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Legal tools, investment treaties, international arbitration, human rights, citizen action

## Policy pointers

### Human rights

considerations should be central to decisions on whether to draw up investment treaties, to the formulation of these treaties and to the settlement of investment disputes.

### Government authorities

should review investment treaty policy and stocks in the light of human rights obligations, and ensure that investment policy fully aligns with human rights.

### Parliament should

scrutinise both investment treaty policy and actual negotiations, use its constitutional powers to oversee treaty-making processes, and more generally ask questions, conduct inquiries, hold debates and provide pointers to ensure that investment policy supports human rights.

### Non-governmental

organisations should step up pressure on government and parliament to act, documenting issues, raising public awareness and engaging with policy processes.

## Rethinking investment treaties to advance human rights

There are over 3,000 international investment treaties worldwide, with more under negotiation. The number of investor-state arbitrations based on these treaties continues to grow. Human rights issues have emerged in several arbitrations, for example in disputes that affected water access, public health, land rights, the environment and actions favouring disadvantaged groups. Yet few investment treaties contain meaningful references to human rights, and some arbitral tribunals have proved reluctant to consider human rights arguments made by states and non-governmental organisations (NGOs). Investment treaty policy needs reconfiguring in the light of human rights obligations. The UK has long been a key player in the development of the international investment regime. As the country gears up for international trade and investment negotiations in the aftermath of the 'Brexit' vote, there is an opportunity to show leadership by ensuring that investment policy supports human rights.

### A growing network of treaties

Investment treaties are mostly bilateral investment treaties (BITs) but also, increasingly, wider regional or bilateral economic treaties that contain an investment chapter, as with the proposed Transatlantic Trade and Investment Partnership (TTIP), the Comprehensive Economic and Trade Agreement (CETA) and the Trans-Pacific Partnership (TPP). While these latter treaties have sparked considerable public debate, less attention has been paid to the thousands of other investment treaties, most of which are with low- and middle-income countries.

Investment treaties aim to promote investment flows between the signatory states. They do so by establishing obligations about how states must protect and possibly admit investments by nationals of the other state(s) within their own territory. Most investment treaties also allow

investors to bring disputes with the host state to international arbitration; this is termed investor-state arbitration. Arbitral tribunals settle these disputes, issuing binding rulings known as arbitral awards. Over the years, investors have brought some 700 *known* arbitrations, challenging state conduct in wide-ranging policy areas from taxation, finance and energy to public health, redistributive reform and environmental protection, to name but a few.

Well thought out investments can help countries realise human rights, for instance through jobs and taxes to fund essential services. But there is inconclusive evidence that investment treaties actually encourage investment,<sup>1</sup> and most treaties do not require investments to respect human rights or maximise social and environmental benefits. On the other hand, in 2003 a report by the United Nations High Commissioner for Human Rights suggested the way some arbitral

## Few international investment treaties contain meaningful references to human rights

tribunals interpret investment treaties could make it more difficult for states to honour their human rights obligations when doing so would adversely affect businesses.<sup>2</sup>

The concern is that the often-large compensation pay-outs that the tribunals awarded to investors, and the significant legal costs and uncertainty associated with arbitration, might

discourage cash-strapped states from taking action to protect human rights. This issue is part of a wider debate about 'regulatory chill' — the concern that overly generous investment protection could affect the ability of states to act in the public interest.

### Investor-state arbitration

Since that 2003 report, human rights issues have surfaced in several investment disputes. Both UN human rights experts and experienced arbitrators have referred to human rights at stake in arbitral proceedings.<sup>3</sup> We cannot present a comprehensive inventory; information is not always publicly available and disputing parties sometimes choose not to discuss human rights even if they are at stake. However, a few examples illustrate how investment treaties and human rights intersect.

Some investors seek compensation under investment treaties for state conduct they claim breaches their human rights. One arbitral tribunal found that the state breached the investor's right to a fair trial and that this action violated investment protection standards.<sup>4</sup> In this context, investor-state arbitration provides foreign investors with an international remedy unavailable to others under international human rights law. That raises broader questions regarding the universality of rights and remedies, and about how arbitral tribunals (which are typically not composed of human rights experts) will interpret human rights norms.

States have developed human rights arguments to rebut investor claims, arguing that human rights law requires authorities to take the measures challenged by the investor. In other cases, human rights dimensions are at stake but not explicitly articulated by either disputing party. So NGOs filed non-disputing party ('*amicus curiae*') submissions to make those dimensions explicit. Arguments by states or NGOs can create tension between investment protection standards and human rights considerations. A few examples follow.

**The right to water.** Water supply concessions feature in several arbitrations and some disputes affect issues relevant to the human right to water — such as water quality and tariffs. In some arbitrations, states or NGOs have argued that the measures challenged by the investor were necessary to preserve the right to water. The arbitral tribunals' discussion of these arguments has tended to be brief and not to significantly affect arbitration outcomes.<sup>5</sup>

**The right to health.** Legislation to discourage smoking supports the right to health.<sup>6</sup> But such measures can undermine the business prospects of tobacco firms and have led to two recent arbitrations. A challenge to Australia's plain packaging legislation failed because of the timing and motivation of the tobacco firm's corporate restructure, upon which the arbitration was premised. Another tribunal dismissed a separate arbitration over Uruguay's anti-smoking legislation on its merits. However, uncertainty remains. Also, legal action against Australia and concerns that tobacco firms might bring similar claims elsewhere appear to have contributed to delays in the adoption of anti-smoking legislation in New Zealand.<sup>7</sup>

**Land rights.** In many parts of the world, land provides the basis for livelihoods and social identity. Land rights may be instrumental to realising human rights to food, housing and self-determination, and the rights of indigenous peoples. Land issues have emerged in several arbitrations, including challenges to land redistribution. In one case, the tribunal rejected an *amicus curiae* submission raising human rights law issues, in part because it deemed the petitioners to lack impartiality.<sup>8</sup> In a separate human rights case, the government sought to resist an indigenous people's land restitution claim partly on the ground that foreign investors protected by an investment treaty now owned the land. The court dismissed this argument.<sup>9</sup>

**Indigenous peoples' rights.** Extractive industries can affect indigenous peoples' rights and ancestral territories. In some arbitrations, investors have challenged government measures taken partly in the name of local opposition to extractive operations. In these contexts, both civil society making *amicus curiae* submissions and governments calling on arbitral tribunals not to accept the investor's claim have invoked human rights. Arbitral tribunals have so far given a mixed reception to these arguments, but some arbitrations are still ongoing.<sup>10</sup>

**Environmental rights.** Measures to protect the environment can adversely affect business and have triggered several arbitrations. Human rights may be relevant, for example, where pollution

impairs water quality or public health. *Amicus curiae* submissions by NGOs have highlighted these issues, for example in one case where NGOs argued that authorities have a duty to act to avoid pollution undermining the right to water. However, the relevant award did not make mention of the human rights arguments.<sup>11</sup>

**Affirmative action.** In one arbitration, an investor challenged affirmative action measures favouring historically marginalised groups. The South African government adopted these measures to address the legacy of apartheid. An NGO made a submission highlighting human rights dimensions,<sup>12</sup> but the case was ultimately discontinued.

These diverse cases show that human rights issues do often appear in investor-state arbitration. There is no inherent contradiction between investment treaties and human rights law. But the cases illustrate how tensions can arise in the practical application of human rights and investment law, because action to advance human rights can adversely affect protected investments.

International law requires arbitral tribunals to 'take account' of all relevant rules, including human rights law, when interpreting investment treaties. But few tribunals have meaningfully done this so far. Also, human rights courts and investor-state arbitral tribunals have taken different approaches to addressing these tensions. While human rights courts have held that human rights should prevail, arbitral tribunals have argued that human rights law and investment law operate on different planes and that states must equally respect both.<sup>13</sup>

### The treaty-drafting stage

The wording of investment treaties affects the scope for arbitral tribunals to advance treaty interpretations that support human rights. The UN's Guiding Principles on Business and Human Rights clarify that businesses have the responsibility to respect human rights, and call on states to formulate treaties in ways that maintain the policy space needed to meet human rights obligations. Following this guidance, the United Kingdom (UK)'s 2013 National Action Plan (NAP) on business and human rights, the first of its kind, called for investment treaties not to 'undermine the host country's ability to meet ... its international human rights obligations'. However, the 2016 version of the UK NAP diluted this language.<sup>14</sup>

In recent years, the growing number of investor-state arbitrations prompted several states to reconsider the wording of their investment treaties, for instance through more narrowly

formulated investment protection standards, clauses calling on investors to apply responsible business practices, or more explicit provisions affirming the right of states to regulate in the public interest. Some states have sought to disengage from the investment treaty regime altogether. Others, such as Brazil, have concluded agreements that look very different to conventional investment treaties.

'Recalibrated' investment protection standards are meant to preserve greater policy space, including in those policy areas relevant to human rights. But they are still to be properly tested in investor-state arbitration, so it is unclear how tribunals will interpret and apply them. Responsible business provisions are meant to improve social and environmental performance but typically do not create binding obligations on investors.

Human rights considerations have not featured prominently in these reform efforts. Few investment treaties refer to human rights — only 0.5 per cent of the over 2,000 investment treaties reviewed in a major survey did so,<sup>15</sup> and mainly through brief references in the treaty preambles and inoperative clauses. More treaties contain provisions regarding labour rights, in particular requiring states not to deviate from, or fail to enforce, their labour laws in order to attract foreign investment. But national labour laws are sometimes inadequate, and many investment treaties do not require compliance with international labour conventions. In addition, labour provisions in investment treaties are typically not supported by effective enforcement mechanisms.

Human rights are also relevant to the treaty-making process itself, for example citizens' rights to access information and participate in public decisions, and human rights impact assessments of proposed treaties. Scrutiny and debate of investment treaties have traditionally been limited but have recently increased, particularly in middle- and high-income countries. But major constraints remain — there is little transparency in negotiations and few mechanisms for citizens to be heard.

Since the 1970s, the UK has concluded over 100 investment treaties, most of which are currently in force and most of which involve low- or middle-income countries. Even the more recent treaties (such as the UK–Ethiopia BIT of 2009, which is not yet in force) do not reflect a recalibration of treaty standards. They stick to traditional succinct formulations that leave considerable discretion to arbitral tribunals and make no mention of human rights. In 2009, responsibility for negotiating investment

treaties shifted to the European Union. But the outcome of the 'Brexit' referendum creates the prospect of new investment treaty negotiations led directly by the UK government, possibly as part of wider trade negotiations. This development creates a need for a new UK investment treaty policy, and the opportunity for innovation in designing a policy that advances human rights.

## Looking forward

Investment treaties raise human rights issues requiring careful consideration. There is considerable room to rethink substantive norms and dispute settlement arrangements. Besides carefully considering whether to sign investment treaties, incremental approaches could involve recalibrating investment protection standards, rebalancing investor rights and obligations, introducing or strengthening human rights clauses, ensuring that arbitral tribunals have human rights expertise where the dispute requires, and improving mechanisms for people to have their voices heard in investment treaty-making and arbitration. In more radical terms, there is an ambitious reform agenda to wholly reimagine the international investment regime, considering both investment promotion and human rights issues.

## Notes

<sup>1</sup> For example, Sauvant, KP and Sachs, L (eds) (2009) *The effect of treaties on foreign direct investment: Bilateral investment treaties, double taxation treaties, and investment flows*. Oxford University Press; Yackee, JW (2011) Do bilateral investment treaties promote foreign direct investment? Some hints from alternative evidence. *Virginia Journal of International Law* 51(2) 397–442. / <sup>2</sup> UN High Commissioner for Human Rights (2003) *Human Rights, Trade and Investment*, UN Doc. E/CN.4/Sub.2/2003/9, at 35. / <sup>3</sup> For example, Tauli-Corpuz, V (2015) Report of the Special Rapporteur on the Rights of Indigenous Peoples on the Impact of International Investment and Free Trade on the Human Rights of Indigenous Peoples, UN Doc. A/70/301; De Zayas, A (2016) Report of the Independent Expert on the Promotion of a Democratic and Equitable International Order, UN Doc. A/HRC/33/40; interview with Toby Landau QC, [www.youtube.com/watch?v=bJaoADpIcJs](http://www.youtube.com/watch?v=bJaoADpIcJs) (28 March 2014). / <sup>4</sup> For example, *Hesham Talaat M. Al-Warraq v. Republic of Indonesia*, UNCITRAL (Final Award, 2014). / <sup>5</sup> *Azurix Corp. v. Argentine Republic*, ICSID ARB/01/12 (Award, 2006), at 254, 261; *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania*, ICSID ARB/05/22 (Award, 2008), at 434; *Suez and Others v. Argentine Republic*, ICSID ARB/03/19 (Decision on Liability, 2010), at 260, 262; and *Saur International S.A. v. Argentine Republic*, ICSID ARB/04/4 (Decision on Jurisdiction and Liability, 2012), at 328–332. For an *amicus curiae* submission containing right to water arguments, see *Biwater Gauff (Tanzania) Limited v. United Republic of Tanzania* (Amicus Curiae Submission by LEAT, LHRC, TGNP, CIEL and IISD, 2007). / <sup>6</sup> *Philip Morris Brands Sàrl and Others v. Oriental Republic of Uruguay*, ICSID ARB/10/7 (Written Submission by the World Health Organization and the WHO Framework Convention on Tobacco Control Secretariat, 2015), at 12. / <sup>7</sup> The two arbitrations are *Philip Morris Asia Limited v. The Commonwealth of Australia*, PCA Case 2012-12 (Award on Jurisdiction and Admissibility, 2015); and *Philip Morris Brands Sàrl and Others v. Oriental Republic of Uruguay* (Award, 2016). See Voon, T and Mitchell, AD (2016), *Philip Morris vs. tobacco control: Two wins for public health, but uncertainty remains, Columbia FDI Perspectives* No. 182. The New Zealand government announced it would 'wait and see what happens with Australia's legal cases, making it a possibility that, if necessary, enactment of New Zealand legislation and/or regulations could be delayed pending those outcomes' ('Government moves forward with plain packaging of tobacco products', press release, 19 February 2013, [www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products](http://www.beehive.govt.nz/release/government-moves-forward-plain-packaging-tobacco-products)). After the arbitration against Australia was dismissed, the New Zealand government announced the legislation would go ahead: Kirk, S (15 February 2016) 'Tobacco Plain Packaging Likely to be Law by End of Year – John Key', [www.stuff.co.nz/national/politics/76917027/Tobacco-plain-packaging-likely-to-be-law-by-end-of-year-John-Key](http://www.stuff.co.nz/national/politics/76917027/Tobacco-plain-packaging-likely-to-be-law-by-end-of-year-John-Key). / <sup>8</sup> *Bernard Von Pezold and Others v. Zimbabwe*, ICSID ARB/10/15 (Procedural Order No. 2, 2012), at 25–27, 51, 55–56. / <sup>9</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*, Inter-American Court of Human Rights (Judgment, 2006), at 115(b) 125, 137, 140. / <sup>10</sup> In *Bear Creek Mining Corporation v. Republic of Peru*, ICSID ARB/14/21 (ongoing), the tribunal accepted one *amicus curiae* submission containing human rights arguments (Amicus Curiae Brief Submitted by DHUMA and Mr Carlos Lopez, 2016) and rejected another one (Submission by CCSI, 2016); see Procedural Orders No. 5 and 6 (2016). Other examples of publicly available *amicus curiae* submissions containing human rights arguments include *Glamis Gold Ltd. v. United States of America*, UNCITRAL (Application for Leave to File a Non-Party Submission and Submission of the Quechuan Indian Nation, 2005). Examples of known human rights arguments made by states include *Bear Creek Mining Corporation v. Republic of Peru* (Respondent's Counter-Memorial on the Merits and Memorial on Jurisdiction, 2015), at 58, 62, 71; and, more extensively, *South American Silver Limited v. Plurinational State of Bolivia*, PCA Case 2013-15 (ongoing) (Objections to Jurisdiction, Admissibility and Counter-Memorial on the Merits, 2015), at 32–177, 192–209, 217–220, 300–324. / <sup>11</sup> *Methanex Corporation v. United States of America*, UNCITRAL (Submission of Non-Disputing Parties Bluewater Network, CBE and CIEL, 2004), at 16–18. / <sup>12</sup> *Piero Foresti and Others v. Republic of South Africa*, ICSID ARB(AF)/07/01 (Petition by CALS, CIEL, INTERIGHTS and LRC, 2009). / <sup>13</sup> *Contrast Sawhoyamaxa v. Paraguay*, at 140, on the one hand, and *Suez and Others v. Argentine Republic*, at 262, and *Saur International S.A. v. Argentine Republic*, at 331, on the other. / <sup>14</sup> Guiding Principles on Business and Human Rights, A/HRC/17/31, 21 March 2011, Principle 9. The UK NAP text cited is from 'Good Business – Implementing the Guiding Principles on Business and Human Rights' (September 2013), section 2, 'new action planned' (vii). The May 2016 version mentions 'support[ing] the EU commitment to consider the possible human rights impacts of free trade agreements, including where these include investment protection provisions, and take appropriate steps including through the incorporation of human rights clauses as appropriate' (section 18(vii)). / <sup>15</sup> Gordon, K *et al.* (2014) *Investment treaty law, sustainable development and responsible business conduct: A fact finding survey*. OECD, Paris.

States have the power to conclude, terminate and reform their investment treaties, so there is much that can be done at the national level. Historically, the UK has acted as a key player in the development of investment treaties and arbitration. As the country gears up for new international trade and investment negotiations, there is an opportunity to show leadership by ensuring that investment law supports human rights.

The UK government should review its investment treaty stock to ensure that investment treaty policy is fully aligned with human rights. Parliament should conduct its own review of the UK's investment treaty policy and stock, fully use its constitutional powers in any treaty-making processes, and more generally ask questions, hold debates and provide policy pointers. NGOs should step up pressure on government and parliament to act by documenting issues, raising public awareness and engaging with policy processes.

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