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Foreign Investment, Human Rights and the Climate in the UK: Asymmetric Legal Protection

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Executive Summary

There is a huge disparity between the legal rights afforded to UK companies investing abroad, and the legal responsibilities placed on them to respect human rights and the climate in their overseas operations. This amounts to an unacceptable double standard in the treatment of corporations compared to those people whose rights are violated.

The UK has more than 90 Bilateral Investment Treaties (BITs) in force containing Investor State Dispute Settlement (ISDS) provisions, with countries ranging from prosperous Singapore and powerful China to impoverished Senegal, beleaguered Bangladesh, and war-torn Yemen. They criss-cross all continents except Antarctica. ISDS provisions give wide-ranging rights to foreign corporations to sue domestic governments for alleged losses in confidential tribunals, with awards running to billions of dollars.

The threat of ISDS proceedings also actively inhibits governments from legislating to address human rights abuses and climate change. It imposes a 'regulatory chill', with governments curtailing their legislative ambitions for fear of being sued. Only one of the UK's current BITs contains a provision which alludes to environmental protections. None contain provisions in relation to human rights.

Of the ISDS cases that have been made public globally, the UK is the third most frequent home country of corporations seeking damages. Over the past decade, there have been 66 known cases brought by UK corporations, according to the United Nations Conference on Trade and Development (UNCTAD), with the number of cases increasing in recent years. The UK is playing a key role in the global increase of ISDS cases; it is estimated to be home to the highest number of corporations acting as 'third party' funders in the world. Alongside the US, it currently dominates the ISDS funding market.

In contrast, UK law relating to domestic corporations' observation of human rights when investing overseas is strikingly undeveloped, and in relation to climate change is almost non-existent. As a result, cases holding UK corporations to account for human rights abuses abroad or driving climate change are far fewer, despite widespread documentation of corporate abuses and the urgency of the climate crisis.

The last decade has seen only 17 human rights civil cases brought against UK corporations in the UK, but these all failed at an early stage or were settled out of court. There have been no criminal prosecutions in the UK for human rights abuses by UK corporations in their overseas operations. In the single climate change case brought in the UK against a UK corporation, shareholders are seeking to hold the board liable for breach of directors' duties in relation to the Paris Agreement.

Key findings

- The majority of UK investment treaties contain no mention of climate change, the environment or human rights
- Corporate investor protections are being enforced far more frequently and successfully than cases against corporations for infringing human rights or climate law
- 66 known cases have been brought by British corporations to protect their investments over the past ten years
- In contrast, 17 civil cases have been brought against British corporations for infringing human rights overseas
- There has been no criminal prosecution of a UK corporation for human rights abuses overseas
- Only one of the UK's current Bilateral Investment Treaties (BITs) (with Colombia) contains a provision which alludes to the environment
- Britain is a global hub for extracting funds from countries for alleged infringement of investment protection commitments
- The UK is the third most frequent home country for corporations seeking damages under Investor State Dispute Settlement (ISDS) provisions contained in BITs
- The UK is home to more firms operating in the lucrative third-party ISDS funding market than any other country in the world

Introduction

This report[1] was commissioned against the backdrop of renewed calls to strengthen corporate regulation, especially as regards human rights and the climate. Many human rights abuses across the world can be linked back to corporations based in the UK, with UK laws inadequate in preventing and addressing these abuses. Meanwhile, despite increasingly urgent calls for steep and immediate carbon emissions cuts, countries taking climate policy actions have been threatened with legal action by corporations, including UK corporations, using investment protection treaties.

This research highlights the disparity between the way investor profits are protected in the UK, through comprehensive, legally binding, and enforceable investment treaties, with the flimsier legal protection afforded through current UK human rights and climate law.

In part 1, the report reviews the legal protection afforded to UK corporations overseas through Bilateral Investment Treaties (BITs) with Investor State Dispute Settlement (ISDS) provisions and identifies a wide range of problems with these protections. It then sets out the use of ISDS by UK corporations over the past decade, and the UK's role in the global ISDS industry. In part 2, the report reviews the legal obligations placed on UK corporations as regards human rights abuses and climate-related activities overseas, and details attempts to hold companies legally accountable using these laws over the same timeframe.

[1] While every effort has been made to obtain accurate figures in this report, due to the limits on and confidentiality of information, these figures may not represent an exhaustive survey.

Part 1

Investor Protections – BITs and ISDS

Bilateral Investment Treaties (BITs) treaties prescribe the types of treatment to which foreign investors (mostly multinational corporations) are entitled. Provisions commonly include, among others, standards relating to 'fair and equitable treatment', 'full protection and security', and protection against 'indirect expropriation'. Many of these are broadly and vaguely defined and are therefore problematic.

'Fair and equitable treatment', for example, requires host states to meet investors 'legitimate expectations', even when the proposed changes are in response to public, economic and developmental needs. The 'full protection and security' standard obliges the state to protect foreign investors and their investments from harm; not only caused by the state's own conduct, but also by the conduct of non-state actors such as protesting communities. The standard has become more frequently used in recent years, with its scope extended in some instances beyond physical damage to also include the availability of a stable legal and administrative system that caters for foreign corporations' interests. Indirect expropriation extends to regulatory or legislative acts, omissions and other forms of state conduct which deprive investors of the value of assets or the benefit they yield. This has included acts to raise environmental standards or secure access to affordable public utilities and has resulted in the awarding of compensation for both actual losses and expected future profits.

Most BITs provide for international arbitration as a mechanism for enforcement of states' obligations to foreign investors through investor-state dispute settlement (ISDS). ISDS confers on foreign investors the legal right to claim against the state hosting their investment for conduct which harmed it or caused it to lose value, through violation of one or more of the standards of treatment contained in the BIT. Regulatory and legislative acts are central to such conduct. This means that BITs generally and ISDS in particular provide multinational corporations with a publicly funded, internationalised layer of protection, in addition to the protection already available to them through insurance, contracts and domestic investment legislation.

State sovereignty is a foundational principle of international law. It includes the power of national governments to set laws which are enforced by the national judiciary. ISDS provisions create an exception to this for foreign corporations. It enables them to challenge state laws and regulation and seek arbitration from a panel of private individuals at the international level, often as an exception to the international law principle of first exhausting domestic remedies. The arbitration panel is guided by a single document, a BIT which promotes a single value – foreign investment protection and promotion. ISDS arbitration panels largely consist of corporate lawyers with close ties to the corporate claimants, and often with no expertise in international public law, leading to pro-investor bias in tribunal interpretations and rulings.

Of 2,231 BITs currently in force globally, the majority contain an ISDS provision. Because arbitration proceedings are confidential, not all cases are in the public domain. As a result, the real figures are likely to be higher than those cited in this research report.

Further problems with ISDS

ISDS cases have been increasing

The number of ISDS cases registered at the International Centre for the Settlement of Disputes (ICSID), which hosts the majority of all known ISDS cases, has rapidly increased in recent decades, from less

than 5 known cases a year in its first two decades (1972-1996) to 58 known cases in 2020.[2] In 2021, a total of 68 ICSID and non-ICSID treaty arbitrations were initiated, bringing the cumulative number of known ISDS claims to 1,190.[3]

ISDS cases disproportionately affect developing countries

130 countries were respondents in one of more of these cases.[4] Three quarters of respondent countries were developing or transition economies. Historically, these have included cases challenging government responses to economic crises.[5]

ISDS cases pose a significant burden on taxpayers

Given that the respondent in ISDS proceedings is invariably a state, the amount awarded is paid out of public funds. Between 2017 and 2020, the average amount claimed by investors in cases where they were successful was $1.8bn. In the period up to 2017, the average amount awarded to foreign investors was $504m. Given the high level of amounts claimed and the legal costs generated by defending these claims, ISDS leads to regulatory chill, where policy makers curtail ambition or abandon policy proposals altogether to avoid the threat of a potential ISDS case.

ISDS cases curtail urgent climate action and human rights

ISDS can curtail human rights overseas. For example, in 2012, Veolia, the multinational utility corporation issued ISDS proceedings against Egypt, demanding US$110 million following changes to Egypt's labour laws which increased the minimum wage.

ISDS cases can directly conflict with climate change measures. 17% of total known ISDS cases relate to the oil sector, with at least 13 climate-related ISDS cases pending.[6] Examples include a €1.4bn case brought by German energy company RWE against the Netherlands following the Government's decision to phase out coal-fired power plants by 2030. In 2022, the UK head-quartered company Rockhopper was awarded $290m dollars compensation from Italy for banning offshore drilling[7].

The UK's role in ISDS cases

The UK is a major participant in the foreign investment protection regime, across the number of BITs in force and of ISDS cases brought, and the provision of 'third party funding', including for ISDS cases brought by non-UK corporations.

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[2] ICSID, 'The ICSID Caseload – Statistics 7 available at <https://icsid.worldbank.org/sites/default/files/publications/The_ICSID_Caseload_Statistics_2022-2_ENG.pdf> accessed 1 Oct 2022.

[3] UNCTAD, 'ISDS Navigator update: 1190 known investment treaty cases by 31 December 2021' (26 April 2022) available at https://investmentpolicy.unctad.org/news/hub/1688/20220426-isds-navigator-update-1190-known-investment-treaty-cases-by-31-december-2021 accessed 1 Oct 2022.

[4] Ibid.

[5] Between 2001 and 2012, Argentina faced 50 known ISDS claims. 75% of the 36 cases mainly or exclusively challenged the measures intended to tackle the economic crisis. Lavopa, F. (2015) 'Crisis, Emergency Measures and the Failure of the ISDS System: The Case of Argentina 2', South Centre

[6] Higham Catherine, Setzer Joana, "Investor-State Dispute Settlement' as a new avenue for climate change litigation' Grantham Research Institute on Climate Change and the Environment London School of Economics (2 June 2021) available at <https://www.lse.ac.uk/granthaminstitute/news/investor-state-dispute-settlement-as-a-new-avenue-for-climate-change-litigation/> accessed 1 Oct 2022.

[7] https://taobserver.com/news/234/icsid-tribunal-awards-british-oil-firm-rockhopperusd-290-million-against-italy-as-compensation-for-offshore-oil-drilling-ban

The UK model BIT

The UK has a model BIT which provides for a broad definition of investment. It contains problematic provisions common to most BITs, including ISDS provisions and indirect expropriation (formulated as 'measures having effect equivalent to nationalisation or expropriation').

The UK model BIT does contain exceptions regarding taxation measures and measures necessary to protect national security, public security or public order. Aside from these however, it contains no provisions capable of restricting its reductive effect on the host state's sovereignty, competence to regulate or adherence to democratic principles. Human rights, the climate and the environment and labour rights are not mentioned, and it imposes no obligations on investors' home states or investors.

UK BITs and ISDS cases

The UK is signatory to the fifth highest number of BITs concluded globally (110). Of these, 94 are currently in force. Of the BITS with available texts, all bar one contain ISDS provisions.[8]
The UK has not elected to terminate any BITs – those terminated have been at the request of the counterparty, and though most UK BITs can be terminated after 10 years and could now be renegotiated in line with human rights and climate commitments, the UK has not elected to do so. Only one of the UK's current bilateral investment treaties (with Colombia) contains a weak provision alluding to environmental protection.

The UK has no BITs with Western European or North American countries. In practice, the UK's position as a capital exporting country to many of its BIT partners places the burden of obligations on the other country, with the UK as the home state for corporations and the other party the host state for investment.

Of the ISDS cases that have been made public globally, the UK is the third most frequent home country for corporations seeking damages (after the US and the Netherlands). Over the past decade, 66 cases were brought by UK corporations.

The number of cases in which the UK is the corporation's home state has followed the rising global trend, averaging one case a year before 2000, just under three cases a year in the decade following, and six cases a year from 2010 to 2021.[9]

UK corporations have used ISDS provisions to claim following human rights abuses. In 2013, South American Silver (SAS), based in the British overseas territory of Bermuda, was able to claim against Bolivia under the UK-Bolivia BIT.[10] The Bolivian government revoked a mining concession following protests by indigenous communities in which protestors' homes were gassed and one activist was killed. The 2018 award ordered Bolivia to pay SAS $19m (out of a claim of $386m). SAS was reputed to have been close to insolvency when it initiated the proceedings.

More recently, a 2021 case was brought by World Natural Resources (WNR) against the Republic of Congo (recognised by the UN as a Least Developed Country (LDC)) for $450m. A 2021 case was brought by Anglo-American against Columbia over the suspension by the Constitutional Court of Colombia of a coal mine expansion, involving diversion of a river, due to the impact on the ecosystem

[8] UNCTAD, International Investment Navigator available at <https://investmentpolicy.unctad.org/international-investment-agreements/countries/221/united-kingdom> accessed 1 Oct 2022.
[9] Ibid.
[10] *South American Silver Limited v Bolivia* PCA Case No. 2013-15.

and the local community's access to water. This decision followed widespread protests by the community, who took their case to court.[11]

UK funding of ISDS cases

The UK is also playing a key role in the global increase of ISDS cases, as home to the highest number of investors acting as 'third party funders'.

Given the costs involved in ISDS proceedings, third party funders (TPF) have become important actors in the ISDS industry, with TPF expanding significantly in recent decades. TPF refers to the provision of finance by a non-party to the proceedings. Typically, funding is extended to the claimant in return for 10-70% cut of a winning award, or in some cases, a funder will acquire equity in the company. ISDS claims have become valuable assets and are increasingly treated as a tradeable derivative, capable of being securitised. They may also have a positive impact on the claiming corporation's share value.

The expansion of the TPF industry has given rise to concerns about its role in increasing the number and size of ISDS claims and intensifying regulatory chill. TPF increases the pressure on respondent states to settle given the level of expenses involved, the investor's ease in accessing funds and the risk of a state not recovering their legal costs even when successful.

The UK, alongside the US, dominates the ISDS funding market. By 2017, 23 international funders operated from the UK, including Calunius Capital LLP and Burford Capital – the latter invests an estimated quarter of its funds in ISDS cases. The TPF industry is secretive, and the funder identity rarely known.[12]

There is no UK legislation governing the funding of ISDS cases. The current regulatory framework consists of a voluntary code of conduct, supervision by the Association of Litigation Funders and periodic judicial oversight of agreements.

[11] Anglo-American issued ICSID proceedings but discontinued them after it had sold its shares in the mine to Glencore. Glencore continues to pursue the claim.

[12] Trade Justice Movement Briefing Note 3, 'Bilateral Investment Treaties: Third Party Funding – The Financialisaton of Justice' (April 2017) available at <https://www.tjm.org.uk/documents/briefings/Third-party-funding-the-financialisation-of-justice_170519_115318.pdf > accessed 1 Oct 2022.

Part 2

Investor Obligations – human rights and climate law

Human Rights law

In contrast to the binding and enforceable nature of international investment law and treaties, it is debatable whether international human rights law covers corporations' activities which take place overseas. The current orthodox position is that for the most part it does not.[13]

The 2011 UN Guiding Principles on Business and Human Rights is a soft law instrument that provides recommendations on how states can meet their existing international human rights obligations to protect against business-related human rights abuses, including through legislative, administrative, judicial, and other appropriate steps. Such steps are to shield individuals and groups from human rights violations by corporations, and to provide opportunities for remedy where violations occur. The Guiding Principles encourage, but do not require states to protect the human rights of those harmed when business activities cross borders. For their part, corporations are only expected to observe the soft law duty to 'respect' human rights under the Guiding Principles.

Under existing international human rights law, state-to-state disputes can be – and on occasion have been – taken to the International Court of Justice. Individual claimants can bring cases against states in regional human rights courts. There is no equivalent international forum for states or civil society to bring cases against foreign corporations. ISDS provisions do not allow states or civil society to bring claims against corporations, but instead exclusively protect investor interests.

UK human rights law

The UK has avowed its commitment to human rights through ratification of a number of human rights treaties,[14] and was one of the state members of the UN Human Rights Council that endorsed the Guiding Principles. But it has taken few steps to prevent, investigate, punish, and redress harms inflicted by UK companies abroad and has only two laws in place that seek to prevent human rights abuses by UK corporations in their overseas activities.

The Modern Slavery Act (MSA) 2015, under Section 54, introduces a legal obligation for UK corporations with a turnover of £36m or more to publish a statement on the risk of modern slavery in their supply chains and steps taken to prevent this.[15] However, there is no possibility for cross border prosecution – UK corporations cannot be taken to court for the overseas activities on which the MSA Section 54 requires they report.

The Companies Act 2006, as amended, under Section 414CB, places certain human rights reporting obligations on public bodies and other large companies. Companies must provide so called "non-financial information" about the impact of their activity on human rights, including in their operations

[13] UN Guiding Principles on Business and Human Rights Principle 2 and Commentary ("At present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction…").
[14] OHCHR, 'View the ratification status by country or by treaty' available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?CountryID=185 accessed 24 July 2022.
[15] The Government announced plans in the May 2022 Queen's Speech to amend the MSA, mandating the reporting areas to be covered in statements. The proposed changes would also introduce civil penalties for non-compliance with reporting and sourcing requirements, alongside criminal penalties for responsible individuals within corporations.

overseas. The information must cover the risks involved, any policies and due diligence processes followed to address these risks, and the outcomes of these. Enforcement is via the Financial Reporting Council and can include indictment and/or fines, but its implementation has been light touch with no penalties imposed.

To date there has been no criminal prosecution of a UK corporation for human rights abuses overseas. Amnesty International called on the UK authorities to launch a criminal investigation in 2014 into whether the UK-based subsidiary of the company Trafigura had coordinated the operations leading to the dumping of toxic waste in Cote D'Ivoire in 2006. The investigation would have occurred under section 1A of the UK Criminal Law Act 1977, which relates to criminal conspiracy rather than human rights abuses and was an attempt to use existing laws in the absence of laws addressing human rights abuses specifically. This call was rejected by both the Crown Prosecution Service and the Environment Agency.

A small number – 17 – civil cases (for harms that amount to human rights abuse) have been brought against UK corporations in the past ten years. Eight are ongoing. Six have been settled after a decision in favour of the claimants on jurisdiction (i.e. a decision that the English courts could hear the case) or another preliminary matter. One obstacle to the development of the law in this area is settlement as a corporate strategy. Settlement is a corporate strategy to avoid the creation of case law through a trial verdict on liability. This stops the law from developing. Of the three remaining cases that were not settled, none were won by the claimants.

There are a number of drawbacks to civil litigation as a means of providing access to effective remedy. Only claims for which there is a corresponding legal course of action are viable, with many instances of corporate human rights abuse not possible to pursue as a civil claim. Further, the remedy that can be claimed is usually in damages, whereas financial redress may not be victims' primary goal. Moreover, claims are usually based on allegations of negligence and not on allegations of direct abuse, and so arguably do not reflect the gravity of the abuse perpetrated and suffered. Impediments to bringing such claims include cost of litigation, knowledge of the ability to claim, legal and evidential hurdles to a successful outcome, difficulty of finding lawyers willing and able to take on the case and threats to and mistreatment of claimants and their lawyers.

Most importantly, settling a case in civil courts through payment of compensation is cheaper than a corporation addressing the issues behind the case. In practice, businesses operating in the UK market have been taken to court multiple times for harms caused in the same site, over actions that can be clearly considered criminal in nature, such as assaults and homicides. Criminal penalties are required to act as an effective deterrent to failing to address human rights abuses.

Finally, these cases represent a small fraction of the instances of human rights abuses that are connected to UK corporations' operations overseas. Between 2004 and 2014, the Business and Human Rights Resource Centre received 303 allegations of serious harm made against 127 UK companies. This accounted for 13% of allegations they received globally. The vast majority of cases related to allegations of abuse in other countries, mostly in the global south.[16] A Business and Human Rights Resource Centre 2022 report found that more than a third of all human rights defender killings globally were linked to UK business activities.

[16] Traidcraft Exchange (now Transform Trade), Submission to Ministry of Justice's 'Corporate liability for economic crime: call for evidence', page 1.

Climate law

Human rights are intertwined with the environment: climate change is currently a major threat to human rights. International agreements on climate are the youngest of the three legal areas in question (foreign investment, human rights, and climate agreements).

The key piece of international climate law – the Paris Agreement - is an international treaty on climate change, adopted in 2015 and applying only to states. Signatory countries are required to set a nationally determined contribution (NDC) with targets to reduce carbon emissions and to re-evaluate this NDC every five years. However, compliance with the NDC itself is not legally binding. Apart from a committee established to facilitate implementation and promote compliance, the Paris Agreement does not contain any specific compliance methods for ensuring countries achieve their NDC, and there are no financial penalties for non-compliance.

UK climate law

As the host of COP-26 in 2021, the UK Government leveraged its strong commitment to net zero emissions; the UK was one of the original signatories of the Paris Agreement in 2016, was the first country to pass a Climate Act legislating for emissions reductions targets and introducing five-yearly 'carbon budgets' (in 2008) and to declare a climate emergency and legislate for net zero by 2050 (in 2019).

International and UK climate law for corporations: almost non-existent

However, in the only UK climate litigation case so far brought against a company in relation to its operations, the UK Companies Act has been used to challenge a UK corporation responsible for significant fossil fuel emissions through their activities overseas. In *ClientEarth UK vs Board of Directors of Shell*,[17] shareholders are claiming, under the Companies Act section 172 and 174, that the board is breaching its legal duty to act in a way that promotes the company's success, and to exercise reasonable care, skill and diligence, by failing to adopt and implement a climate strategy that aligns with the Paris Agreement goal to keep global temperature rises to below 1.5°C by 2050[18].

Conclusion

The legal protection afforded to UK foreign investments contrasts starkly with the lack of protection available for rightsholders abroad who are impacted by UK companies. This is reflected in the number of cases brought and the outcome of these cases. Legally, UK investors' interests are prioritised over the interests of those who are harmed by UK companies.

This is concerning given the continued reports of modern slavery in UK supply chains and the consensus that urgent progress to decarbonise is needed to avoid climate breakdown. It is clear that UK law reform is needed in order to protect the climate, provide access to justice for victims and penalise UK companies that violate human rights abroad.

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[17] ClientEarth, 'We're taking legal action against Shell's Board for mismanaging climate risk' (15 March 2022) available at https://www.clientearth.org/latest/latest-updates/news/we-re-taking-legal-action-against-shell-s-board-for-mismanaging-climate-risk/ accessed 7 October 2022.

[18] climatecasechart.com/non-us-jurisdiction/united-kingdom