Parliamentary Briefing

International Investment Agreements (IIA) regime investor-to-state dispute settlement mechanism (ISDS) is a major obstacle to keeping global warming to 1.5°C upholding human rights and has implications for Peace Agreements

Implications for Colombia

23 November 2023

International Investment Agreements (IIA) are agreements that set out the provisions for the protection of the investments for multinational corporations (MNC) and possible dispute mechanisms. The investor protection provisions between Colombia and the UK are contained in the Colombia – UK Bilateral Investment Treaty (BIT) that was signed by both parties in 2014.[i] This briefing sets out why it is important for the UK and Colombia to terminate the BIT and neutralise its Sunset Clause.

Investment protection standards and dispute settlement mechanisms have raised legitimate questions from multilateral bodies, governments, and civil society. Of particular concern is the inclusion of an Investor-State Dispute Settlement (ISDS) mechanism, whereby individual foreign investors may bring claims against host state governments for regulatory change that could reduce the value of their investments. MNCs in these cases can sue states through a secretive parallel legal system, with arbitrators that sit outside national judicial systems. This investor–state arbitration system has cost governments hundreds of millions of dollars and prevented ambitious climate action.[ii]

The International Energy Agency warned that if the world is to have a chance of limiting global warming to 1.5°C, 'there should be no new investments in coal, oil or gas.' The 2022 Intergovernmental Panel on Climate Change report highlighted the risks of ISDS being used to challenge climate policies.[iii] As the very prospect of claims being filed against a government creates a "regulatory chill", as investor protections generally place enforceable obligations only on states, **meaning investors can win cases even if they have violated domestic law or other international norms.**

British-registered company Glencore Plc. is suing Colombia for millions of dollars for a court decision preventing the expansion of its Cerrejón coal mine which would have risked violating the fundamental rights of the Wayuu indigenous people and diverted an important water source the Arroyo Bruno (Bruno Stream).[iv] There are at least 20 ISDS claims involving Colombia in international arbitration (between 2016 and 2022). Many of these relate to claims by mining, gas and oil companies because of regulations addressing climate or Courts upholding human and environmental rights.[v]

Environmental Protections

Given the broad protections IIAs provide, and the large amounts ISDS tribunals award, the risk of private companies challenging climate policies could hinder a just transition to a low-carbon economy.[vi]

In June 2015 the Colombian Government passed a law[vii] that amongst other things banned exploration for or exploitation of non-renewable natural resources, as well as the "construction of oil and gas refineries", [viii] in the Páramos.[ix] The Colombian Páramos are high altitude eco-systems, the most extensive on earth, and they supply more than 70% of the country's population with water.[x] They are also important in terms of carbon sequestration and include wetlands recognised as having global significance by Ramsar.[xi]

The mining ban resulted in three MNCs filing for millions of dollars. One was the Canadian Mining Giant Eco-Oro[xii] (formally Greystar Resources Ltd) who filed a lawsuit claiming USD $696 million[xiii] in compensation and won – the final amount awarded is currently being decided. This case rang alarm bells with UNCTAD because the Canadian Investment Chapter in its Free Trade Agreement was of the newer variety and supposed to have contained safeguards that explicitly allowed a country to regulate to protect climate**.**[xiv] In its assessment of the Eco Oro case*,* it states that this ISDS decision '*signals that measures taken for the protection of the environment can be challenged and deemed in violation of International Investment Agreements'.*[xv] Two other multinational mining companies are in the process of suing Colombia: Galway Gold for $196 million and Red Eagle for $118 million due to the measures adopted to protect the Páramos.[xvi] States have increasingly raised concerns about the calculation of damages and the award of ever greater sums of compensation.

The British registered multinational Glencore Plc has brought four ISDS cases against Colombia. It won the first case and was awarded US$19 million. The other three are still in process for undisclosed sums of money, one of which, as mentioned earlier, was for a Constitutional Court ruling protecting the fundamental rights of indigenous communities and their environment from an expansion of Cerrejón, the largest open-pit coal mine in Latin America.

Questioning of the ISDS mechanism

The International Arbitration regime heavily favours investors, raising democratic concerns that an implicit or explicit threat of ISDS will result in a regulatory chill with governments delaying action on climate change, failing to protect human and environmental rights, or passing legislation in favour of protecting health. For Colombia specifically, added to this list is the difficulty of implementing some of the measures agreed in the 2016 Peace Accord, or those that will need to be agreed in the current Peace Talks.

As a result of the impacts of ISDS, some governments have been including a range of qualifying clauses to investor protections while others have stopped including the ISDS mechanism. Between 2017 and 2021 **only one third** of trade and investment agreements contained ISDS clauses. [xvii] Other countries are also questioning this mechanism and qualifying how and when it can be used, for example, recent treaties by Canada and the United States 'display a wide spectrum of ISDS reform approaches, from improved procedures to omission of ISDS,' Australia only selectively includes ISDS (with procedural improvements), and Brazil does not include this mechanism in their agreements.[xviii]

Major issues associated with this mechanism include the secrecy of these tribunals, arbitral decisions ("awards") characterised by inconsistency;[xix] no recourse to an appeal; and concerns about the independence and impartiality of members of tribunals, particularly due to 'double-hatting', whereby individuals act, in different disputes, as counsel and arbitrators.[xx] In an effort to address these issues, the EU has established a Multilateral Investment Court, a two-tier investment court system. The EU told its members to end any pre-existing BITs between the EU member States and third countries that included ISDS. Whilst the Multilateral Investment Court will address some of the issues, it will also further entrench a system whereby multinational companies can sue democratically elected governments for large sums of money for regulatory changes.

UK and Colombia Bilateral Investment Treaty.

The Colombia-UK BIT has an initial treaty term of 10 years (until 10 October 2024) with automatic renewal for an indefinite term. The Treaty includes modalities for unilateral termination but not for amendments or

renegotiation. Termination after 10 years requires a one-year notice period by the country wishing to terminate it.

If the UK-Colombia BIT is terminated unilaterally it has a “survival"/"sunset" clause of 15 years. This means that any investments made before the termination notice becomes effective will remain in force for a further 15 years.

However, if the **BIT is terminated by the consent of both parties,** it is possible for the parties to decide **to neutralise the survival clause,** which entails clarifying that, upon termination of treaty by mutual consent**, the survival clause expires.**

It is important that the UK and Colombia unilaterally agree to end the BIT and to neutralise the survival clause.

Recommendation

> The UK needs to consider doing the same as many other countries and omit ISDS mechanisms from its bilateral investment treaties and FTAs. There is an opportunity to do this with the UK/Colombia BIT from October 2024. Terminating this agreement and neutralising the Sunset Clause will allow Colombia to regulate to address climate issues and fulfil its commitments to peace and human rights. It will also demonstrate that the UK has a real and tangible commitment to support Colombia on climate change and peace.

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[i] Many countries’ Free Trade Agreements (FTA) contain an investment chapter. However, as the UK was a member of the European Union, the EU primarily negotiated on trade and related issues, and its member states had the competency for investor protection (protecting the investments of UK registered or headquartered MNCs in third countries).

[ii] IISD, The Energy Charter Treaty https://www.iisd.org/projects/energy-charter-treaty

[iii] The 2022 Intergovernmental Panel on Climate Change; UNCTAD Investment Treaties Regimes need Reforms in order to ensure that they Support Climate Action, 6 September 2022

[iv] Complaint for NON-COMPLIANCE WITH THE OECD GUIDELINEs FOR MULTINATIONAL ENTERPRISES: BHP, Anglo American, and Glencore https://www.abcolombia.org.uk/wp-content/uploads/2022/01/Parent-Companies-FINAL.pdf

[v] Colombia | Investment Dispute Settlement Navigator | UNCTAD Investment Policy Hub

[vi] Watson Farley and Solicitors, ISDS and Climate Change: What Happens Next? https://www.wfw.com/articles/isds-and-climate-change-what-happens-next/

[vii] The implementing law for Colombia’s National Development Plan 2014-2018. This law provided for no mining in the Paramos.

[viii] Constitutional Court Communique, 8 February 2016

[ix] However, there was a loophole in this law in that it excluded mining operations with contracts and environmental licenses before 9 February 2010, and oil and gas operations with contracts and licenses before 16 June 2011. As a result, the loopholes were challenged by NGOs and others by means of a Tutela brought before the Constitutional Court. The Court ruled that the loopholes, “ignore the constitutional duty to protect areas of special ecological importance [and] put at risk the fundamental rights of the entire population to access good quality water.” This ruling helped to close the loopholes.

[x] Cited in The Guardian, Colombian court bans oil, gas and mining operations in paramos, 21 February 2016

[xi] Ramsar sites are classified under the Convention on Wetlands of International Importance. The Convention states “the conservation and wise use of all wetlands through local and national actions and international cooperation, as a contribution towards achieving sustainable development throughout the world”.

[xii] Eco-Oro https://www.italaw.com/cases/6320

[xiii] The exact amount of the payout is yet to be decided and published italaw16212.pdf

[xiv] Cited in Watson Farley and Solicitors, ISDS and Climate Change: What Happens Next? https://www.wfw.com/articles/isds-and-climate-change-what-happens-next/

[xv] Cited in Watson Farley and Solicitors, ISDS and Climate Change: What Happens Next? https://www.wfw.com/articles/isds-and-climate-change-what-happens-next/

[xvi] Transnacional Institute y Colectivo de Abogados José Alvear Restrepo, ISDS Colombia, Boom de demandas de inversores extranjeros, May’23.

[xvii] Business and Human Rights Resource Centre, Corporate rights or human rights? How Trade and Investment Agreements Could Threaten Human Rights Due Diligence Laws, September 2021

[xviii] UNCTAD, Reforming Investment Dispute Settlement: A Stocktaking, 2019

[xix] Susan D Franck, ‘The Legitimacy Crisis in Investment Treaty Arbitration: Privatizing Public International Law Through Inconsistent Decisions’ (2005) 73 Fordham Law Review 1521

[xx] Malcolm Langford, Daniel Behn and Runar Hilleren Lie, ‘The Revolving Door in International Investment Arbitration’ (2017) 20 Journal of International Economic Law 301