

International Trade Committee
Inquiry on Inward Foreign Direct Investment

Evidence from the Trade Justice Movement

February 2021
David Lawrence

Background

1. The Trade Justice Movement is a UK-wide network of sixty civil society organisations, with millions of individual members, calling for trade rules that work for people and the planet. Our members include trade unions, NGOs, consumer groups and faith organisations. Together we are calling for trade justice, where the global system of trade ensures sustainable outcomes for ordinary people and the environment.
2. This inquiry is important and timely. As the UK regains competence for trade policy for the first time in nearly 50 years, there is a once in a lifetime opportunity to design an investment policy which is socially and environmentally just. Inward Foreign Direct Investment (FDI) is a core part of this. How we regulate, incentivise and restrict FDI must reflect our values, and must meet certain tests for social and environmental benefit. While Brexit undoubtedly creates new opportunities, it should not be assumed that new trade and investment agreements are always beneficial; rather, each should be assessed on its own merits through careful democratic scrutiny.
3. TJM has produced a considerable amount of work on Investor-State Dispute Settlement (ISDS), which is an important part of the UK's FDI policy. This response will focus on (1) ISDS, (2) human rights, and (3) democratic scrutiny of trade and investment policy. The second section will look in particular at the challenges posed by increased investment from China. We hope that our evidence will inform the committee's inquiry and be useful to MPs as they debate the National Security and Investment Bill.

1. Investor-State Dispute Settlement

4. The UK has historically been a keen proponent of the Investor-State Dispute Settlement (ISDS) system, which is included in the UK's Bilateral Investment Treaties and was negotiated as part of some of the EU's FTAs. ISDS allows investors from the relevant party to sue governments in private arbitration courts for measures which are deemed harmful to their profits. This can cost taxpayers millions of dollars, and evidence shows that ISDS cases have been particularly used against developing countries.¹
5. ISDS can also threaten environmental regulations and potentially has a 'chilling' effect on future regulation designed to combat climate change. While the aim is to mitigate against unreasonable and unpredictable government behaviour, in practice ISDS has been used to challenge all sorts of important environmental regulations, including: water pollution controls in Germany, a ban on fracking in Canada, and various regulations on mining in

¹ Trade Justice Movement, [Shaping future UK trade policy: Investment Protection Provisions](#), September 2020

East Asia and South America.²

6. The UK Government has given no indication of moving away from ISDS, and is expected to seek new investment agreements with Japan and Canada as part of their respective rolled-over FTAs. The UK still has over 100 Bilateral Investment Treaties with partners including China, Russia and various other fossil-fuel producing countries in the Middle East.³ These provide any existing investors from these countries with protection for their investments in the UK, and make it harder for governments in the UK and abroad to transition economies towards greener alternatives.
7. There is also evidence of ISDS being used to challenge health provision, labour rights and other important regulations. ISDS was used in Egypt to challenge an increase in the minimum wage, Philip Morris sued Australia for attempting to introduce plain-packaged cigarettes, and Slovakia was sued for attempting to nationalise part of the health service.⁴ This demonstrates a clear challenge to the right of governments to regulate in the public interest, and means that states are beholden to the interests of private companies rather than the democratic wishes of citizens.
8. There are particular concerns about the interaction between ISDS and the Covid-19 pandemic, though the exact effects of this are yet to be seen. Government lockdown and social distancing policies have understandably had an impact on private sector profits, though not without good reason - the aim being very much to protect public health and long run economic stability. However, it is possible that these measures lead to a raft of ISDS cases, which could put pressure on public finances while also encouraging the government to relax measures prematurely.⁵
9. ISDS has no place in the UK's investment policy after Brexit. While encouraging foreign investment can be important for British jobs and prosperity, there is little evidence that BITs encourage increased investment, and additional FDI must not be at the cost of the government's ability to regulate and manage the economy in the public interest. The Covid-19 pandemic has demonstrated the importance of state intervention in protecting public health and the economy, and ISDS must not pose an additional constraint as the UK hopes to 'build back better'.
10. The Department for International Trade must review its existing Bilateral Investment Treaties, especially where these agreements are with states that have poor human rights records (discussed in more detail later), and should commit to removing ISDS provisions from all new trade agreements, including rollovers (such as with Canada and Japan) and new deals (such as with the US, Australia and New Zealand). The UK has already requested to join the Trans-Pacific Partnership (CPTPP), which contains ISDS provisions as part of the agreement. There is a lack of strategy and impact assessment around this decision and the UK should press pause on these negotiations until there is more evidence of the benefits and clear demonstration of public support. However, if the UK is

² All examples detailed in Trade Justice Movement, [Shaping future UK trade policy: Investment Protection Provisions](#), September 2020

³ UNCTAD Investment Policy Hub, [International Investment Agreements Navigator: United Kingdom](#), accessed February 2021

⁴ All examples detailed in Trade Justice Movement, [Shaping future UK trade policy: Investment Protection Provisions](#), September 2020

⁵ Ibid.

to join the CPTPP, it should follow in the footsteps of New Zealand, which successfully negotiated exemptions from the ISDS provisions of CPTPP.⁶

2. Human rights and investment

11. There is cross-party agreement that the UK must champion global human rights, especially as liberal democratic values are at threat from autocrats and belligerent states all over the world. UK politicians have rightly condemned recent reports of human rights abuses in China, Russia, Saudi Arabia, Cambodia and elsewhere, as well as standing up for democratic freedoms in Hong Kong, Myanmar and elsewhere.
12. However, there is a noticeable gap between the UK's human rights rhetoric and its trade and investment policy. Evidence shows that Western multinationals are often indirectly implicated in human rights abuses: for example, recent research identified 83 well known brands which benefit from the use of Uyghur workers caught in potentially abusive labour transfer programs, including Nike, Adidas, Google and Marks & Spencer.⁷ Similar concerns have been raised about labour rights in supply chains across Asia, Africa and South America.
13. Meanwhile, the UK continues to have Bilateral Investment Treaties with countries which have perpetrated human rights abuses, including China, Russia and various Middle Eastern countries.⁸ There has been no announcement of any review of these treaties, or any other proposals to join together trade and human rights. Amendments to the Trade Bill designed to protect against trade with countries accused of genocide, and provide full human rights impact assessment, have been consistently resisted by the Government.⁹
14. The UK's Bilateral Investment Treaty with China seems particularly at odds with wider government policy on human rights and national security. Companies like Huawei and Bytedance, which have been accused of complicity in the abuse of Uyghur Muslims in Xinjiang, are currently protected under the terms of the UK's BIT with China.¹⁰ The UK would do well to examine the experience of Sweden, which has faced threats of legal challenge from Huawei, after Sweden decided not to use the company for its 5G infrastructure, citing security concerns.¹¹ This shows how ISDS agreements can be used by private companies to challenge government policy. It is worth noting that the UK-China BIT does not include exemptions for national security or human rights.¹²
15. The UK should put global human rights at the heart of its investment policy. This will require looking beyond trade agreements. The UK should support recent efforts at the UN for a Binding Treaty on Business and Human Rights, and consider primary legislation to enforce compliance amongst British companies operating overseas, as well as

⁶ Herbert Smith Freehills, [New Zealand signs side letters with five CPTPP members to exclude compulsory investor state dispute settlement](#), 9 May 2018

⁷ Business and Human Rights Resource Centre, [China: 83 major brands implicated in report on forced labour of ethnic minorities from Xinjiang assigned to factories across provinces](#), March 2020

⁸ UNCTAD Investment Policy Hub, [International Investment Agreements Navigator: United Kingdom](#), accessed February 2021

⁹ Financial Times, [Tory MPs rebel over genocide amendment to trade bill](#), 19 January 2021

¹⁰ BBC News, [Huawei patent mentions use of Uighur-spotting tech](#), 13 January 2021

¹¹ Global Arbitration Review, [Huawei threatens Sweden over 5G ban](#), 7 January 2021

¹² Investment Policy Hub, [China - United Kingdom BIT \(1986\)](#), accessed February 2021

bilateral action with the EU.

16. As things stand, human rights chapters in trade agreements tend to be unenforceable, and the UK is very willing to receive significant investment from countries whose leaders have been accused of gross human rights abuses, such as Saudi Arabia and China. Enforceable chapters in trade deals as well as rights-based conditionality for trade will be essential for ensuring that our trade and investment policy protects human rights.

3. Democracy and scrutiny of investment agreements

17. The UK's FDI policy should be transparent and open to public and parliamentary scrutiny. This is a fundamental part of ensuring that investment meets public interest, as well as social and environmental, tests after Brexit. Ultimately, any investment policy decisions should be accountable to Parliament. Investment policy can impact on a wide range of issues of concern to citizens, including water quality, wages and healthcare provision. However, as things stand, the UK's processes for scrutiny of trade and investment policy are woefully inadequate.
18. A lack of democratic oversight can lead to bad trade and investment policy, as new FTAs are unlikely to have popular support, and without transparency, businesses and other organisations are not well-prepared for regulatory and cross-border changes. When it comes to transparency and parliamentary scrutiny, the UK lags behind international counterparts, including many of our most important trade and investment partners - notably the US, the EU and Japan.¹³
19. Under the existing scrutiny system, set out in the Constitutional Reform and Governance (CRAG) Act (2010), MPs have very little say in the development of trade policy. Parliament is not involved in setting a mandate for trade and investment agreements, is excluded from the negotiation process and there are no guaranteed votes or debates on new trade agreements. It is very difficult for MPs to secure a debate on a new deal under the CRAG processes.¹⁴ Although the government has made some steps to update Parliament before and during negotiations, these provisions are not guaranteed in legislation, and depend on goodwill from the government.¹⁵
20. Despite the rhetoric of "taking back control", the government has done very little to empower British MPs, or indeed British civil society and ordinary citizens, to influence trade policy after Brexit. This risks creating a culture of mistrust between the public, businesses, MPs and government, and a lack of transparency about what is on the table in trade agreements. The absence of an overarching trade strategy from the Department for International Trade, with clear objectives and principles, also means that businesses and civil society are left in the dark about the government's objectives for new trade and investment arrangements.¹⁶
21. The UK would do well to learn lessons from TTIP - the proposed EU-US mega trade deal - which was met with significant opposition from European citizens, leading to its eventual

¹³ Trade Justice Movement, [Trade Bill Briefing: Lords Report Stage](#), January 2021

¹⁴ Trade Justice Movement, [Securing democracy in UK trade policy](#), November 2017

¹⁵ Trade Justice Movement, [Trade Bill Briefing: Lords Report Stage](#), January 2021

¹⁶ Ibid.

collapse despite years of negotiations and political will from Brussels and Washington DC. TTIP collapsed in part due to public anger about the lack of transparency in the negotiation of the deal, as well as frustration that their own elected representatives could do little to scrutinise or stop the deal. The lack of transparency also meant that politicians struggled to assuage citizens' specific concerns about ISDS.

22. In order to build consensus and ensure that the UK's post-Brexit investment policy is fully transparent and democratic, the government should set out legislation which includes:

Before negotiations: Publication of the government's negotiation objectives and a guaranteed debate and vote for MPs on these objectives, for all new trade and investment agreements.

During negotiations: A high level of transparency, with regular release of negotiating texts after each round.

After negotiations: A guaranteed debate and vote for MPs on the final trade and/or investment deal.

Throughout the process: Regular engagement with civil society, including environmental groups, businesses and trade unions, and the publication of an independent Sustainability Impact Assessment for investment agreements.

23. The process set out above would put democratic values at the heart of the UK's investment policy after Brexit. Other concerns - ranging from the environment and data to national security and human rights - can be dealt with far more effectively if the underlying framework is democratic, open and transparent. This should be a key strategic priority for the government as designs a new FDI policy.

For more information, please visit the Trade Justice Movement [website](#), or contact:

David Lawrence, Senior Political Adviser