

**Updated July 2020**

### **Summary of ISDS in UK trade policy**

- Investor-State Dispute Settlement (ISDS) clauses in trade agreements allow foreign investors to sue national governments for measures which harm their profits.
- ISDS cases take place in private arbitration courts with high levels of secrecy and can cost the taxpayer billions. The mechanism offers sweeping rights to investors with no equivalent for domestic companies or communities facing adverse effects of business malpractice.
- The government has previously said that the idea of banning ISDS is “nonsensical”.<sup>1</sup> In the previous Trade Bill debates in the Lords, the government made clear that it was willing to replicate agreements including ISDS.<sup>2</sup> We can therefore assume that the Government is open to including ISDS in post-Brexit trade deals.

### **Covid-19 challenges**

The Covid-19 pandemic could lead to an increase in ISDS cases. A number of law firms have already promoted the possibility of cases,<sup>3</sup> on the grounds that investors may challenge governments for introducing measures designed to protect public health, regulate the economy or support particular industries in response to the pandemic.

Since ISDS cases allow investors to sue for loss of profits resulting from government policy, and changes in the investment conditions, it is possible that Covid-related policies would be the basis of disputes. For instance, Covid has led to various restrictions on economic activity, resulting from lockdown policies. This could very easily impact the profitability of an investment.<sup>4</sup>

There are also concerns that this could have an impact on devolved areas and local governments, which are often responsible for implementing lockdown policies. Variation between regional policies could be construed as a breach of Fair and Equitable Treatment, which can in turn form the basis of an ISDS claim. For example, if Scotland has stricter lockdown regulations than England, a US investor with more operations in Scotland could claim that this amounts to unequal treatment. In such instances, the claim would still be brought against the UK government, since the UK is party to the treaty, but any financial settlement may involve the Scottish government.<sup>5</sup>

---

<sup>1</sup> [Hansard](#), 7 February 2019

<sup>2</sup> [Hansard](#), 23 January 2019

<sup>3</sup> See for example: Alston & Bird, '[The Coming Wave of Covid-19 Arbitration](#)', 29 April 2020; Ropes & Gray, '[COVID-19 Measures: Leveraging Investment Agreements to Protect Foreign Investments](#)', 28 April 2020; Reed Smith, '[International Arbitration Focus](#)' newsletter, 5 May 2020; Global Arbitration Review, '[Could COVID-19 emergency measures give rise to investment claims? First reflections from Italy](#)', 26 March 2020; Aceris Law, '[The COVID-19 Pandemic and Investment Arbitration](#)', 26 March 2020

<sup>4</sup> See a Peruvian case which argued that “a foreign investment that suffers losses due to restrictions on business operations could have a claim against the host government for its losses”; Ropes & Gray, '[COVID-19 Measures: Leveraging Investment Agreements to Protect Foreign Investments](#)', 28 April 2020

<sup>5</sup> See answer to written question, House of Commons, '[Transatlantic Trade and Investment Partnership: Scotland:Written question - 31198](#)', 15 March 2016

## Parliamentary opportunities

**New trade agreements:** the Government's has begun trade negotiations with the US, Australia, New Zealand and Japan, and announced its intention to join the Trans-Pacific Partnership (CPTPP). Other trade negotiations with new partners are also likely. Many of these agreements could contain ISDS - indeed, it has been expressly sought by the US and is already contained in the CPTPP. Parliament may have the opportunity to debate some of these deals, subject to the usual constraints of the CRAG process. If so, these debates may offer the opportunity to reject ISDS.

**Rollover agreements:** agreements to which the UK is currently party through EU membership are being 'rolled over' by the Government. Some of these, such as the agreement with Canada, include ISDS provisions. These will also be approved through the CRAG processes.

**The Trade Bill** is currently making its way through Parliament. Although the focus of the Bill is on rollover agreements, amendments have previously been tabled on ISDS and future trade policy in general.

## Notable ISDS cases

**Environment:** [Vattenfall v Germany](#): in 2009, Swedish energy firm Vattenfall sued Germany for introducing policies designed to curb water pollution and carbon emissions - both of which, unsurprisingly, affected the profitability of their coal power station. Germany lowered its environmental standards as a result.

**Health:** [Philip Morris v Australia](#): In 2015, US tobacco giant Philip Morris sued the government of Australia for attempting to introduce plain-cigarette packaging legislation - a policy designed to protect public health. Although the case was unsuccessful, Australia spent nearly Aus\$40 million (approximately £22 million) defending the case.<sup>6</sup>

**Labour rights:** [Veolia v Egypt](#): In 2012, French multinational Veolia sued the Egyptian government for increasing its national minimum wage, which would have increased the company's costs and reduced their profits. Although Veolia lost the case it is likely that Egypt paid millions defending the case; figures have not been released but average costs of these cases are US\$8-10 million.

**Health standards:** [Cargill v Mexico](#): US firm Cargill won an ISDS case against Mexico after challenging the a tax on high fructose corn syrup that had been introduced to address health issues. Cargill were awarded US\$77.3 million.

**Health services:** [Achmea v Slovakia](#): Dutch firm Achmea sued Slovakia government for introducing health insurance reforms designed to improve public health access. Achmea won the initial case, and was awarded 22 million Euros, but then lost after appeal.

**Environment / minority rights:** [Bear Creek v Peru](#): Canadian firm Bear Creek won US\$18 million in compensation because Peru cancelled a mining license after the company failed to

---

<sup>6</sup> <https://www.theguardian.com/business/2018/jul/02/revealed-39m-cost-of-defending-australias-tobacco-plain-packaging-laws>

obtain informed consent from indigenous land owners, ignoring the ILO convention on indigenous peoples.

## Summary of arguments against ISDS

**Impact on rights:** Human rights are fundamental rights and therefore merit the most rigorous standard of protection. The past twenty-five years have seen significant developments in human rights protections, including the recognition of economic, social, cultural, civil and political rights. ISDS provisions have not kept pace with these developments. Instead, they create a special class of rights for investors which are extensive and benefit from powerful enforcement mechanisms with no means for balancing them against fundamental human rights and no equivalent mechanism to protect human rights.

**Regulatory chill / right to regulate:** even where ISDS claims are not brought, the threat of a potential claim can discourage national governments from introducing policies that may negatively affect investors' profits. There is evidence that this effect of ISDS has influenced policy in Canada.<sup>7</sup> Lots of environmental, health and social regulation is likely to affect company profits. Governments have to factor in the risk of legal action and the potential cost to the taxpayer before introducing regulations.

**Developing countries:** ISDS has a particular impact on developing countries for two reasons. First, many developing countries are yet to finalise their regulatory frameworks for dealing with environmental, health and social issues. As these countries develop, they may well wish to introduce new regulation: for example, introducing new labour protections, or policies to address air pollution in cities. ISDS means that this could come with a big financial cost. Second, the high cost of ISDS cases is proportionally worse for less wealthy governments. Compensation is calculated by arbitration courts in relation to the lost profits of companies, and not the ability of governments to provide compensation. Developing countries are targets for a significant proportion of ISDS cases.

**Rule of law concerns:** a number of lawyers and academics have highlighted that ISDS constitutes a 'parallel legal system', which grants investors unprecedented sweeping rights. ISDS courts lack an appeals system, are highly opaque and pose high barriers to entry (in terms of cost). ISDS offers a degree of enforceability that is unparalleled elsewhere in international law.<sup>8</sup>

**Economic arguments:** the cost of bringing an ISDS claim means that cases are almost exclusively brought by large, multinational companies, rather than SMEs.<sup>9</sup> Similarly, ISDS gives investors protections that are not available to domestic companies. This is bad for competition and creates an unlevel playing field. The evidence that ISDS increases foreign investment is limited. In a recent survey, companies cited ISDS as a less important factor than domestic legal protections and other business-openness factors.<sup>10</sup>

**Cost to taxpayer:** the cost to governments of defending ISDS claims is very high, and frequently runs into billions of dollars. This is the case even if cases are unsuccessful. For

---

<sup>7</sup> See Van Harten, Scott; '[Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada](#)', Osgoode Hall Law School of York University, 2016

<sup>8</sup> Bingham Centre, '[International Economic Agreements and the Rule of Law – the Case of the Transatlantic Trade and Investment Partnership \(TTIP\)](#)' (2015)

<sup>9</sup> Osgoode Legal Studies Research Paper No. 14/2016, '[Who Has Benefited Financially from Investment Treaty Arbitration? An Evaluation of the Size and Wealth of Claimants](#)

<sup>10</sup> Bingham Centre and Economist Intelligence Unit, '[Corporate Decision Making in Foreign Direct Investment](#)

instance, Philip Morris lost its challenge against the Australian government, but it still cost the taxpayer AUS \$39m.<sup>11</sup>

### **Is reform possible?**

The EU has proposed alternative models of investor protection, such as the Investment Court System (ICS) in CETA, and the Multilateral Investment Court (MIC) designed to adjudicate disputes in investment treaties between member states and future EU partners.

These proposals deal with some of the rule of law concerns around ISDS, through vetting judges, offering an appeals system and greater transparency.

However, these proposals fail to deal with any of the other concerns around ISDS: the impact on rights and the environment, regulatory chill, cost to the taxpayer and economic arguments.

The Trade Justice Movement and a number of other civil society organisations therefore believe that ISDS should be excluded from all trade and investment deals, including 'reformed' iterations.

--

**For more information or further briefing, please contact:**

**Leo Verity**  
**Senior Political Adviser**  
**Trade Justice Movement**  
[leo@tjm.org.uk](mailto:leo@tjm.org.uk)

---

<sup>11</sup> Guardian, [Revealed: \\$39m cost of defending Australia's tobacco plain packaging laws](#), 1 July 2018