Submission to OECD public consultation on business responsibilities and investment treaties

16th February 2020

Introduction

1. The Trade Justice Movement (TJM) appreciates the opportunity to respond to the OECD public consultation on business responsibilities and investment treaties.

2. TJM is a UK coalition of sixty civil society organisations with millions of members, calling for trade rules that work for people and planet. Our members include trade unions, aid agencies, environment, social justice and human rights campaigns, Fair Trade organisations and consumer groups.

3. This submission summarises our main concerns regarding investment treaties and in particular Investor-to-State Dispute Settlement (ISDS) and suggests a number of alternative approaches that OECD members should seriously consider as alternatives. In particular, we believe that countries must urgently take steps to ensure that investment provisions within trade and investment agreements are compatible with their commitments on international development, climate change and human rights.

About Investment Protection Provisions

4. Investment protection provisions are primarily found in Bilateral Investment Treaties (BITs) and in a small number of Free Trade Agreements (FTAs). When originally developed, the intention of these provisions was to provide investors with legal certainty when investing overseas: they offer a range of broadly-defined protections, including those of fair and equitable treatment, protection from expropriation (including indirect expropriation), and national and most favoured nation treatment. These rights are enforceable through Investor to State Dispute Settlement (ISDS) mechanisms which allow investors to seek compensation from governments for measures that they consider to have negatively impacted on the profitability of their investment, using ad-hoc arbitration tribunals. The UK for example, currently has 96 of its own BITs, mostly signed in the 1980s and 1990s, and is party to four EU agreements that contain ISDS provisions.[1]

5. In recent years questions have increasingly been raised regarding the appropriateness of ISDS as a tool to protect international investment. This has been prompted by:

5.i The kinds of government measures that have been challenged under ISDS, including: raising water quality standards, the introduction of a sugar tax, a ban on a toxic fuel additive and the introduction of plain packaging on cigarette packets.[2]
5.ii The significant awards that have been made to investors, generally in the hundreds of millions of dollars.[3]

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[1] CETA, the EU-Canada deal, and the EU-Mexico revised FTA contain provisions for an Investment Court System; the EU has separate FTAs and Investment Protection Agreements (IPAs) containing ICS with Singapore and Vietnam.

[2] See: Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6); Archer Daniels Midland Company and Tate & Lyle Ingredients Americas, Inc. v. United Mexican States, ICSID Case No. ARB (AF)/04/5 (NAFTA); Ethyl Corporation v. Canada, NAFTA/ UNCITRAL (1976); Philip Morris Asia Ltd v. The Commonwealth of Australia, UNCITRAL (2010).

[3] UNCTAD (2017) *IIA Issues Note: Special Update on Investor-State Dispute Settlement: Facts and Figures.* Available at: https://unctad.org/en/PublicationsLibrary/diaepcb2017d7_en.pdf, accessed 07/06/19.

5.iii The high legal costs, averaging US$8 million, faced by governments even when they are successful in defending a claim.[4]
5.iv Evidence that governments are being deterred from introducing new policies because they are concerned that it will trigger an ISDS claim.[5]
5.v The lack of obligations on investors, for example to comply with human rights or environmental standards in the host country, as a condition of accessing treaty protections.

The following outlines a number of concerns that we believe provide a strong case for rethinking the system.

A. ISDS could hamper efforts to tackle climate change and address the loss of biodiversity

6. There is widespread consensus that preventing extreme climate change and reversing the global loss of biodiversity are among the most urgent issues of our time and that addressing them will require significant changes to government policy. ISDS mechanisms could allow investors to sue for compensation if these changes negatively affect the profitability of their investments, potentially impeding the development of policy in this area:

6.i Half of all ISDS cases registered at the World Bank by the end of 2015 related to oil, mining, gas, electric power or other energy forms, all of which have climate and environmental impacts.
6.ii Overwhelmingly, the findings of the tribunals hearing ISDS cases support the proposition that companies should be compensated if their 'legitimate expectations' of a 'stable business environment' are undermined, whether or not environmental concerns are at stake.
6.iii Many BITs contain nothing to exempt environmental or climate measures from their provisions.[6]

7. Cases brought on the basis of environmental policy changes include: Vattenfall vs Germany, where the company challenged the introduction of higher water quality standards; Lone Pine vs Canada in response to a moratorium on fracking under the St. Lawrence river; Bilcon vs Canada for the denial of a mining permit; TransCanada threatened the US with a $15 billion case when President Obama denied a permit for an oil pipeline.[7]

B. ISDS has not kept pace with developments in international human rights law

8. 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.[8]

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[4] OECD (2012) *Investor-State Dispute Settlement: Public Consultation.* Available at: https://www.oecd.org/daf/inv/investment-policy/ISDSconsultationcomments_web.pdf, accessed 07/06/19.,
[5] Van Harten, G., and Scott, D. N. (2016) 'Investment treaties and the internal vetting of regulatory proposals: A case study from Canada', *Journal of International Dispute Settlement*, *7*(1), 92–116.
[6] Trade Justice Movement (2015) *Worried About UK BITs?* Available at https://www.tjm.org.uk/resources/reports/worried-about-uk-bits-analysis-of-uk-bilateral-investment-treaties accessed 07/06/19.
[7] See: Vattenfall AB and others vs. Federal Republic of Germany, ICSID, ARB/09/6; Lone Pine Resources Inc v. Canada, ICSID case no. UNCT/15/2; William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware Inc. v. Government of Canada, UNCITRAL, Permanent Court of Arbitration (PCA) Case No. 2009-04; TransCanada Corp v. United States of America, ICSID, ARB/16/21.
[8] Fowles, S. (2017) H*ow Investment Treaties Have a Chilling Effect on Human Rights,* The Foreign Policy Centre: London, p.4. Available at: https://fpc.org.uk/wp-content/uploads/2017/05/1803.pdf, accessed 21/03/19.

9. BITs have not kept pace with these developments. They contain no language on human rights, which means that there can be no certainty that human rights will be protected in an agreement or taken into account should a dispute arise and tribunals rarely consider human rights arguments because they are not required to do so.[9] This creates a situation of significant inequality: BITS 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.

C. ISDS can undermine the rule of law

10. There are a number of ways in which BITs can undermine the rule of law in host countries. Many BITs, including those to which the UK is a party, do not require companies to exhaust domestic remedies before they can access ISDS mechanisms. This bypasses domestic legal systems and creates a parallel system. This is problematic because:

10.i A process that effectively requires taxpayers to insure the business risk of international investors does nothing to raise governance standards for society as a whole and instead removes some of the incentives for host countries to strengthen domestic governance and judicial systems;
10.ii It eliminates opportunities for domestic judges and administrative agencies to consider and address the substantive problems faced by investors and to develop corresponding domestic law and expertise;
10.iii It can create incentives for governments to favour the concerns of foreign investors over other constituencies because ISDS offers significant amounts of protection to foreign investors only;
10.iv National treatment provisions in fact often duplicate existing domestic laws, many of which already offer international investors the same treatment as domestic investors. This offers the potential for investors to have 'two bites of the cherry' when bringing a case;[10]
10.v Most Favoured Nation clauses mean that companies can access the benefits of treaties to which their own home state is not a signatory by looking at the full range of deals that the host country has signed and picking the one that offers them the best terms;
10.vi The ISDS system has no established system of case law or precedent such that the potential outcomes of a case and the amount of an award are often unpredictable and inconsistent.[11]

D. ISDS creates special protections accessible only to a particular group of actors

11. ISDS is only accessible to international investors, there is no equivalent provision made for domestic investors. Whilst compensation proceedings by domestic investors are possible through the European Convention on Human Rights/Human Rights Act, historically the process has proven problematic and foreign investors covered by BITs have a stronger claim both procedurally and

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[9] Office of the High Commissioner for Human Rights (2015) *UN Experts Voice Concern Over the Adverse Impact of Free Trade and Investment Agreements on Human Rights.* Available at: https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=16031, accessed 27/01/20; Schill, S.W. (2015) *Reforming ISDS: Conceptual Framework and Options for the Way Forwar*d, The E15 Initiative. Available at: https://www.ictsd.org/sites/default/files/research/E15-Investment-Schill-FINAL_0.pdf, accessed 27/01/20.

[10] Fowles (2017).

[11] Sachs, L. and Johnson, L. (2017) *Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities*. Available at: http://ccsi.columbia.edu/files/2017/11/ISDS-and-Intra-national-inequality.pd, accessed 23/03/19.

substantively which strengthens the legal force of their economic rights and "expectations". [12] This creates a significant imbalance between domestic and international companies.

12. A further barrier to access for small and medium-sized companies is that the ISDS process is very costly, cases can take several years and the outcomes are uncertain. This puts the system out of reach of the majority of investors who lack the resources to bring a case: whilst the UK is a significant source of cases, relatively few UK companies investing overseas have made use of the system: the 69 UK cases registered by 2018 were brought by 61 companies - a very small proportion of the UK's total outward investment flows - and only 16 cases have resulted in awards for these companies.[13]

E. ISDS now goes far beyond protection against arbitrary deprivation of property

13. The right to compensation for 'indirect expropriation' has meant that investors have been able to claim not just for the uncompensated seizure of physical assets but also for issues such as the perceived infringement of intellectual property rights , the limiting of tariffs in public utilities and increased environmental standards.

14. Investors have been compensated not only for actual losses suffered but often also for a loss of anticipated future profits; this can significantly increase the amount of compensation awarded. For example, in the case of Al-Kharafi and Sons vs Libya, US$935 million in compensation was awarded, of which US$900 million was for lost profits. The investor had only invested US$5 million at the time of bringing the case and sought US$2 billion in compensation to cover an 83-year land lease.[14]
BITs generally offer no guidance to tribunals as to how an award is to be calculated and, although some tribunals have applied the full reparation principle of customary international law, there are significant variations in the methods of calculation used and disagreement regarding the factors that should be taken into account.[15]

F. There is no direct relationship between signing an investment treaty and increased investment

15. When BITs were first developed, the promise was that they would bring additional investment. A number of studies have been undertaken to assess whether they have delivered on this promise. The overall conclusions are that:

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[12] Sachs, L. and Johnson, L. (2019) 'Investment Treaties, Investor-State Dispute Settlement and Inequality: How International Rules and Institutions Can Exacerbate Domestic Disparities', *Colombia Centre on Sustainable Investment Working Paper 2019*. Available at: https://ssrn.com/abstract=3452136, accessed 21/01/20; Clifford Chance (2019) 'UK Nationalisation: The Law and Cost - 2019 Update'. Available at: https://www.cliffordchance.com/content/dam/cliffordchance/briefings/2019/07/UPDATE%20Nationalisation%20July%202019.pdf, accessed 21/01/20.

[13] Poulsen, L. (2018) *Investment Policy After Brexit: Investment Treaties and Beyond,* Written evidence submitted to the House of Commons International Trade Committee UK Investment Policy Inquiry. Available at: http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/international-trade-committee/uk-investment-policy/written/84748.pdf, accessed 06/06/19.

[14] See: Mohamed Abdulmohsen Al-Kharafi & Sons Co. v. Libya, ad hoc arbitration rules, Cairo Regional Center for International Commercial Arbitration.

[15] UNCTAD (2018) *IIA Issues Note, Investor-State Dispute Settlement: Review of Developments in 2017.* Available at: https://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf, accessed 04/07/19; Garcia Dominguez, Marcos D. (2017) 'Calculating Damages in Investment Arbitration: Should Tribunals Take Country Risk into account*?', Arizona Journal of Comparative Law,* 31 (1): 96-122. Available at: http://arizonajournal.org/wp-content/uploads/2017/04/03_GARCIA_DOMINGUEZ.pdf, accessed 04/07/19.

15.i There is no clear evidence that they bring additional investment.[16]
15.ii Investors tend to prioritise other factors before they look at whether a country has an investment treaty including the skill level of the labour force, quality of infrastructure and proximity of target markets.[17]
15.iii Some of the biggest investment destinations in the world do not have investment treaties: Brazil is among the world's top five investment destinations and has no investment treaties that contain ISDS and there are no investment treaties between the EU and the US, despite significant investment flows.[18]

G. A number of countries are changing their approach to ISDS

16. In light of the concerns raised about investment protection provisions, and ISDS in particular, a number of countries are rethinking their approach to investment protection and promotion:

16.i The US-Mexico-Canada Agreement (USMCA - the revised version of NAFTA) removes dispute settlement provisions between the US and Canada, and significantly restricts those between Mexico and the US. Canada and Mexico are both members of the Comprehensive and Progressive Trans Pacific Partnership (CPTPP) and therefore continue to be subject to investment provisions.[19]
16.ii New Zealand has sought to limit the applicability of ISDS to inward investment coming from other members of the CPTPP.[20]
16.iii Countries including South Africa and Ecuador have cancelled their BITs outright.
16.iv A number of other countries, including India, Morocco and Nigeria have undertaken a significant overhaul of their investment protection models, introducing innovations such as limitations on investor rights, increased investor responsibilities and requiring that investors be liable in domestic law for their activities overseas.
16.v Brazil has introduced an alternative model called a 'Cooperation and Facilitation Investment Agreement' which introduces a number of innovations, including: the exclusion of an ISDS mechanism, instead establishing a national ombudsman to whom investors can appeal; clarifying the range of investor protections, for example by replacing 'fair and equitable treatment' with more specific standards like access to justice and excluding indirect expropriation. The agreement also narrows the definition of which investments are covered, excluding short term speculative portfolio investments.
16.vi The EU has introduced a new 'Investment Court System' (ICS) into some of its trade agreements and its proposal for a Multilateral Investment Court, currently under discussion at the UN. ICS is problematic because it leaves investment protections largely unchanged, but it does

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[16] Poulsen, L.N.S. (2010) 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Karl Sauvant (ed.) *Yearbook on International Investment Law and Policy 2009/10,* Oxford: Oxford University Press.
[17] *Ibid.*
[18] UNCTAD (2018) *World Investment Report 2018: Investment and new industrial policies,* p.4. Available at: https://unctad.org/en/PublicationsLibrary/wir2018_overview_en.pdf, accessed 07/06/19.
[19] Osterwalder, N.B (n.d) *USMCA Curbs How Much Investors Can Sue Countries – Sort of* Available at: https://www.iisd.org/library/usmca-investors, accessed 14/02/20.
[20] Horrigan, B., and Naish, V. (9th May, 2018) *New Zealand signs side letters with five CPTPP members to exclude compulsory investor state dispute settlement*. Available at: https://hsfnotes.com/arbitration/2018/05/09/new-zealand-signs-side-letters-with-five-cptpp-members-to-exclude-compulsory-investor-state-dispute-settlement/?utm_source=Mondaq&utm_medium=syndication&utm_campaign=LinkedIn-integration, accessed 14/02/20.

introduce procedural reforms including the creation of a permanent tribunal with government appointed arbitrators, an appeal tribunal, and the obligation to disclose third party funding.[21]

17. Alternative protections are already available to international investors

There are a number of alternative ways that investors can seek to protect their investments overseas:

I. Investors can help to avoid problems arising in the first place by taking a number of steps, such as:

II.i Undertaking due diligence before an investment is considered;
II.ii Undertaking impact assessments that engage with local communities;
II.iii Consider designing investment to ensure strong backward linkages into local or national economies, for example by exploring the possibility of a joint venture;

II. Non-legal mechanisms may prove to be the best way to avoid disputes:

II.i Disputes can be addressed in the initial stages via mediation;
II.ii Investors may be able to develop good relationships with local actors, such as other businesses or civil society, who could support efforts to address issues that arise;

III. Investors can use market-based products to protect their investments:

III.i Commercial political risk insurance is available through a number of private banks, or for investments in developing countries through the World Bank's Multilateral Investment Guarantee Agency;

IV. There are a number of alternative legal mechanisms:

IV.i Investors should seek to exhaust domestic remedies before looking to international instruments;
IV.ii In cases of the most egregious behaviour, disputes can be dealt with under human rights instruments;

V. State-to-state dispute settlement may also be available.

Conclusion

18. OECD members must seriously consider their approach to international investment protection. Existing agreements have not kept pace with developments in human rights and environmental protections, they create a parallel legal system and offer significant benefits to investors with no corresponding obligations. Their vague wording has allowed for broad interpretation by tribunals without any requirement to follow case law, making the system unpredictable. Finally, there is little evidence to support the proposition that BITs lead to increased investment in partner countries. Given the range of alternative options that are available and the continuing rejection of ISDS by countries around the world, members must use the opportunity of the OECD review to rethink their approach.

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[21] Trade Justice Movement (August 2017) *Stepping Away from ISDS.* Available at: https://www.tjm.org.uk/documents/briefings/Stepping-away-from-ISDS.pdf, accessed 07/06/19.