing Legal Liability Mechanisms Applicable to Foreign Direct Investment

As mentioned above, the 2030 Agenda has catalysed a discursive shift towards responsible investment, in the context of a blueprint that addresses multiple global challenges, including poverty, inequality, climate change and environmental degradation. Corporations increasingly seek to align their strategies with the SDGs, recognising that their success is linked to achieving these global goals.⁶ In this sense, the SDGs should serve as an indicator and a practical framework for investors to embed sustainability into their operations.

Given that it has been estimated that investment gaps in financing SDGs range between \$2.5 trillion and \$4 trillion annually (see Figure 1),⁷ FDI has been considered as one important means for closing this gap. Nonetheless, the contribution of investment to global growth has declined in recent years, and FDI flows to developing countries have fallen sharply, while financial flows from developing countries to developed countries continue to rise sharply, fuelled by foreign debt and historically unfair terms of trade.⁸ These trends pose severe risks to achieving the SDGs, especially given that Official Development Assistance (ODA) continues to fall short of the escalating needs of developing countries.⁹

Figure 1.- Range of Estimates of Annual SDG Financing Gaps in Developing Countries (Billions of United States Dollars)



Source: Department of Economic and Social Affairs (2024)

6 See: Principles for Responsible Investment (PRI), Strategy Plan 2024-2027 in <https://www.unpri.org/download?ac=21567> (accessed 02.09.2024).

7 See: United Nations Department of Economic and Social Affairs (UNDESA), Financing for Sustainable Development Report 2024: Financing for Development at a Crossroads, Report of the Inter-Agency Task Force on Financing for Development (accessed 02.09.2024).

8 See: United Nations Trade and Development (UNCTAD), World Investment Report 2024: Investment Facilitation and Digital Government.

9 UNDESA (2024), p. 99.

In the face of these challenges, understanding the complexity of FDI and its socio-economic and human rights impact requires a multi-faceted approach. To exploit the potential of FDI for driving sustainable development, it is crucial to strengthen regulatory frameworks to align FDI with development priorities, protect the communities impacted by investment, and mitigate the risk of human rights violations in the conduct of business operations.

While ESG frameworks are increasingly used to assess corporate social responsibility, they have proven insufficient to protect human rights. ESG focuses on investor interests and how to mitigate their financial risks through practical measures that prevent human rights violations. The fact that ESG reporting does not sufficiently address these risks leaves vulnerable communities, especially in developing countries, exposed to human rights violations. Due to the lack of regulation for ESG rating firms and potential conflicts of interest, concerns have been raised about the effectiveness of addressing human rights violations.¹⁰

States must actively regulate ESG rating firms to address these shortcomings. This includes establishing mechanisms for the prevention of violations (including but not limited to due diligence), and for compliance with human rights obligations by TNCS and OBEs, as well as legal liability mechanisms in case of non-compliance, thereby embedding international human rights standards into ESG frameworks, reducing conflicts of interest within rating agencies, and increasing transparency in their methodologies.

Although compliance with ESG frameworks with international human rights standards is growing, it would be necessary to move beyond investor-focused rating systems toward establishing direct, binding legal obligations on corporations. In this regard, a potentially more effective means to ensure that businesses effectively prevent and take responsibility for their human rights impacts is contemplated in Articles 6 and 8 of the draft LBI, which are central to ensuring businesses effectively prevent and take responsibility for their human rights impacts. Although the concept of human rights due diligence (HRDD) is still under discussion in the draft LBI, it clearly involves the obligation of companies to identify, prevent, mitigate, and account for potential human rights violations during their operations. Most proposals from different States agree that such an obligation involves key elements: (a) identifying and assessing impacts, (b) taking measures to prevent and mitigate such human rights violations, (c) monitoring the effectiveness of these measures, and (d) communicating actions to stakeholders and significantly affected persons.¹¹

The HRDD approach in Articles 1.8 and 6 addresses some of

10 Danish and Daniel Uribe, "Leveraging ESG for promoting Responsible Investment and Human Rights", Policy Brief, No. 126 (Geneva, South Centre, 2024).

Available from <https://www.southcentre.int/policy-brief-126-23-february-2024/>.

11 See: Open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, Updated draft legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises (10th Session, October 2024), art 1.8 at <https://www.ohchr.org/sites/default/files/documents/hrbodies/hrcouncil/igwg-transcorp/session10/igwg-10th-updated-draft-lbi-with-proposals.pdf> (accessed 3 April 2025).

the weaknesses identified in current ESG practices regarding human rights. The core elements outlined in the duties of prevention established in Article 6 significantly exceed addressing financial risks often associated with ESG ratings. In particular, the proposed HRDD requirements recognise that HRDD implies identifying, preventing, and mitigating adverse impacts on people's human rights. The draft LBI mandates a proactive and ongoing engagement with human rights issues embedded within a company's operations and business relationships, aligning with a mandatory component of responsible business conduct.

Focusing on HRDD is central to advancing responsible investment, a concept gaining urgency in response to the negative impacts of some FDI on climate change and social stability. The proposed LBI would solidify this approach by providing a clear legal framework for States to protect human rights, imposing direct obligations on corporations to prevent, monitor, and be held accountable for human rights violations.

While HRDD is a key element in the prevention framework proposed in the draft LBI, it should not be the only standard for prevention, as other prevention mechanisms crystallised in international law, such as access to information, precautionary measures and free, prior and informed consent, are crucial to halt violations. Moreover, if HRDD is not contextualised correctly, HRDD can become a bureaucratic, "box-ticking" exercise that shields corporations from liability rather than genuinely preventing harm. Considering that conducting the HRDD process is the *only* obligation of corporations is a critical error. A corporation's primary, substantive duty is to respect human rights and not cause harm; therefore, HRDD should be considered a legally mandated procedure to effectively achieve that outcome. If this difference is ignored, a company might produce extensive reports to show compliance, even as its primary business still exploits labour and interacts with communities in a manner that violates human rights.

Therefore, the LBI must establish a framework for mandatory, legally enforceable HRDD, moving beyond the ESG and the voluntary, risk-management approach of the United Nations (UN) Guiding Principles. Under that robust model, failing to conduct adequate due diligence would itself constitute a legal breach, warranting State-imposed sanctions. However, HRDD performance alone should not exempt a company from liability if harm occurs. Instead, a well-structured HRDD framework should provide a foundation for legal accountability, such as showing that a company knew or should have known about a risk it failed to address. Therefore, the prevention provisions in the LBI should be defined as mandatory, enforceable duties with explicit standards, rather than merely processes subject to corporate discretion.

The Impact of ISDS on Labour and Human Rights Standards

The adoption of the LBI can empower States to enforce high standards for corporate prevention, accountability, and remedy. Ultimately, creating a stable and predictable legal environment that prioritises human rights and environmental protection ser-

ves as a mechanism for attracting high-quality and responsible investment.

The relationship between FDI and labour conditions in developing countries is complex and often contradictory. In general terms, the pursuit of lower production costs has served as a key driver for FDI in specific sectors, frequently leading to the erosion or violation of fundamental labour rights.¹²

Although FDI is often linked to increased work opportunities in the host State, abuses are also commonly associated with FDI, particularly in labour-intensive industries such as the garment sector, construction, agriculture, electronics, and in Export Processing Zones (EPZs).¹³ Cases of unsafe working conditions, poverty wages, excessive working hours (sometimes compulsory and unpaid), suppression of freedom of association and the right to collective bargaining, and, in severe cases, the use of child or forced labour, are not unusual.¹⁴

Likewise, the competitive pressure among countries to attract FDI often pushes governments to be reluctant to enforce labour, human rights and other international standards rigorously, fearing that such implementation could deter investors, leading to a potential “race to the bottom.”¹⁵ EPZs are specifically designed to attract export-oriented FDI through incentives like tax breaks and streamlined regulations, and are often hotspots for labour rights concerns.¹⁶ The International Labour Organization (ILO) has consistently raised concerns about working conditions and rights violations in global supply chains and in EPZs heavily influenced by transnational investment.¹⁷

Although certain States have taken a proactive approach to reforming or derogating legislation that provides for the establishment of EPZs, these processes have also been limited by ISDS cases. The case of *Próspera Inc v. Honduras* exemplifies how efforts taken by States to increase the implementation of international standards for the protection and fulfilment of human rights are met with staggering ISDS claims amounting in that case to ten billion dollars, which was equivalent to nearly two-thirds of Honduras’s entire national budget for 2022, making the claim an existential threat to the

12 D. Allison, G. Pavela, and I. Oransky, “Reasonable Versus Unreasonable Doubt”, *American Scientist*, Vol. 106, No. 2 (2018), pp. 84-87. Available from <https://www.americanscientist.org/article/reasonable-versus-unreasonable-doubt> (accessed 2 July 2025).

13 Nicole Janz, “Foreign Direct Investment and Repression: An Analysis Across Industry Sectors”, *Journal of Human Rights* (2017). Available from <https://gpde.direito.ufmg.br/wp-content/uploads/2019/08/janz2017.pdf> (accessed on May 6, 2025).

14 *Ibid.*

15 G. Biglaiser, and H. Lee, “The effects of different entry modes of foreign direct investment on labor rights in the developing world”, *Journal of Human Rights*, Vol. 18, No. 2 (2019), pp. 165-183. Available from <https://www.tandfonline.com/doi/full/10.1080/14754835.2019.1599833> (accessed 2 July 2025).

16 E. Sychenko, “The review of Concluding observations of the Human Rights Committee and CESCR adopted in 2023”, *Revue de droit comparé du travail et de la sécurité sociale*, 4 (2024), pp. 360-364. Available from <https://journals.openedition.org/rdctss/9378> (accessed 2 July 2025).

17 International Labour Organization (ILO), *Handbook of procedures relating to international labour Conventions and Recommendations* (Geneva, 2019). Available from <https://www.ilo.org/publications/handbook-procedures-relating-international-labour-conventions-and-2>.

public finances of the country.¹⁸

This case highlights various structural and systemic obstacles in ISDS proceedings. First, the procedures of the case has identified consistent limitations to the participation of key stakeholders and affected communities, including creating procedural hurdles to accessing key information for the presentation of *amici* briefs, limiting access to public hearings, and providing insufficient preparation time for these briefs.¹⁹ The lack of efficient mechanisms of participation by key actors and affected communities in ISDS proceedings continues to reduce the legitimacy and transparency of the system. It illustrates how critical information and the involvement of affected victims, communities, and civil society organisations are often disregarded by tribunals, consolidating an unbalanced system where investors’ rights take precedence over the rights of those most affected by their conduct. Secondly, the *Próspera* case illustrates how ISDS is systematically utilised to undermine democratic processes and the sovereign right of States to determine their own legal and economic frameworks.²⁰ Finally, the case has also demonstrated how ISDS has been used as a mechanism for penalising governments for enacting or reforming laws that prioritise human rights and social welfare above the profits of foreign corporations.²¹

FDI, particularly when concentrated in resource-extractive sectors and large-scale industrial agriculture or forestry, can also pose environmental risks to developing host countries. According to the United Nations Trade and Development (UNCTAD)’s World Investment Report 2025, these sectors experienced a sharp contraction in new FDI, with the value of announced greenfield projects falling by nearly half to approximately forty billion US dollars.²² However, the sector is the primary source of international investment disputes. Of the 58 new investor-State dispute settlement (ISDS) cases initiated in 2024 (Figure 2), over half were linked to extractive and energy supply activities. These disputes spanned a range of strategic resources, including 13 cases related to fossil fuels and at least five concerning critical minerals such as lithium and copper.²³

18 L. Mehranvar, “Sideline Living Realities of Those Most Affected by Investment Projects and Disputes”, Columbia Center on Sustainable Investment Blog, 23 February 2025. Available from <https://ccsi.columbia.edu/news/sideline-living-realities-those-most-affected-investment-projects-and-disputes> (accessed July 2, 2025).

19 *Ibid.*

20 N. Young, “Honduras fights back against global oligarchy”, *Public Seminar*, 17 March 2025. Available from <https://isds.bilaterals.org/?honduras-fights-back-against&lang=en> (accessed 2 July 2025).

21 See also *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) and *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No ARB/12/12).

22 UNCTAD, *World Investment Report 2025: International Investment in the Digital Economy*. Available from <https://unctad.org/publication/world-investment-report-2025> (accessed 14 July 2025).

23 *Ibid.*

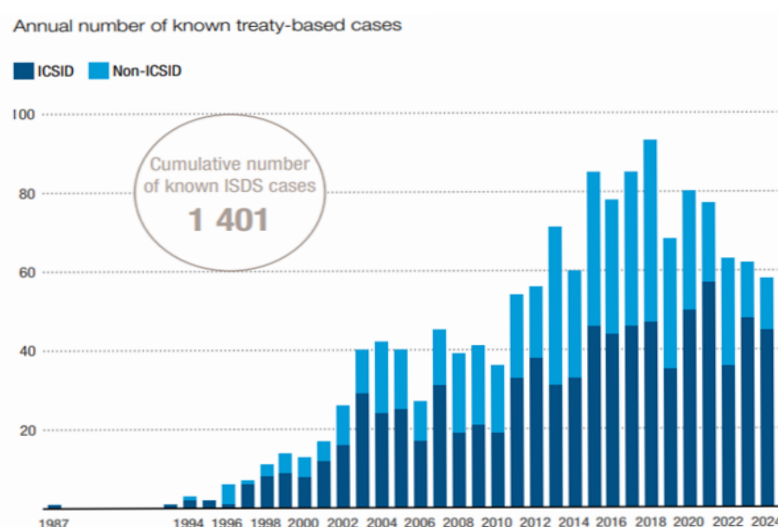
Figure 2.- Number of ISDS Cases in 2024

Source: UNCTAD, World Investment Report 2025

The Impact of Foreign Direct Investment on Human Rights and the Protection of the Environment

As mentioned above, FDI presents both opportunities for economic advancement and significant challenges related to human rights and environmental protection. When TNCs and OBEs invest abroad, as noted, significant social risks are associated with their investment, including potential violations of labour rights, environmental degradation, and resulting social unrest within impacted communities.²⁴ In addition, the majority of international investment agreements (IIAs) include ISDS mechanisms, a system that has been significantly used and has generated considerable controversy. Since 1987, 1401 ISDS cases have been initiated worldwide, averaging 36 claims annually, with nearly half concerning primary and tertiary sectors such as mining, energy, and water supply (Figure 3).²⁵

Developing countries have been disproportionately targeted by ISDS claims, facing 863 of these cases, including 61 resulting in awards exceeding US\$100 million.²⁷ In addition, nearly 46% of all concluded cases have been either decided in favour of the investor or settled (which typically benefits the investor).²⁸ The financial implications of these processes are substantial, as developing States are forced into difficult choices between paying arbitral awards or funding essential services and social investments, such as public health, education, and adequate housing.

Figure 3.- Investor-State Dispute Settlement Cases Surpassed 1300 at the End of 2023

Source: UNCTAD, ISDS Navigator database, April 2025²⁶

²⁴ See: Human Rights and Social Issues: Insights from the 2023 Reporting Cycle at <https://www.unpri.org/investment-tools/human-rights-and-social-issues-in-sights-from-the-2023-reporting-cycle/12552.article> (accessed 3 April 2025).

²⁵ UNCTAD, "Investment Dispute Settlement Navigator". Available from <https://investmentpolicy.unctad.org/investment-dispute-settlement> (accessed 03.04.2025).

²⁶ ICSID cases are those administered by the International Centre for Settlement of Investment Disputes, an institution of the World Bank Group, under the rules of

the ICSID Convention. Non-ICSID cases refer to other investor-state arbitrations conducted outside of the ICSID framework, often administered by other institutions such as the Permanent Court of Arbitration (PCA) or under different procedural rules, most notably the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL).

²⁷ UNCTAD, "Investment Dispute Settlement Navigator".

²⁸ UNCTAD, *World Investment Report 2025*.

States have taken proactive measures to align domestic law with international standards for environmental protection and human rights, but the ISDS system also limits these efforts. The case of *Eco Oro Minerals Corp. v. Republic of Colombia*²⁹ exemplifies how a State's duty to safeguard a critical ecosystem and the human right to water is met with costly ISDS proceedings that can generate a "chilling effect" on future regulation. Although Colombia was ultimately found liable for breaching the investment treaty simply due to the process of enacting a mining ban deemed, however, legitimate, this set a worrying legal precedent and confirmed that the ISDS framework poses a substantial threat to a country's public finances and regulatory autonomy.

The case of *Eco Oro* highlights various structural and systemic obstacles in ISDS proceedings. It showcases how the ISDS system imposes consistent limitations on the participation of key stakeholders and affected communities. In the *Eco Oro* arbitration, the tribunal explicitly rejected an *amicus curiae* brief from a coalition representing 75,000 local people, stating that issues of human rights, and particularly the right to live in a healthy environment, were out of the scope of the dispute.³⁰ As mentioned above, the rejection of *amici curiae* not only leaves out critical information of victims, but also consolidates an unbalanced system where foreign investors' rights take precedence over the rights of those most affected by their conduct.

Secondly, the *Eco Oro* case also illustrates how ISDS can be systematically used to undermine democratic processes and the sovereign right of States to determine their own legal and economic frameworks. The tribunal's contradictory ruling, recognising that Colombia's mining ban was simultaneously a legitimate exercise of its regulatory power and a breach of the treaty, demonstrates how the vague standards of investment law can be wielded to second-guess and penalise domestic policymaking. This creates a potent "regulatory chill" that can force governments to reverse democratically enacted laws, including, for example, in *Ethyl v. Canada*,³¹ where the threat of an ISDS claim led Canada to repeal its ban on a toxic gasoline additive.

Finally, the case has also demonstrated how ISDS has been used as a mechanism for punishing governments for enacting or reforming laws that prioritise climate action, environmental integrity and social welfare above the profits of foreign corporations. Even when a State's regulation is deemed legitimate, as in *Eco Oro*, the risk of being found liable remains. This practice of punishing States for pursuing the public good is widespread, as evidenced by landmark cases where foreign investors have sought massive compensation for climate policies. These include claims against States for phasing out fossil fuels or nuclear

29 *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41. See especially the *Decision on Jurisdiction, Liability and Directions on Quantum*, 9 September 2021; and the final *Award*, 15 July 2024.

30 N. Ridi, "What are amicus interventions for? Some provocations on non-disputing party submissions in international investment arbitration", *Questions of International Law* (31 July 2023). Available from <https://www.qil-gdi.org/what-are-amicus-interventions-for-some-provocations-on-non-disputing-party-submissions-in-international-investment-arbitration/> (accessed 14 July 2025).

31 Kathleen Cooper, Kyra Bell-Pasht, Ramani Nadarajah, and Theresa McClenaghan, "Seeking a Regulatory Chill in Canada: The Dow Agrosiences NAFTA Chapter 11 Challenge to the Quebec Pesticides Management Code", *Golden Gate University Environmental Law Journal*, Vol. 7, No. 1 (2014), p. 5. Available from <http://digitalcommons.law.ggu.edu/gguelj/vol7/iss1/4>.

power, such as in *Vattenfall AB v. Federal Republic of Germany*³² and *Rockhopper v. Italy*,³³ thereby turning essential climate mitigation and public health measures into targets for financial speculation.

Beyond the direct financial strain, the threat of costly ISDS claims creates a 'regulatory chill' that discourages States from adopting or enforcing legitimate public policies concerning public health, environmental protection, and other areas crucial for sustainable development and human rights protection, included with regards to limitation on tobacco control measures and decisions regarding the operation of coal plants.³⁴ Moreover, ISDS allows foreign investors to circumvent domestic judicial systems, limiting the State's capacity to have its measures reviewed and potentially refined by domestic tribunals rather than international *ad-hoc* bodies.

The unprecedented privileges it endows to foreign investors and the significant financial burdens, the chilling effect on regulatory space, and the circumvention of domestic processes limit States' ability to protect human rights, address climate change, and pursue sustainable development, revealing a deep fragmentation between international investment law and these global imperatives. Addressing this imbalance requires a systemic reform, and an international instrument like the proposed LBI, which could play a crucial role in promoting coherence in the IIAs reform and modernisation processes.

As noted, the LBI has the potential to establish clear international standards for corporate conduct and obligations regarding human rights and environmental impacts. It could also reinforce the legitimacy of State regulatory measures aimed at preventing and mitigating harm, rebalancing the investment system, reducing regulatory chill, and ensuring that investment governance supports, rather than undermines, human rights and sustainable development. Such an instrument offers a pathway towards a more coherent international legal framework where investment is effectively balanced with the safeguarding of human rights and the environment.

Final Remarks and Recommendations

The existing tension between the possible benefits of FDI and its human rights, social and environmental risks requires to balance investor protections with the well-being of the host States' populations, by reinforcing the State's primary duty to protect human rights and establishing human rights obligations on foreign investors separate and independent from those of the States. The mechanisms intended to govern FDI, including ISDS, have proven inadequate, often prioritising investor interests over public welfare. The ISDS system, embedded in thousands of investment treaties, has granted foreign corporations the right to submit claims against sovereign States in private international investment arbitration tribunals for enacting policies that might reduce the value of their investments.

32 *Vattenfall AB et al. v. Federal Republic of Germany I*, ICSID Case No. ARB/09/6.

33 *Rockhopper Exploration Plc et al. v. Italian Republic*, ICSID Case No. ARB/17/14, *Award*, 23 August 2022.

34 See for example *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) and *Vattenfall AB and others v. Federal Republic of Germany* (ICSID Case No. ARB/12/12).

Given these systemic failures, a robust international legal framework is required to rebalance the scales. The proposed LBI may offer means for a solution, as it would clarify the duties of corporations to proactively identify, prevent, mitigate, and account for adverse human rights impacts across their operations. This approach is fundamentally different from ESG, as its primary focus is on preventing harm to people. By codifying human rights obligations and legal liability provisions for foreign investors and TNCs and OBEs into international law, the LBI would empower States to enforce higher standards and defend their public interest regulations, creating a level playing field for responsible businesses and fostering a more stable and predictable environment for the high-quality, sustainable investment needed to achieve the 2030 Agenda.

Therefore, countries must proactively and decisively contribute to reform the international investment regime. The LBI would be an important tool for achieving this objective, but it would also be important for States to conduct a thorough review of existing investment treaties, renegotiate or terminate those that contain ISDS clauses, which create power imbalances. It would also be important for countries to consider signing new treaties that clearly exclude ISDS arbitration and other disciplines that limit States' policy space, such as fair and equitable treatment, and indirect expropriation.

Likewise, new and revised investment frameworks should promote sustainable investment and abide by international human rights protection standards. This strategic shift would lower the risk of expensive litigation that limits sovereign policy options and send a strong message that investment protection should not compromise public welfare or environmental sustainability.

In parallel with the reform of the international investment regime, the role of national justice systems must be strengthened as the primary forum for resolving investment disputes. States should ensure their domestic courts are competent to adjudicate these controversies. In doing so, decisions would be based on domestic law and the international human rights standards that the LBI itself would enshrine, ensuring that social and environmental considerations are an integral part of the legal analysis. This approach would not only restore judicial sovereignty but also guarantee greater transparency, legal coherence, and more effective access to justice for affected communities, fully integrating investment protection within the framework of the rule of law.

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