



**FPC Briefing: How Investment Treaties have a chilling effect on Human Rights**  
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How important are human rights? For many they are the ultimate arbiter of relationship between state and individual. Efforts to protect human rights may, however, be chilled by Investment Protection Provisions (IPPs): clauses in international trade and investment treaties (TIAs) that, in effect, set the interests of investors ahead of the imperative to protect human rights.<sup>2</sup> When the UK leaves the EU, it must negotiate independent TIAs. IPPs will be a live issue in every set of negotiations. If fundamental human rights are to be protected, post-Brexit, we must understand the nature and impacts of TIAs.<sup>3</sup>

A new generation of investment agreements is maturing, in which the principle parties are states in the Global North. This Second Generation (as I will call it) represents a substantive change in the impact of IPPs: from guarantees of fair treatment into entitlements to special privilege. This evolution incentivises governments to place the interests of investors ahead of the imperative to protect human rights. Understanding the tension between IPPs and human rights is vital for policy-makers, business and civil society as the UK seeks to negotiate new TIAs post-Brexit.

The first section of this briefing will analyse the evolution of IPPs from the First Generation to the Second Generation of TIAs: from guarantees of fair treatment to entitlements to preferential treatment. The second section will examine the chilling effect of investment law on measures that give effect to human rights. The third section will consider how this leads, in practice, to the interests of investors overriding attempts to protect human rights. The final section will reflect on the post-Brexit impacts of IPPs on human rights in the UK.

### **The Development of the Second Generation of IPPs**

IPPs regulate the treatment of foreign investors by states. They prohibit measures that will harm the interests of investors, even if those measures are backed by democratic mandates.<sup>4</sup> IPPs are enforced by Investor State Dispute Settlement (ISDS) tribunals.<sup>5</sup> These are *ad hoc*, independent tribunals, constituted by investment treaties.<sup>6</sup>

The international law of investment protection was originally developed to facilitate investment in states that lacked independent judiciaries or established rule of law traditions. First Generation IPPs ensured that (a) states could not arbitrarily deprive investors of their assets and (b) that disputes

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<sup>2</sup> These provisions have become controversial. Governments and civil society organisations have criticised plans to include investment protection in treaties under negotiation between the EU, USA, and Canada. See, European Commission, “Report on investor protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), (Brussels; 2015), available at [http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc\\_153044.pdf](http://trade.ec.europa.eu/doclib/docs/2015/january/tradoc_153044.pdf)

<sup>3</sup> Legal analyses of investment protection provisions tend to focus on their impact on decision making based on investment norms (See, for example, Julian Lew and Loukas Mistellis, “Arbitration of Investment Disputes”, in *Comparative International Commercial Arbitration*, (London; Kluwer Law International, 2003), pp. 761-804). Political analyses generally consider the political economy of investment agreements (See, for example, Ferdi De Ville and Gabriel Siles-Brugge, “The Truth about the Transatlantic Trade and Investment Partnership”, (Cambridge; Polity, 2016)). Critics tend to focus on issues of democratic decision making or environmental protection (See, for example, John Hillary, “The Transatlantic Trade and Investment Partnership: A Charter for Deregulation, An Attach on Jobs, An End to Democracy”, (Brussels; Rosa Luxemburg Institute, 2015). Those studies that consider the human rights implications of investment protection tend to focus on developing states (See, for example Tienhaara, n. 2, pp. 185-196). But the impacts in developed states should not be ignored.

<sup>4</sup> By this I mean measures that are proposed by democratically elected governments and are subject to, and survive, scrutiny by elected legislatures.

<sup>5</sup> The Comprehensive Economic and Trade Agreement (CETA), made between the EU and Canada, provides for a variation on ISDS called the Investment Court System (ICS). However, as CETA contains the same IPPs as other TIAs, this procedural difference is not material to the discussion here, CETA will, as such, be considered as part of the same class as other Second Generation TIAs.

<sup>6</sup> Lew and Mistellis, n. 2, pp. 761-804



between investors and states were resolved by independent tribunals in which both parties received a fair hearing.

The First Generation of TIAs developed as a response to de-colonisation. When European states held colonial empires, investments in imperial territories were protected by the metropolitan power.<sup>7</sup> Investments in British territories were generally subject to British law and disputes were settled by colonial versions of the British legal system. In French territories, investments were regulated by French law and disputes settled by versions of the French legal system. The same was true for other European empires.<sup>8</sup>

When the former colonies gained independence, investors were compelled to deal with each state in its own right. Courts in some newly formed states were not thought to conform to the same standards of independence from the government as those in Western Europe or the United States.<sup>9</sup> Investors could not, therefore, be sure that they would receive a fair hearing in domestic court if a dispute arose with the host state. International investment law, at the time, applied only to states. The only recourse for investors, when in disputes with their host state, was to lobby their home state to intercede on their behalf. States were often unwilling to 'politicise' trade disputes by intervening on behalf of investors.<sup>10</sup>

This created problems for both investors and new states. Investors were unwilling to invest in post-colonial states because they could not be certain that they would be treated fairly. Post-colonial states needed to attract investment to stimulate their economies and to better exploit their natural resources. IPPs, inserted into trade treaties or agreed in dedicated Bilateral Investment Treaties (BITs), solved both problems.<sup>11</sup> They provided a generally coherent set of norms governing the behaviour of states towards investors, and gave investors an independent course of action against states that violated these norms. They provided for disputes to be settled by independent Investor State Dispute Settlement (ISDS) tribunals, in which states and investors appear on equal terms and cases are decided by independent arbitrators.<sup>12</sup> IPPs thereby gave investors the confidence to invest in post-colonial states.<sup>13</sup>

### **Key features of the Second Generation**

Since the 1990s a new generation of investment protection treaties has emerged. This Second Generation includes the North American Free Trade Agreement (NAFTA), the Energy Charter Treaty (ECT), the proposed Trans-Pacific Partnership (TPP)<sup>14</sup>, the Comprehensive Economic and Trade Agreement (CETA), the proposed Transatlantic Trade and Investment Partnership (TTIP), and the proposed Trade in Services Agreement (TiSA). Second Generation of TIA's are distinguished by two features:

- Second Generation TIAs apply IPPs to a substantially larger proportion of global investment than First Generation TIAs. The ambit of Second Generation IPPs is thus wider than that of First Generation IPPs.

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<sup>7</sup> Antony Anghie, "Imperialism, Sovereignty and the Making of International Law", (Cambridge; Cambridge University Press, 2007), pp. 32-114

<sup>8</sup> Ibid, pp. 40-47

<sup>9</sup> Ibid, pp. 40-47

<sup>10</sup> Exceptions to this rule, such as the Anglo-French intervention to secure the Suez Canal after it was expropriated by the Nasser government in Egypt, are notable for their failure. See Diane B. Kunz, *The Economic Diplomacy of the Suez Crisis*, (Chapel Hill; University of North Carolina Press, 1991), pp. 23-78

<sup>11</sup> Anghie, n. 7, pp. 196-244

<sup>12</sup> Lew and Mistellis, n.2, pp. 761-804

<sup>13</sup> The use of IPPs in many First Generation TIAs is nevertheless considered deeply problematic, in particular for its tendency to undermine democratic decision-making in the Global South. See, for example Kyla Tienhaara, n. 12, pp. 73-100

<sup>14</sup> Now on hold due to the withdrawal of the US from the current process at the start of the Trump Administration in January 2017.



- Most parties to Second Generation TIAs are states in the Global North, which have independent judiciaries. The effect of Second Generation treaties, therefore, is not to ensure *fair* treatment for investors, but rather to ensure they are accorded *preferential* treatment.

### Expanding the scope of IPPs

First Generation TIAs generally involved a party from the Global North, on one side, and a party from the Global South, on the other. The UK is party to 94 BITs, most which include some form of ISDS.<sup>15</sup> In these relationships, the flow of investment is primarily one-way: UK based companies and individuals invest in the other party, but the other party provides little or no investment to the UK.<sup>16</sup>

The principle parties to Second Generation TIAs are states in the Global North. Around 54% of all FDI inflows fall within members of the G20 group of states.<sup>17</sup> The Second Generation of TIAs therefore substantially increases the portion of FDI within the ambit of IPPs. This could amount to as much as a threefold increase in the total volume of investment covered by IPPs in the next ten years.<sup>18</sup>

### From fair treatment to preferential treatment

In First Generation TIAs, IPPs were intended to protect investors against arbitrary acts by states. In particular, they protected investors against arbitrary deprivation of their property. When host states did not have independent judiciaries, TIAs provided for a forum in which investors could be sure of a fair hearing. States in the Global North generally have independent judicial systems, along with domestic laws that protect property and prohibit discrimination.<sup>19</sup> Investors need not fear arbitrary deprivation of their assets because host states have domestic laws prohibiting such actions. Similarly, investors need not look to TIAs for a fair hearing because domestic courts are generally agreed to be independent and capable of delivering just resolutions to disputes.<sup>20</sup> If the sole purpose of IPPs is to ensure that investors are treated fairly, then they are not necessary in most Second Generation TIAs.

In practice, Second Generation IPPs act to ensure preferential treatment for investors. They do through in two principle avenues. First, IPPs impose greater restrictions on government action than domestic public law imposes in relation to citizens.<sup>21</sup> Investors thus have more extensive rights in

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<sup>15</sup> Department for Business Innovation and Skills, "ISDS in Numbers", available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/311247/bis-14-695-investor-state-dispute-settlement-fags.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/311247/bis-14-695-investor-state-dispute-settlement-fags.pdf). This list includes only those treaties to which the UK is an independent party. The UK is party to a number of other IIAs as a member of the EU.

<sup>16</sup> See Ernst and Young, UK Attractiveness Survey 2014, available at <http://www.ey.com/UK/en/Issues/Business-environment/2014-UK-attractiveness-survey>

<sup>17</sup> United Nations Conference on Trade and Development, "World Investment Report 2014", (2015), p. xvi, [http://unctad.org/en/PublicationsLibrary/wir2014\\_en.pdf](http://unctad.org/en/PublicationsLibrary/wir2014_en.pdf)

<sup>18</sup> Gus Van Harten, "Why Arbitrators Not Judges? Comments on the European Commission's Approach to Investor-State Arbitration in TTIP and CETA", (Osgoode-Hall Law School, York University, 2014), [http://eu-secretdeals.info/upload/2014/07/Van-Harten\\_Comments-id2466688.pdf](http://eu-secretdeals.info/upload/2014/07/Van-Harten_Comments-id2466688.pdf)

<sup>19</sup> In the UK, for example, English law has prohibited unreasonable expropriation without compensation since the Magna Carta (see Magna Carta, Arts. 22, 26 and 37 available in translation at <https://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (last checked 1st of February 2017)). The Equality Act 2010 prohibits discrimination based on race or any other protected category. In the European Union, Art. 17 of the EU Charter of Fundamental Rights prohibits the expropriation of private property except in the public interest, provided for by law, and subject to fair compensation (European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, Art. 17). Arts. 63 to 66 of the Treaty on the Functioning of the European Union prohibit discrimination against investors. This protection can extend to FDI (see Stefan Hindelang, *Free Movement of Capital and Foreign Direct Investment*, (Oxford, OUP, 2009) pp. 62-63). Protocol 1 of the European Convention on Human Rights (ECHR) provides similar protections for property (Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Protocol. 1, Art. 1) and Art. 14 of the ECHR prohibits discrimination and can be applied in relation to Protocol 1 (ibid, Art. 14). Any investor providing FDI into a European state is thus protected by legal rights at three levels, all of which can be directly enforced in domestic courts and, if those fail, appealed to the Court of Justice of the European Union or the European Court of Human Rights.

<sup>20</sup> See World Justice Project, "Rule of Law Index 2016", available at <http://worldjusticeproject.org/rule-of-law-index>

<sup>21</sup> See the discussion on pp. 4-6 for analysis of the restrictions that IPPs place on states.



relation to the host state than citizens of that state. Second, TIAs also accord foreign investors a preferential mechanism for enforcing their rights. IPPs are enforced by ISDS tribunals, a remedy that is available only to foreign investors. In practice the high cost of ISDS means it is available only to the wealthiest investors.<sup>22</sup> ISDS tribunals make decisions in a manner that is less favourable to governments, and more favourable to the claimant (exclusively foreign investors) than domestic courts.<sup>23</sup>

The development of the Second Generation has led to a dramatic rise in the use of ISDS. In 1987 fewer than five ISDS arbitrations were initiated per year. By 2012, that number had risen 54.<sup>24</sup> Furthermore, the direction of the arbitrations has altered. In 1987 all recorded claims were against states in the Global South. By 2012 40% of claims were against states in the Global North<sup>25</sup>.

### **The first avenue: the substance of IPPs**

Second Generation IPPs generally impose four criteria. A contracting state is (1) prohibited from expropriating the property of an investor, must accord the investor (2) 'national treatment' and (3) 'most favoured nation treatment', and must (4) treat the investor fairly and equitably. These criteria give investors extensive rights against the governments of host states.

#### **1. Expropriation**

A state may not expropriate (take) the property of the investor without providing reasonable compensation<sup>26</sup>. The scope of the prohibition on expropriation has, however, progressively expanded. The prohibition initially applied to the taking of physical assets, it has since been extended to include intangible assets like intellectual property<sup>27</sup>. The prohibition can now be violated if a government policy prevents the investor making a desired use of their asset, even if the asset remains in the investor's possession.<sup>28</sup> Tribunals have also awarded damages for 'creeping expropriation' in which a series of regulations, built up over time, hinders the use of an asset. The prohibition of expropriation has thus evolved from a protection against taking without compensation, to a prohibition of any measure that might hinder an investor in extracting the maximum possible profit from an asset.<sup>29</sup>

#### **2. National Treatment**

A state must accord investors 'national treatment'<sup>30</sup>. This means that foreign investors must be accorded the same treatment as domestic investors. The effect of this type of provision has remained relatively static between First Generation and Second Generation TIAs. It is significant, however, because parties to Second Generation treaties generally have domestic laws prohibiting

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<sup>22</sup> See discussion on p. 13

<sup>23</sup> See, Tienhaara, n. 12, pp. 73-100

<sup>24</sup> United Nations Conference on Trade and Development, "Recent Trends in IIAs and ISDS", (New York, 2015), available at [http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1\\_en.pdf](http://unctad.org/en/PublicationsLibrary/webdiaepcb2015d1_en.pdf)

<sup>25</sup> Ibid

<sup>26</sup> See, for example, The Comprehensive Economic and Trade Agreement (CETA), Consolidated Text, Art. 8.12, available at [http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc\\_152806.pdf](http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf)

<sup>27</sup> Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay, ICSID Case No. ARB/10/7 (formerly FTR Holding SA, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay)

<sup>28</sup> For example, see Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany, ICSID Case No. ARB/09/6 (formerly Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG & Co. KG v. The Federal Republic of Germany)

<sup>29</sup> See, for example, Ethyl Corporation v. The Government of Canada, UNCITRAL, 78 International Legal Materials (1999), <http://www.italaw.com/cases/409>, in which a measure prohibiting the transport of certain chemicals, after independent scientific advice indicated that they were dangerous when transported, was the subject of a claim based on the prohibition of expropriation under NAFTA Ch. 11.

<sup>30</sup> See, for example, CETA, n. 26, Art. 8.6



discrimination.<sup>31</sup> Where national treatment provisions once provided the only guarantee against discrimination. In Second Generation TIAs, they merely duplicate existing domestic law.

### 3. Most Favoured Nation Treatment

Investors must also be accorded ‘most favoured nation treatment’.<sup>32</sup> This means that states must accord all foreign investors, regardless of their state of origin, the same treatment that they would extend to investors from the state that has the most favourable relationship with the host.<sup>33</sup> Most favoured nation treatment gives investors access to the most favourable terms on offer, even if those terms are not contained in a treaty to which their state is party. This provision means that investors from one state can theoretically benefit from a treaty signed by a different state if that treaty contains more favourable terms than those to which she would otherwise be entitled.<sup>34</sup>

### 4. Fair and Equitable Treatment

Finally,<sup>35</sup> investors must be treated in a manner that is ‘fair and equitable’<sup>36</sup>. This has a broad meaning, and potentially prohibits almost any action taken by a government if that action compromises the interests of an investor. In general, it is violated whenever public policy frustrates an investor’s ‘legitimate expectations’. This term is given a much broader construction by ISDS tribunals than it is by domestic courts in the UK. In *Ethyl v Canada*, an investor brought action in ISDS because the Canadian government banned MMT, a gasoline additive. The Canadian ban was based on independent, scientific advice stating that MMT was dangerous when transported. The tribunal indicated that the ban frustrated Ethyl’s legitimate expectations.<sup>37</sup> Canada and Ethyl subsequently reached a settlement that required Canada to repeal the ban, make a public statement (contradicting the advice it had received) that MMT was neither harmful to public health nor to the environment, and pay Ethyl \$19 million in compensation.<sup>38</sup>

#### *The second avenue: a preferential mechanism for enforcement*

IPPs are enforced by ISDS tribunals. These are arbitration tribunals that sit outside the legal systems of host states. If a tribunal finds that a state has violated an IPP, the offending state is compelled to pay damages to the investor that brought the suit. ISDS tribunals offer greater advantages to claimants than they would receive in domestic courts. As ISDS is only available to foreign investors, the effect is that investors are more likely to succeed in claims against a state than citizens of that state. It is therefore easier for investors to force a state to accede to their demands than it is for domestic citizens. The problems with ISDS tribunals can be categorised under three headings: (1) Proportionality, (2) Predictability, and (3) Exclusivity.

#### (1) Proportionality

ISDS tribunals make decisions in a manner that is less favourable to governments, and more favourable to the claimant than domestic courts. ISDS tribunals will, for example, generally only

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<sup>31</sup> See Article 206 and 207 Treaty on the Functioning of the European Union; Michael V. Seitzinger, “Foreign Investment in the United States: Major Federal Statutory Restrictions”, (Congressional Research Service, 2013); Equalities Act (UK) 2010, Canadian Human Rights Act, R.S.C., 1985, c. H- 6, Pt. I

<sup>32</sup> See, for example, CETA, n. 12, Art 8.7

<sup>33</sup> Lew and Mistellis, pp. 761-804

<sup>34</sup> There is no record of this being done but analysis by Kent Law School indicates it would not be prohibited. See Harm Schepel, Statement of Concern about Planned Provisions on Investment Protection and Investor-State Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership (TTIP), (Kent, 2014)

<sup>35</sup> Some treaties also explicitly prohibit discrimination although in many the “national treatment” and “most favoured nation treatment” clauses serve this purpose.

<sup>36</sup> See, for example, CETA, n. 12, Art. 8.10

<sup>37</sup> Ethyl Corporation v. The Government of Canada, UNCITRAL, 78 International Legal Materials (1999), available at <http://www.italaw.com/cases/409>

<sup>38</sup> *Ethyl v Canada* 78 International Legal Materials (1999), pp. 708-31



consider whether a measure violates an IPP.<sup>39</sup> They will not consider the purpose of the measure, whether it is in the public interest, or whether it is effective in achieving that purpose. Domestic courts, by contrast, will balance any violation of individual rights against public policy concerns, such as whether the measure was in the public interest and whether it was effective in achieving its stated aim.<sup>40</sup> In matters concerning human rights, this is referred to as determining the proportionality of the measure.<sup>41</sup>

## (2) Predictability

ISDS tribunals are usually comprised of commercial lawyers.<sup>42</sup> There is generally no prospect of appeal unless the tribunal reaches a conclusion that is manifestly absurd.<sup>43</sup> Tribunals are bound only to enforce the terms of the treaty under which they are constituted. Although they will generally apply general principles of international law (such as peremptory norms, other treaty law, or customary international law), they are not bound to do so. Tribunals are not bound by the precedent of previous courts and can reach their decisions with reference to the reasoning of any court in the world or none.<sup>44</sup> These factors mean that ISDS tribunals are less predictable in their decisions than domestic courts. It is, therefore, more difficult to interpret IPPs than it is to interpret domestic statutes. It is not always clear that ISDS tribunals will apply the same reasoning as their predecessors have on similar questions or even the same approach to interpreting the treaty.<sup>45</sup> ISDS thus offers less legal certainty than independent, domestic courts, which are bound to follow the decisions of their more senior courts.

## (3) Exclusivity

Only foreign investors may benefit from ISDS tribunals. Citizens cannot bring suits against their home state in ISDS. In practice the high cost of ISDS means it is available only to the wealthiest investors. In the 55 arbitrations conducted at the World Bank's International Centre for the Settlement of Investment Disputes between 2011 and 2015 (for which data is available), the average cost of the case to the claimant was \$5.6 million. In only nine cases did the claimant incur costs of \$1 million or less. Claimants incurred costs of over \$5 million in 20 cases.<sup>46</sup> The average turnover for an SME (0-249 employees) in the UK is just under £1.8 million (approximately \$2.3 million).<sup>47</sup> The average cost of an ISDS suit therefore represents more than twice the yearly turnover of the average SME in the UK. The costs of bringing a suit in ISDS are not always recoverable. Even if they were, it is unlikely that an SME could survive the outlay of more than twice its annual turnover required to finance and ISDS suit. It is therefore likely that the benefits of IPPs will accrue almost entirely to large companies.

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<sup>39</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 ILM 317 (2000)

<sup>40</sup> Kyla Tienhaara, n. 12, pp. 73-100

<sup>41</sup> The issues that ISDS tribunals will take into consideration is further discussed at p.9

<sup>42</sup> Lew and Mistellis, n. 2, pp. 761-804

<sup>43</sup> *Ibid*, pp. 761-804

<sup>44</sup> *Ibid*, pp. 761-804

<sup>45</sup> For an example of how this can occur in practice see *CME Czech Republic B.V.v. v Czech Republic* UNCITRAL, available at

<http://www.italaw.com/cases/281> and *Ronald S. Lauder v Czech Republic* UNCITRAL, available at

<http://www.italaw.com/cases/documents/611>. Both cases concerned the same measure (a law limiting foreign ownership of media companies), were brought under the same treaty (a bilateral investment treaty between the Netherlands and the Czech Republic), and arbitrated under the auspices of the same organisation (the United Nations Commission on International Trade Law – UNCITRAL), but by different ISDS tribunals. One tribunal met in Sweden and the other in London. The tribunal in Sweden concluded that the measure violated the treaty. 11 days later, the tribunal in London reached the opposite conclusion. Two tribunals, applying the same treaty to the same set of facts, thus reached entirely contrasting conclusions.

<sup>46</sup> Jeffery P. Commission, "How Much Does and ICSID Arbitration Cost? A Snapshot of the Last Five Years", *Kluwer Arbitration Blog* (29<sup>th</sup> February 2016), available at <http://kluwerarbitrationblog.com/2016/02/29/how-much-does-an-icsid-arbitration-cost-a-snapshot-of-the-last-five-years/>

<sup>47</sup> Figures as of 2015, Department for Business, Innovation and Skills (UK), "Business Population and Estimates for the UK and Regions 2015), (14<sup>th</sup> October 2015), URN 15/92, p. 3, available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/467443/bpe\\_2015\\_statistical\\_release.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/467443/bpe_2015_statistical_release.pdf)



### The impacts of ISDS

ISDS tribunals cannot directly overrule decisions taken by national governments. Their powers of remedy are limited to the award of damages to the wronged party. This does not, however, prevent ISDS tribunals influencing government policy. The award of damages is often so large that continuing the offending measure (and thus risking further adverse awards) becomes financially unviable.<sup>48</sup> Alternatively, states often repeal offending measures as part of settlement negotiations, in attempts to avoid the economic and reputational damage of an adverse ISDS award.<sup>49</sup> Therefore, while ISDS tribunals lack formal powers to overrule governments, their actions often have an equivalent substantive impact.

The damages for breaches of IPPs are calculated based on the value of the investment at the time of the violation. If the investment was expected to pay out over ten years and the violation occurs after five, then the expected return for the remaining five years will be factored in to the calculation of damages. This means that ISDS tribunals can, in effect, award damages for loss of future profits<sup>50</sup>.

### The proposed 'Investment Court System'

In response to critiques of ISDS in CETA and TTIP, the EU has proposed an alternative form of dispute settlement, the 'Investment Court System' (ICS).<sup>51</sup> The EU's alternative model is included in CETA<sup>52</sup> and is also proposed for the (currently uncertain) TTIP. The fundamentals of ICS are similar to ISDS. Disputes between investors and states will be determined by tribunals, sitting outside domestic or European legal systems, based on Second Generation IPPs. There are, however, three key differences between ISDS and ICS. ICS tribunals (i) will be selected from a permanent panel of judges, rather than appointed ad hoc, (ii) their decisions will be subject to appeal to another tribunal, and (iii) the right to regulate will be given greater protection in the text of the treaties.

The ICS proposal does not, however, address the principal problems with Second Generation TIAs because it does not address the issues of proportionality, predictability or access. While the ICS system aims to limit the extent of the prohibition on expropriation and the entitlement to fair and equitable treatment and strengthen protections for the right to regulate, it will still put investors in a privileged position over citizens. While there is a separate set of laws, enforced by a separate judicial system, existing solely for the benefit of investors, there will always be an incentive to accord investors special treatment, beyond that to which citizens are entitled. If the intention of ICS is to ensure that investors are accorded the same treatment as citizens then a separate legal system is unnecessary. Investors can enjoy the same protections for their property and entitlement to non-discriminatory treatment, enforced by the same courts and tribunals, as domestic citizens. Indeed, if the prohibition of expropriation and the entitlement to fair and equitable treatment are truly subject to the right to regulate then it is difficult to see how they will provide protection that differs from that provided by domestic law.<sup>53</sup>

While the ICS proposal will create an appeals mechanism, this will not address the problem of predictability. In domestic systems, such as the UK's, appeals courts increase legal certainty by settling difficult legal questions. Their answers are authoritative because they bind lower courts. The

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<sup>48</sup> Jonathan Bonnitcha, *Substantive Protection under Investment Treaties: A Legal and Economic Analysis*, (London; Cambridge University Press, 2014), p. 12

<sup>49</sup> *Ibid*, p. 12

<sup>50</sup> *Ibid*, p. 12

<sup>51</sup> CETA Article 8.27

<sup>52</sup> CETA, Articles 8.27 and 8.28

<sup>53</sup> Subjecting the prohibition on expropriation and the entitlement to fair and equitable treatment to the right to regulate implies that a measure that violates the prohibition or the entitlement will not be prohibited if it is for a public purpose and is proportionate in achieving that purpose. There is no substantive difference between this level of protection and that which already exists in the domestic law of the UK or EU law.



decisions of the ICS appeals tribunals will not bind lower tribunals. They will not, therefore, offer authoritative answers to difficult legal questions. The ICS tribunals will not be any more predictable than ISDS tribunals, two tribunals may still come to opposing conclusions on the same question.

The ICS proposal does not include measures to address the exclusivity issue. ICS will remain reserved for investors. The proposal makes no mention of measures to reduce the cost of bringing a suit. The ICS is therefore likely to remain, like ISDS, accessible only to the wealthiest investors.

### **Chilling in law: How IPPs set the interests of investors ahead of human rights**

IPPs have greater weight than human rights norms in ISDS arbitrations. If measures intended to protect or provide for human rights compromise the interests of an investor, the investor's interest can override the imperative to protect human rights. States have a duty in international law to protect the human rights of their citizens.<sup>54</sup> This duty requires states (a) refrain from taking action that will violate the human rights of citizens<sup>55</sup>, and (b) take positive action to prevent citizens (or other non-state actors, such as multinational corporations<sup>56</sup>) from violating the rights of other citizens.<sup>57</sup> Public international law recognises that states have 'police powers' or a 'right to regulate'.<sup>58</sup> These powers should be used to regulate those within the ambit of a state's authority and, *inter alia*, to protect human rights.

The exercise of police powers can, however, violate IPPs. When this happens, the interests of the investor can take precedence. ISDS tribunals need not consider the purpose of a measure. It does not, therefore, matter that a measure is intended to fulfil human rights obligations, nor whether it is effective at doing so.<sup>59</sup> The tribunal need only consider whether the measure has compromised the interests of the investor. If it has, the tribunal can award damages, regardless of whether doing so will set back efforts to protect human rights. In *Metalclad v Mexico* the municipal authority opposed the building of a landfill because it would pollute the water supply to the municipality. The preparatory work for the landfill, conducted by Metalclad, contributed to sickness amongst residents. The municipal authority ultimately decided to deny the investor permission to build the landfill in the light of the threat it posed (and the damage it had already caused) to public health. Metalclad claimed that the decision violated its entitlement to fair and equitable treatment, enshrined in Chapter 11 of NAFTA. The tribunal acknowledged that Metalclad's project would cause environmental damage. Nevertheless, as previous Mexican governments had encouraged similar investments in the past, Metalclad had a legitimate expectation that it would be granted permission for the project in question. Metalclad's legitimate expectation outweighed the municipality's desire to protect the health of the local residents. In practice, Chapter 11 thus effectively barred the Mexican government (and, by extension, the municipal government) from refusing permission to continue with the project<sup>60</sup> even though this meant that the project would continue to damage public health.

Some investment treaties purport to protect police powers. Such protections, however, generally prove ineffective in practice<sup>61</sup>. When a treaty (a) purports to protect the right to regulate yet, at the same time, (b) grants investors the right to sue the state if regulations compromise their interests,

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<sup>55</sup> Charles R. Beitz, *The Idea of Human Rights*, (Oxford; Oxford University Press, 2009), pp. 14-48

<sup>56</sup> John Ruggie, *Guiding Principles on Business and Human Rights*, (New York and Geneva; Office of the United Nations High Commissioner for Human Rights, 2011)

<sup>57</sup> Charles R. Beitz, *The Idea of Human Rights*, (Oxford; Oxford University Press, 2009), pp. 14-48

<sup>58</sup> Tienhaara, n. 2, p. 45

<sup>59</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 ILM 317 (2000)

<sup>60</sup> *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1

<sup>61</sup> Javier Perez, Myriam Gistelinc, Dima Karbala, "Sleeping Lions: International investment treaties, state- investor disputes and access to food, land and water", (London; Oxfam, 2011), p. 14



two competing imperatives are created. Such contradictory principles cannot co-exist without friction. In practice, IPPs generally prevail over the right to regulate. The wording of most TIAs makes the right to regulate subject to the IPPs: the state can regulate, but only in the limited sphere prescribed by the treaty. For example, the treaty between the European Free Trade Area and Singapore provides:

‘Article 43 - Domestic Regulation

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns<sup>62</sup>.’

This purports to protect the right to regulate but, in fact, only does so as far as the investment protection provisions permit. As Howard Mann puts it:

‘The breadth of the language “any measure that is in the public interest” clearly would encompass all manner of human rights legislation. However, the insertion of the phrase “consistent with this Chapter” renders the entire paragraph legally useless in terms of reinforcing the right to regulate. In practice, it states the opposite, that the right to regulate for a public purpose *must be* fully exercised in a manner consistent with the IIAs protections of the foreign investor. This qualifying language, which originated in 1992 in NAFTA’s Chapter 11 on Investment, is now found in dozens of TIAs.’<sup>63</sup>

### Equality of arms

Some TIAs contain additional chapters that purport to protect human rights and other ‘public interests’ such as the environment, sustainable development, or labour rights.<sup>64</sup> Yet the mechanisms for enforcing these are not as powerful as the mechanism for enforcing IPPs (ISDS). Public interest provisions, however, rarely have legal ‘teeth’. They do not have a dedicated enforcement mechanism and, unless a special provision is made, cannot be enforced in domestic courts. Although states ostensibly agree to abide by public interest provisions, citizens have no effective legal mechanism to ensure they do so. IPPs, by contrast, are enforced by the powerful and effective mechanism of the ISDS tribunal. They can therefore be enforced directly and effectively by investors.

The members of ISDS panels are generally commercial law practitioners. They rarely, if ever, have expertise in human rights. This means they are less likely to consider the human rights issues in a case than, for example, a domestic law judge, who will have a much broader set of experiences. It is, perhaps, for this reason that human rights issues are considered in less than 12 percent of ISDS arbitrations. There is, therefore, no equality of arms between IPPs and public interest provisions. The former can be enforced directly by those they concern (investors) using a mechanism that is generally sympathetic to their interests (ISDS). The latter cannot be directly enforced by those they concern (citizens) and can thus be side-lined in policymaking without legal consequence.

### Chilling in Practice: How IPPs prevent governments from protecting human rights

The formal dominance of IPPs can mean that, in practice, the interests of investors override concerns for human rights and social justice. This has two principal impacts: ‘direct chill’, in which IPPs are used to actively frustrate attempts to protect human rights, and ‘indirect chill’, in which governments decline to take measures for fear of being sued under an IPP, even if those measures are necessary to protect human rights.

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<sup>62</sup> European Commission, EU-Singapore Free Trade Agreement: Consolidated Text, Art. 43, (Brussels, 2015), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=961> (last accessed October 2016)

<sup>63</sup> Howard Mann, International Investment Agreements, Business and Human Rights: Key Issues and Opportunities, International Institute for Sustainable Development Briefing, prepared for Professor John Ruggie, UN Special Representative to the Secretary General for Business and Human Rights, (Winnipeg, 2008), p. 19

<sup>64</sup> For example, in CETA, the investment protection provisions are contained in Chapter 8 while provisions relating to labour and environmental standards are found in Chapter 22.



### Direct chill

IPPs have been used to directly prevent governments taking measures to protect human rights. In *Foresti et al v South Africa*, a consortium of mining companies used IPPs in the Belgium-South Africa TIA to prevent the African National Congress (ANC) government taking measures to remedy various apartheid era injustices.<sup>65</sup> Under Britain's colonial rule, and subsequently the segregationist and apartheid regimes, successive South African governments had deprived black South Africans of land that they legally owned<sup>66</sup>. In 1913 the Land Act restricted black South Africans to owning 7.3% of the total land in South Africa. This meant the (black) majority of the population owned less than 10 percent of the total land. Between 1948 and 1991, successive apartheid governments imposed measures compelling black South Africans to give up land they previously owned. These included the Group Areas Act 1950<sup>67</sup>, the creation of black 'Homelands',<sup>68</sup> and the policy of forced removals.<sup>69</sup> These measures, in effect, compelled black landowners to give up their land or sell it for below market prices. This drove down the price of land in South Africa<sup>70</sup>. Any white investor could, therefore, acquire a portion of 92.7% of land in South Africa below market price. Investors benefitted from the labour policies of the apartheid governments. Black South Africans were restricted to the lowest paying jobs. This drove down the price of labour.<sup>71</sup> Those companies that require large tracts of land or have labour intensive operations, such as mining firms, were in a position to derive significant benefit from these policies.

The unjust deprivation of property is a human rights issue. The right to private property is recognised by human rights instruments at both international<sup>72</sup> and regional<sup>73</sup> level. The right provides that individuals cannot be deprived of their property unreasonably or without compensation. The Land Acts systematically deprived black South Africans of their property without compensation of any form. The ANC government proposed to (partially) remedy this historic injustice by compelling mineral companies to divest themselves of 26% of their assets, on the open market, to black South Africans.<sup>74</sup> Foresti and other investors claimed that this amounted to expropriation of their assets and a violation of their right to fair and equitable treatment in the BLEU

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<sup>65</sup> Piero Foresti, Laura de Carli & Others v. The Republic of South Africa, ICSID Case No. ARB(AF)/07/01

<sup>66</sup> Harold Wolpe, "Capitalism and Cheap Labour Power in South Africa: From Segregation to Apartheid", 4 *Economy and Society* 1 (1972), pp. 425-456

<sup>67</sup> This assigned different racial groups to different residential in business areas in cities, with white South Africans receiving the most favourable allocations. South Africans (mainly black South Africans) who lived in an area not assigned to their race were compelled to move.

<sup>68</sup> This created a series of nominally self-governing territories within South Africa. Black South Africans were encouraged, and in some cases compelled, to move to these territories. The Homelands, however, accounted for only 13% of the total land in South Africa and were generally located in the parts of the country with the fewest natural resources (see generally William Beinart, *Segregation and Apartheid in Twentieth Century South Africa*, (Exeter; Psychology Press, 1995).

<sup>69</sup> This involved forcibly removing black South Africans to Homelands or townships. They were not compensated for the land or business opportunities they were forced to give up. Resources (see generally William Beinart, *Segregation and Apartheid in Twentieth Century South Africa*, (Exeter; Psychology Press, 1995).

<sup>70</sup> Harvey M. Feinburg, "The 1913 Natives Land Act in South Africa: Politics, Race, and Segregation in the Early 20th Century", 26 *International Journal of African Historical Studies* 1 (1993), pp. 65-109

<sup>71</sup> Wolpe, n. 41, pp. 425-456

<sup>72</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), Art. 17; UN General Assembly, *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, Art. 5; UN General Assembly, *Convention on the Elimination of All Forms of Discrimination Against Women*, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, Art. 15

<sup>73</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, Protocol I, Art. 1; Organization of American States (OAS), *American Convention on Human Rights, "Pact of San Jose"*, Costa Rica, 22 November 1969, Art. 21; Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ("Banjul Charter")*, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982), Art. 14

<sup>74</sup> Annika Wythes, "Investor-State Arbitrations: Can the 'Fair and Equitable Treatment' Clause Consider International Human Rights Obligations?", 23 *Leiden Journal of International Law* 1 (2010), pp. 241-256



(Belgium- Luxembourg Economic Union)-South Africa BIT<sup>75</sup>. They argued that compelling them to divest certain assets artificially lowered the price of those assets. The investor claim did consider whether they had benefitted from the artificially depressed price of land during apartheid. The tribunal gave no indication that it was prepared to consider the human rights or historic injustice aspects of the issue. ISDS tribunals are, as argued above, unlikely to consider the ‘good intentions’ behind a measure, only whether it breaches the terms of the relevant treaty.<sup>76</sup> The ANC government was forced to settle on terms favourable to the mining companies.

Foresti and the other claimants thus continued to benefit from the gains they had made during the apartheid regime. The IPPs in the BLEU-South Africa treaty effectively ‘locked in’ the impacts of the apartheid regime’s human rights violations. Although the claimants had acquired their South African assets at a time when the market price was artificially depressed as a result of systematic and violent human rights abuses, the IPPs privileged Foresti’s financial interests ahead of the ANC’s attempts to rebalance the South African economy and redress historic human rights violations.<sup>77</sup>

In 2006 70% of all land in South Africa was still controlled by the white minority. While this is not solely the result of the Foresti case, its impact should not be underestimated. Apartheid and other human rights violations undermine the free market, using the coercive power of the state to give some citizens an unfair advantage over others. Foresti shows how IPPs can be used to lock in such unfair advantages so that, even after the repressive government has left office, the impacts of its policies retain the force of law.

In Second Generation TIAs, IPPs will retain their legal effect even if a state leaves the treaty. TIAs generally contain a ‘stabilisation clause’ that provides for the IPPs to continue to bind states for 20 years after the state leaves the treaty.<sup>78</sup> This means that, even if a government takes its state out of the treaty, it can still be prevented from taking measures to protect human rights if those measures might compromise the interests of investors. IPPs thus lock in the impacts of human rights abuses even after governments and electorates decide to no longer be a party to the treaty.

### **Indirect Chill**

Investment protection provisions also have an indirect chilling effect on human rights. IPPs can incentivise governments to avoid taking measures that might provoke action under a TIA, even if those measures are necessary to protect human rights. The effectiveness of ISDS as an enforcement mechanism results in “regulatory chill”.<sup>79</sup> Policy makers refrain from developing policies that might put them at risk of an ISDS claim. This means that policymakers are incentivised to prioritise the interests of investors without it ever becoming necessary for investors to enforce their interests through ISDS. The absence of equality of arms between IPPs and public interest provisions means that there is no equivalent pressure to respect human rights norms.

Action on Smoking and Health, the largest global NGO campaigning against smoking, believes that Philip Morris’ ISDS suits against Australia and Uruguay significantly slowed the progress of plain packaging legislation in other states<sup>80</sup>. Philip Morris ultimately lost both cases. The litigation, however, dragged on for six years, in the case of Uruguay, and four, in the case of Australia. While

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<sup>75</sup> The EU has only had exclusive competence for Foreign Direct Investment since the ratification of the Lisbon Treaty in 2009.

<sup>76</sup> *Compañía del Desarrollo de Santa Elena S.A. v. Republic of Costa Rica*, 39 ILM 317 (2000)

<sup>77</sup> The BLEU-South Africa treaty was denounced, and thus ceased to take effect, in 2013. Although this, technically, removed the barrier to reanimating the measures in question, no serious attempt has been made to do so.

<sup>78</sup> See, Sam Fowles, *The Subtle Revolution: TTIP, CETA and the Sovereignty of Parliament*, (London; Mishcon de Reya, 2015), p. 13

<sup>79</sup> Bonnitcha, n. 50, p. 15

<sup>80</sup> Action on Smoking and Health press release, “Uruguay Wins its Tobacco Case Against Philip Morris International”, July 2016, available at <http://ash.org/uruguay-wins-its-tobacco-case-against-philip-morris-international/>



governments believed that they might be penalised by an ISDS tribunal for passing plain packaging legislation, they had a powerful incentive not to do so.<sup>81</sup>

### **Lessons for Post-Brexit TIAs**

FDI into the UK is regulated by EU law until the UK leaves the EU.<sup>82</sup> After Brexit, the UK will be required to negotiate independent TIAs. This will present a substantive challenge for human rights in the UK. As a rich nation with a well-developed rule of law tradition, the UK is not as vulnerable to ISDS claims many other states. Indeed, the UK has never lost a claim that it has contested in ISDS. The Second Generation of investment treaties will, however, substantially increase the UK's vulnerability to ISDS claims. Second Generation TIAs are expected to significantly increase the proportion of investment that falls within the scope of IPPs. Furthermore, the UK has hitherto only signed independent TIAs with states with which the investment relationship is outward-facing: the UK companies and citizens invest in the other party to the agreement, but citizens and companies in that state provide little or no FDI to the UK. The UK's investment relationship with the principle suppliers of FDI<sup>83</sup> to the UK is largely unprotected by IPPs. With the Second Generation of investment agreements, this will change. If the UK agrees TIAs with states in the Global North after Brexit, this will bring the bulk of FDI into the UK into the ambit of IPPs protected by ISDS. The UK will thus be substantively more exposed to action in ISDS than ever before.

### **The Impact of CETA, TTIP and TiSA**

The impact of the major Second Generation TIAs currently under negotiation, TTIP, CETA and TiSA, on the UK post-Brexit will depend on when these agreements are ratified. The agreement most likely to be ratified before Brexit is CETA. The UK has begun the process of leaving the EU by submitting a notice to the European Council under Article 50 of the Treaty on the Functioning of the European Union. The UK and EU must agree the terms on which the UK will leave the EU within two years. If they fail to reach an agreement within this time, then the UK's membership of the EU is terminated automatically. If CETA is ratified before the expiry of the two-year period then it may continue to bind the UK after it leaves the EU. When the UK leaves the EU it may negotiate an exit package which guarantees continued membership of CETA. In this case, the IPPs in CETA would continue to have effect in the same manner as when the UK was a member of the EU. If, however, the UK is not able to remain a party to CETA after it leaves the EU, the IPPs in CETA will continue to have effect. Article 30.9 of CETA provides:

‘Notwithstanding paragraph 1, in the event that this Agreement is terminated, the provisions of Chapter Eight (Investment) shall continue to be effective for a period of 20 years after the date of termination of this Agreement in respect of investments made before that date. This paragraph shall not apply in the case of provisional application of this Agreement.’

The effect of this provision is that, when the UK leaves the EU, it will continue to be bound by the provisions of CETA, in relation to all investments made while the treaty was in effect, for a further 20 years.

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<sup>81</sup> New Zealand considered plain packaging legislation around the same time as Australia. But New Zealand did not pursue its legislation after Philip Morris began litigation against its neighbour. While there is no available documentary evidence that the Philip Morris arbitration was determinative in the New Zealand government's decision, a number of circumstantial factors, including the timing of the decisions and statements by New Zealand officials, led observers to believe the decision was influenced by the arbitration. (See Razeen Sappideen, and Ling Ling He, "Dispute Resolution in Investment Treaties: Balancing the Rights of Investors and Host States", *Journal of World Trade* [2015], p. 85)

<sup>82</sup> See European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, December 2007, 2008/C 115/01 Arts. 206 and 207

<sup>83</sup> See Ernst and Young, n. 14



If, however, CETA is not ratified by the time the UK leaves the EU, then CETA will cease to bind the UK on the date that it leaves the EU.<sup>84</sup> The UK will, however, it will still be subject to influence of CETA, TTIP and TiSA, regardless of whether it remains a formal party to these agreements. The framers of these agreements intend them to impact beyond the parties to the treaty. They are intended to establish international norms<sup>85</sup>. In effect, to provide a model treaty to which other contracting parties will conform. The parties to TTIP, the EU and USA, represent the first and second largest economies in the world. The investment between them accounts for 30% of all global investment.<sup>86</sup> Governments seeking to develop regulatory frameworks that are consistent with international investment norms are therefore likely to replicate the norms established by those treaties. CETA, TTIP and TiSA are thus likely impact on any TIAs negotiated by the UK post-Brexit.

### **The Human Rights Act**

ISDS suits can be used to frustrate the application of the Human Rights Act 1998 (HRA). The HRA requires that courts take human rights into account when interpreting domestic law. IPPs can be used to reverse the decisions of national courts that protect human rights. ISDS tribunals can, in effect, nullify the decisions of domestic courts.<sup>87</sup> If a domestic court applies the HRA in a dispute between a UK citizen and an international investor (such as the recent litigation around fracking) then this may violate an IPP. If, for example, a successful challenge to planning permission for a fracking project<sup>88</sup> impacts on the profits of an international investor, it may be considered expropriation or a violation of the entitlement to fair and equitable treatment because the investor will have lost profits, it might have expected to make from the project, as a direct result of the court's decision. An ISDS tribunal would have the power to compel the UK to pay damages to the investor to compensate her for her loss in the domestic court.

### **International Human Rights Obligations**

The imbalance of incentives between IPPs and public interest provisions means that IPPs can be applied to prevent measures to discharge international human rights obligations. Article 12 of the International Covenant on Economic, Social, and Cultural Rights<sup>89</sup> requires that the UK provide for the health of its citizens. In 2016 the Cameron government took steps to discharge this obligation with the introduction of a tax on sugar<sup>90</sup>. Such a policy would likely have been impossible had IPPs been in effect. In *Cargill v Mexico*<sup>91</sup> a similar tax, albeit focused solely on soft drinks, was found to violate the investment protection provisions in Chapter 11 of NAFTA. The tribunal did not consider public health or human rights arguments but compelled Mexico to pay Cargill substantial damages. A similar measure in the UK will likely meet a similar result if IPPs are in effect.

### **Conclusions**

Understanding the relationship between IPPs and human rights is essential to our understanding of the role of government, citizens, and investors in a democracy. The relationship informs both domestic policy and international relations. IPPs were originally created to ensure investors received

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<sup>84</sup> As long as the UK remains a member of the EU, it's approval is likely required to ratify CETA. However, as soon as the UK leaves the EU (i.e. after the Article 50 process is completed) the UK's approval will no longer be required to ratify CETA.

<sup>85</sup> Jake Slegers, "TTIP: Setting Global Standards", (Centre for European Policy Analysis, 2013), <http://cepa.org/index/?id=9083886512a1293b8ec542bc27feab3d>

<sup>86</sup> Eurostat, "EU-USA international trade and investment statistics", [http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU\\_-\\_international\\_trade\\_and\\_investment\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/USA-EU_-_international_trade_and_investment_statistics)

<sup>87</sup> See, for example *Deutsche Bank AG v. Democratic Socialist Republic of Sri Lanka*, ICSID Case No. ARB/09/2, <http://www.italaw.com/cases/1745#sthash.2M1GS0bC.dpuf>

<sup>88</sup> Such as in *R (Friends of the Earth Ltd and another) v North Yorkshire County Council and another* [2016] EWHC 3303 (Admin)

<sup>89</sup> UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, December 1966, United Nations, Treaty Series, vol. 993, p. 3

<sup>90</sup> See, HM Treasury, "12 Things You Should Know About The Sugar Industry Levy", <https://www.gov.uk/government/news/soft-drinks-industry-levy-12-things-you-should-know>

<sup>91</sup> *Cargill, Incorporated v. United Mexican States*, ICSID Case No. ARB(AF)/05/2



fair treatment when investing in states without independent judiciaries. The Second Generation of TIAs change the impact of IPPs: from ensuring fair treatment to ensuring preferential treatment from host states. IPP norms chill measures to protect human rights. This means that, in practice, the interests of investors often chill the interests of human rights. In the wake of Brexit, the UK must negotiate new TIAs. Including IPPs in these treaties could fundamentally change the nature of the relationship between government and citizen in the UK.