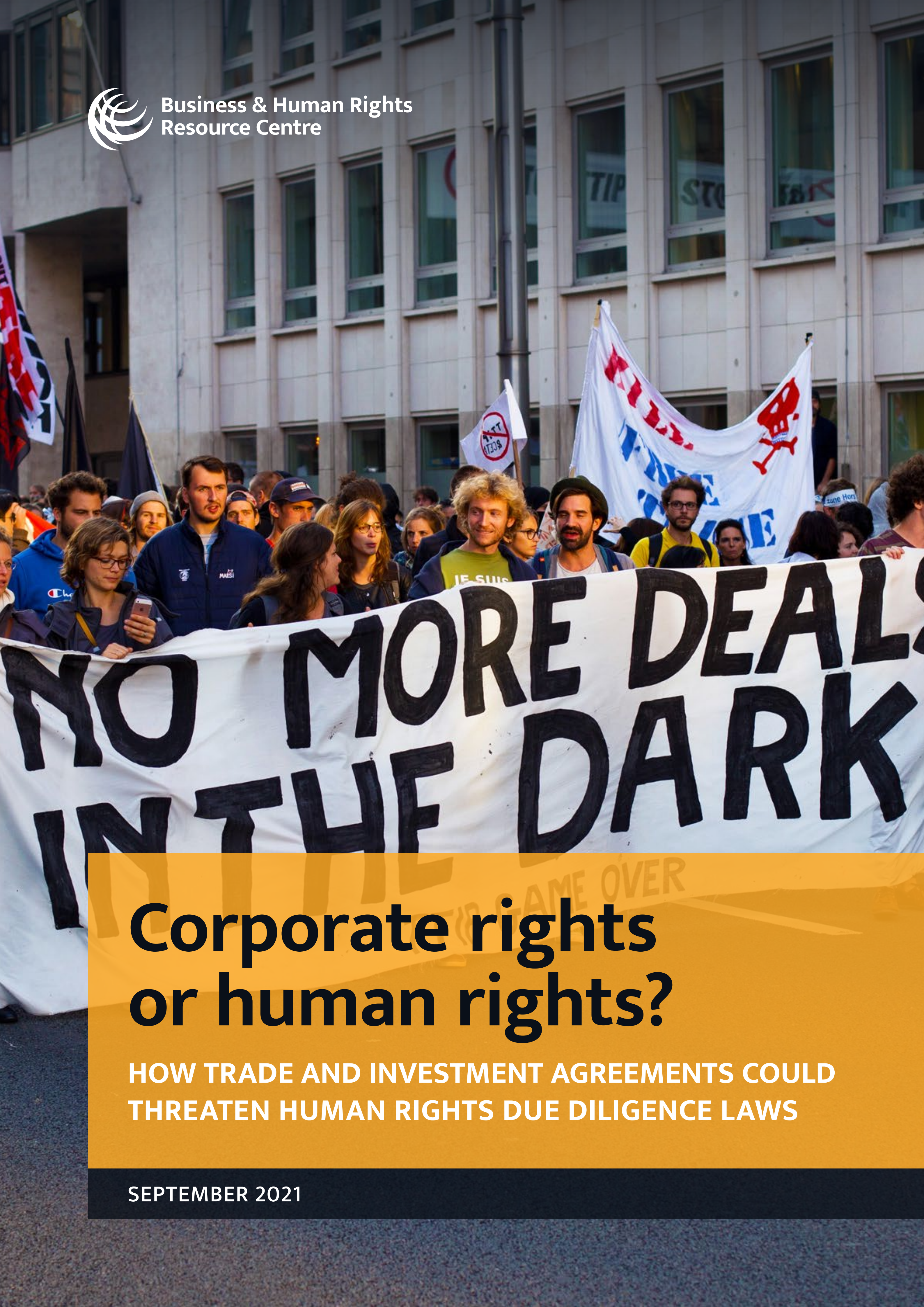


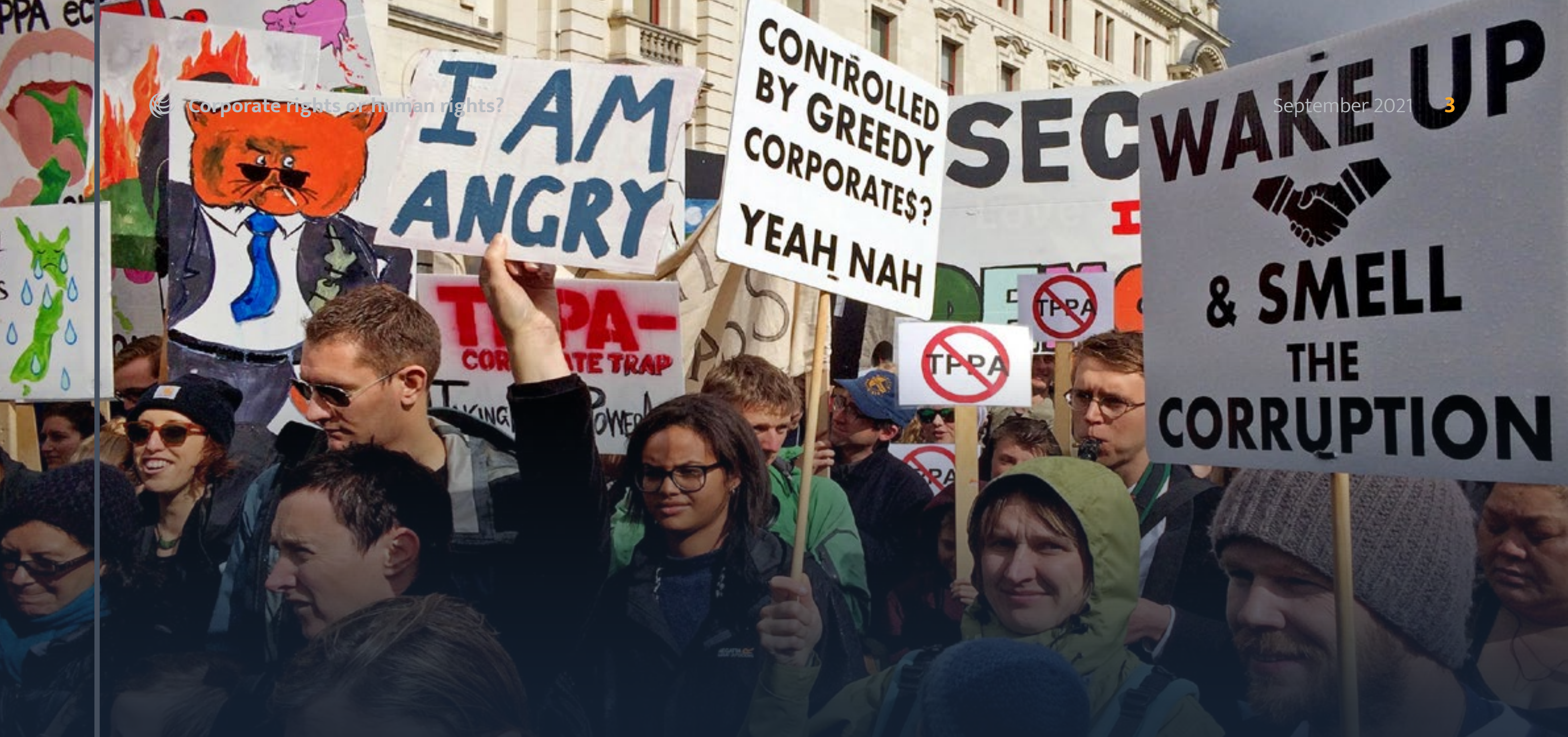
Business & Human Rights Resource Centre

Corporate rights or human rights?

HOW TRADE AND INVESTMENT AGREEMENTS COULD THREATEN HUMAN RIGHTS DUE DILIGENCE LAWS

SEPTEMBER 2021

Contents



Executive summary

Governments are increasingly aware that, to address climate breakdown and unsustainable inequality, new forms of regulation are needed to direct companies and investment towards respect for human rights and environmentally sustainable practices. The pandemic has provided a further major spur to action. Any 'just recovery' agenda must involve addressing the business models that have meant that the lives and livelihoods of the poorest have been disproportionately affected during the pandemic. Yet elements of trade and investment agreements may obstruct government action in this area.

The wave of human rights and environmental due diligence laws currently being explored across Europe aims to prevent abuse and hold corporations liable for their social and environmental impact. The introduction of these laws, in European states and beyond, will signal the end of a long and failed over-reliance on voluntary initiatives to encourage corporate respect for human and environmental rights. While these laws cannot be a panacea, they represent a vital shift away from exploitative business models, and have gained widespread support from governments as well as responsible companies and investors.

However, this urgent agenda risks being undermined by controversial Investor-State Dispute Settlement (ISDS) clauses in trade and investment agreements. These clauses allow corporations to sue states through a secretive parallel legal system if government polices threaten their future profits – even if those policies are aimed at protecting human rights and the environment. Corporations have already used ISDS to sue governments more than a thousand times, including over laws aimed at raising minimum wages, guaranteeing affordable water to citizens and phasing out the use of fossil fuels.

UK energy company Ascent Resources is currently suing the Slovenian state using ISDS simply for requiring it conduct an environmental impact assessment of a planned fracking project. If due diligence laws begin to hold corporations accountable for their social and environmental impact, unscrupulous corporations can be expected to use ISDS to challenge those laws. Corporations could argue, by introducing new regulations, states are violating the terms of their trade and investment agreements in ways that may reduce corporate profits, and demand huge compensation payments. Many governments might delay or cancel legislation to avoid being sued.

If due diligence laws *do* make it onto the statute book, the ISDS system could be used to derail the enforcement of those laws: ISDS cases have previously been used by corporations to, in effect, overturn the rulings of domestic courts by making it prohibitively expensive to implement them. About 60% of ISDS cases are decided in favour of the investor, with an average award of US$125 million.[1] Given ISDS cases are most frequently brought against governments in the Global South, there is an acute risk ISDS could be used to undermine due diligence initiatives in emerging markets.

The ISDS system is incompatible with corporate accountability and the broader agendas of a just recovery from the pandemic, as well as a just transition to a greener economy. States' frustration with ISDS is leading many governments to move against it. Only one third of trade and investment agreements concluded in recent years contain ISDS, while in August 2021 Pakistan became the latest of a number of countries to announce it was terminating its existing treaties containing ISDS.

This briefing seeks to explain why states should combine the introduction of human rights and environmental due diligence legislation with reform of trade and investment agreements, removing ISDS and with it the ability of irresponsible corporations to stymie vital new regulation.

60%

of ISDS cases are decided in favour of the investor

US$125 million

is the average amount awarded to investors in cases won against the state

2,800

trade and investment agreements around the world contain ISDS clauses

4 years

On average, **an ISDS case lasts four years** and costs the government defending the case **US$4.7 million** in legal fees.

Introduction:
why corporate regulation and accountability is central to the just recovery

The COVID-19 pandemic has exposed and entrenched the imbalances of power in the global economy. At the same time, it has demonstrated the inadequacy of existing non-binding tools to hold corporations to account for human rights abuses.

The costs of the pandemic have fallen heavily on workers in international supply chains, who have seen their rights threatened even as the companies they produce for make unprecedented profits. Millions of workers have lost their jobs, suffered wage theft and worked in factories plagued with COVID-19 without adequate protection. Fire-and-rehire tactics are being used around the world by employers viewing the crisis as an opportunity to force workers into worse labour conditions. Attacks on human rights defenders have spiked and new laws curtailing civic freedoms and labour rights have been rushed through in countries such as India, Malaysia and Turkey.

Meanwhile, the climate crisis is of utmost urgency. Each new year breaks records for extreme weather, and action to limit the damage of global heating has been frustratingly inadequate. The role played by corporations – just 20 are behind one third of all modern carbon emissions – is receiving increasing scrutiny.

This situation is giving rise to a politics of change. States are realising that to achieve a just recovery from COVID-19 requires stronger laws to regulate the social and environmental conduct of corporations. These are needed to hold corporations accountable when harms do occur, and to level the playing field for all businesses. If successful, this new politics could drive action on the climate crisis and begin to rebalance the deeply unequal power relationship between corporations on one side and workers and communities on the other.

The mandatory human rights and environmental due diligence model (henceforth 'due diligence') has emerged as a key legislative trend, which would place an obligation on corporations to assess, disclose and take action on the risks they pose to human rights and the environment. This should cover the direct operations of a business as well as its supply chain. To be truly transformative, due diligence laws must hold corporations legally liable if they fail to protect the planet or respect the human rights of workers and communities.

If they carry these strong liability provisions, due diligence laws will challenge exploitative business models, forcing some corporations to alter their commercial practices and address the structural drivers of corporate human rights abuses. They will also provide communities with a means of accessing justice when their rights are abused. However, without liability and enforcement, due diligence risks simply replicating failed transparency laws such as the UK's Modern Slavery Act.[2]

Due diligence laws have already been introduced in some countries, including the French *Devoir de Vigilance* law, the Dutch Child Labour Law, and the German Act on Corporate Due Diligence in Supply Chains. The European Commission is set to bring forward due diligence legislation in 2021 as part of its Sustainable Corporate Governance Initiative, which has substantial support from the business community with 26 companies, business associations and initiatives signing a statement to *"welcome the European Union and its member states' efforts to introduce new mandatory human rights and environmental due diligence legislation, as an integral part of the move to build back a more resilient economy that works for all."*

Many countries yet to introduce due diligence laws, such as the UK, have strong civil society movements calling for their governments to legislate to *"incentivise companies to take action to prevent abuse from happening, and hold companies accountable if they failed to do so."*

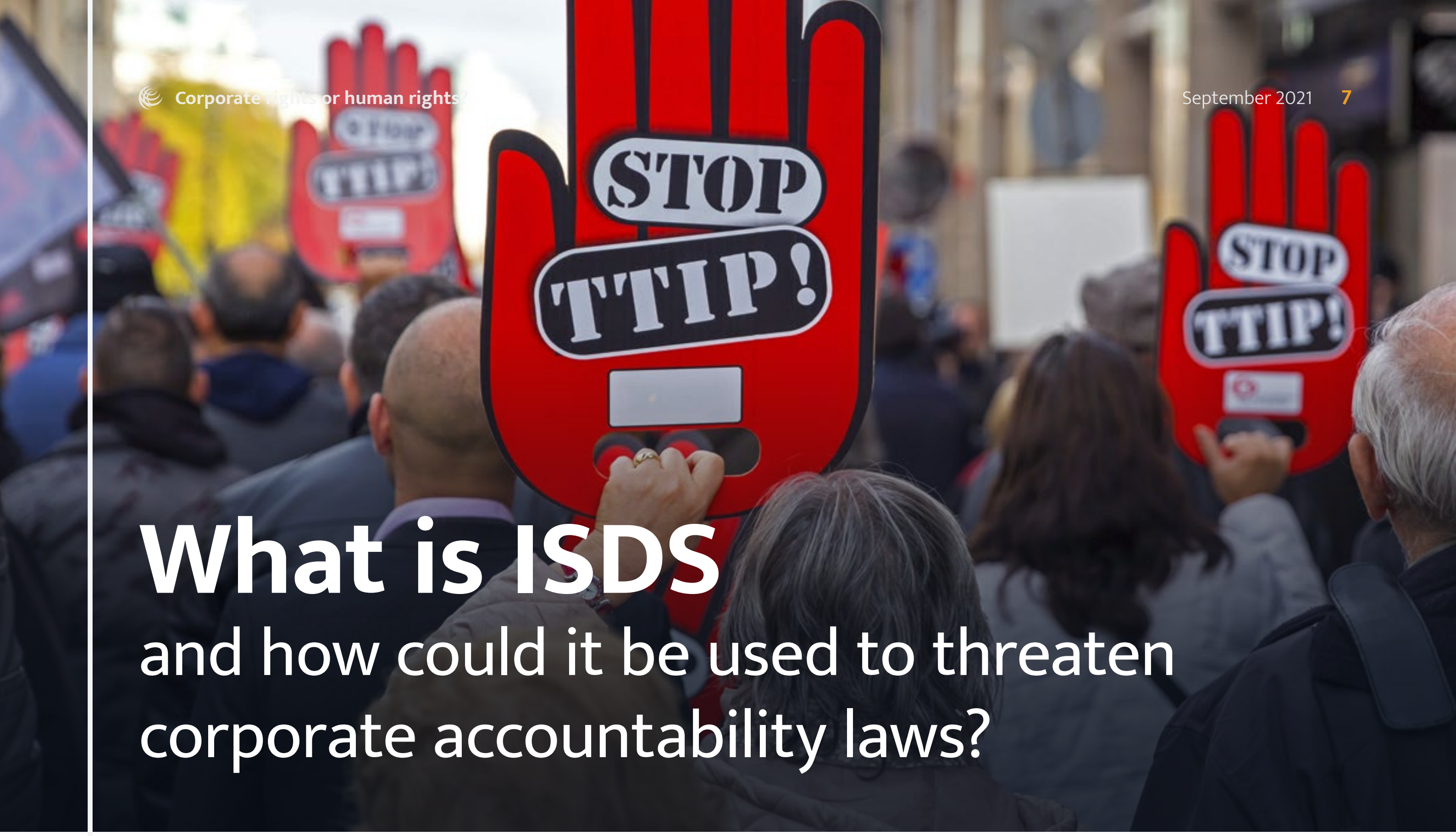
Movements in favour of due diligence are starting to gather force beyond Europe too. Brazil, Colombia and Kenya, in particular, have seen a lively debate around how to regulate irresponsible corporate conduct.[3] The vast majority of alleged corporate abuse of human rights recorded by the Business & Human Rights Resource Centre take place in low and middle-income countries, indicating that the spread of due diligence laws to those countries will be a critical next step in the movement for greater corporate accountability.

Although this report focuses on ISDS and due diligence legislation, popular support for human rights and the environment has led to a range of government actions that will also play a valuable role in a just recovery and should be adopted more widely. For example, the EU's Unfair Trading Practices Directive and the UK's Groceries Code Adjudicator regulate the purchasing practices of powerful buyers in the groceries sector, preventing risk and cost from being passed down to the most vulnerable parts of the supply chain. The EU has specific regulations covering supply chains where human rights are at greater risk, such as conflict minerals and fisheries. Meanwhile, American officials have expanded the use of the US Tariff Act to clamp down on imports of goods linked to forced labour, with positive results for workers.

Due diligence laws, as well as other regulatory measures aimed at increasing corporate accountability, could become unworkable if irresponsible corporations are able to use ISDS clauses in trade and investment agreements to obstruct the introduction and enforcement of new laws. If the just recovery agenda is going to yield meaningful results, states must work together to dismantle the ISDS system.

ISDS poses three distinct impediments to corporate accountability legislation, which will be explored in more detail later in this report.

- **Issue 1:** ISDS as an obstacle to the introduction of new corporate accountability laws
- **Issue 2:** ISDS as a means through which corporations can escape justice
- **Issue 3:** ISDS facilitates irresponsible corporate conduct



What is ISDS

and how could it be used to threaten corporate accountability laws?

The Investor-State Dispute Settlement (ISDS) mechanism exists in more than 2,800 trade and investment agreements around the world.[4]

ISDS was originally conceived as a means through which international investors could claim compensation if their assets were expropriated by a foreign government. However, it has sprawled far beyond its original purpose. The ISDS system is now often used by corporations to challenge – via private tribunals – new regulations which might hit future profits. Corporations demand disproportionately large sums in compensation for projected losses in profits over many years, calculated using contested methods. Tribunals are untransparent, with no appeals mechanism, while trade and investment agreements containing ISDS clauses are usually negotiated behind closed doors with little democratic scrutiny.

The ISDS system is, in essence, a charter of rights for irresponsible or unscrupulous corporations. It can be used to stymie urgent regulatory advances, guaranteeing corporations an unchanging regulatory environment even as governments seek to urgently address inequality and climate breakdown. There is no equivalent level of protection for human rights or the environment, relegating them to second-order concerns in trade and investment agreements. This skewed regulatory system is unfit for the challenges of the 21st century, which demand policy reforms to rebuild post-pandemic and tackle the climate crisis.

Even the original justification for ISDS – that offering these protections to corporations is a vital precondition for states to attract investment – is not supported by conclusive evidence.[5] Brazil is consistently one of the world's most common investment destinations, despite having no treaties containing ISDS. There is even less evidence to suggest ISDS clauses encourage *socially desirable* forms of investment: those which provide decent employment, help tackle inequality and lead to sustainable development.

Trade and investment agreements typically contain many of the provisions below, which can be enforced by foreign investors using the ISDS mechanism.

- **Expropriation provisions**, limiting the contexts in which a state is permitted to expropriate a corporate asset and setting out how investors should be compensated.
- Provisions allowing investors to claim compensation if a regulation is judged to have damaged profits so severely that it constitutes an '**indirect expropriation**' on the part of the state. Broad definitions of 'protected investment' mean even modest regulatory changes can be judged to amount to expropriation.
- **Fair and equitable treatment (FET)** provisions, allowing corporations to claim compensation on the vague basis of having been treated unfairly by the host state. This is the most frequently used basis for suing a state; corporations can use FET provisions to challenge any new regulation by arguing it violates their 'legitimate expectations' to a stable regulatory environment.
- **National treatment** provisions, establishing the principle that international investors should be treated at least as favourably as domestic investors.
- **Most favoured nation clauses (MFN)**, allowing investors to automatically enjoy the most advantageous investor privileges a host state has offered.

ISDS presents a clear threat to the corporate accountability agenda: the system could be used by corporations and their lawyers to derail due diligence laws and obstruct progress towards a just recovery. How exactly this might work will be explored in more detail below.

Facts on ISDS

- Today **300 Free Trade Agreements** and around **2,500 investment protection treaties** feature the ISDS mechanism.[6]
- ISDS has been used to bring cases against states **1,104 times**.
- The majority of cases are brought against Global South governments, including:
  - **296 cases** vs states in Latin America and the Caribbean
  - **130 cases** vs African states[7]
- **61% of cases are decided in favour of the investor**, with an average award of **US$125 million**.[8]
- The investors benefiting from ISDS are usually Northern corporations: analysis of 936 cases between 1987 and 2017 found **86% of claimants were from high-income countries**.[9]
- **ISDS could even be used by corporations to gain compensation for COVID lockdown measures**: in April 2020 the law firm Ropes & Gray advised potential clients *"investment agreements could be a powerful tool to recover or prevent loss resulting from COVID-19 related government actions."*

Issue 1:
ISDS as an obstacle to the introduction of new corporate accountability laws

By suing a country using ISDS, corporations can derail regulations intended to protect human rights and the environment. Even the threat of legal action can have a similar effect, 'chilling' the progress of new regulation.

Due diligence laws, if designed and enforced ambitiously, will challenge business models that abuse rights and harm the environment. For example, the commercial practices of many powerful buying companies, in sectors such as groceries and garments, involve negotiating excessively low prices and cancelling orders at the last moment.[10] This has a direct impact on wages and workers' rights. To fully comply with bold due diligence laws many corporations will need to transform their approach to ensure, for example, workers are no longer paid less than a living wage. The impact of these laws on some corporations will extend far beyond just changing purchasing practices. A range of corporate practices that have become embedded, despite their negative impact on people and planet, will be similarly challenged, including union busting, land grabbing and polluting rivers.

Due diligence laws entail a move away from business models that, although exploitative, have been extremely remunerative. It is thus likely they will be challenged by unscrupulous corporations and business groups,[11] with ISDS being a powerful tool with which to make this challenge. This is in contrast to those companies and investors who have welcomed due diligence laws as a means of setting a new legal floor for responsible business behaviour.

In attempting to undermine due diligence laws using ISDS, a range of arguments may be available to corporations and their lawyers. A corporation might contend that new due diligence laws amount to indirect expropriation of their future profits, or that they violate FET provisions (particularly if regulations only capture corporations of a certain size or with a certain geographical operation). Unlike national or international courts, ISDS tribunals – which are composed of arbitrators appointed by the disputing parties – consider the merits of a case in isolation and are under no obligation to factor in whether regulations are intended to protect rights or the environment. ISDS tribunals have been criticised for specifically failing to take human rights arguments into account – including the right to water, the right to health and Indigenous rights.

If an ISDS claim against a due diligence law is successful, tribunals can rule that states compensate investors for the cost of complying with new regulations. These costs could be significant and could make the introduction of new laws unaffordable, particularly for the most under-resourced governments.

The small number of due diligence laws in existence have not yet been challenged by corporations through ISDS. However, if states are to bring forward meaningful corporate regulation containing a new basis for liability, irresponsible corporations will doubtless be eager to avoid the scrutiny and cost these laws would bring.

For example, in 2020 the UK energy company Ascent Resources brought an ISDS case against Slovenia for requiring it conduct an environmental impact assessment of a proposed fracking project. The requirement came after members of the nearby Petišovci community petitioned the Slovenian authorities, concerned about the impact the project would have on a nearby water source. Ascent calls the requirement "arbitrary and unreasonable" and is suing for €120 million in compensation. If fracking companies are using ISDS to oppose doing a basic environmental impact assessment, a comprehensive human rights and environmental due diligence law will surely be subject to energetic challenge.

An ISDS challenge to new corporate accountability laws may not even have to progress to the tribunal stage to have the desired effect of derailing regulation. Being sued under ISDS is expensive. On average, an ISDS case lasts four years and costs the government defending the case US$4.7 million in legal fees. Losing a case can be ruinous; in 50 known cases a tribunal has awarded compensation of over US$100 million, including eight awards of over US$1 billion. States have no right to appeal these decisions.

Therefore, many countries choose to back down – settling out of court or quietly cancelling planned legislation – rather than taking on the huge financial burden of fighting a case. When Australian mining company Newcrest threatened to use ISDS to challenge an Indonesian law aimed at limiting environmentally destructive mining, the Indonesian Government decided not to risk being sued for what could have been hundreds of millions of dollars. Instead, the President issued an emergency decree exempting Newcrest from the law. The lawyer who drafted the decree said *"arbitration is the only reason"* for the volte-face, adding that *"under the circumstances, we had no choice."*[12]

Case study:
Corporation uses ISDS to contest increases to the minimum wage in Egypt

Attempts by the Egyptian Government to tackle poverty by raising the minimum wage were challenged in 2012 by the French multinational Veolia. As an employer of low-skilled Egyptian workers, they protested that the plans would increase their wage bill. Veolia lost the case, but only after a six-year case during which the Egyptian Government paid out millions of dollars in legal fees.

Source

Fear of being sued under ISDS may disincentivise governments from even considering introducing new regulations on business. This 'regulatory chill' is inherently difficult to measure, but there is compelling evidence that it weighs heavily on the minds of policymakers. The tobacco giant Philip Morris International brought an ISDS case against Australia in 2011 in response to a new law requiring plain packaging on cigarettes. The case was dismissed on a procedural technicality after four years, but in that time research shows 17 countries either delayed or actively chose not to introduce similar anti-smoking laws.[13] Countries in the Global South are especially vulnerable to regulatory chill, given ISDS cases are most commonly brought against Southern countries and that those countries are least likely to have the resources to fight an expensive legal case.

If the ISDS system is not dismantled, the chilling effect the threat of an ISDS case has on governments – particularly in the Global South – may be the greatest impediment to the effective future regulation of corporations.

Issue 2:
ISDS as a means through which corporations can escape justice

ISDS can be used by corporations to gain effective legal immunity from prosecution

ISDS can be used by unscrupulous corporations to challenge and undermine the findings of courts, and therefore evade legal accountability. If states succeed in passing due diligence laws, ISDS could be used to stop those laws being effective.

A Buzzfeed investigation conducted in 2016 found at least eight instances in which a company or executive accused of criminal activities used ISDS as a legal shield, writing that in these cases *"...bringing an ISDS claim got results for the accused wrongdoers, including a multimillion-dollar award, a dropped criminal investigation, and dropped criminal charges. In another, the tribunal has directed the government to halt a criminal case while the arbitration is pending."*

That the findings of ISDS tribunals can disagree with public courts is a threat to democratic process. Tribunalists are appointed on an *ad hoc*, case-by case-basis by the disputing parties. The community of specialists is small: the same 14 trade lawyers took part in one half of the ISDS cases identified by UNCTAD. Given only investors can initiate cases, this places a strong incentive on those lawyers to interpret investment treaty provisions broadly and make large awards, encouraging claimants to bring more cases using ISDS and guaranteeing themselves lucrative future work.

By providing an alternative court for investors, removed from domestic courts and domestic law, ISDS has the effect of undermining the domestic judiciary, as the Transnational Institute has recently shown. A Chief Justice of the Supreme Court of the United States warned ISDS tribunals have the power to review the laws of a nation and *"effectively annul the authoritative acts of its legislature, executive, and judiciary."* This has worrying implications for states aiming to promote responsible investment and company practice through new obligations on companies such as mandatory due diligence.

Case study:
HSBC challenges the court of El Salvador using ISDS

In August 2021 HSBC initiated ISDS proceedings against El Salvador for $49.3m. This was a direct response to a ruling by the Supreme Court of El Salvador that the bank had to pay that sum in damages to a Salvadoran business. HSBC claims that the Supreme Court's decision breaches El Salvador's obligations to investors under the El Salvador – UK Bilateral Investment Treaty.

Source

Case study:
A UK company uses ISDS to pay less tax

"The UK oil giant Tullow Oil sued Uganda via ISDS over a disputed US$400 million capital gains tax bill. Ugandan tax authorities had demanded the sum from the company after it sold its stakes in three oil and gas blocks for US$2.9 billion. In 2015 Tullow withdrew its ISDS case – but only after the state lowered Tullow's tax bill to US$250 million."

Source

Due diligence laws, when they are passed, are likely to be enforced via a domestic court or public regulator. This would sanction corporations for failure to conduct adequate due diligence or prevent human rights or environmental abuses. Sanctions could take the form of civil, administrative or criminal penalties, depending on the design of the particular law.

An international corporation found to have broken the law has the option of using ISDS to hit back, challenging the decisions of a court, public regulator or tax authority by suing the host country. A corporation might allege that a ruling against them constitutes unfair treatment, perhaps by invoking national treatment or FET clauses. This would leave the host country with the unenviable option of either facing expensive legal action or otherwise reversing course and undermining the rule of law.

Case study:
Romania sued by Gabriel Resources after communities fight toxic goldmine

For two decades communities in Romania have opposed the development, by Canadian company Gabriel Resources, of what is planned to be Europe's largest open-pit gold mine. Despite intimidation and harassment, campaigners succeeded in convincing courts that the company hadn't complied with environmental laws and that the illegally obtained mining permits should be withdrawn. Since 2015 Gabriel Resources has been suing Romania for not granting it the necessary permits, claiming a huge US$5.7 billion in compensation.

Campaigners gather in central Bucharest to protest the planned gold mine

Source

Issue 3:
ISDS facilitates irresponsible corporate conduct

The existence of ISDS clauses facilitates some corporations to make unsustainable and irresponsible decisions

Conducting human rights and environmental due diligence should mean companies continually assess the sustainability of any investment and engage with rightsholders to ensure, for instance, that affected Indigenous communities' rights to free, prior and informed consent have been respected and supported.

However, the effect of ISDS clauses is to disincentivise this kind of approach. ISDS provides investors with a means of claiming compensation if governments intervene to regulate or sanction their conduct, therefore removing the disincentive for unscrupulous corporations to cut corners and allowing them to make decisions that pose greater risks to human rights and the environment.

Case study:
A mining company claims damages from Peru after failing to consult with communities over a mining venture that was later derailed due to human rights concerns

The Canadian mining company Bear Creek held an exploration license in Peru for a project that was vigorously opposed by local groups. Protestors claimed that the mine would have violated various human rights, including Indigenous rights, and that the company had not conducted the necessary consultation with communities. Bear Creek would have needed 40 further licenses to actually build their proposed mine, but when the Peruvian Government responded to community protests by revoking Bear Creek's exploration license, the company nonetheless hit back. It successfully used ISDS to sue for indirect expropriation, leaving the Peruvian Government needing to pay out US$30.5 million, as well as 5% of Bear Creek's legal fees.

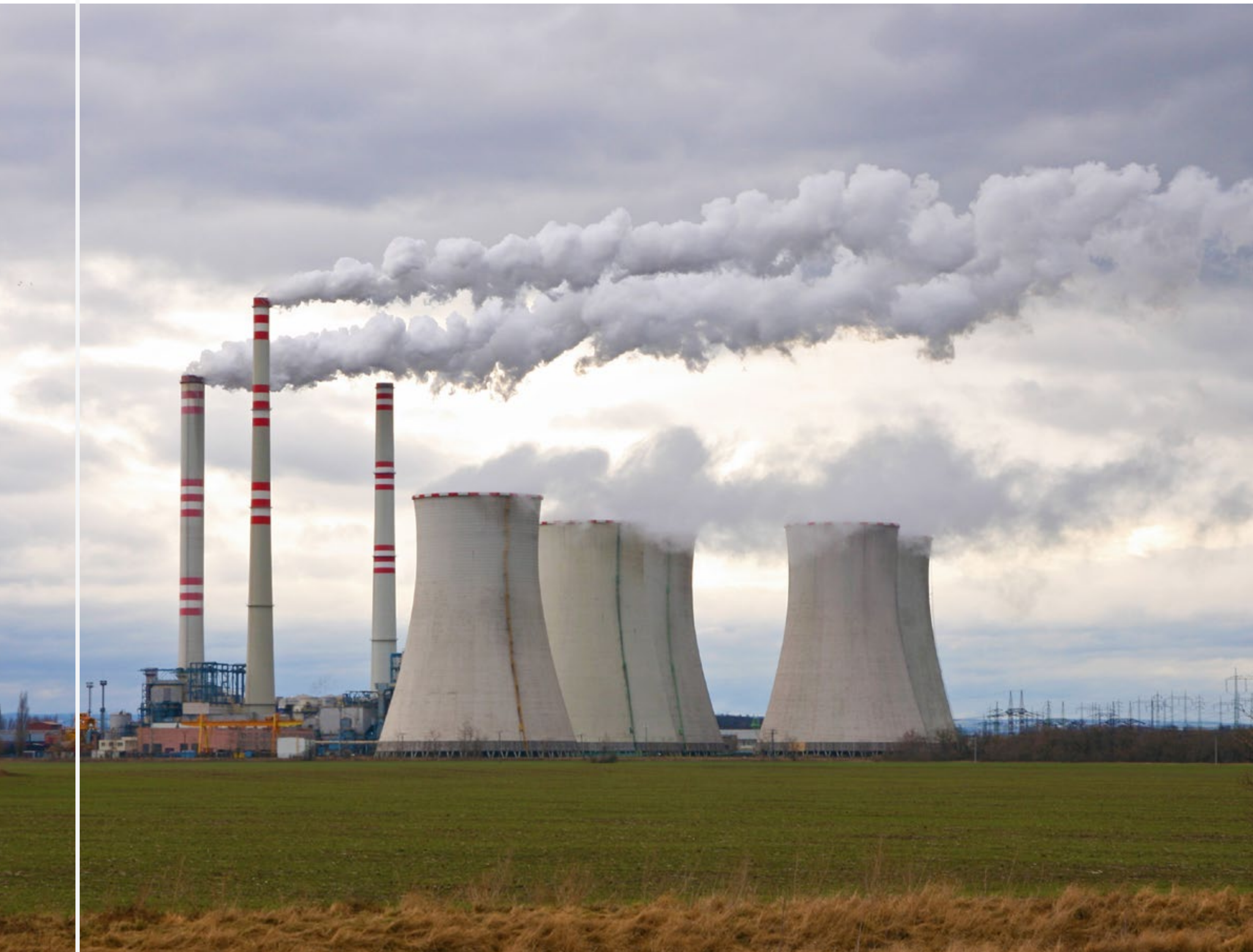
Source

An example of this is seen in the Energy Charter Treaty (ECT), an international agreement including ISDS that covers the energy sector. A number of cases are currently being brought against states by fossil fuel corporations using the ECT, arguing government policies to phase out or limit fossil fuels are unfair and discriminatory. For example, German energy giant RWE is suing the Netherlands for €1.4 billion for its policy to phase out coal power by 2030, and the UK oil and gas corporation Rockhopper is suing Italy for banning oil drilling off the Italian coast.

These energy companies surely knew the direction of public policy across Europe was to phase out fossil fuels and should have reconfigured their businesses and investments accordingly. By providing an effective guarantee fossil fuel companies can claim huge compensation when overdue regulations start to bite into their business model, it would be reasonable to conclude that the existence of ISDS within the ECT has meant fossil fuel companies have been slower to adopt more sustainable approaches.

ISDS and climate action

By limiting the ability of states to regulate in the public interest, ISDS threatens far more than just corporate accountability legislation. It also provides investors with a means through which to obstruct and frustrate the new regulations and laws which are urgently needed if the world is going to take meaningful action to address climate breakdown and introduce a Green New Deal. The Energy Charter Treaty, which includes an ISDS mechanism and is specifically for investors in the energy industry, is the prime example of this, having been used to bring at least 135 cases against states. It is vigorously opposed by citizens and lawmakers, while in September 2021 the European Court of Justice struck a major blow against the Treaty by ruling that the ISDS elements were not applicable in intra-EU disputes.



Reforming ISDS

For the reasons explored above, if states are to hold corporations legally accountable for their social and environmental impact, ISDS clauses in trade and investment agreements urgently need to be dismantled.

ISDS features in the majority of trade and investment agreements, including the major CPTPP agreement, signed in 2018 and comprised of 11 countries around the Pacific Rim. However, signs indicate the dominant position of ISDS is starting to crumble. In recent years citizen movements have succeeded in catapulting ISDS into the headlines – as happened during the failed TTIP negotiations.

Recognising the risks of the system far outweigh any potential advantages, many states are now seeking to remove ISDS from new treaties. ISDS appears in only one third of treaties agreed in the last five years, while the Regional Comprehensive Economic Partnership (a 2020 mega-agreement in the Asia-Pacific covering 40% of the world's population) is notable for not including ISDS.

Excluding ISDS from new treaties is a valuable step, but Pakistan, South Africa and Tanzania are among the countries to have gone further by terminating or renegotiating existing agreements containing ISDS. Since it scrapped ISDS, South Africa has seen foreign investment increase by 10%. Meanwhile, the EU has terminated its intra-union bilateral investment treaties following a finding by the European Court of Justice that ISDS was inconsistent with EU law. President Biden has also voiced his opposition to including ISDS in future US trade deals, writing *"I oppose the ability of private corporations to attack labor, health, and environmental policies through the investor-state dispute settlement (ISDS) process, and I oppose the inclusion of such provisions in future trade agreements."*

Despite this progress, ISDS remains present in more than 2,800 trade and investment agreements. Proponents of the ISDS system have sought to head off criticism by promoting incremental reform. These reforms are being played out in specific treaties, such as in the EU-Canada agreement, which replaces ISDS with the Investment Court System. There are also discussions taking place at multilateral level, principally via the UN Commission on International Trade Law. Reform attempts fall into four broad categories, as analysed by UNCTAD:

- **No ISDS.**
- Reforms which **limit the scope of ISDS** by narrowing the range of companies, sectors or issues covered by ISDS clauses, or by more precisely specifying the treatment that investors should expect.
- Reforms which **establish a standing ISDS tribunal**, which would solve some of the main procedural issues with the ISDS system.[14]
- **Procedural reforms** aimed at increasing the efficiency and transparency of the system, offering enhanced opportunity to states, the public and third parties to participate in proceedings.

Given the threats posed by ISDS to the just recovery agenda, and the lack of evidence suggesting ISDS leads to socially desirable investment, states should avoid reforms which fail to challenge the underlying precept: that corporations should have greater rights than individuals or communities. Instead, they should pursue a clear policy of excluding ISDS from any new treaties, as well as exploring options for terminating existing treaties containing ISDS.

Removal of ISDS clauses does not mean international investors will be left helpless if their assets are expropriated by host states. Most states remain eager to maximise foreign investment and are reluctant to damage their reputation as an attractive investment destination. However, in the event of direct expropriation, there are a range of alternative options available to investors. These include:

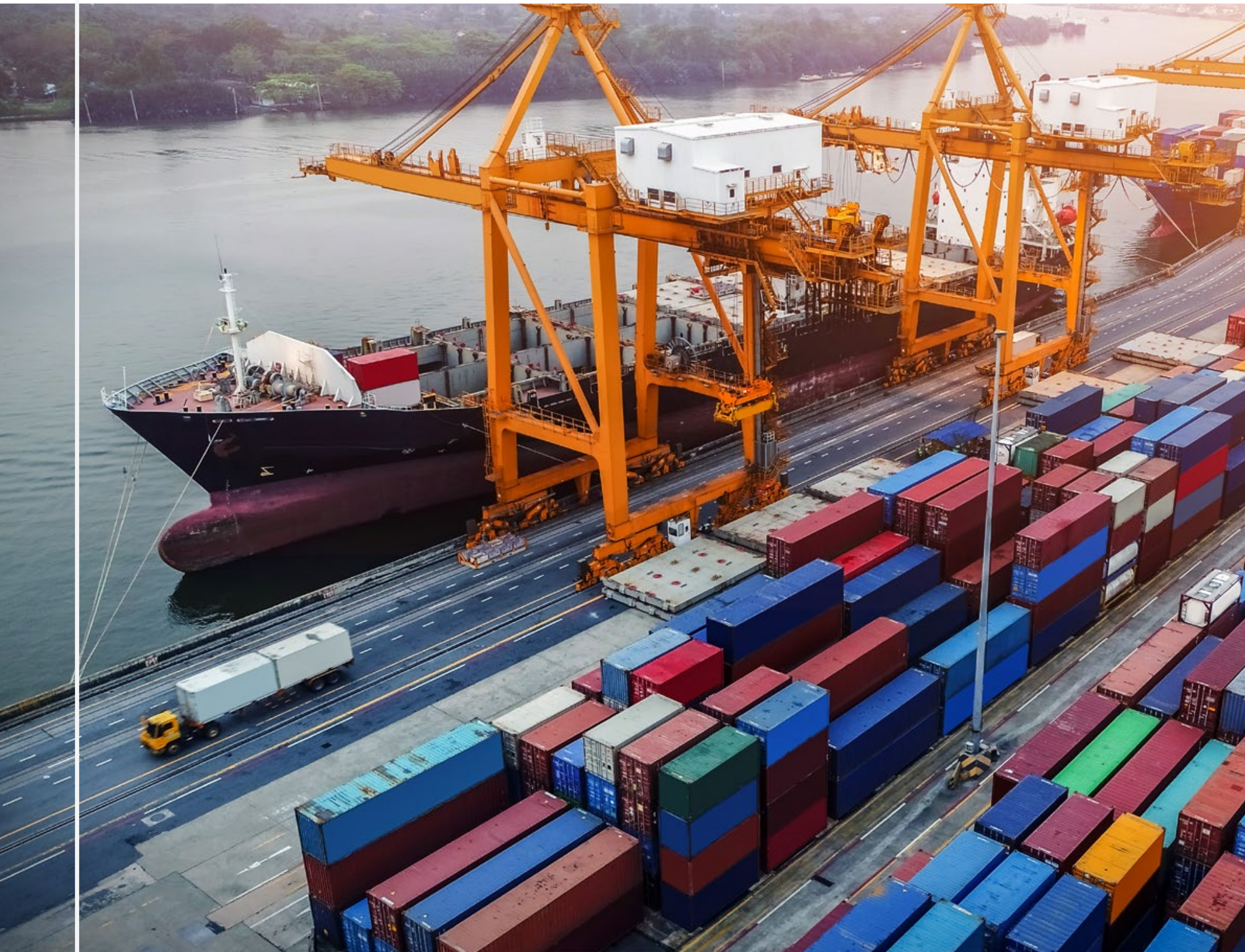
- Buying **political risk insurance**, which is widely available and can allow businesses to claim compensation if their assets are expropriated or a host government breaches a contract.
- Requesting the home state pursues the matter on behalf of a corporation via **state-state arbitration**, as provided for by most trade and investment agreements (including those of Brazil and South Africa, who have rejected ISDS).
- Bringing the case through the same **domestic legal proceedings** available to domestic investors.[15]

The termination or renegotiation of current trade and investment agreements requires time, expertise and diplomacy. In the case of the Energy Charter Treaty, unilateral withdrawal could leave a state liable to being sued under the Treaty for a further 20 years. When termination or renegotiation is not plausible, other options are available. Reforms to limit the application of ISDS clauses should be explored, especially if these specifically exclude due diligence laws from the scope of regulations that can be challenged using ISDS.[16] Another option is the issuing of joint interpretive statements, recommended by a recent Chatham House study, through which states can clarify or define their positions on various contentious clauses and therefore provide guidance to ISDS tribunals.

Despite the role ISDS clauses continue to play in allowing corporations to evade accountability, a positive relationship between investment agreements and corporate accountability is possible.

One example can be found in the 2016 Morocco-Nigeria Bilateral Investment Treaty. This paves the way for investment between the two countries, but also introduces a corporate accountability mechanism not too dissimilar to a due diligence law. The Treaty requires potential investors to conduct a social impact assessment of their activities. It also creates a mechanism to hold investors liable under civil law for *"the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state."* This offers an interesting possible direction for trade and investment agreements in which obligations are placed not only on the state, but on the investor too.

Innovations of this sort, if expanded to a much larger scale and combined with a wholesale exclusion of ISDS, could help to align new trade and investment agreements with broader social and environmental goals.



Conclusion

The new politics of change sees proportionate regulation of corporations as a necessary response to the challenges of inequality, injustice and climate breakdown. Human rights and environmental due diligence legislation, supported by mechanisms to hold corporations liable for any abuses, will play a vital role in this emerging agenda.

Achieving higher minimum standards of business conduct globally is made far more possible through coherent policies in trade, investment and corporate regulation. ISDS clauses offer corporations the power to challenge new regulations or the findings of courts. Rejecting ISDS clauses should therefore sit alongside the introduction of mandatory due diligence legislation as one of the priorities for states working towards a just recovery from the pandemic and a just transition to a greener economy.

Recommendations to states

Domestic regulation

- In line with the UN Guiding Principles, states should enact binding regulation to ensure companies perform robust due diligence to prevent human rights and environmental harms, are held liable and are obliged to provide remedy to affected workers and communities when abuse does occur, and adopt environmental targets in line with climate science.

Trade and investment policy

- When negotiating trade and investment agreements, states should explore how those deals can actively support human and environmental rights by including obligations on corporations to conduct due diligence and provide remedy.
- States should involve a range of stakeholders, including those with human rights expertise, in the formulation of trade and investment policy and the negotiation of trade and investment agreements.
- States should reject ISDS clauses in new trade deals as a vital step towards a world where the rights of investors do not interfere with human and environmental rights.
- States should cooperate in multilateral and plurilateral fora, from the UN to the G20, to develop collective approaches to ending the ISDS system.
- States should only sign new trade and investment agreements consistent with the state duty to regulate to protect human rights and the environment.
- Where ISDS clauses are already in place in international investment agreements, states should consider options to terminate, renegotiate or not renew these deals.
- Where ISDS clauses are in force, and termination or renegotiation are not plausible options, states party to the agreements should collaborate to enact reforms that limit the scope of ISDS clauses. In particular, reforms should challenge:
    - the wide range of companies, sectors and issues covered by most ISDS clauses;
    - the premise that investors should be afforded rights which are not available to individuals or citizens;
    - the arbitral culture of ordering large compensatory awards which fail to consider human rights;
    - the lack of transparency of process and judgement;
    - the primacy given by investment agreements to investor rights over duties to respect human rights and the environment.

Further reading

Some of the groups conducting comprehensive analysis on ISDS include:

- Asia Pacific Forum on Women, Law and Development
- Climate Action Network Europe
- Columbia Centre on Sustainable Investment
- Corporate Europe Observatory
- Friends of the Earth Europe
- Focus on the Global South
- Gender and Trade Coalition
- Global Justice Now
- International Institute for Environment and Development
- International Institute for Sustainable Development
- Public Citizen
- Seattle to Brussels Network
- SOMO
- South Centre
- Stop ISDS
- Third World Network
- Trade Justice Movement
- Transnational Institute

References

1 Based on analysis of ISDS cases between 1987 and 2017, p5.

2 The Resource Centre's view on the Modern Slavery Act, that it *"has failed in its stated intentions"*, is explained in "Modern Slavery Act; Five years of reporting."

3 Recent progress in Latin America is covered in a Business & Human Rights Resource Centre YouTube video; the trends across the African continent are discussed in this blog.

4 Parallel Justice.

5 The existence of ISDS clauses in trade agreements are not necessarily taken into account by investors when deciding where to invest. Professor Rob Howse has written that *"...the evidence as to whether there is a benefit from [offering treaty protection to foreign investors] in terms of increased FDI is both highly ambiguous and highly unreliable."*

6 Parallel Justice.

7 UNCTAD, Investment Dispute Settlement Navigator: full data release as of 31/07/2020 (excel format).

8 According to UNCTAD's analysis of data between 1987-2017, and excluding the awards made in cases related to the Yukos company, p5.

9 Tim R Samples, Winning and Losing in Investor–State Dispute Settlement, American Business Law Journal, Volume 56, Spring 2019.

10 See, for example: 1, 2.

11 The tactics used by corporate lobbyists to fight the EU's due diligence proposal are detailed in "Off the Hook", June 2021.

12 The Billion Dollar Ultimatum.

13 Carolina Moehlecke, The Chilling Effect of International Investment Disputes: Limited Challenges to State Sovereignty, *International Studies Quarterly*, Volume 64, Issue 1, March 2020, Pages 1–12.

14 Principal among these reforms is the European Commission's proposed Multilateral Investment Court, which has been criticised by campaigners as a "wolf in sheep's clothing."

15 This is the approach taken by South Africa's Protection of Investment Act 2015.

16 'Carve-outs', that limit the types of regulation that can be subject to ISDS challenge, have been used by Australia to ensure that anti-tobacco legislation cannot be challenged by investors

Business & Human Rights Resource Centre

SEPTEMBER 2021

Business & Human Rights Resource Centre is an international NGO that tracks the human rights impacts of over 10,000 companies in over 180 countries, making information available on our 10-language website.

AUTHOR

Thomas Wills

THANKS TO

Kinda Mohamadieh (Third World Network)

Lorenzo Cotula (IIED)

Lucía Bárcena (Transnational Institute)