

ANALYSIS OF THE UK-COLOMBIA BILATERAL INVESTMENT TREATY

The UK ratified the UK-Colombia Bilateral Investment Treaty (**BIT** or the **Treaty**) on 10th July 2014. This note argues that the UK Parliament should regret ratification of the BIT in its current form because the Treaty:

1. threatens the ability of the UK to regulate in the public interest, including on human rights, and does not offer safeguards for the inclusion of Investor-State Dispute Settlement (ISDS) provisions;
2. is contrary to current UK commitments on human rights and the UN Guiding Principles on Business and Human Rights (UNGPs); and
3. places the UK in danger of inconsistency with its current commitments to Colombia on human rights and the UNGPs.

The UK-Colombia BIT threatens the ability of the UK to regulate in the public interest and does not offer safeguards for the inclusion of ISDS provisions

A recent report by the EU Committee of the House of Lords (**EU Committee**) has identified as major concerns for the negotiation of the Transatlantic Trade and Investment Partnership (**TTIP**) between the European Union (**EU**) and the United States (**US**) the need to preserve the right of states to regulate in the public interest and the inclusion of ISDS provisions. The report makes recommendations to address these concerns. An analysis of the UK-Colombia BIT in light of these recommendations exposes the shortcomings of the Treaty, including the manner in which it threatens the ability of the State parties to regulate in the public interests and the absence of safeguards for the inclusion of ISDS.

On the occasion of the on-going negotiation of the TTIP between the EU and the US, the EU Committee of the UK House of Lords published a report (the **Report**) presenting the conclusions of an inquiry it conducted to examine the prospects of the EU and the US to be able to conclude the TTIP, explore a number of concerns about possible adverse effects of the agreement and make recommendations to the UK Government's approach to the negotiations.¹

The Report identifies two key areas of concern, both of which are relevant to the Colombia-UK Treaty.²

First, the Report highlights the need that the TTIP "*strike[s] a better balance between affording protection to investors and the right of states to regulate*". According to the Report, steps can be taken in this direction by "*defining the grounds on which claims may be brought with more precision, and allowing for binding interpretations*."³

¹ European Committee of the UK House of Lords, The Transatlantic Trade and Investment Partnership, 14th Report of Session 2013-2014, published 13 May 2014.

² These concerns respond to views expressed during the inquiry that ISDS would allow foreign investors to challenge before arbitration tribunals measures taken to protect the public interest including in areas such as labour, health, environment and human rights. Deliberations of such tribunals are not generally made public and their decisions are definitive and not subject to appeal. It was also noted that the very prospect of claims being filed would create a "regulatory chill" which "stays the hand of governments to regulate in the public interest for fear of litigation". See the Report at ¶¶156-162.

³ Report, at ¶168

Second, the Report expresses the EU Committee's doubts about including an ISDS mechanism that would give investors the right to challenge measures adopted by the UK in the public interest in areas such as health, environment and human rights. The Report recommends conditioning the inclusion of ISDS to obtaining evidence that the UK could attract more investment from the US by signing up to such provisions.⁴ In addition, the Report recommends that if an ISDS clause made its way into the TTIP a number of safeguards would need to be in place. These safeguards include "*improve transparency around ISDS proceedings, for example by making hearings and documents public, allowing interested third parties to make submissions, and reviewing rules around the appointment of arbitrators.*"⁵

The Report points to relative achievements attained during negotiations of the Comprehensive Economic and Trade Agreement (CETA) between the EU and Canada as evidence of better practice dealing with these concerns.⁶

The UK-Colombia BIT does not adequately address the question of preserving the regulatory powers of State parties threatening therefore their ability to regulate for the public good including on human rights. The BIT also provides investors with the right to access ISDS without any of the safeguards identified by the EU Committee and without any evidence that the Treaty could attract more investment to Colombia or the UK. It is important to note that even without a BIT, the UK is already the second biggest investor in Colombia,⁷ and there is no empirical evidence that this Treaty would increase investment flows in any direction.

Reference to some of the better practices achieved in the CETA negotiations⁸ further illuminates the serious shortcomings of the UK-Colombia BIT.

Reaffirmation of the right to regulate: while CETA expressly reaffirms the right of State parties to regulate for the public interest, the UK-Colombia BIT is silent in this respect. This type of statement is particularly relevant when interpreting the treaty. In the case of the UK-Colombia BIT, such a statement would have been useful particularly given the lack of reference to the Treaty's objectives--other than the protection of investment.

Tighten definition of substantive provisions: for the first time in an international investment agreement, the CETA agreement provides for a **precise definition of Fair and Equitable Treatment (FET)**. Parties agree on a closed list of cases that can only be extended by mutual agreement. A breach of FET would arise in the following cases:

- Denial of justice in criminal, civil or administrative proceedings
- Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings
- Manifest arbitrariness
- Targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief
- Abusive treatment of investors, such as coercion, duress and harassment

In contrast, the FET provision in the UK-Colombia BIT is open-ended and vague, leaving the potential for wide ranging interpretations. Furthermore the attempt to clarify this provision through an exchange

⁴ *Id.*, at ¶169

⁵ *Id.*, at ¶168.

⁶ *Id.*

⁷ UK Trade & Investment, Guidance; Exporting to Colombia, updated 1 May 2014, available at <https://www.gov.uk/government/publications/exporting-to-colombia/exporting-to-colombia>

⁸ The analysis on the content of CETA was prepared using the explanatory note made available by the European Commission on December 2013 at http://trade.ec.europa.eu/doclib/docs/2013/november/tradoc_151918.pdf and the text included in the consultation document on the TTIP also made available by the European Commission at http://trade.ec.europa.eu/doclib/docs/2014/march/tradoc_152280.pdf

of notes between the UK and Colombian governments appears ineffective, as it adds further complexity and uncertainty, rather than tightening the definition.

In Article II of the BIT, the parties commit to “*accord fair and equitable treatment [...] in its territory to investment of investors of the other contracting party.*” For greater certainty, the Article notes that the concept of “fair and equitable treatment” do not “*require additional treatment to that require in accordance with international law*” and that it includes “*the prohibition against denial of justice in criminal, civil or administrative proceedings in accordance with the principle of due process embodied in the main legal systems of the world.*”

In addition, in an exchange of notes, the Colombian and UK government confirm that

... without wishing to narrow the meaning of the concept of “fair and equitable treatment” as it is interpreted in accordance with international law, they do not understand this term to incorporate a stabilization clause. Thus a Contracting Party is not prohibited from exercising regulatory powers, whenever introduced, that impact on investments of the investor of the other Contracting Party, so long as these powers are exercised in a fair and equitable manner.

The practical consequence of the lack of clarity in the UK-Colombia BIT FET provision is uncertainty for investors and the UK and Colombian governments as to the measures that can be challenged by investors. This favours the so-called “regulatory chill” where governments refrain from regulating to avoid costly litigation. Regulatory chill constitutes a threat to Colombia’s and the UK’s ability to regulate to protect the public interest. Moreover, the lack of clarity in this provision will increase the already high litigation costs for States and investors alike, as clarifying the meaning of the provision will require extensive argumentation and interpretation.

In terms of ISDS, none of the better practice safeguards considered by CETA and highlighted by the EU Committee report are included in the UK-Colombia BIT. In particular:

- **Transparency:** the UK-Colombia BIT does not provide for any measure to ensure transparency while CETA provides for full transparency: all documents will be public, all hearings open and interested parties (NGOs) can make submissions.
- **Binding interpretations:** the UK-Colombia BIT is silent on this respect while CETA provides for mechanisms to allow parties to issue binding interpretations on what they originally meant and to take part in arbitration proceedings on questions of interpretation.
- **Rules around appointment of arbitrators:** again, the UK-Colombia BIT is silent on this point while CETA provides for a code of conduct for arbitrators and the creation of a list (roster) of arbitrators, jointly decided by the EU and Canada.

By lacking these clarifications and safeguards, the UK-Colombia BIT increases uncertainty for investors and States, increases the risk of litigation, heightens the threat to the States’ ability to regulate for the public good and offers little guarantee that decisions resulting from ISDS will be in line with the States’ intentions in signing and ratifying this BIT. These elements are all relevant to the UK and Colombian governments’ ability to meet their international human rights obligations and the UK government commitments, in particular, to implement the UNGPs under its National Action Plan (**NAP**), as further explained below.

The UK-Colombia BIT is out of line with current UK commitments on human rights and the UNGPs

The UK has recently undertaken significant commitments for the implementation of the UNGPs including through regulation of its economic activity. In particular, the UK has undertaken to ensure that “*agreements facilitating investment overseas by UK or EU companies incorporate the business responsibility to respect human rights, and do not undermine the host country’s ability to meet its international human rights obligations.*” The UK-Colombia BIT is out of line with this clear commitment.

The UK strongly supported the mandate of the UN Special Representative to the Secretary-General for Business and Human Rights, which culminated in the unanimous endorsement of the UNGPs by the UN Human Rights Council in June 2011. To-date the UK government continues to strongly support the implementation of the UNGPs in the Council, domestically and internationally.

Business and human rights has become one of the six thematic priorities of the UK policy on human rights, and in September 2013 the UK became the first government to adopt a NAP for the implementation of the UNGPs. In the Ministerial Foreword that accompanies the NAP, Rt Hon William Hague and Rt Hon Dr Vince Cable made clear that the UK was committed to implementing the UNGPs and expressed their intention that the UK emerge as a leader on business and human rights:

The Government welcomes the creation of the UN Guiding Principles on Business and Human Rights [...] We want British companies to succeed and for the UK to show a lead on business and human rights, given the global reach and impact of UK business [...] [the NAP] embodies our commitment to protect human rights by helping UK companies understand and manage human rights [...] The Guiding Principles are intended to apply the world over and we will work for widespread international uptake and implementation of them.⁹

Consequently, the NAP includes *inter alia* the UK commitment to lobby foreign states to support widespread international implementation of the UNGPs, work with EU partners to implement the UNGPs across member states and internationally and support the UN Working Group in their role to promote uptake of the UNGPs.¹⁰ In addition, the NAP includes an explicit commitment with respect to international investment agreements.¹¹ Article 11 (vii) of the NAP states that the UK commits to:

Ensure that **agreements facilitating investment overseas** by UK or EU companies **incorporate the business responsibility to respect human rights**, and **do not undermine the host country’s ability to meet its international human rights obligations** nor to impose the same environmental and social regulation on foreign investors as it does on domestic firms. (Emphasis added)

It is precisely in an agreement like the UK-Colombia BIT that this commitment is to be respected and realised. This commitment supposes therefore that the BIT should: (i) incorporate the business responsibility to respect human rights; and (ii) include safeguards to preserve the regulatory space necessary for State parties to meet their human rights obligations.

As discussed above, the UK-Colombia BIT lacks the safeguards to preserve the ability to regulate in the public interest. In addition, the BIT is silent on investors’ responsibilities including their responsibility to respect human rights. These shortcomings make the UK-Colombia BIT out of line with current UK commitments on human rights and the UNGPs. Moreover, as explained below the UK has widely promoted its commitments to support Colombia in ensuring respect for human rights

⁹ UK National Action Plan, Good Business – Implementing the UN Guiding Principles on Business and Human Rights, September 2013, Ministerial Foreword.

¹⁰ UK NAP, articles 11 (viii), (ix), (x).

¹¹ This commitment reflects principle 9 of the UNGPs that requires states to “*maintain adequate policy space to meet their human rights obligations when pursuing business-related policy objectives with other States or business enterprises, for instance through investment treaties or contracts.*”

including through regulation of business and investment activity. This commitment intensifies the need to ensure coherence in UK policy towards Colombia in the area of investment.

The UK-Colombia BIT places the UK in danger of inconsistency with its current commitments to Colombia on human rights and the UNGPs

Colombia is one of the 28 “countries of concern” where the Foreign Office has the most serious wide-ranging human rights concerns. The UK acknowledges the significant human rights challenges in Colombia given the legacy of more than 50 years of conflict, and it has committed its support in various priority areas to help Colombia emerge from conflict. These priority areas include assisting Colombia to implement both the UNGPs and Colombia’s Victims and Land Restitution Law. The UK-Colombia BIT, as written, fails to reflect UK commitments under the UNGPs and the NAP. Moreover, the vaguely written BIT puts at serious risk the implementation of laws such as the Colombia Victims and Land Restitution Law. This places the UK in the untenable position of ratifying a BIT that directly threatens the very progress the UK has committed to supporting in Colombia.

Colombia has been entangled in conflict for decades. The conflict has involved grave violations of human rights and has resulted in massive internal displacement of people. According to the Internal Displacement Monitoring Centre there are 5.7 million internally displaced people (IDPs) by the conflict,¹² involving the illegal seizure of approximately 6 million hectares of land.¹³

Colombian President Juan Manuel Santos has instituted a radical policy change towards the conflict, human rights abuses and remediating the situation of IDPs. Some of the most relevant measures of his government include:

- The approval of Law 1448 – the Victims and Land Restitution Law – in June 2011. The Law recognises, for the first time, the existence of a conflict, of victims of human rights violations and the need for reparation. The Law provides a mechanism for reparation and the restitution of land to displaced people.
- The beginning of a peace process with the main guerrilla group in October 2012. The parties have reached key agreements on essential topics including land distribution and rural development.

The UK has committed to help Colombia emerge from conflict and support the government in the implementation of these measures. In November 2011, PM David Cameron and President Santos met in London and both governments issued a joint declaration on human rights. In the declaration, Colombia and the UK reaffirmed their shared commitment to respect, protect and promote human rights and boosted the assurance of strong collaboration on this topic. In particular, the UK government referred to sharing its technical expertise to help implementation of the Colombia’s Victims and Land Restitution Law and its commitment to the implementation of the UNGPs:

Colombia’s Victims and Land Restitution Law is a significant piece of legislation which has been commended by the UN. **The UK is sharing technical expertise with the Government of Colombia to help implement the law** [...] As we deepen commercial links between the UK and Colombia we acknowledge the importance of working with the private sector on human rights issues. **We are committed to implementing the UN Guiding Principles on Business and Human Rights.** Our countries are at the forefront of this debate globally. The UK is supporting a project in Colombia which will set out how the principles could be implemented in the Colombian context. (Emphasis added)

¹² See <http://www.internal-displacement.org/americas/colombia/>

¹³ ABColombia, Colombia the Current Panorama: Victims and Land Restitution Law 1448, June 2012, p. 2, available at http://www.abcolombia.org.uk/downloads/Colombia_the_Current_Panorama.pdf

This commitment is further referred to in the NAP at article 11(i):

The Government will do the following to reinforce its implementation of its commitments under Pillar 1 of the UNGPs [...] Develop partnerships with other countries seeking to implement the UNGPs. We already have a strong collaborative partnership with the **Government of Colombia** on implementation in both countries, in the context of the November 2011 joint statement on human rights [...]

Colombia is set to become an example for UK engagement in this respect. It is therefore urgent that UK economic policy, in particular, the UK-Colombia BIT should not undercut its own commitments to respect and protect human rights and to support Colombia in this endeavour.

As the Treaty stands today, it is a threat to UK and Colombia's ability to maintain regulatory space to pursue objectives such as the protection of human rights and exposes them to the risk of litigation. In particular, Colombia could see its capacity to implement the peace agreements and the Victim and Land Restitution Law threatened by litigation under the BIT. This eventuality can put the UK in the incongruous position of committing to support implementation of measures such as the Victims and Restitution of Land Law while opening avenues to challenging this same implementation through unqualified ISDS proceedings in the BIT.

Moreover, the BIT does not reflect the broader UK commitments undertaken in the UNGPs and the NAP, in particular with respect to requiring responsible business conduct through the inclusion of investor responsibilities in the Treaty.

Finally, the BIT does not consider the negative impact that foreign investors can have on human rights. The Treaty provides investors with the right to access the protections of the Treaty and arbitration before international tribunals with no counterbalance or safeguards that conditions these protections to a minimum standard of responsible conduct.

July 2014