Make world trade work for people and the planet

Worried About UK BITs?

The case for reviewing UK investment protection provisions

Published by: Trade Justice Movement

Contents

3 **Acronyms**

4 **Executive Summary**

7 **Introduction**

9 **Chapter 1**
Policy Implications of Bilateral Investment Treaties (BITs)

13 **Chapter 2**
The UK Investment Protection Regime – Leading the Pack?
- UK Bad BITs
- UK BITs in practice – an overview of cases to date
- UK BITs in practice – law firms and third party funders

23 **Chapter 3**
Alternatives to the UK System

26 **Conclusion and Recommendations**

27 **Bibliography**

Acronyms

BIS
(United Kingdom Department for)
Business, Innovation and Skills

BIT
Bilateral Investment Treaty

CETA
Comprehensive Economic and Trade
Agreement (EU-Canada free trade agreement)

CSO
Civil Society Organisation

FCO
Foreign and Commonwealth Office

FDI
Foreign Direct Investment

GAR
Global Arbitration Review

ICSID
International Centre for the Settlement
of Investment Disputes

IIA
International Investment Agreement

ILO
International Labour Organisation

ISDS
Investor to State Dispute Settlement

MAI
Multilateral Agreement on Investment

MNC
Multinational Corporation

NGO
Non Governmental Organisation

TPF
Third Party Funding

TTIP
Transatlantic Trade and Investment
Partnership (EU-US free trade agreement)

UNGPs
United Nations Guiding Principles
(on Business and Human Rights)

WTO
World Trade Organisation

Executive Summary

The United Kingdom is a major player in the global investment landscape. It has 105 BITs, the second highest number in Europe. UK companies are responsible for 8% of total known cases, and several high profile law firms and third party funders are headquartered in the UK.[1]

The UK investment protection regime is highly problematic: its agreements contain many potentially damaging clauses and little to prevent them from having unintended consequences for policy. Some UK law firms are not only world leaders in terms of participation in cases, they have also been heavily involved in shaping the system. The practice of third party funding of cases is also growing in the UK.

The UK plans to ratify a number of outstanding treaties and is playing a key role in advocating for an investment chapter in TTIP. At the same time, the majority of UK BITs have reached their 'anytime termination' phase, providing an opportune moment for review.

The global investment protection regime has come under increasing scrutiny, as governments and civil society have highlighted the damaging impact of a system that offers exclusive rights, unparalleled in international public law, to investors, whilst imposing no enforceable responsibilities.

The UK is a major player in this field. It has 105 Bilateral Investment Treaties (BITs), the second highest number in Europe, and plans to ratify a further eleven in the coming years. The majority of these are with developing countries, with Ethiopia next on the list for ratification. The UK has also actively promoted the inclusion of an investment chapter in the Transatlantic Trade and Investment Partnership (TTIP – the proposed EU-US trade deal) and is home to a significant number of law firms and third party funders who play an important role in shaping the system.

In common with the majority of BITs globally, UK treaties offer companies the possibility of suing governments if they feel that a policy change has negatively impacted upon their investment. UK-registered companies are among the most active in the world in terms of litigation, responsible for 8% of total known cases.

Prominent cases include Anglia Water vs. Argentina, which centred on a water concession in Buenos Aires. The company claimed that Argentina breached the terms of its BIT with the UK by forcing renegotiation of the contract, preventing the company from raising tariffs during the country's financial crisis and eventually cancelling the concession. During the case, the Argentine government, together with non-governmental organisations (NGOs), argued that the tribunal should take into account the fact that the concession dealt with water and impacted upon the human right to that resource. The government further argued that its "emergency response" (including freezing tariffs), was necessary in the context of its financial crisis. The tribunal rejected both propositions and specifically stated that states must respect human rights and BITs obligations equally.

UK BITs contain many potentially damaging clauses and little to prevent them from having unintended consequences for the policy space of treaty partners, the majority of whom are developing countries. Treaty clauses are vaguely worded, leaving them open to wide interpretation by arbitrators. For example, definitions of 'investor' and 'investment' are very broad, such that companies are not even required to have a seat or substantial business interests in the host country in order to benefit from treaty protections.

Perhaps most significant is the almost total absence of any reference to human rights commitments. The UK government has made a number of commitments under its action plan for implementing the United Nations Guiding Principles on Business and Human Rights (UNGPs), including to **"ensure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country's ability to […] meet its international human rights obligations"**. Despite this, it has no plans to review its agreements to bring them in line with these commitments.

This raises the prospect of BITs acting as a barrier to policy change that is intended either to support the UNGPs or to achieve development goals. Indeed, there is already evidence that UK BITs are impacting upon the policy space of governments. For example, in the more recent of two Standard Chartered Bank cases against Tanzania, the tribunal ordered the parties to recalculate an electricity tariff, increasing costs for end users. In Wena Hotels vs. Egypt, two separate tribunals chose to override Egyptian law regarding the calculation of interest payments. These precedents are of particular concern with respect to developing countries as they are more likely to need to introduce new regulations, such as a minimum wage, as their economies develop.

One of the most likely causes of this kind of 'policy chill' is the high costs of defending cases and of eventual awards. For example, although awards are yet to be made in the two cases brought by Standard Chartered Bank against Tanzania, the Tanzanian government has stated that the counsel and expert costs for just one of them will amount to more than US$8 million. These costs are, however, dwarfed by the magnitude of potential awards under UK BITs. For example, in 2014, Yukos Universal Ltd. (registered in the Isle of Man) received an award of US$50 billion against Russia, the largest in arbitration history.

Law firms stand to make significant profits from such cases. UK law firms are not only world leaders in terms of participation in cases, they have also been heavily involved in shaping the system. Freshfields is the most prominent example, and, at the time of writing, is acting in 24 different International Centre for the Settlement of Investment Disputes (ICSID) cases, more than any other law firm. UK firms advise governments and companies on the negotiation of treaties and, in the case of Allen and Overy, have helped to set up new dispute settlement centres. Freshfields has also highlighted the potential availability of claims under BITs to companies seeking to protect their interests during times of regulatory change or political upheaval, for example in relation to the financial crisis in the Eurozone, the Arab Spring and the conflict in Libya.

Because the costs of cases have increased significantly in recent years, it is perhaps not surprising to find there is a growing industry of 'third party funding'. This is where banks, hedge funds or other institutions fund a case in exchange for a share of the award, in the event that the claim succeeds. Some of the major specialist funders, such as Juridica Investments, Calunius Capital, Vannin Capital and the Burford Group, are based in the UK. Companies generally invest between US$3 million and US$10 million to cover the costs of a lawsuit potentially worth US$25-100 million. In a case brought against Bolivia, UK-registered firm Ruralec (operating via companies registered in the British Virgin Islands) was awarded compensation of US$31.5 million (plus interest) of which Burford received US$11 million.

Despite the growing body of evidence pointing to the serious problems with the system, the UK continues to argue that BITs are a normal part of international relations. Not only does it have no plans to review its model treaty or renegotiate existing agreements, it is also planning to ratify a further eleven BITs in the coming years, and has been a strong advocate of similar provisions in TTIP. It is worth noting that, since the US is the single largest source of foreign investment in the UK and also home to the most litigious companies under the BITs system, this would increase significantly the risk of a successful case against the UK.

There are right now a number of factors which present a huge opportunity to change course. The majority of UK BITs have reached their 'anytime termination' phase, meaning that they can be cancelled or renegotiated. A number of governments (such as South Africa, India, Australia and Indonesia) are either cancelling their BITs and developing alternative arrangements, or introducing significant reforms which allow them to better protect their right to regulate.

This report argues there is an urgent need for a review of the UK investment protection regime to address the problems outlined above and, in particular, to bring it into line with UK commitments under international human rights instruments. It recommends the review begin by considering to what extent taxpayers, particularly those in developing countries, should be required to insure the business risk of international investors.

The report makes the following recommendations:

As part of the review, the UK government should seriously consider alternatives such as:

- Directing investors to the other protections available to them;
- Establishing a dispute prevention policy;
- Replacing investor-to-state dispute settlement (ISDS) with state-to-state dispute settlement.

It should ensure that future and existing investment agreements are compatible with the UK's commitments under the UNGPs and other international human rights and environmental protection instruments, for example by including:

- Binding obligations on investors to undertake due diligence;
- Binding obligations on investors to adhere to the international human rights and environmental instruments to which the UK is a signatory;
- Binding obligations on investors to comply with the national laws of the host country;
- Legal liability of companies, in home states, for (complicity in) human rights violations, environmental destruction and corrupt practices;
- Legally binding mechanisms of redress for communities who have been negatively impacted upon by the activities of investors.

The review should also address the issues with the arbitration system, highlighted in this report, and seek to regulate third party funding.

Pending such a review, which should include in its purview the UK's model BIT as well as its existing BITs, the concerns expressed in this report suggest that the UK must halt the ratification of its outstanding BITs and offer alternatives to the countries in question.

[1] For all references in this executive summary, please see main report.

Introduction

International Investment Agreements (IIAs), the vast majority of which are Bilateral Investment Treaties (BITs), have been part of the international investment protection regime since the late 1950s.[2] However, the mid-1990s saw a significant increase in the number of treaties signed, as negotiations for a Multilateral Agreement on Investment (MAI) failed in the face of significant public protest.[3] There are now 3,268 IIAs globally; in addition, investment protection chapters are included in a number of trade and sectoral agreements.[4]

The rationale for BITs was initially that they would offer additional protection to investors in countries where the investment environment would otherwise be considered too risky. In this way, BITs would help attract investment that would stimulate growth to support the achievement of policy goals.[5]

More recently, as global flows of foreign investment have grown, often in the absence of IIAs, this rationale has been called into question.[6] Widespread criticism has highlighted that the system offers significant rights to investors with no parallel obligations, has far-reaching consequences for government sovereignty and is out of step with international human rights and environmental instruments.[7] The system has also been criticised for underwriting the liberalisation policies of the 1990s; privatisations undertaken as a condition of IMF and World Bank loans have set the scene for many of the BIT cases.[8] The huge increase in the number of cases taken to the International Centre for the Settlement of Investment Disputes (ICSID) by companies has prompted calls from civil society and governments for urgent review: by the end of 1994, only three investment treaty related disputes had ever been submitted; by the end of 2014, that number had grown to 608.[9] Defending a case is costly and awards against countries can run to billions of dollars.

The UK is a significant player in this landscape. It is a leading capital exporting country with the second highest number of BITs in Europe (and the second highest number of IIAs globally).[10] More than three-quarters of the UK's 105 BITs are with developing countries.[11] The number of cases brought under UK BITs has grown significantly: the UK now accounts for 8% of all known cases. The UK is a hub for law firms practising in international investment law, who have a significant role in shaping the international investment protection regime. It is also home to a growing number of third party funders who provide financial support for companies to take cases.

Despite growing criticism of the system, the UK has no plans to review its own BITs and intends to ratify a further eleven, including treaties with Ethiopia, Gambia, Costa Rica, Angola and Zimbabwe. It is taking a strong position of support for the inclusion of an investment protection chapter in the Transatlantic Trade and Investment Partnership (TTIP), a major trade deal being negotiated between the EU and the US. Such a chapter could have system-wide implications for the international investment protection regime and the idea has been met with significant criticism from both civil society and politicians.[12]

This report gives an overview of the main critiques of BITs and outlines the current state of the UK investment protection regime. It goes on to consider whether UK BITs are fit for purpose, analysing the impact that they are having in terms of cases being brought against countries, as well as their effects on key policy processes. It then looks at the role that UK law firms are playing, both in terms of their participation in cases and in their shaping the global investment protection regime, and gives an overview of third party funders in the UK. Finally, it describes the steps many countries are taking to review and reform their investment protection provisions, and makes a number of recommendations regarding steps that are urgently needed for the UK to bring its own regime up to date.

[2] IIAs are divided into two types: Bilateral Investment Treaties and other IIAs. A BIT is an agreement between two countries regarding promotion and protection of investments made by investors from the respective countries in each other's territory. The category of other IIAs covers three main types of treaty: broad economic treaties, such as Free Trade Agreements (FTAs), that include similar obligations to those found in BITs; treaties with limited investment-related provisions; and treaties that only contain 'framework' clauses (for example, on cooperation in the area of investment or a mandate for future negotiations on investment issues). See http://investmentpolicyhub.unctad.org/ accessed 01/05/15

[3] Negotiations, initially held in secret between OECD members, were eventually halted in 1998. See http://www.oecd.org/daf/mai/ accessed 01/05/15

[4] For example the Comprehensive Economic and Trade Agreement (CETA – between the EU and Canada), and the EU-Singapore Free Trade Agreement.

[5] Neumayer and Spess (2005), p1

[6] Flows grew from under US$500 billion to $1.3 trillion between 1995 and 2014, peaking at over $2 trillion in 2007. Figures from UNCTAD (2014) p.xiii

[7] For examples of this criticism, see for example Bernasconi-Osterwalder et al (2012), Eberhardt & Olivet (2013) and Tienhaara (2009).

[8] Poulsen (2011), p.79. Prominent examples include Aguas del Tunari, S.A (Bechtel) vs. Republic of Bolivia ICSID ARB/02/3. See also Ruralec vs. Bolivia, discussed below.

[9] http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf accessed 22/04/15

[10] Mirroring the global picture, UK outward investment flows tend to fluctuate significantly, for example decreasing from £60.1 billion in 2011 to £26.5 billion in 2012. See http://www.ons.gov.uk/ons/rel/fdi/foreign-direct-investment/2012-ma4/stb-fdi-ma4-2012.html accessed 23/03/15

[11] UNCTAD Investment Treaty Database. 82 of the UK's BITs (87%) are with developing countries (World Bank classification) http://investmentpolicyhub.unctad.org/IIA accessed 15/03/15.

[12] UNCTAD (2014), p118

Chapter 1 Policy implications of Bilateral Investment Treaties

BITs have been promoted as a way of attracting investment to help generate growth and jobs. Not only are they failing to live up to their promise, they are undermining key economic justice goals by:

- **Offering foreign investors excessive rights with no obligations;**
- **Undermining governments' right to regulate; and**
- **Mitigating against recent international work on the human rights responsibilities of business.**

A Bilateral Investment Treaty is an agreement between two countries regarding the promotion and protection of investments made by investors from those countries in each other's territory. There are 3,268 International Investment Agreements (IIAs) globally, of which 2,926 are Bilateral Investment Treaties (BITs). There is also a growing trend to include investment chapters, with similar provisions to IIAs, in bilateral trade agreements like the Transatlantic Trade and Investment Partnership (TTIP).

The problems that BITs pose for governments and communities have been outlined in detail by numerous commentators; the following provides a summary of the key concerns.[13]

BITs have not delivered on their promises

One of the claims made of BITs is that they contribute to generating increased investment. The argument is that they offer investors an increased level of certainty, encouraging them to invest more in countries that would otherwise be considered too risky and thereby contribute to those countries' economic development.[14] However, a number of studies have found that early assessments demonstrating this were flawed, that there is little relationship between signing a treaty and attracting investment, and that other factors, such as the standard of infrastructure, availability of raw materials or size and proximity of target markets, are more important determinants.[15] UNCTAD for example found that BITs have failed to deliver investment in critical sectors for sustainable development, such as water and sanitation, and are poorly designed to do so.[16] UNCTAD also highlighted the role of BITs in preventing governments from adopting policy measures necessary for economic diversification and industrialisation.[17]

BITs offer foreign investors excessive rights with no enforceable responsibilities

BITs offer foreign investors an additional layer of protection – on top of their commercial contracts – in respect of government action and policy that could affect their operations and profitability. These are exclusive rights, unparalleled in international public law, and not available to any other actor. They also impose no enforceable responsibilities on investors regarding their conduct in host countries, whether in terms of the economic contribution of their activities, or in terms of their human rights and environmental obligations.

Key issues with BIT clauses

Broad definitions

BITs contain broad definitions of 'investment' and 'investor' that allow companies to bring disputes across a wide range of policy areas, often without having a significant economic presence in a country.[18]

Far-reaching clauses

BITs typically contain a number of clauses that give significant rights to investors. Some of the most problematic are as follows:

- Fair and Equitable Treatment (FET) clauses: these require governments to treat investors 'fairly' and not upset their 'legitimate expectations'. They have permitted investors to bring disputes against a wide range of government activities from changes in tariff charges in public utilities to withdrawal of tax exemptions and changes to the regulation of chemicals.[19]

- Indirect expropriation clauses: such clauses provide for compensation where a regulatory measure is considered to harm, affect or interfere with an investment. This can cover a wide range of government actions and measures, ranging from taxation to environmental regulation.
- Umbrella clauses: these clauses mean that host states must comply not only with the obligations explicitly agreed to in the treaty, but any other obligations, such as those in contracts with the investor. This potentially elevates contract commitments outside of the BIT process to the level of treaty obligations and makes it difficult for governments to manage the scope and impact of their treaty commitments.
- Capital control clauses: many BITs contain clauses requiring governments to allow unrestricted movement of payments and capital by investors, with very few exceptions. This can make it difficult for countries to ensure economic stability and manage financial crises.[20]

The ability to bypass domestic courts

Exhaustion of local remedies is a principle of customary international law, according to which all remedies available in the domestic legal system must be exhausted before a legal case can be raised to the international level. BITs typically do not require the exhaustion of local remedies and allow investors to go directly to international arbitration, the assumption being that domestic courts may be considered inadequate. However, bypassing them precludes the possibility of preventing premature or frivolous claims at national level or for the government to remedy alleged wrongs without international arbitration. In addition, it prevents domestic legal systems from developing expertise in this area.[21]

The right to sue governments at private international tribunals

The majority of BITs contain Investor to State Dispute Settlement (ISDS) clauses which allow investors to challenge governments at private international tribunals if they feel a government has acted in breach of a treaty. The basic premise of ISDS is that governments, and therefore taxpayers, should mitigate the business risk of multinational companies (MNCs) – in effect offering a subsidy for particular kinds of MNCs.[22]

Signing BITs therefore exposes countries to the threat of expensive legal disputes.[23] Average costs for defending a case are US$8 million and large awards are not uncommon. The largest known award was for US$50 billion, against Russia, followed by a US$1.77 billion ruling against Ecuador.[24]

The lack of transparency in the arbitration system makes it impossible to know the exact number of cases being brought under BITs, but the evidence available suggests that it is increasing.[25] The World Bank Group's International Centre for the Settlement of Investment Disputes (ICSID) is the only centre to have a track record of publishing cases.[26] At the end of 1994 only three investment treaty disputes had been submitted; by the end of 2014, that number had grown to 608.[27] There are many more cases that are not in the public domain, heard at centres such as the London Court for International Arbitration and the International Chambers of Commerce in Paris, amongst others.

Another key issue is that cases are heard by arbitrators who often have little or no experience in international public law.[28] The system allows considerable leeway for lawyers and arbitrators to interpret clauses, and studies have found that investor-friendly interpretations are prevalent in disputes.[29]

There are no requirements to include expert bodies in the process to assess the relevance or appropriateness of government measures, rather than just the impact on the investor. There is also little opportunity for external experts or *amicus curiae* briefs and there are limited options for review of or appeal against tribunal findings.[30]

BITs can undermine the state right to regulate

> **"IIAs may make it difficult for countries to achieve essential public policy objectives, including their development goals and the maintenance of environmental, human rights and labour rights standards."[31]**
>
> Veniano Qalo, Acting Head of International Trade, Commonwealth Secretariat

There have long been indications that the problems outlined above are undermining policy space for important environmental and social legislation.[32] Indeed, foreign investors have already challenged a broad range of government measures and policies using BITs protections, such as emergency laws put in place during a financial crisis, taxation, land use policy, media regulation, energy regulation, currency regulation, licensing rules for telecom and tourism, the withdrawal of solar energy subsidies, hazardous waste legislation, and many more.[33]

Furthermore, there is evidence that, even in the absence of a dispute, governments are tailoring their policy and regulatory choices to suit investors because of the threat of BITs. For example, in 2010, Germany agreed to lower environmental requirements of a coal power plant rather than defend a claim by Vattenfall.[34] Canada has also repealed environmental law, in this case a law banning the export of PCBs (a chemical used as a coolant) with effect from January 2015, rather than defend a BIT claim.[35]

In an interview with the LSE's Investment and Human Rights Project, Toby Landau, who has participated in more than 300 cases as both counsel and arbitrator, argues:

"No state wants to be brought under a treaty to an international process. It has an impact upon diplomatic relations, it may have an impact upon a state's credit standing and it may have a direct impact deterring future foreign investment. As a practitioner, I can tell you that there are states who are now seeking advice from counsel in advance of promulgating particular policies in order to know whether or not there is a risk of an investor-state claim."[36]

Toby Landau, QC, Essex Chambers

Finally, there are already specific examples of law firms encouraging companies to use the existence of BITs protections as a first resort, as 'leverage' to reach early settlements.[37] This means that it is extremely difficult to quantify how much or how often governments have agreed to change regulations or policies. It also means that the financial implications of BITs are likely to be much bigger than a simple examination of arbitral awards would suggest.

BITs do little to support human rights commitments

The past decade has witnessed potentially significant developments regarding the intersection between international human rights instruments and the activities of business. In 2008, the Human Rights Council approved the UN Framework and Guiding Principles on Business and Human Rights. These are based on the recognition of state obligations to respect, protect and fulfil human rights and fundamental freedoms, the need for business to comply with all applicable laws and to respect human rights, and the need for effective remedies when human rights are breached.[38]

The idea that governments have the right to expect investors to make a contribution to such policy goals is not unheard of even under the current system of investment protection. A limited number of treaties, such as NAFTA (the North American Free Trade Agreement) and the Energy Charter Treaty, use their preambles to explicitly position foreign investment within the overall aim of economic development.[39] In some revealing cases, arbitration panels have used this language to make companies' right to bring disputes under the investment treaties conditional upon their contribution to the host economy.[40] NAFTA even goes as far as affirming the parties' resolve to "protect, enhance and enforce basic workers' rights".[41]

Referring to analysis of three tribunal findings, one expert finds that: "[i]f one combines the criteria for determining a contribution to economic development as applied by the ICSID Tribunals in [the cases of] Salini, MHS and CSOB, it can be concluded that the investment must: (a) be made for the public interest; (b) transfer know-how; (c) enhance the GDP of the host state; and (d) have a positive impact on the host state's development."[42] Overall, this suggests that there is scope for reform to ensure that investment protection is in line with human rights commitments.

However, the vast majority of BITs do not contain the kind of language found in the treaties mentioned above. There are also many examples of tribunals who have failed to take this language into account, instead choosing to emphasise the goals of promoting investment and creating conditions favourable for investors. Indeed, BITs contain very little language to support countries in implementing their obligations under human rights instruments. A 2014 OECD survey found that treaty language referring to "human rights" is extremely rare, appearing in less than 1% of the 2,107 treaties in the sample. (By contrast, the environment was

mentioned in 10% of the treaties.) Furthermore, all human rights references occurred in the preambles to the treaties; whilst this helps to clarify the context, object and purpose of the treaty for arbitrators, it is not legally binding.

Compounding this situation is the fact that, even where obligations contained in international human rights treaties are specifically directed at the activities of corporations, the treaties are only binding on the contracting states, not on the corporations themselves. As a result, human rights concerns can only be raised in BIT arbitral tribunals in a very limited number of circumstances, with nothing to direct tribunals to take into account an investor's record of compliance with human rights instruments when considering the admissibility of a claim.

[13] See for example Bernasconi-Osterwalder et al. (2012), Poulsen (2010) and UNCTAD (2006)

[14] See for example Neumayer and Spess (2005) and Jacob (2010)

[15] See for example Aisbett (2009), Poulsen (2010) and Yackee (2010)

[16] UNCTAD (2014)

[17] Ibid.

[18] This is a non-exhaustive list – for a discussion of problem clauses see: Bernasconi-Osterwalder and Johnson (2010) and the UNCTAD Series on International Investment Agreements.

[19] Bernasconi-Osterwalder and Johnson (2010)

[20] See for example Gallagher (2010) and (2011)

[21] Bernasconi-Osterwalder, N et. al. (2012): pp.38-39.

[22] See http://www.cato.org/publications/free-trade-bulletin/compromise-advance-trade-agenda-purge-negotiations-investor-state accessed 02/03/15

[23] Gaukrodger and Gordon (2012). As there is no "loser pays" principle established in ISDS rules, governments can still be liable to pay considerable legal bills.

[24] See Yukos Universal Limited (Isle of Man) vs. The Russian Federation, UNCITRAL, PCA Case No. AA 227 and Occidental Petroleum Corporation vs. The Republic of Ecuador, ICSID Case No. ARB/06/11 award 05/10/2012.

[25] For more details on the problem of poor transparency in investment disputes, see especially: http://unctad.org/en/PublicationsLibrary/unctaddiaeia2011d6_en.pdf accessed 04/03/15

[26] Recent innovations mean that, as of April 2014, there will be greater transparency in new cases taken under UNCITRAL proceedings.

[27] See http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf accessed 04/03/15

[28] Eberhardt and Olivet (2013)

[29] See, for example, Gaukrodger and Gordon (2012), Van Haarten (2012) found that arbitrators tended towards expansive claimant-friendly rulings, rather than government-friendly ones, based on an analysis of 140 known cases up to May 2010; see also Johnson and Volkov (2014) who find that awards are more favourable to investors under international, rather than national, tribunals.

[30] It is possible to set up these institutional mechanisms, as demonstrated by the 2012 US Model BIT, which includes procedures for assessing prudential measures related to the financial market, see Van Aaken (2013). There is no inbuilt appellate mechanism in the majority of BITs, but ICSID allows for review in a limited set of circumstances and the US Supreme Court, for example, has recently overturned a number of arbitral decisions, see Bernasconi-Osterwalder et. al. (2012)

[31] Qalo (2013)

[32] See for example, Peterson (2004) and Oxfam International (2007)

[33] UNCTAD 2006 and 2013a

[34] See Vattenfall AB and others vs. Federal Republic of Germany, ICSID, ARB/09/6

[35] See http://www.gazette.gc.ca/rp-pr/p2/2014/2014-04-23/html/sor-dors75-eng.php accessed 27/04/15. SD Myers, a US company treating Canadian PCBs, brought a claim against Canada after an export ban of these chemicals, cited in Glinavos (2010)

[36] Video link available at the LSE Investment & Human Rights Project site – http://blogs.lse.ac.uk/investment-and-human-rights/ accessed 20/03/15

[37] Eberhardt and Olivet (2013)

[38] UNHCR (2011)

[39] Garcia-Bolivar, O. E. (2012) Available at https://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/ accessed 30/04/15. Preambular language in the ICSID Convention, NAFTA and the Energy Charter Treaty states specifically that their aim is to promote economic development.

[40] Most notably Salini Costruttori SpA and Italstrade SpA vs. Morocco ('Salini' - ICSID case no. ARB/00/4) but also Malaysian Historical Salvors Sdn Bhd vs. Malaysia ('MHS' - ICSID Case No. ARB/05/10) and Ceskoslovenska Obchodni Banka, A.S. v. The Slovak Republic ('CSOB' - ICSID Case No. ARB/97/4)

[41] See the North American Free Trade Agreement, signed 17 December 1992, United States-Canada-Mexico, 32 ILM 289 (entered into force 1 January 1994) ('NAFTA'), available at <www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/nafta-alena/texte/index.aspx> accessed 05/11/14, preamble

[42] Garcia-Bolivar, O. E. (2012)

[43] Ibid.

[44] Gordon, K. et. Al. (2014), Jacob (2010)

[45] See http://www.iisd.org/itn/2013/03/22/how-to-incorporate-human-rights-obligations-in-bilateral-investment-treaties/ accessed 05/10/14

Chapter 2 The UK Investment Protection Regime – Leading the Pack?

The UK is a major player in the global investment landscape. It has 105 BITs, the second highest number in Europe. UK companies are responsible for 8% of total known cases, and several high profile law firms and third party funders are headquartered in the UK.

The UK investment protection regime is highly problematic: its agreements contain many potentially damaging clauses and little to prevent them from having unintended consequences for policy. Some UK law firms are not only world leaders in terms of participation in cases, they have also been heavily involved in shaping the system. The practice of third party funding of cases is also growing in the UK.

The UK plans to ratify a number of outstanding treaties and is playing a key role in advocating for an investment chapter in TTIP. At the same time, the majority of UK BITs have reached their 'anytime termination' phase, providing an opportune moment for review.

The UK has 105 BITs, the second highest in Europe.[46] Whilst competence for investment policy was formally transferred to the EU under the Lisbon Treaty of 2009, UK agreements will remain in force until such time as EU agreements are ratified covering the same countries. Taking into account existing EU treaties, the uncertain status of intra-EU BITs and ongoing EU negotiations, only 25 UK BITs are likely to be superseded in the foreseeable future.[47] The UK is also allowed to negotiate new agreements (subject to EU approval) and in the coming years plans to ratify treaties with Angola, Brazil, Costa Rica, Ethiopia, Gambia, Kuwait, Libya, Qatar, Vanuatu, Zambia and Zimbabwe.

The UK Parliament has debated the issues associated with investment agreements in relation to the investment chapter of TTIP, as well as the ratification of the UK-Colombia BIT (in July 2014).[48] MPs, Lords and MEPs have raised concerns about the potential impact of investment agreements on governments' ability to regulate in the public interest. Public concern in the UK about investment protection provisions is also growing: a consultation by the European Commission on the investment chapter in TTIP received over fifty thousand separate responses (one third of the EU total) from the UK. Ninety-seven percent of total responses received by the Commission opposed the inclusion of an investment chapter.[49] At the same time, since the majority of the UK's existing BITs (including most of the eleven BITs that the UK plans to ratify) have reached their 'anytime termination phase', and therefore could be cancelled, there is a window of opportunity for reform.

UK bad BITs

UK BITs contain few innovations to ensure that they do not have unintended consequences for policy or to improve their impact on sustainable development. UK treaties contain standard, broad definitions of what constitutes an "investor" or protected "investment", which are critical in allowing companies to challenge a wide range of government policy decisions. Significantly (and in contrast to countries like Germany), the UK does not require companies to have seat or substantial business interests in the host country before benefiting from its treaty protections.[50] Clauses in the treaties are broadly defined and some treaties, including the UK's model treaty, contain an 'umbrella clause', allowing investment contract disputes to be raised to the level of treaty disputes. While the OECD has found that countries are increasingly including environmental concerns in investment agreements, the only UK treaty that refers to them is with Mexico, a country that systematically includes environmental language in its treaties.[51]

Qualifications to treaty language in UK BITs are minimal. For example, exceptions to the expropriation clause are only allowed for governments to adopt "measures which are necessary to protect national security, public security or public order". Exclusions (generally referred to as 'carve outs') to non-discrimination clauses such as Fair and Equitable Treatment, only cover taxation matters and agreements, and benefits arising from customs unions, free trade areas and similar agreements.[52]

The UK government has made a number of commitments under its action plan for implementing the UNGPs, including the following:

"[The government will] ensure that agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country's ability to either meet its international human rights obligations or to impose the same environmental and social regulation on foreign investors as it does on domestic firms."[53]

However, despite these commitments, UK treaties do little to support the implementation of human rights instruments.

UK BITs pre-date ongoing European reform efforts (in the context of CETA and TTIP), which have attempted, for example, to clarify the scope of clauses and address issues with ISDS.[54] Despite this the UK currently has no plans to revise its model BIT or renegotiate existing BITs.

Indeed, as well as pushing forward with ratification of its own BITs, the UK has been a vocal advocate of an investment protection chapter in TTIP.[55] This would mark a significant change both for the global investment landscape and for the UK, setting a strong global precedent with significant implications for multilateral negotiations and increasing exponentially the amount of investment covered by agreements.[56] The majority of existing UK BITs are with capital-importing countries, which means there is a low likelihood of a case being brought against the UK. In contrast, the US is the single largest source of inward investment into the UK, accounting for 27% of total stocks.[57] Under TTIP, US companies would be brought into the equation as potential litigants, and since US companies have already initiated no less than 20% of global arbitrations to date, this increases significantly the likelihood of a case being brought against the UK.[58]

In 2013, a UK government commissioned report on the costs and benefits to the UK of an investment chapter in TTIP found not only that it was highly unlikely to lead to an increase in investment flows but also that it would incentivise claims that would not have been brought under existing UK domestic law. Furthermore, it found that the costs of defending cases under TTIP, as well as any potential awards, could be significantly higher than those of cases brought to domestic courts.[59] Despite all of this, however, the UK government has consistently defended investment protections as a normal part of international relations.

As one UK minister recently put it:

"Investment protection plays a vital role in safeguarding the gains of international investments and the trade that depends on them, benefiting producers and consumers alike. It has been included in every British investment deal, without doing the slightest damage to consumer protection or undermining our sovereignty or our legal system."[60]

Rt. Hon. Kenneth Clarke QC MP, 2014.

While discussions regarding a potential investment chapter in TTIP are ongoing, and the provisions that may be in it have therefore not been tested, the following analysis of how UK BITs have worked in practice demonstrates that the UK government's positive take may not be well-founded.

UK BITs in practice – an overview of cases to date

The EU and US together account for 75% of all investment arbitration claims.[61] The UK has the second highest number of claimants in the EU, being the source of 48 claims or nearly 8% of the known global total. It is not possible to access information on all of the cases brought by UK-registered firms. It is, however, possible to give an insight into the sectors, countries and impacts of UK cases through analysis of those that have been made public.

UK claims relate to a broad range of investment activities, from mining (Oxus Gold vs. the Republic of Uzbekistan,[62] Churchill Mining vs. Indonesia[63]), and shareholding (The Children's Investment Fund

Case Study **UK-Ethiopia BIT**

Ethiopia has made significant progress in achieving a number of poverty reduction goals. For example, since the early 1990s the number of children enrolling in primary school has quadrupled (to 82% by 2012) and the number of people with access to safe drinking water has doubled (reaching 71% of the population by 2010). Nevertheless it remains one of the world's poorest countries. Extreme poverty rates remain high: around one-third of the population lives on less than US$1.25 a day and per capita GDP in 2012 was US$453.60 – substantially lower than the regional average.[64 65]

The country is seeking to attract foreign investment to strengthen its economy, in particular to develop mineral extraction industries, such as gold, platinum, tantalite, soda ash and phosphate. It has plans to develop significant infrastructure, including the controversial building of several large dams to address electricity shortages.[66] Ethiopia is also under pressure to increase the liberalisation of its markets as one of the criteria for WTO membership.[67]

Investment inflows to Ethiopia have been relatively volatile over the last ten to fifteen years, achieving a high of around US$550 million in 2004, for instance, but dropping to just US$100 million in 2008.[68] Most foreign investment takes place in manufacturing and agriculture sectors; for example, the UK has significant investment in leather processing.[69] In its 2011 review, UNCTAD criticised Ethiopia's lack of strategy for foreign investment and noted a dearth of resources dedicated to its promotion. The report also pointed to problems in some of the major investment sectors, including in tannery, where it identified issues around disease prevention and animal husbandry.[70]

Ethiopia has signed 29 BITs to date, of which 22 are in force and up to eighteen have reached their anytime termination phase.[71] Ethiopia has also been respondent in a number of cases, including under European Development Fund arbitration rules regarding contracts for public transport and water and sanitation services.[72] The UK-Ethiopia BIT was signed in 2009 and at time of writing is next on the list of treaties the UK wants to ratify. Despite being one of the UK's more recently-agreed deals, the BIT contains no language to protect Ethiopia's right to regulate to protect the environment and human rights. The definitions of the substantive provisions (including of 'investment' and of 'fair and equitable treatment', for example) remain vague, allowing for the most expansive (and therefore least predictable), investor-friendly interpretation by tribunals. It makes allowance for the imposition by the state of capital controls only "in exceptional circumstances" and "if such measures are strictly necessary".[73] Interpretation of these qualifications is left to arbitral tribunals and there are no rules to govern the transparency and fairness of ISDS proceedings. Finally, the treaty contains an umbrella clause, meaning that breaches of private contracts between investors and the signatory states can be raised to the level of breaches of treaty.[74]

To ensure international investment is of benefit to its own citizens, Ethiopia will need to put the right laws and policies in place to frame that investment, for example laws to protect workers' rights or prevent damage to the environment. As the analysis of UK cases in this report suggests, this kind of evolution in the policy landscape can make a country more vulnerable to challenge under a BIT. Even the cost and time required to respond to an unsuccessful challenge could be a significant impediment to achieving poverty reduction targets.

vs. India[75]) to the provision of energy (Standard Chartered Bank vs. Tanzania,[76] Rurelec vs. Bolivia[77]) and water services (Anglia Water vs. Argentina,[78] Biwater Gauff vs. Tanzania[79]).

Research for this report has identified UK cases against at least fifteen different countries. Mirroring a global trend, Argentina has been the target of a significant proportion of the claims, from a range of companies including Anglia Water (see below), BG Group Plc. (formerly British Gas) and National Grid.[80] Egypt, Tanzania and India also rank high on the list of governments that have had claims against them.

There is also evidence that cases like these are having an impact on the policy space of the governments concerned. For example, in the most

recent Standard Chartered Bank vs. Tanzania case, the tribunal ordered the parties to recalculate the electricity tariff, increasing costs for end users.[81] In Wena Hotels vs. Egypt, two separate tribunals chose to override Egyptian law regarding the calculation of interest payments.[82]

The costs associated with these cases are extremely high, although these are dwarfed by the magnitude of the awards granted to winning investors. Although, to date, no award has been made in the cases brought by Standard Chartered Bank against Tanzania, the government has stated that the counsel and expert costs for just one of them will amount to more than US$8 million.[83] In 2014, Yukos Universal Ltd. (registered in the Isle of Man) received an award of US$50 billion against Russia, the largest in arbitration history (brought under the Energy Charter Treaty, to which the UK is a signatory).[84] Although the tribunal in the Ruralec vs. Bolivia case only found in favour of the company in respect of one aspect of its claim, Bolivia was ordered to pay compensation of almost US$31.5 million, plus 5.6% compound interest (calculated from 2010 to the time of payment).[85]

The BG Group and Standard Chartered Bank claims illustrate how unpredictable the system can be. BG Group was awarded US$185 million in compensation against Argentina in 2007, but the award was overturned in 2011 when a separate tribunal found that the company had not respected the BIT requirement to first seek relief in domestic courts. In 2014 the award was then reinstated by the US Supreme Court. In the case of Standard Chartered Bank vs. Tanzania, there have been no less than three arbitral proceedings relating to the purchase by the bank (via companies in Hong Kong and Malaysia) of a bundle of investment assets, including a loan for the building and operation of an electricity generation facility in Tanzania.[86]

Case Study **Anglia Water vs. Argentina**

In the 1990s, Argentina privatised water and sewage services in Santa Fe and Buenos Aires. French, Spanish and UK firms formed a company called AASA to take on the concessions. As part of the consortium, the British firm, Anglia Water Group took on the 30-year Buenos Aires concession.

Argentina revoked the concession in 2006, claiming that AASA had breached its obligations under the concession agreement by, among other failures, providing water with excessive levels of nitrate and not completing scheduled works. During the Argentine financial crisis, Argentina also refused to allow the companies to raise tariffs. The investors claimed that Argentina breached its BITs with the UK, Spain and France via unlawful expropriation of their property (by cancelling the concession and refusing to raise tariffs) and failure to provide fair and equitable treatment, again by refusing to raise tariffs and also by forcing renegotiation of the contracts.[87]

During the case, Argentina urged the tribunal to take into account the fact that the concession dealt with water and impacted upon the human right to that resource. Five NGOs also submitted an *amicus curiae* brief with similar arguments. However, the tribunal did not agree that human rights obligations should take precedence and concluded that states must respect both human rights and BITs obligations equally. Although the expropriation claims were rejected, in December 2010, an ICSID tribunal concluded that the "forced" renegotiation and refusal to raise tariffs constituted unfair treatment.[88] In 2015, the total award against Argentina was revealed to be US$405 million plus interest, of which Anglia Water was allocated US$21 million.[89]

Argentina's argument that its "emergency response", including the above policy changes, was necessary in the context of its financial crisis was not accepted in this case (although the country had previously been successful in securing an annulment against a case brought by Enron using a similar defence).[90] Argentina is appealing this case via the ICSID annulment process, which has already allowed it to significantly reduce its total liability in other awards.[91]

UK BITs: Unintended consequences? Tax avoidance and treaty shopping

Although the Netherlands may have some claim to be the jurisdiction of choice for companies wishing to avoid taxes whilst enjoying investor protection, the UK tax and investment protection regimes share similar characteristics with their Dutch counterparts that make them vulnerable to exploitation by companies that do not necessarily contribute significantly to the UK economy.[92]

Whilst the practice of establishing 'shell' companies, (companies without any real economic activities), in order to cherry-pick the most advantageous tax treaty networks, is starting to be more widely recognised and the subject of national and international action, the accompanying practice of 'nationality planning' to take advantage of investment treaties is not being tackled, and is becoming more widespread.[93] There is evidence that tax planning firms and law firms benefiting from arbitration cases are increasingly advising companies to look at the system of BITs as well as tax regimes when planning their investment structures.[94]

Companies can acquire fiscal benefits and the benefits of protections of investment treaties through the UK by establishing a shell company which has no substantive activities in the UK or its overseas territories, but which enables the investor to take advantage of the UK's tax and investment protection regimes. The only real limitation on this appears to be that arbitral tribunals have rejected cases where companies change their registration (to a more beneficial location) after a claim has been initiated.[95] [96]

For this reason, and because of the sensitive nature of challenging national sovereignty on taxation, some treaties, such as NAFTA and the Energy Charter Treaty, specify that they do not apply to tax measures, by introducing 'carve outs'. However, there are a number of loopholes in the BITs system that allow companies to minimise their tax payments. The most common way of minimising tax payments is by shifting profits into low tax jurisdictions; transfer of capital clauses in BITs facilitate this by allowing freedom of movement of profits and payments. Other protections, such as fair and equitable treatment provisions, can allow companies to challenge government changes to tax rules and regimes.[97]

Whilst the majority of UK BITs have carve-outs from non-discrimination clauses (like Fair and Equitable Treatment) for tax measures, they usually contain transfer of capital clauses which, together with the vague wording of the non-discrimination clauses, can facilitate challenges to tax policy. A number of UK cases have also involved companies based in tax havens, including Yukos Universal Ltd (registered in the Isle of Man) and Rurelec (which made its investments through two companies – Birdsong Overseas Ltd. and Bolivia Integrated Energy Ltd. registered in the British Virgin Islands).

UK BITs in practice: law firms and third party funders

Law firms can earn significant sums from ISDS arbitration cases. According to UNCTAD, costs of investor-state arbitration have "skyrocketed" in recent years.[98] An OECD survey has found that the average cost of a case has risen to US$8 million and has on occasion exceeded US$30 million. The OECD goes on to suggest that the involvement of law firms may be driving this increase, for example through the use of corporate litigation practice, including billing rates of up to US$1,000 an hour.[99] Fees and expenses incurred for legal counsel are estimated to average about 82% of the total costs of a case and, as the OECD conclude, high costs shift power to the financially stronger party.[100]

It is feasible for law firms to charge such high fees partly because of the size of awards at stake, but also because the field is a narrow and specialised one. A limited number of firms dominate and UK firms are significant within the field, accounting for 16 of the Global Arbitration Review (GAR) top 100 firms.[101] Indeed, the undisputed number one firm since the ranking started seven years ago has been Freshfields Bruckhaus Deringer, based in the UK.

Freshfields: Profiting handsomely from arbitration

Freshfields was a pioneer in arbitration, having a team of three arbitrators in the 1970s, when few firms were active in the field. The practice has grown rapidly: the main locations for the international arbitration team are now London, Paris, various German offices, New York, Washington, Dubai, Bahrain and Hong Kong, with a further office shortly to open in Singapore. It has even created specialised sub-practices: a gas price review practice, Spanish and Portuguese-language practice groups and a construction arbitration practice.[102]

The firm has acted in a large number of cases against South American governments. The company has represented over 30 investors in arbitrations against Argentina, Bolivia, Ecuador and Venezuela alone. These include cases

leading to awards against Argentina for measures taken during its economic crisis (including representing the AASA consortium in the case outlined elsewhere in this report and for the effects on investments by CMS Gas Transmission, BG Group and National Grid, for example), and against Venezuela (for instance, a dispute worth tens of billions of dollars, brought by Conoco Philips in relation to the expropriation of oil fields).[103]

2013 saw significant growth in the firm's caseload – particularly for cases worth over US$1 billion in potential award. At the time of writing, the firm is acting in 24 different ICSID cases, more than any other law firm. In 2013, the firm saw profits rise significantly, which it credits in part to an "outstanding" year for its dispute resolution practice.

Freshfields has also been involved in some high profile cases outside South America: the firm has enabled the Karachaganak oil and gas field consortium to remain in Kazakhstan and, acting for the state, defeated a claim against Guatemala (by Iberdrola), winning costs of US$5.3million. In December 2013, a case against Romania at ICSID concluded after a marathon eight years of proceedings. Romania was ordered to pay US$116 million plus interest to Swedish investors affected by the withdrawal of economic incentives. New cases from 2013 saw Greece's Marfin Investment Group using the firm for a claim against Cyprus worth at least €823 million and Austrian energy group EVN using it for a claim against Bulgaria over electricity pricing.[104]

It would be wrong to assume that law firms such as this are passive beneficiaries of the BITs ISDS system. They do much to promote BITs among companies and governments, even to the extent of helping governments draft and negotiate BITs. On their website, for example, Allen and Overy describe how they have advised governments and companies on the negotiation, drafting of and accession to treaties, as well as on rights and obligations under international trade, intellectual property, environmental and human rights agreements. The arbitration team at Freshfields has close links to governments: its co-head, Lucy Reed, was formerly a senior lawyer at the US State Department and the firm has a Brussels-based EU regulatory and public affairs practice for the following stated purpose:

"A large part of our work relates to shaping draft EU legislation. We analyse the potential effect of draft legislation on our clients' business activities and make sure their interests are represented. We devise and implement detailed campaigns including both legal and public affairs advice".[105]

Allen and Overy have also advised clients in relation to the structuring and restructuring of their overseas investments to secure investment treaty protection, and were instrumental in Deutsche Bank's claim against Sri Lanka, where they successfully argued that a complex financial product should be classed as a protected 'investment', creating a potential precedent for future claims.[106]

Allen and Overy in Myanmar

Allen and Overy's website trumpets their establishment of an office in Myanmar. Their representatives have advised on the development of Myanmar's economy, including its financial sector. They note "this engagement puts Allen and Overy in a key position to help shape this sector".[107] The firm is advising companies in relation to auctions of public assets, for example those in the telecommunications and power sectors. It is of note that these moves are happening at the same time that the EU is negotiating an investment protection agreement with Myanmar.

Law firms can also have significant influence over the development of the arbitration processes themselves. When the Hong Kong International Arbitration Centre introduced new rules in 2013, for example, not only did Allen and Overy host the roadshow to launch them, the committee that drafted the 2013 rules was chaired by the Global Co-Head of Allen and Overy's International Arbitration Group, Matthew Gearing QC.

Some law firms have also highlighted the potential availability of claims under BITs to companies seeking to protect their interests during times of regulatory change or political upheaval, for example in relation to the financial crisis in the Eurozone, the Arab Spring and the conflict in Libya.[108] This possibility has been mooted despite the fact that the measures were non-discriminatory, that large claims like these could undermine government efforts to rebuild their economies and that local citizens and firms have also been adversely affected by the crisis and austerity periods. Some observers have dubbed these activities "ambulance chasing"; the OECD refers to law firms engaged in these activities as

"entrepreneurial lawyers" who are "advising potential clients about options for resolving disputes through international arbitration that would not have been considered only a few years ago."[109 110]

Freshfields: Profiting from Crisis

As the following quotes illustrate, Freshfields has highlighted possibilities for companies to sue governments for breach of BITs obligations for actions taken during financial crises in the Eurozone, citing examples of governments being obliged to cut spending, raise taxes and change regulations.[111]

On Europe:

"Closer integration in financial services and the whiff of protectionism in the actions of national governments raise new legal questions – and potential disputes".

William Robinson, Partner, London

On the Arab Spring:

"The Arab Spring and consequent political changes have already triggered a number of BIT claims, and we can expect more".

Reza Mohtashami, Partner, Dubai

On conflict in Libya:

"As investors consider possible indemnification claims for harm and loss (including loss of profit and consequential damage) arising from the events in Libya, they will be turning their attention to protection under BITs".

Investments in Libya, Client briefing, March 2011

Finally, the dominance of practising lawyers in the literature around investment arbitration has raised concerns regarding the potential distortion of a full and balanced debate about reform of the system.[112] For example, Freshfields prides itself on feeding into debates and thinking around investment arbitration, and has produces two handbooks on international arbitration, including the ICSID Guide. It also sponsors the Queen Mary School of International Arbitration annual lecture, commonly known as the "Freshfields Lecture". Jan Paulsson, one of the company's former partners, and until recently a Centennial Professor at the London School of Economics, was instrumental in creating this culture. As he puts it:

"It's not a job, it's a vocation. So from the outset, they [lawyers at Freshfields] are encouraged to study, write [about] and infiltrate arbitral institutions as thoroughly as they can."[113]

The role of third party funders

"You look at the rapid rise of investment cases and you think, wow, the world didn't really expect this. And you wonder, is third-party funding going to put this on steroids?"[114]

Catherine Rogers, Professor of Law,
Penn State University

Given the spiralling costs of cases, it was perhaps predictable that 'innovative' financial products would be devised to help companies fund them. Again, the UK is a significant hub for this nascent sector.

Third party funding (TPF) is an agreement by which a bank, hedge fund, insurance company or law firm agrees to pay all or part of the costs of a case in exchange for a portion of any compensation awarded to their client. One study found that a relatively small number of cases were funded in this way in 2009, but that it has rapidly become a widespread part of the system since then.[115] Some of the major specialist funders, such as Juridica Investments, Calunius Capital, Vannin Capital and Burford Group, are based in the UK.[116]

While exact information is not available on funders' share of awards, those shares generally seem to be between 10 to 60 percent of the recovered amount.[117] Companies such as Juridica or Burford will generally invest between US$3 million and US$10 million to cover the costs of a lawsuit potentially worth US$25-100 million, in exchange for an agreed-upon percentage of the recovery, which is usually either two-and-a-half to four times its upfront investment, or 10 to 45 percent of the damages awarded.[118]

In the Rurelec example cited elsewhere in this report, Burford received US$11 million profit out of the total award against Bolivia of US$31.5 million.[119] Burford also recently acquired an asset recovery firm to help enforce awards; this will allow the company to purchase uncollected judgments and awards, and then pursue them at its own cost and risk.[120]

TPF can help companies, and indeed governments, to finance legal representation and manage high-risks involved in investment arbitration cases. The large sums involved in investment arbitration make them an attractive prospect for TPF. However, the rapid rise of unregulated funders has led to criticism that such funders have provided little social benefit and have exacerbated the problems of an already flawed system, primarily by increasing (sometimes frivolous) litigation.[121]

"There is a vast reservoir of untapped arbitration claims that prevailing business models make too uneconomical to take on. Arbitral institutions should take the lead in helping claimants to access potential funding packages."[122]

Iain McKenny, Vannin Capital

As well as potentially increasing the number of cases, TPF has also been accused of reducing the likelihood of an amicable settlement between the disputing parties, as a settlement can be thwarted by third party funders if it means that they will not, in their view, be sufficiently compensated.[123]

Another criticism is that involvement of funders can interfere with governments' defence of public interest and their public accountability. This is because funders' involvement in cases often extends beyond financing, and can include managing the process, providing advice and consulting with the legal team. The funders' interests may not wholly coincide with those of its client, and where this is the case, there is a real possibility that if the funder gains too much control of a case, it can prioritise its own interests ahead of those of its client. This becomes particularly important if a state loses its sovereign authority over public interest issues as a result of a case.[124] As one expert explains:

"As a recipient of TPF, a state [...] may have to submit to the whims and considerations of the third party, often contrary to the state's public policy. There could also be the possibility of the state's regulatory or nationalisation measures being attributed to the interest of the third party funder [...]. Thus, there could be issues of public policy, transparency and the state's accountability to the public."[125]

Funders often have the power to choose lawyers and manage their fees and payment, and some have been known to decide whether or not to back a case according to the legal team that has been chosen. This raises the risk of undermining the independence of lawyers and dividing their loyalties between client and funders. Questions have also been raised about the possible conflict of interest if a funder is supporting an action before an arbitrator and simultaneously funding a separate matter in which the arbitrator's firm is counsel.[126]

Critics have also highlighted the excessive charges and lopsided terms in agreements between funders and clients, and the significant risks involved for clients. For example, in a case between S&T Oil and Romania, backed by Juridica, the funder brought proceedings against its former client when a case broke down, using evidence shared in the context of the original arbitration case.[127]

Finally, with such high sums involved, some commentators fear that the legal system could become a mere instrument for financial speculation, as funders package up and sell on claims (for example, as derivatives). This scenario sees speculative interests, alien to the dispute, benefiting from the rights granted to investors in BITs.[128]

As a result of all of this, there is growing consensus that there is an urgent need to review this situation, and as a minimum to address the following issues:

(i) abuse of TPF arrangements for excessive and unreasonable profiteering (e.g. the taking of 90% of the award proceeds by a TPF) in some cases;

(ii) unreasonable exertion of influence in arbitration strategy, including selection of arbitrators, defying the requirement of impartiality and independence of arbitrators;

(iii) possible exploitation of attorney-client privilege and confidentiality;

(iv) funding of frivolous cases intended to inflate the value of funders' portfolios; and,

(v) the potential encouragement of financial speculation in arbitration cases.[129]

The challenges outlined above suggest that any review of UK BITs would need to address third party funding as a priority.

[46] The figure of 105 includes nine that are listed as being not currently in force (although Colombia was ratified in July 2014), but excludes a further three – with Qatar, Zambia and Libya – which the UK lists as being signed but not in force. See http://investmentpolicyhub.unctad.org/ accessed 01/05/15

[47] Ibid. These 25 comprise ten of the countries in CARIFORUM, who have existing BITs with the UK, three countries covered by FTAs and twelve EU countries. Existing EU agreements which contain investment protection chapters are: Korea, Chile and Mexico (although they do not include provision for ISDS), CETA and Singapore (which include ISDS). The European Commission is pushing for intra-EU BITs to be terminated (the UK has 12 of these); negotiations are ongoing with a number of regions but they are either stalled (Mercosur, ASEAN) or do not cover the same countries as UK BITs (TTIP). See http://ec.europa.eu/trade/policy/countries-and-regions/ accessed 01/05/15.

[48] See for example the House of Commons debate of 15th January 2015 on the Transatlantic Trade and Investment Partnership (TTIP) which welcomes the suspension of ISDS from the negotiations, and the House of Lords debate of 30th July 2014 on the UK-Colombia BIT, transcripts of which are available in Hansard.

[49] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1234

[50] Pohl et. al. (2012)

[51] Gordon and Pohl (2011)

[52] UK Model Text for Agreement for the Promotion and Protection of Investments (2008)

[53] HM Government FCO/BIS (2013) *Good Business: Implementing the UN Guiding Principles on Business and Human Rights*: p.7

[54] As outlined, for example, in the EC's public consultation on modalities for investment protection and ISDS in TTIP, available at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf accessed 28/04/15.

[55] For example, Trade Minister, Lord Ian Livingston, was one of fourteen EU Member State signatories to a letter urging the European Commission to ensure ISDS provisions are not removed from TTIP. See https://www.gov.uk/government/publications/transatlantic-trade-and-investment-partnership-eu-mandate accessed 29/03/15

[56] Gus Van Haarten suggests that current agreements cover approximately 20% of global investment flows and that TTIP would increase this to around 80%. See http://www.euractiv.com/sections/trade-society/analyst-isds-model-australia-not-canada-310835 accessed 29/03/15

[57] See http://www.cityam.com/1405852602/uk-foreign-investment-highest-europe-and-second-highest-world accessed 29/03/15.

[58] UNCTAD (2014)

[59] Poulsen et al (2013), p.26.

[60] See the UK Department for Business, Innovation and Skills 'ISDS FAQ' leaflet https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311247/bis-14-695-investor-state-dispute-settlement-faqs.pdf accessed 01/05/15

[61] UNCTAD (2014), p.125.

[62] *Oxus Gold plc vs. Republic of Uzbekistan, the State Committee of Uzbekistan for Geology & Mineral Resources, and Navoi Mining & Metallurgical Kombinat*, UNCITRAL rules

[63] *Churchill Mining PLC and Planet Mining Pty Ltd vs. Republic of Indonesia,* ICSID Case No. ARB/12/14 and 12/40.

[64] See https://data.un.org/CountryProfile.aspx?crName=Ethiopia accessed 15/03/15

[65] See http://www.worldbank.org/en/country/ethiopia/overview accessed 15/03/15

[66] The dam building projects have seen the displacement of fishing communities and sparked controversy with Egypt, which fears the impact on its own water resources. See, for example http://www.bbc.co.uk/news/world-africa-26679225 & http://news.nationalgeographic.com/news/2013/09/130927-grand-ethiopian-renaissance-dam-egypt-water-wars/ accessed 01/05/15

[67] UNCTAD (2011)

[68] Ibid p.29.

[69] Ibid.

[70] UNCTAD (2011) p.33

[71] The exact number will depend on whether the treaties specify a ten or fifteen year application.

[72] http://www.iareporter.com/articles/round-up-of-known-claims-under-european-development-fund-arbitration-rules/ accessed 24/08/15

[73] Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Federal Democratic Republic of Ethiopia for the Promotion and Protection of Investments available at http://investmentpolicyhub.unctad.org/Download/TreatyFile/1180 Article 7:2

[74] Ibid

[75] The Children's Investment Fund (CIF) owned a 1% stake in Coal India, which is 90% owned by the State. CIF objected to pricing decisions which it said were detrimental to minority shareholders and put India on notice of arbitration. It eventually dropped the case. See http://justinvestment.org/2013/05/a-treaty-too-many/ accessed 11/05/15

[76] Standard Chartered Bank vs. The United Republic of Tanzania, ICSID Case No. ARB/10/12

[77] *Guaracachi America, Inc. and Rurelec PLC vs. The Plurinational State of Bolivia*, UNCITRAL, PCA Case No. 2011-17

[78] *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal vs. the Argentine Republic.* ICSID Case No. ARB/03/19.

[79] Biwater Gauff (Tanzania) Ltd. vs. United Republic of Tanzania, ICSID Case No. ARB/05/22

[80] BG Group Plc. vs. The Republic of Argentina, UNCITRAL & National Grid plc. vs. The Republic of Argentina, UNCITRAL.

[81] Standard Chartered Bank vs. The United Republic of Tanzania, ICSID Case No. ARB/10/12

[82] *Wena Hotels Ltd. vs. Arab Republic of Egypt*, ICSID Case No. ARB/98/4

[83] Ibid

[84] Yukos Universal Limited (Isle of Man) vs. The Russian Federation, UNCITRAL, PCA Case No. AA 227

[85] The case concerned renationalisation measures and reforms to eliminate windfall profits and reduce greenhouse gas emissions in the energy sector.

[86] All documents relating to these cases can be accessed at https://icsid.worldbank.org/apps/ICSIDWEB/Pages/default.aspx

[87] All references in this section from Investment Arbitration Reporter Argentina section. http://www.iareporter.com/categories/20090823 accessed 11/05/15

[88] See *Suez, Sociedad General de Aguas de Barcelona S.A., and Vivendi Universal vs. the Argentine Republic.* ICSID Case No. ARB/03/19. Cited in Investment Treaty News: Awards and Decisions, 23/9/10; Amicus Curiae Brief available at: http://www.ciel.org/Publications/SUEZ_Amicus_English_4Apr07.pdf accessed 01/05/15].

[89] http://www.iareporter.com/articles/damages-tribunal-in-now-public-award-relies-on-independent-expert-to-determine-a-reasonable-regulators-response-to-argentine-crisis/ accessed 24/08/15

[90] The Enron case in question was *Enron Corporation and Ponderosa Assets, L.P. v. Argentine Republic*, ICSID Case No. ARB/01/3.

[91] The ICSID Convention provides for the annulment of awards in a small number of circumstances, further information is available here: http://www.iisd.org/pdf/2011/dci_2010_annulment_icsid_awards.pdf accessed 29/04/15

[92] For more information on the Netherlands and tax avoidance, see http:// www.somo.nl/publications-nl/Publication_1397-nl accessed 29/04/15

[93] See, for example the following presentation, http://uba.ua/documents/doc/richard_winston.pdf accessed 29/04/15

[94] Ibid.

[95] See for example: *Phoenix Action, Ltd vs. The Czech Republic,* ICSID Case No. ARB/06/5, *Mobil Corporation, Venezuela Holdings, B.V., Mobil Cerro Negro Holding, Ltd., Mobil Venezolana de Petróleos Holdings, Inc., Mobil Cerro Negro, Ltd., and Mobil Venezolana de Petróleos, Inc. vs. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27

[96] Schreuer, C. (2012), p.26.

[97] See, for example, *Goetz and Others vs. the Republic of Burundi* ICSID Case No. ARB/01/2.

[98] UNCTAD (2010), p.16.

[99] Gaukrodger and Gordon (2012), p.20.

[100] Ibid, p.23.

[101] See Global Arbitration Review Top 100 Firms http://globalarbitrationreview.com/gar100/ accessed 21/09/14

[102] See Global Arbitration Review, Freshfields Profile http://globalarbitrationreview.com /firms/307/know-how/12251/freshfields-bruckhaus-deringer accessed 21/09/14

[103] http://www.freshfields.com/uploadedFiles/SiteWide/News_Room/Insight/Seminars/Resolving_disputes_in_emerging_markets/Investment%20and%20dispute%20resolution%20in%20Latin%20America.pdf accessed 11/05/15

[104] http://globalarbitrationreview.com/news/article/31869/greek-investors-hire-freshfields-cyprus-claim accessed 11/05/15

[105] See http://m.freshfields.com/Content.aspx?id=2147498118 accessed 06/03/15

[106] See http://www.allenovery.com/expertise/practices/litigation/Pages/investment-treaty.aspx accessed 29/04/15

[107] See http://www.allenovery.com/news/en-gb/articles/Pages/Allen--Overy-continues-its-expansion-in-Myanmar-with-relocation-of-partner-Simon-Makinson.aspx accessed 17/02/15

[108] Eberhardt and Olivet (2012), p.8.

[109] Ibid

[110] Gaukrodger and Gordon (2012), p.7.

[111] See, for example, http://www.freshfields.com/foresight/article-02.html accessed 29/04/15

[112] Eberhardt and Olivet (2012)

[113] See http://globalarbitrationreview.com/news/article/31397/paulssons-fresh-fields/ accessed 25/09/14

[114] Cited in Lowe (2013)

[115] Schaner L. S. and Appleman T. G. (2011),

[116] Cremades (2011)

[117] GAR, 'The Dynamics of Third-Party Funding' in vol. 7, no. 1, p.15

[118] Cremades (2011)

[119] See http://www.lse.co.uk/AllNews.asp?code=78gyppoc&headline=Burford_Nets_USD110_Million_On_Rurelec_Arbitration_Claim_Investment accessed 03/05/15

[120] See http://www.burfordcapital.com/wp-content/uploads/2015/02/30-1-15_Burford_acquires_asset_recovery_firm.pdf accessed 03/05/15

[121] Beisner et. al. (2009) p.9 One study has estimated that the volume of litigation in Australia has risen 16.5% as a result of the practice.

[122] See http://globalarbitrationreview.com/journal/article/32712/third-party-funding-wildcatting-new-claims accessed 30/04/15

[123] See p.3 of http://investmentpolicyhub.unctad.org/Upload/Documents/Torterola_Third%20Party%20Funding%20in%20Arbitration.pdf accessed 30/04/15

[124] Ibid.

[125] Maniruzzam (2012)

[126] Cremades (2011)

[127] See http://corporateeurope.org/es/printpdf/book/export/html/1271 accessed 15/05/15

[128] See http://investmentpolicyhub.unctad.org/Upload/Documents/Torterola_Third%20Party%20Funding%20in%20Arbitration.pdf accessed 30/04/15

[129] List adapted from: http://kluwerarbitrationblog.com/blog/2012/12/29/third-party-funding-in-international-arbitration-a-menace-or-panacea/ accessed 31/04/15

Chapter 3 Alternatives to the UK System

In light of the growing recognition of problems with the system, and the fact that more than 1,300 treaties worldwide are at a stage where they could be terminated or renegotiated, governments are increasingly amending their investment protection regimes to preserve regulatory space and minimise exposure to disputes.[130] They have done so in two ways:

- **By cancelling treaties completely or not signing up to them in the first place, and developing alternative arrangements for investment protection. These alternatives include the use of established systems such as investment contracts, commercial political risk insurance, recourse to host-country judicial systems and state-to-state dispute settlement.**
- **Reforming treaties to: omit problem clauses, such as umbrella clauses; include clauses that limit the scope of a treaty (for example, by excluding certain types of investment); clarify obligations such as expropriation; set explicit exceptions for certain areas of public policy; and/or omit or carefully regulate ISDS.[131]**

Living without BITs

A number of countries are rejecting BITs altogether. Brazil, the world's fourth largest recipient of FDI (foreign direct investment), has never been party to a BIT.[132] Whilst it signed number of agreements in the 1990s, these were never ratified by the Brazilian Congress because it found the provisions on indirect expropriation and ISDS were not in line with the country's constitution. Brazil has since worked on a new model 'Cooperation and Facilitation Investment Agreement', which prioritises the regulatory autonomy of the state and includes mechanisms for risk mitigation and dispute prevention. Its specific clauses differ from BITs in a number of ways, including the use of state-to-state (rather than investor-to-state) dispute settlement, a safeguard on the free transfer of funds to avoid balance of payments problems and limiting the definition of investment to foreign direct investment only.[133] Two such treaties were signed in April 2015 with Angola and Mozambique, at the time of writing they had yet to be a voted on in the Brazilian Congress.

In 2010 the South African government concluded a three-year review of its BITs which found that the existing system "open[ed] the door for narrow commercial interests to subject matters of vital national interest to unpredictable international arbitration that may constitute direct challenges to legitimate, constitutional and democratic policy making".[134]

It therefore decided to terminate its existing BITs and offer partners the possibility of renegotiation on the basis of a new model. The new model includes a range of innovations: most significantly, it only gives the option for cases to be heard in South African courts, removing the extra layer of international protection for foreign investors. It also limits the scope of expropriation to exclude instances where a government measure has only an indirect adverse impact on an investment or is introduced to protect public welfare objectives.

Indonesia also plans to terminate more than 60 BITs following a number of large claims for compensation, including one from UK Churchill Mining for US$1 billion following the revocation of a mining contract. The government has said that it will draw up a revised model that provides for greater capacity to regulate in the "public interest for health, the environment or financial reasons".[135]

There are many more examples: Ecuador is currently undertaking an audit of its treaties, and Bolivia has denounced its BITs and developed a law which balances the promotion of domestic and foreign investment with socio-economic development priorities. Ecuador, Bolivia and Venezuela have all withdrawn from the ICSID Convention and Norway has decided not to negotiate any further BITs (although the newly-elected conservative coalition government recently re-opened consultation on their model treaty).

If a state decides to terminate its BITs, a number of options exist for the protection of investments. Irrespective of whether new treaty arrangements are in place, MNCs have the option of using domestic courts and holding governments to the terms of contracts that they may have. Political risk insurance covers many of the risks protected by investment treaties, such as uncompensated expropriation and breach of contract. This is already offered by, for example, the UK government, private markets (mostly located in London at Lloyds) and the Multilateral Investment Guarantee Agency at the World Bank, among others.[136] Countries can also opt for state-to-state dispute resolution, which is the norm under the WTO.

Finally, there are also proposals for the establishment of a new 'international investment court' to replace all existing treaties. Arbitration would be conducted by judges with public law experience and have open proceedings with the aim of addressing concerns regarding the independence of current arbitrators.[137]

Reform Options

Some countries that have not chosen to cancel their BITs are looking at options for renegotiation. An UNCTAD review of the 18 IIAs concluded in 2013 found that most of the treaties included modifications to include sustainable development oriented features.[138] Fifteen of the agreements had general exceptions for such issues and referred to them in their preambles, and twelve contained clauses to prevent the parties lowering health, safety or environmental standards in order to attract investment. Similarly, the OECD has found that BITs are increasingly referencing environmental protection, labour rights, anti-corruption measures and corporate social responsibility.[139] Canada, Mexico, the United States and Belgium now routinely use such language in treaties.

India also launched a review of its investment treaties in mid-2012, in response to arbitration notices by no less than seventeen investors (including Vodafone), challenging various policy measures and demanding billions of dollars in compensation.[140] As a result, it has developed a new model which limits the scope of agreements, including by narrowing the definition of 'investor' and 'investment' and introducing binding obligations on investors in matters related to corruption, disclosures and taxation. A number of policy measures are exempted from challenge, including taxation, intellectual property rights, state subsidies, government procurement, public health and safety, environmental protection and financial stability.[141]

Australia has similarly opted to change its BITs system. Following the instigation of a claim by Philip Morris in response to legislation requiring the plain packaging of cigarettes, its government has said that it will now only consider the inclusion of ISDS in its treaties "on a case-by-case basis". As a result, there is no ISDS provision in its agreements with Japan and the US,[142] and a number of exceptions to the ISDS provision in its free trade agreement with Korea.[143]

There also have been a number of reform proposals at an EU level, including to remedy issues such as the scope of substantive provisions and the vague wording of non-discrimination and expropriation clauses. The European Commission has also attempted to find ways to better embed the right to regulate in investment treaties and to improve transparency and accountability in arbitration.[144] Responses to the EU's consultation on the investment chapter of TTIP, however, suggest that these reforms continue to fall short of a satisfactory solution.[145] The European Parliament and German government have also both raised concerns about the inclusion of ISDS in TTIP.[146]

At an international level, UNCTAD is advocating for governments to come together to start a multilateral process for system-wide reform. It finds that the reforms that are underway are "ad hoc" and fears that they will create inconsistencies and confusion within what it already describes as a "spaghetti bowl" of investment treaties.[147] It has also criticised governments that simply opt to preserve the status quo.[148]

Putting international human rights and environmental commitments first

Many of the changes outlined above aim at strengthening the position of states and communities vis à vis international investors. International treaties such, as the International Labour Organisation (ILO) Conventions, the Maastricht Principles on the Extraterritorial Obligations of states and the Kyoto Protocol, also provide a potentially useful and internationally agreed framework that might better ensure international investment contributes to social and environmental goals.

As outlined earlier in this report, developments in the international human rights arena provide a particularly strong context for the review of investment protection policies. The 'Ruggie Process', and resulting UN Guiding Principles on Business and Human Rights (UNGPs), recognise

the need for coherence in dealing with business and human rights issues. They specifically note that states and companies should respect and protect human rights and offer affected communities the possibility of redress in cases where those rights are breached. Companies have also recognised their responsibilities with respect to human rights, sustainability and social impact elsewhere, for example in the UN Global Compact.

[130] UNCTAD (2013b)

[131] UNCTAD (2014)

[132] http://unctad.org/meetings/en/Presentation/diae_stat_2013-01-28_en.pdf accessed 02/04/15

[133] http://unctad-worldinvestmentforum.org/wp-content/uploads/2014/10/Godinho.pdf accessed 02/04/15

[134] See http://www.pmg.org.za/policy-documents/2009/06/25/bilateral-investment-treaty-policy-framework-review accessed 25/03/15

[135] See http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination -of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/accessed 02/14/15

[136] Poulsen (2010)

[137] See for example Van Haarten (2007)

[138] UNCTAD (2014)

[139] Gaukrodger, D. and K. Gordon (2012)

[140] Vodafone gave notice of arbitration to India under UNCITRAL rules in April 2014, the notice is not public.

[141] See http://blogs.ft.com/beyond-brics/2015/01/21/guest-post-india-and-bilateral-investment-treaties-are-they-worth-it/?Authorised=false accessed 02/04/15.

[142] Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia (2014) p 14 and Tienhaara, K and Ranald, P (2011) Australia's Rejection of Investor-State Dispute Settlement: Four Potential Contributing Factors available at http://www.iisd.org/itn/2011/07/12/australias-rejection-of-investor-state-dispute-settlement-four-potential-contributing-factors/ accessed 11/05/15

[143] See http://kluwerarbitrationblog.com/blog/2014/08/21/indonesias-termination-of-the-netherlands-indonesia-bit-broader-implications-in-the-asia-pacific/ accessed 02/04/15

[144] See http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf accessed 11/05/15

[145] See http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf accessed 02/04/15

[146] See 'Transatlantic Trade Talks hit German Snag', Financial Times, 14 March 2014; and http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf accessed 15/11/14

[147] http://unctad.org/en/pages/newsarchive.aspx?ReferencePageId=3744&Sitemap _x0020_ Taxonomy=607; accessed 15/11/14

[148] UNCTAD (2013).

Conclusion and Recommendations

This report has described the highly problematic nature of the existing UK investment protection regime. It has demonstrated that the UK is playing a particularly backward role due to its outmoded treaties, and the negative impact of cases brought under those treaties on host states' right to regulate, along with the role of UK law firms in promoting the BIT system, as well as the growth of third party funding in the UK.

These problems with the existing UK investment protection regime clearly point to the urgent need for a review. This need is particularly pressing given that the UK plans to ratify a further eleven BITs in the near future and is also engaged in the negotiation of an investment protection chapter in TTIP. Even were this not the case, the UK would still need to change its approach in order to bring it in line with the commitments it made under the UNGPs. Since the majority of UK BITs have reached their anytime termination phase, there is now ample opportunity to do so.

Furthermore, developments at an international level demonstrate that there is appetite, including amongst key trading partners such as the EU, US and Canada, for change. Countries are pursuing a number of alternatives to the current regime, ranging from reform of their existing models to restrict the scope of investment protections and eliminate the most problematic provisions through to cancelling existing BITs and developing new approaches that balance investment protection with governments' right to regulate.

This report argues there is an urgent need for a review of the UK investment protection regime to address the problems outlined above and, in particular, to bring it into line with UK commitments under international human rights instruments. It recommends that the review begin by considering to what extent taxpayers, particularly those in developing countries, should be required to insure the business risk of international investors.

As part of the review, the UK government should seriously consider alternatives such as:

- Directing investors to the other protections available to them;
- Establishing a dispute prevention policy;
- Replacing investor-to-state dispute settlement (ISDS) with state-to-state dispute settlement.

It should ensure that future and existing investment agreements are compatible with the UK's commitments under the UNGPs and other international human rights and environmental protection instruments, for example by including:

- Binding obligations on investors to undertake due diligence;
- Binding obligations on investors to adhere to the international human rights and environmental instruments to which the UK is a signatory;
- Binding obligations on investors to comply with the national laws of the host country;
- Legal liability of companies, in home states, for (complicity in) human rights violations, environmental destruction and corrupt practices;
- Legally binding mechanisms of redress for communities who have been negatively impacted by the activities of investors.

The review should also address the issues with the arbitration system, highlighted in this report, and seek to regulate third party funding.

Pending such a review, which should include in its purview the UK's model BIT as well as its existing BITs, the concerns expressed in this report suggest the UK must halt the ratification of its outstanding BITs and offer alternatives to the countries in question.

Bibliography

Aisbett, E. (2009) 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation' in Sauvant, K. and L.E. Sachs (eds.) *The Effects of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties and Investment Flows* (New York: Oxford University Press) ch.15

Beisner, J., Miller, J. And Rubin, G. (2009) *Selling Lawsuits, Buying Trouble: Third Party Litigation Funding in the United States* US Chamber Institute for Legal Reform, Washington

Bernasconi-Osterwalder, N. and Johnson, L. (2010) *Belgium's Model Bilateral Investment Treaty: A Commentary* IISD, Winnipeg and Geneva, study commissioned by Oxfam-Solidariteit

Bernasconi-Osterwalder, N., Cosbey, A., Johnson, L. and Vis-Dunbar, D. (2012) *Investment Treaties and Why They Matter to Sustainable Development: Questions and Answers* IISD, Winnipeg and Geneva

Cremades, B.M. (2011) 'Third Party Litigation Funding: Investing in Arbitration' in *Transnational Dispute Management* Vol. 8 (4)

Department for Business, Innovation and Skills (2014), *Transatlantic Trade and Investment Partnership (TTIP): Separating Myth from Fact*, UK Government, Ref: BIS/14/883

Eberhardt and Olivet (2013) *Profiting from Injustice: How law firms, arbitrators and financiers are fuelling an investment arbitration boom.* Corporate Europe Observatory and the Transnational Institute: Brussels/Amsterdam

European Parliament Committee on Environment, Public Health and Food Safety (2013) *Legal Implications for the Acquis Communitaire in ENVI relevant sectors.* IP/A/ENVI/ST/2013-09 available at www.ep.europa.eu/studies

European Union Committee, House of Lords (2014) *The Transatlantic Trade and Investment Partnership* European Union Committee Fourteenth Report, House of Lords, UK

Gallagher, K. (2010) *Policy Space to Prevent and Mitigate Financial Crises in Trade and Investment Agreements*, G24 Discussion Paper Series No. 58, UNCTAD, Geneva and New York

Gallagher, K. (2011) *Reforming United States Trade and Investment Treaties for Financial Stability: The case of capital controls*, IISD, Winnipeg and Geneva

Gaukrodger, D. and K. Gordon (2012), *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community* OECD Working Papers on International Investment, 2012/03 Paris

Garcia-Bolivar, O. E. (2012),'Defining an ICSID Investment: Why Economic Development Should be the Core Element', Available at https://www.iisd.org/itn/2012/04/13/defining-an-icsid-investment-why-economic-development-should-be-the-core-element/

Ginsburg, T. (2006) 'International Substitutes for Domestic Institutions: Bilateral Investment Treaties and Governance' in *Illinois Law and Economics Working Papers Series No. LE06-027* University of Illinois College of Law, Illinois

Glinavos, I. (2010) *Pro-Market Reform Sustainability and the Tool of 'Constitutionalization': Economic Rights as Fundamental Rights* June 8, 2010; Hart Workshop 2010, University of Westminster School of Law

Gordon, K. and J. Pohl (2011) 'Environmental Concerns in International Investment Agreements: A Survey', OECD Working Papers on International Investment, 2011/01, Paris

Gordon, K, J. Pohl & M. Bouchard (2014) *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A Fact Finding Survey* OECD, Paris

Hallward-Driemeier, M. (2003) *Do Bilateral Investment Treaties Attract FDI? Only a Bit... and They Could Bite* World Bank, New York

Jacob, M. (2010) *International Investment Agreements and Human Rights* INEF Research Paper Series, INEF, Essen

Johnson, L. and Volkov, O. (2014) *State Liability for Regulatory Change: How International Investment Rules are overriding Domestic Law.* IISD, Winnipeg and Geneva

Joint Standing Committee on Treaties, Parliament of the Commonwealth of Australia (2014) *Agreement Between Australia and Japan for an Economic Partnership* Report 144, Canberra

Lowe, R. (2013) *Speculate and Arbitrate to Accumulate* International Bar Association. Available at: http://www.ibanet.org/Article/Detail.aspx?ArticleUid=804e46e3-dfc0-4966-b16e-31627803970c

Maniruzzaman, M. (2012) *Third Party Funding in International Arbitration: A Menace or a Panacea?* Kluwer Arbitration Blog. Available at http://www.kluwerarbitrationblog.com/

Neumayer, E. and Spess, L. (2005) 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' *World Development* vol.33 (10), pp.1567-1585.

Olivet, Cecilia (2013) *The Case of Intra-EU Bilateral Investment Treaties.* Transnational Institute, Amsterdam

Oxfam International (2007) *Signing Away the Future: How trade and investment agreements between rich and poor countries undermine development.* Oxfam International Briefing Paper 101, Oxford

Peterson, L. (2004) *Bilateral Investment Treaties and Development Policy-Making* IISD, Winnipeg and Geneva

Phillips, William Z. (2014) *Risky Business or Risky Politics: What Explains Investor-State Disputes?* IISD, Winnipeg and Geneva

Pohl, J., K. Mashigo and A. Nohen (2012), 'Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey' OECD Working Papers on International Investment, 2012/02, Paris

Poulsen, Lauge N. Skovgaard (2014) 'Bounded Rationality and the Diffusion of Modern Investment Treaties' *International Studies Quarterly* (58: pp.1-14)

Poulsen, Lauge N. Skovgaard, Bonnitcha. J. and Webb Yackee, J. (2013) *Costs and Benefits of an EU-USA Investment Protection Treaty* Department for Business, Innovation and Skills, London.

Poulsen, Lauge N. Skovgaard (2011) *Sacrificing Sovereignty by Chance: Investment Treaties, Developing Countries and Bounded Rationality* Ph.D. thesis, London School of Economics

Poulsen, Lauge N. Skovgaard (2010) 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' in Sauvant, K. (ed.) *Yearbook on International Investment Law and Policy* Oxford University Press, Oxford

Qalo, V. (Jan 2013) Integrating Sustainable Development into International Investment Agreements: A Commonwealth Guide for Developing Country Negotiators. In *Investment Treaty News*, IISD

Salacuse, Jeswald W. And Nicholas P. Sullivan (2009) "Do BITs Really Work? An Evaluation of Bilateral Investment Treaties and their Grand Bargain" in Karl P. Sauvant and Lisa E Sachs *Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows* Oxford University Press, Oxford

Schaner L. S. and Appleman T. G., 'The Rise Of 3rd-Party Litigation Funding', *LAW 360*, 21 January 2011 (available at www.law360.com)

Schreuer, C. (2012) 'Nationality Planning' in A. Rovine (ed.), *Contemporary Issues in International Arbitration and Mediation: The Fordham Papers 2012* Martinus Nijhoff Publishers, Boston

Tienhaara, K (2009) *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* Cambridge University Press, Cambridge

UNCTAD (2014) *World Investment Report 2014: Investing in the SDGs – An Action Plan* UNCTAD, Geneva and New York

UNCTAD (June 2014) *Reform of the IIA Regime: Four Paths of Action and a Way Forward.* IIA Issues Note Series, no.3, June 2014. UNCTAD, Geneva and New York

UNCTAD (2013) *World Investment Report 2013: Global Value Chains: Investment and Trade for Development.* UNCTAD, Geneva and New York

UNCTAD (2013a) *Investor-State Disputes Arising from Investment Treaties: A Review.* UNCTAD, Geneva and New York

UNCTAD (2013b) *International Investment Policymaking in Transition: Challenges and Opportunities of Treaty Renewal* IIA Issues Note Series no.4, June 2013. UNCTAD, Geneva and New York

UNCTAD (2011) *Report on the Implementation of the Investment Policy Review: Ethiopia* UNCTAD, Geneva and New York

UNCTAD (2010) *Investor-State Disputes: Prevention and Alternatives to Arbitration,* UNCTAD, Geneva and New York

UNCTAD (2009) *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries,* UNCTAD, Geneva and New York

UNCTAD (2006) *Investor-State Disputes arising from Investment Treaties: A Review.* UNCTAD, Geneva and New York

UNCTAD (2006a) *International Investment Agreements: Trends and Emerging Issues.* UNCTAD, Geneva and New York

UNHR (2011) *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework* UNHRC, New York and Geneva

Van Haarten, G. (2012) *Pro-Investor or Pro-State Bias in Investment-Treaty Arbitration? Forthcoming Study Gives Cause for Concern* available at https://www.iisd.org/itn/2012/04/13/pro-investor-or-pro-state-bias-in-investment-treaty-arbitration-forthcoming-study-gives-cause-for-concern/

Van Haarten, G. (2007) *Investment Treaty Arbitration and Public Law* Oxford University Press, Oxford

Van Os, R. and Knotternus, R. (2011) *Dutch Bilateral Investment Treaties: A Gateway to Treaty Shopping for Investment Protection by Multinational Companies* SOMO [Centre for Research on Multinational Organisations], Amsterdam

Yackee, J. W. (2010) 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence'", *Virginia Journal of International Law* (vol.51, no.2), pp.397-434.

Research and writing for this report was carried out by Ruth Bergan, Coordinator at the Trade Justice Movement. The Trade Justice Movement would like to thank Rebecca Varghese Buchholz, Trade and Investment Policy Advisor at Traidcraft, and Ruth Kelly, Programme Policy Manager at ActionAid for their input and review.

October 2015

Make world trade work for people and the planet

The Trade Justice Movement is a coalition of organisations, including trade unions, aid agencies, environment and human rights campaigns, fairtrade organisations, and faith and consumer groups. Together, we are campaigning for trade justice – not free trade – with the rules weighted to benefit people and the environment. The movement is supported by more than 60 member organisations that have over 6 million members.

We believe that everyone has the right to feed their families, make a decent living and protect their environment. But the rich and powerful are pursuing trade policies that put profits before the needs of people and the planet. To end poverty and protect the environment we need trade justice, not free trade.

www.tjm.org.uk