**UK Foreign Investment Protection Policy post-Brexit**

# Introduction

The debate about the future of the UK foreign economic relations post-Brexit has so far been dominated by issues of global trade. However, despite having so far attracted relatively limited attention in political and legal discourse, the development of UK foreign investment policy remains a tremendously important issue, not least because of the scale of the UK’s existing investment treaty commitments. Prior to the transfer of competence over foreign investment to the EU in 2010, the UK concluded at least 106 bilateral investment treaties and 75 treaties with investment provisions (most of the latter signed by the EC and subsequently the EU). There is also a strong likelihood of investment promotion and protection rules being incorporated in the future UK trade agreements both with the EU and third states, including the eagerly anticipated free trade deals with the United States, Australia, and India. Furthermore, the UK government’s economic priorities, as articulated in its recent policy documents, suggest that inward foreign investment is expected to play a key part in governmental efforts to foster economic growth after the country withdraws from the EU.[[1]](#footnote-1) The UK plc is open for business, but what does that mean from the point of view of international investment law?

This chapter will focus on three key areas which are not only of fundamental importance to the UK as both a recipient and exporter of investment, but are also likely to pose challenges to policymakers in formulating the country’s future priorities in the field of foreign investment protection and protection. These key areas include (1) the content of commitments to be included in UK investment agreements with the EU and other countries around the globe; (2) the telos, or object and purpose, of future UK investment agreements; and (3) the process of drafting, negotiating and concluding UK investment agreements. This chapter does not aim to provide a comprehensive analysis of UK investment treaty policy but rather seeks to highlight some of the most contentious overarching issues and challenges that policymakers would need to address after reclaiming competence over investment issues from Brussels.

# Legal significance of UK International Investment Agreements

What are international investment agreements and why do they matter for the UK after Brexit? Historically, the UK was at the forefront of the movement to create what we know as the contemporary investment treaty regime – a network of bilateral, regional and sectoral agreements containing investment promotion and protection rules. An historic impetus for such agreements came with the end of the World War II, when the newly independent developing countries asserted their ‘right to throw off the yoke of economic colonialism and rules of international law fashioned before their admission to the family of nations.’[[2]](#footnote-2) Prior to that, during the colonial period, assets of British investors overseas in British territories were protected through a combination of customary international law, bilateral agreements, concession contracts and, most importantly, political and military pressure.[[3]](#footnote-3) Following the demise of the imperial order, Britain—alongside other Western capital-exporting countries—faced a significant difficulty to persuade the newly-independent developing countries to endorse the customary international norms on investment protection.[[4]](#footnote-4) The primary bone of contention was the requirement that any expropriation or nationalisation of foreign-owned investments must be accompanied by a prompt, adequate and effective compensation. Since asserting economic independence from their former colonial masters inevitably entailed nationalisation of hitherto foreign-owned assets, an overwhelming majority of developing states opposed customary international rules arguing that the latter no longer suited the new economic and political reality.[[5]](#footnote-5)

As customary international law on the protection of foreign property became vigorously contested, the UK – alongside its European counterparts such as Germany and Switzerland – resorted to bilateral investment protection and promotion agreements with developing states. These agreements were designed to ensure that British investments overseas would at all times be protected against expropriation and nationalisation as well as other forms of host government interference.[[6]](#footnote-6) Many of the contemporary investment treaties owe their origins to the so-called Abs-Shawcross agreement, named after a German banker Herman Abs and a British lawyer and diplomat, Lord Shawcross.[[7]](#footnote-7) The Abs-Shawcross Draft Convention on Investments Abroad was conceived and drawn up in 1959 as a unified 'system of joint measures' designed 'to resuscitate, on a reciprocal basis, the principle of *inviolability of private property and other private rights*' (emphasis added).[[8]](#footnote-8) The idea was subsequently taken up by OECD.[[9]](#footnote-9) Despite having not been formally adopted, the draft convention became a blueprint for a rapidly growing number of investment treaties between developed and developing countries.

Many of the UK bilateral investment agreements currently in force follow this blueprint, but would it be appropriate in the new economic and political realities? First, the major issue with relying on the existing drafting patterns is that, historically, investment treaty protection was designed to safeguard primarily UK investments in developing countries. If we examine the early generation of UK investment treaties as well as the most recent drafting patterns that emerged just before the transfer of competence to Brussels, the UK investment treaties have unequivocally prioritised investment protection over any other competing policy considerations. The forefathers of investment treaties saw investment protection as an overriding and principal goal of investment treaties. To ensure that investors from traditional capital-exporting states, including the UK, are shielded from political and other vicissitudes when investing in capital-importing states (i.e. developing countries) investment treaties offer substantive and procedural guarantees that are largely unparalleled in other areas of international law. These guarantees can be grouped into three key pillars of investment protection. First, under traditional investment treaties investors can enjoy broad and far-reaching substantive rights vis-à-vis host governments, such as the guarantee of fair and equitable treatment, compensation for expropriation, and sanctity of contract. These guarantees go beyond what investors would enjoy under national laws of developed economies.[[10]](#footnote-10) Second, in a manner unseen in other areas of international law, such as WTO law and international human rights, investment treaties enable investors to claim monetary remedies, i.e. damages, in cases where the host state fails to abide by investment treaty standards.[[11]](#footnote-11) Third, investment treaties allow investors to bypass the national judicial system and bring their claims against the host government directly before an international tribunal comprised of party-appointed arbitrators.[[12]](#footnote-12) Arbitral awards rendered in investor-state arbitration cases are readily enforceable in most jurisdictions and can be executed even against the will of a respondent state.[[13]](#footnote-13)

The question that inexorably arises at this point is whether Brexit changes anything, given that the UK has been signing investment treaties since the 1970s. Why the need to reformulate UK investment treaty priorities? First and foremost, the need to identify and formulate new investment policy priorities stems from the fact that the UK has long led a “double life”. It signed bilateral investment treaties with third states across the globe, including some EU member states in Central and Eastern Europe, yet by and large investment relations between the UK and European partners were and still are regulated by EU law, in particular the disciplines on free movement of goods, services, capital, and the freedom of establishment. As outlined below, there are fundamental differences between protections afforded to foreign investors under the bilateral investment treaty regime and EU law respectively. The question is: would the future UK investment protection policy be modelled on its investment treaties with third states or inspired by rules and practices of the EU?

One crucial difference is that under EU law investor rights come with much more ‘policy space’ than the existing international investment treaties.[[14]](#footnote-14) Consider, for example the key investment treaty guarantee against uncompensated expropriation. The characteristic feature of the protection against expropriation under EU law is that proprietary rights generally do not constitute an unfettered prerogative and their scope depends on the social function of the right or freedom. As the CJEU stressed in one of its judgements, the rules governing property protection

…form part of the general principles of Community law. However, those principles are not absolute but must be viewed in relation to their social function. Consequently, the exercise of the right to property and the freedom to pursue a trade or profession may be restricted, provided that any restrictions do not constitute a disproportionate and intolerable interference...[[15]](#footnote-15)

By contrast, the considerations of the margins of appreciation and proportionality are not widely endorsed by investment tribunals. As one recent tribunal suggested, investment treaty protections *should not be diluted* by precisely the same notions of ‘margins of appreciation’ …(emphasis added).[[16]](#footnote-16) Investment arbitration practice has attracted considerable criticism because expropriation provisions in investment treaties have been given a very broad interpretation. The well-known definition of expropriation was provided by an investment tribunal in *Metalclad v Mexico* which held that the finding of expropriation was justified even in cases not involving the outright taking of a foreign investor’s assets. Rather, expropriation could be found whenever the state interference with the use of investment ‘has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property.’[[17]](#footnote-17) According to some tribunals, the fact that the allegedly expropriatory governmental measures were undertaken in pursuit of certain public policy objectives was irrelevant: ‘where property is expropriated, even for environmental purposes – whether domestic or international – the state’s obligation to pay compensation remains.’[[18]](#footnote-18)

The first wave of arbitration cases concerning alleged expropriation by host states of foreign investments prompted concerns that a broad interpretation of the already exacting expropriation standard would fetter sovereign regulatory powers and limit states’ capacity to pursue competing policies in such areas as public health and safety, environmental protection, labour standards, and human rights.[[19]](#footnote-19) In some countries, the debate over the scope of expropriation provisions has spilled over into domestic political discourse and forced policymakers to clarify and scale back the relevant clauses in the new and revised investment treaties.[[20]](#footnote-20) For instance, the recent Canadian investment treaties have been modified to incorporate a provision excluding certain categories of governmental action from the scope of the otherwise absolute obligation to compensate:

Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.[[21]](#footnote-21)

Another highly contentious investment treaty provision is the guarantee of fair and equitable treatment. Originally it was conceived as the politically more palatable semantic alternative to the customary international minimum standard. The aim was to overcome the resistance and suspicion on the part of developing states towards the language of “international minimum” standard.[[22]](#footnote-22) Over the time, however, the fair and equitable treatment standard outgrew the original intentions of its protagonists and came to encompass much more than customary international law guarantees. Today, the guarantee of fair and equitable treatment is not confined to protection against denial of justice, arbitrariness, and discrimination. Investment tribunals have construed the standard to require protecting investors from governmental misconduct that displays ‘a relatively lower degree of inappropriateness’ in comparison with the higher threshold required in establishing a violation of customary international law.[[23]](#footnote-23) For instance, a lack of transparency, predictability, consistency in governmental action may be found to constitute a breach of the fair and equitable treatment standard. As one critic has put it, the fair and equitable treatment is not a standard but rather is ‘a description of a perfect public regulation in a perfect public world, to which all States should aspire, but very few (if any) will ever attain.’[[24]](#footnote-24) As far as its material scope is concerned, the fair and equitable treatment can be invoked to challenge actions of the executive, judiciary and legislative bodies. The “good governance” ideals which the fair and equitable treatment has been construed to embody go beyond the classical core of administrative law practised in the UK and other Western democracies.[[25]](#footnote-25)

Does EU law provide a standard of protection that would match the fair and equitable treatment standard contained in bilateral investment agreements? In the investment arbitration case of *Eastern Sugar v Slovak Republic*, the respondent state argued that a similar protection is afforded by the guarantee of equal treatment contained in Article 18 TFEU. The tribunal, however, refused to accept such an argument, instead pointing to the absence of ‘any principle of EU law that specifically forbids treatment that is not fair and equitable.’ The tribunal held that a protection similar to that offered under the [fair and equitable treatment] standard is not yet established in EU law.[[26]](#footnote-26) Indeed, it is the flexibility and uniquely broad protective reach of the fair and equitable treatment standard enabling investors to obtain a remedy in a wide range of circumstances that elevates the standard well above other investment protection standards available to investors under EU law.[[27]](#footnote-27)

Last but not the least, another potentially highly problematic provision frequently featuring in investment treaties is the so-called umbrella clause – also known as the observance of undertakings, sanctity of contract, or *pacta sunt servanda* standard.[[28]](#footnote-28) While the wording of the standard may significantly vary, a typical umbrella clause requires that each contracting party observes any obligation it may have entered into with regard to an investment of an investor of another contracting party. For instance, Article 2(2) of the 1994 UK–Estonia BIT provides that ‘[e]ach Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.’[[29]](#footnote-29) In its original design, the primary objective of the umbrella clause was to protect against the interference by a host state with investors’ contractual rights and to ensure that the same remedy as in the case of expropriation – full compensation – was available to investors in the event the host government reneged on or otherwise breached its contractual promises to an investor.

The umbrella or sanctity of contract clause is likely to present a challenge to the drafters of future UK investment treaties. While many of the existing UK investment treaties contain the umbrella clause, some of its key future treaty partners are emphatically against it. To name some notable examples, it is by now an established practice of the US and Canada not to include umbrella protection in their ever-growing network of investment treaties with countries around the globe. In fact, the inclusion of the umbrella clause in the un-adopted OECD Draft Convention in the 1960s was met with opposition from the US, with the Department of State seeing it as ‘an undesirable attempt through international law to fetter the US Government’s sovereign right of eminent domain and to bargain away its police powers.’[[30]](#footnote-30) The degree of sacrosanctity which the umbrella clause affords to an investor’s contract is largely unprecedented. It goes beyond the advantages of international commercial arbitration and domestic adjudication in most sophisticated national legal systems. Opposition to the idea of sanctity of state contracts has long been a feature of English law. The traditional position has been that ‘where a contract is concluded by the UK Government and governed by English law, such a contract is always subject to future legislation the operation of which cannot be precluded by acts of the local authority or the central government.’[[31]](#footnote-31)

Neither does EU law offer an equivalent standard whereby an individual or corporation would enjoy a direct standing against the host state merely on the basis of a contractual breach. Of course, although a breach of contract does *per se* is insufficient to give rise to state liability in EU law, it is possible to envisage a scenario where a claim could be brought against an EU member state based on a breach of contract if the state action leading to such a breach constitutes an impediment to one of the economic freedoms, such as the free movement of goods or services. However, unlike umbrella clauses in investment treaties which grant protection to investor claims arising from *any* breach of contract, the ability of an economic actors to claim redress for a contractual breach under EU law would necessitate showing something more.[[32]](#footnote-32)

Likewise, investors in the EU could also rely on the Charter of Fundamental Rights, in particular Article 17 (property rights) and Article 16 (freedom to conduct business). Yet even a cursory overview of EU jurisprudence in this area suggests that neither of these fundamental rights offers the same level of protection as umbrella clauses under investment treaties. The CJEU recently had the opportunity to interpret Article 17 in *Sky Austria*.[[33]](#footnote-33) It held that a contractual right – even if qualifying as an asset having economic value – should not be seen as an absolute right the interference with which would entitle the right holder to monetary redress in cases it clashes with other fundamental freedoms.[[34]](#footnote-34) The more restrictive stance of EU law is in stark contrast with investment treaty law where treaties containing an umbrella clause enable investors to benefit from undiluted protection of their contractually acquired entitlements.

Not only are the investment treaty standards described above unparalleled in EU law or, for that matter, UK law and that of developed national legal systems, but international investment treaties also grant investors the right to claim damages in cases where a host government’s action falls short of those standards.[[35]](#footnote-35) As the recent OECD study observes,[[36]](#footnote-36) the prevalence of damages in investment treaty law is almost mystifying: monetary redress is rarely available to claimants challenging governmental conduct in either national legal systems and general international law (both traditionally favour non-pecuniary forms of relief). National legal systems have traditionally restricted the use monetary damages as a remedy for governmental action and even so for governmental omissions. The longstanding maxim of ‘the King can do no wrong’[[37]](#footnote-37) continues to underpin legal regulation of state liability even in the UK.[[38]](#footnote-38) As Lord Browne-Wilkinson cautioned,

it is not really in the interests of society as a whole if you spend your time concentrating on rights of individuals to damages—because that is what we are talking about, financial compensation—against public authorities who are charged with looking after society as a whole and doing their best to perform a social welfare function; the creation of ever more duties giving rise to financial compensation is actually counterproductive in a society.[[39]](#footnote-39)

The recent rise in the number of investor-state arbitration cases has led to profound concerns about the large sums awarded to claimant investors, the high cost of the arbitration process and the budgetary implications of these losses for host states, in particular developing countries.[[40]](#footnote-40) To comply with the arbitral awards, respondent states could be forced to divert the already limited funds from important socio-economic objectives, such as investment in infrastructure, education and health. Even in cases where the final award is in favour of the respondent state, the latter would have to bear significant amounts in legal expenses and the costs of the arbitral proceedings.[[41]](#footnote-41) For instance, it has been reported that the successful defence against the investment arbitration claim by Philip Morris cost Australia US$35 million.[[42]](#footnote-42)

# 3. Telos: Why Sign Investment Treaties?

Why should the UK sign international investment agreements that might hurt it?[[43]](#footnote-43) Why afford foreign investors protection that is higher than that they would enjoy under EU law and most developed national legal systems? As the above comparative overview of the key investment protection standards under investment treaties and EU law shows, investment treaties were designed to protect investors, not to safeguard regulatory space for host governments. When examined closely, even the most recent reformed treaty models—featuring hortatory provisions such as a state’s right to regulate—continue to prioritise investment protection.[[44]](#footnote-44)

While one of the key premises behind the UK’s withdrawal from the EU was to ‘take back control’, policymakers should be mindful that new and much touted investment deals are likely to entail considerable restraints upon UK sovereignty. Political discourse after the EU Referendum exposed a profound tension in how international economic agreements, including investment treaties, are portrayed UK. While some view global deals as a crucial, if not primary, vehicle for achieving economic prosperity post-Brexit, others express deep anxieties over the impact of such agreements on the future of public health, labour rights, and the UK's regulatory sovereignty in general. One widespread (and well-founded) charge often levelled by critics against the investment treaty regime is that by subjecting states to fa-reaching investment protection commitments and allowing foreign corporations to challenge regulatory acts of the host state, investment treaties and their investor-state arbitration mechanism represent an ‘inherent assault on democracy’ and effectively mean ‘unelected transnational corporations can dictate the policies of democratically elected governments’.[[45]](#footnote-45) The risks associated with corporations deploying investment treaties to challenge governmental measures may dissuade legislative decision-making in such areas as environmental protection, public health and labour rights. Concerns have been voiced that the existence of investment treaties might discourage government agencies from exercising their executive powers against foreign investors whose activities fall short of national regulatory standards.[[46]](#footnote-46) Examples of such ‘chilling’ effect of investment treaties on the exercise of regulatory powers by host states include the New Zealand government which chose to delay the introduction of a new policy on tobacco plain-packaging in light of the then ongoing investment arbitration dispute whereby Philip Morris challenged the plain tobacco packaging laws of Australia.[[47]](#footnote-47)

Prior to the EU Referendum, the risks of exposure to corporate claims under investment treaties was somewhat limited, firstly because EU law—as discussed above—regulated investor-state relations within the EU in a manner that safeguarded policy space and did not elevate investor rights into absolute guarantees. Furthermore, most of the UK investment treaties outside the EU were signed with developing countries and this, what one might argue, entailed a limited likelihood of an investor from a developing state making a tangible investment in the UK and subsequently bringing claims against the UK government. Also, the recent large-scale trade and investment agreements with developed states, such as CETA and TTIP, have been concluded and being negotiated by the EU on behalf of its member states. After Brexit, UK investment treaties with EU member states (there are a few with countries of the Eastern and Central Europe) are likely to become a primary legal instrument to regulate investor-state relations in Europe, thus increasing the risk of the UK government becoming at some point subjected to investment arbitration claims – something which it had escaped due to the primacy of EU law.[[48]](#footnote-48)

Another fundamental shift in investment treaty practice globally is a rise in the deployment of investment treaties against developed countries. Highly publicised and politically sensitive investment cases, such as that brought by Philip Morris against Australia because of their anti-tobacco laws, by Lone Pine against Canada because of moratoria on fracking, and by Vattenfall against Germany because of its phase-out of nuclear energy after Fukushima, have heralded the end of an era when investment treaty law and arbitration were primarily used by investors from developed states against the governments of developing countries.[[49]](#footnote-49) These cases—and a string of arbitration disputes brought against the US and Canada under the investment chapter of the North American Free Trade Agreement (NAFTA) have intensified concerns over the constraining effect of investment treaties on national regulatory sovereignty.[[50]](#footnote-50) Since in the aftermath of Brexit the UK is aiming to conclude international trade and investment agreements with developed economies such as Australia, Canada and the US, there is a stronger likelihood than before that the UK will face investor claims challenging various governmental measures and claiming compensation. In the energy sector, European investors too will be able to rely on investment protection rules, in particular those enshrined in the Energy Charter Treaty, in leveraging their relations with the UK government.[[51]](#footnote-51)

So the question is: does the UK need investment treaties, and are the benefits such treaties entail justify sacrificing state sovereignty, especially in the new economic and political realities the UK is facing? Now that the UK is poised to act as a host and recipient of foreign investments from developed and emerging economies would the government wish to face claims from foreign investors – the current estimate is that there £1 trillion in foreign direct investment (FDI) in the UK – challenging a broad array of governmental decisions, enjoying the right to claim damages where such decisions undermine profitability of their investments, and doing so by sidestepping UK courts?

The forefathers of the first generation investment treaties reasoned that developing countries would accept the limitations upon their sovereignty if the end result meant more inward FDI flows and fostering economic development in host states. What the makers of future UK investment treaties should bear in mind is the recently uncovered evidence showing that at the time the UK embarked on signing its bilateral investment treaties with developing countries in the 1980s, UK negotiators were fully conscious that while the treaty regime were ‘very much in our interests, it might not serve the interests of developing countries equally well.’[[52]](#footnote-52) Investment treaties were pushed in the knowledge that while they provide protections to UK investors overseas, economic development and growth in host countries would not necessarily follow.[[53]](#footnote-53) The primary (yet publicly unspoken) objective of the treaties was to safeguard the interests of British investors in developing countries, not of the foreign investors in the UK.[[54]](#footnote-54) It is with this objective in mind that the Confederation of British Industry contributed to the process of shaping the UK investment treaty programme in the 1980s by pressing for very high standards of investment protection, including protection against indirect and regulatory expropriation.[[55]](#footnote-55) Due to historical realities at the time the UK bilateral investment treaty programme was being formulated, the treaty drafters were unable to envisage a scenario where the UK would rely on inward foreign investment and where the UK government could be exposed to the risk of being sued before an investor-state arbitration panel.[[56]](#footnote-56)

The fact that investment treaties were seen as instruments for advancing the interests of British investors overseas has been amply illustrated when the UK government was made aware of the reciprocal applicability of investment treaties and the prospect of foreign investors of the nationalised Northern Rock and Bradford & Bingley bringing claims against the UK. The debate in the House of Lords revealed both surprise and resentment over the fact that investment treaties could be invoked against the UK. In the words of the then Government Deputy Chief Whip, Lord Davies, ‘[n]othing could be more offensive … than the idea that someone based abroad would be able to take advantage of bilateral treaties that were designed to – and this has been accurately reflected in discussion today – safeguard, on the whole, British taxpayers regarding regimes that can act on occasion in an extremely arbitrary and unfair manner.’[[57]](#footnote-57)

Not only were the UK negotiators aware that investment treaties served the interests of investors, not of host states, and might not quite lead to an increased FDI and more economic prosperity in the countries on the receiving end, but this link between treaties, foreign investment and economic growth has been disproved in a number of recent econometric studies.[[58]](#footnote-58) Some obvious examples casting doubt on the importance of investment treaties for attracting FDI and fostering development include Brazil which has enjoyed a large influx of foreign investment despite having historically refrained from ratifying any bilateral investment treaties.[[59]](#footnote-59) Conversely, the signing and ratification of numerous investment treaties between African states and developed economies has not entailed a tangible increase in investment flows and economic growth.[[60]](#footnote-60) Furthermore, even if it could be proven that investment treaties lead to more foreign investment leading to higher growth, ‘[i]t does not mean that societal welfare will increase, especially once resource depletion and environmental degradation are taken into account.’[[61]](#footnote-61)

Now that the UK is finding itself at a receiving end, poised as a recipient of foreign investment from other developed as well as emerging economies, would future UK investment treaties be re-designed to genuinely foster development both in partner states and in the UK, in particular its regions? If sovereignty is to be sacrificed for more foreign investment in the name of economic development, the question arises as to how the commitment to development would manifest itself in future UK investment treaties. Will future treaties feature a more development friendly definition of investment, and will there be clearly articulated and effectively enforceable provisions on investor responsibilities, including corporate social responsibility and sustainable development commitments? How will the future treaties balance the protection and promotion of investment with the need to retain regulatory freedom and to make treaties work for all, e.g. foster development in local communities?

The existing investment treaties of the UK (which the government is likely to use as a springboard for its future agreements) remain strongly focused on investment protection and therefore cannot accommodate the inherently clashing concerns between investment protection and national regulatory sovereignty. Furthermore, as shown above, UK investment treaties have not been designed to foster economic development (even if they often claimed the development to be their primary objective). If they were to be re-crafted into economic instruments that work for all, including in the UK and its regions, it is tremendously important that relevant provisions are included in treaty texts and that such provisions are not merely hortatory in their nature. The truism that is becoming increasingly relevant for the UK society is that ‘the gains of economic liberalisation should not be lost to its beneficiaries.’[[62]](#footnote-62) The challenge for those in charge of the new UK foreign investment policy is to design treaties that would facilitate socio-economic growth and prosperity while ensuring that the UK retains sovereign right to regulate and legislate in pursuit of important public policy objectives. For post-Brexit investment protection policies to be compatible with the government’s promise to transform Britain into ‘a country that works not for a privileged few, but for every one of us’,[[63]](#footnote-63) a bold and radical overhaul of the existing model treaties is needed.

# Process: The Importance of Transparent, Inclusive and Participatory Investment Treaty-making

Finally, another important question the UK policymakers will need to address in designing post-Brexit investment protection policy is how to ensure democratic legitimacy of the investment treaty regime. Long before the UK referendum on the EU membership, the processes underpinning the formation and operation of international economic agreements had been criticised for their failure to secure the democratic character of the resulting decision-making structures and outputs. In the words of Harlow, ‘in global space, power is diffused to networks of private and public actors, escaping the painfully established controls of democratic government and public law.’[[64]](#footnote-64) Investment protection treaties form part the global economic governance framework which is still seen as not only ‘inherently less-permeable to democratically-grounded values and conceptions of the public interest or collective good, but also less capable of generating the public policy outcomes people want.’[[65]](#footnote-65)

The concrete challenges UK policymakers will face here relate to democratic input in the process of drafting and negotiating investment treaties. Historically, treaty negotiations were a largely technocratic affair and there was limited, if any, direct and representative democratic input. Both the processes giving rise to investment policy and investor-state arbitration are vociferously criticised for their inaccessibility, lack of transparency and democratic deficit.[[66]](#footnote-66) Recent political developments, both in the UK in the aftermath of the EU membership referendum and in other developed economies, have not only highlighted the importance of democratically supported trade and investment policies but also exposed the consequences of failure to engage with public concerns in formulating the state’s trade and investment policy priorities.

Do constitutional arrangements in the UK enable effective public input into the making and change of investment treaties? In the EU, the European Parliament has recently been seen asserting greater control over the negotiation of investment treaties, including through seeking greater transparency with regard to the Commission’s negotiating objectives and providing its opinion on the most contentious aspects of EU investment treaties. The changes introduced by the Lisbon Treaty enabled the European Parliament, in its capacity as a co-legislator on the EU’s trade agreements, to assume the responsibility of ensuring that the talks on EU investment agreements are transparent and that the final outcome ‘respects European values stimulates sustainable growth and contributes to the well-being of all citizens.’[[67]](#footnote-67) The European Parliament’s involvement in the making of TTIP (Transatlantic Trade and Investment Partnership between the EU and the US) and CETA (EU-Canada Comprehensive Economic and Trade Agreement) has signalled a shift towards a more transparent and inclusive process of international trade and investment treaty negotiations. The European Parliament has offered a platform for relevant political factions to debate and contest various aspects of the EU investment agreements and by doing so it created opportunities for a more inclusive dialogue.

The Lisbon treaty also introduced the so-called European Citizens Initiative instrument which allows citizens to bring new issues to the political agenda through collecting a certain number of signatures in support of a policy proposal.[[68]](#footnote-68) This instrument was deployed by the EU citizens seeking to halt the negotiation of the much-debated TTIP. The STOP TTIP initiative was formally submitted on 15 July 2014 and requested the Commission to halt the process of negotiating TTIP and CETA due to these agreements giving rise to ‘several critical issues such as investor-state dispute settlement and rules on regulatory cooperation that pose a threat to democracy and the rule of law.’[[69]](#footnote-69) Despite the initiative having been unsuccessful due to the Commission refusal to register it,[[70]](#footnote-70) the European Citizens Initiative framework has played a significant part by enabling civil society concerns over investment treaties and their effects to be voiced, and the issues of investment treaty protection and investor-state arbitration to be brought to the forefront of political and legal discourse.

The pressure from civil society, alongside a more assertive exercise by the European Parliament of its powers of oversight, has prompted the Commission to depart from the traditional drafting patterns and to propose some quite far-reaching reforms in the area of investment protection and investor-state arbitration provisions. One example of such reform is the incorporation of ‘a set of modern provisions which rebalance the rights of the state and the investor in favour of the state, and its right to regulate in the public interest’ in EU-Canada CETA.[[71]](#footnote-71) Other proposed changes include measures to increase transparency of arbitral proceedings,[[72]](#footnote-72) creating a code of conduct for arbitrators, access to an appeal system and, a medium term goal, working towards the establishment of a permanent multilateral investment court.[[73]](#footnote-73)

Although both the Commission and the European Parliament could be criticised for not going far enough to address citizens and other stakeholder concerns over investment treaties, EU law has set a commendable example by taking its first (and tentative) steps towards facilitating greater participative democratic input in international treaty-making.[[74]](#footnote-74) One potential (and highly troublesome) consequence of Brexit is that, outside the EU, and in the absence of the equivalent legal and constitutional arrangements allowing for strong parliamentary oversight of, and direct civic participation in, the making of international investment treaties, the UK government may return to its practice of negotiating these treaties in the absence of any political debate, with the general public and other stakeholders missing the opportunity to influence their content.

Excluding the public and civil society from having a say in the process of drafting and negotiating investment treaties may be dangerous. To name one example, the history of failed Multilateral Agreement on Investment (MAI)—the first attempt at concluding a multilateral treaty framework on investment protection and promotion—amply showed that the secrecy surrounding the negotiation process would inevitably rise to a feeling that the public and interested civil society and stakeholder organisations were being excluded from the process.[[75]](#footnote-75) The downfall of MAI was attributed to, among other things, lack of attention to public opinion and to the views of civil society, which subsequently created an air of hostility around the project and made it politically hard to justify.[[76]](#footnote-76) More recently, growing criticisms of, and backlash against, international trade and investment agreements—on the both sides of the Atlantic and globally—has been underpinned by a broader concern over the ‘denationalization of clusters of political, economic, and social activities that undermine the ability of the sovereign state to control activities on its territory.’[[77]](#footnote-77)

As Cotterrel argued long before the EU referendum, legitimacy of the international economic order ‘needs strengthening in the face of political opposition to globalisation, perceptions of the remoteness of international regulatory processes and suspicion about their character.’[[78]](#footnote-78) The introduction of a more participatory and inclusive treaty-making process will arguably not only counter the perceptions of remoteness of international investment agreements but also crucially would facilitate a “bottom up” formulation of investment policy priorities whereby the interests of UK society at large, will be protected alongside investment protection through the regulation by the state of social issues such as protection of the environment, observance of minimum labour and human rights standards, and local development. These issues have long been regarded as concerns for developing countries—as something from which developed countries had to insulate their investors. The reality that UK treaty-makers will face after Brexit is that economic development, environmental protection and labour rights will need to be safeguarded for the UK and its society. Yet without sufficient input from a diverse range of stakeholders and civil society groups, the UK government alone might not be able to represent and safeguard various competing environmental, public health and socio-economic development imperatives in drawing up its new and revised investment treaty instruments.[[79]](#footnote-79)

# **5. Conclusion**

The overarching aim of this chapter was to highlight some of the key challenges the policymakers would need to address when drafting and negotiating UK investment treaty instruments after Brexit. These challenges stem from a combination of factors, including (1) a significant role the future investment and trade deals are expected to play in the government plans to foster economic growth and prosperity in the UK after Brexit; (2) the change in the direction of investment flows and the shift from investment treaties being deployed primarily by British investors against overseas governments to foreign investors, including European investors, being able to deploy investment treaties vis-à-vis the British government; and (3) the growing backlash against and contestation of investment and trade agreements both in the UK and globally. These factors, among a vast array of other policy concerns and rapidly changing political and socio-economic realities, necessitate re-visiting the blueprints the UK government relied upon in its treaty-making prior to the transfer of competence over investment to the EU. The existing investment treaty models were drawn up at the time when the UK was primarily interested in advancing the interests of British investors overseas. Now that Britain is increasingly acting as a host country to foreign investment—from the EU, China, Japan and major developed economies, there is an urgent need to fundamentally re-think and reform UK investment treaties.

Who stands to gain from international agreements that grant foreign investors greater privileges than those afforded to corporations and individuals under UK law? Since the existing UK investment treaties prioritise investor rights in a manner unseen in EU law and UK legal system, such treaties are incompatible with the government’s intention to use Brexit as an opportunity to transform the country that works for all, not just the privileged few. Can investment treaties be re-designed into instruments that tangibly contribute to sustainable economic development in host states, including regional and local development, and will there be sufficient political will in the UK to push for such a radical overhaul of investment treaties post-Brexit? After Brexit, the UK policymakers will need to face the question of whether there is enough *quid pro quo* to justify maintaining the treaty regime that is premised on over-protection of foreign investors. In deciding how to proceed and which models to use in drafting future investment protection policies, policymakers will face the choice which is, put crudely, either to continue with the established but outdated and arguably dangerous investment treaty models that prioritise investment protection, or to create new models, perhaps using as the benchmarks the UK legal system and protections it offers to its own investors and balancing investor rights with concrete and enforceable investor responsibilities. If Brexit is truly about ‘taking back control’, investment treaties should go beyond offering merely a hortatory acknowledgement of the state’s power to regulate in pursuit of public policy objectives. If post-Brexit Britain is to be transformed into a country that would work for all, treaty drafting and negotiation should become more transparent and inclusive, and the contribution of foreign investment to sustainable economic development—as well as the role of investment treaties in advancing this goal—need to be among the key negotiating objectives guiding those in charge of shaping future UK investment treaties.

1. For references to deepening investment relations with the wider world and maximising wealth creation through supporting Foreign Direct Investment and Outward Direct Investment, see HM Government, ‘The United Kingdom’s exit from and new partnership with the European Union’ Cm 9417, presented to Parliament by the Prime Minister by Command of Her Majesty, February 2017, pp 54-5. [↑](#footnote-ref-1)
2. E Denza and S Brooks, ‘Investment Protection Treaties: United Kingdom Experience’ (1987) 36 *International and Comparative Law Quarterly* 908, 909. [↑](#footnote-ref-2)
3. See L N Skovgaard Poulsen, *Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries*, Cambridge University Press, Cambridge 2015, 48, also S Subedi, *International Investment Law Reconciling Policy and Principle*, 3rd ed, Hart Publishing 2016, chapter 4. [↑](#footnote-ref-3)
4. For instance, Latin American states refused to include the international minimum standard into multilateral agreements during the interwar years. See also A Newcombe and L Paradell, *Law and Practice of Investment Treaties: Standards of Treatment*, Alphen aan den Rijn, Kluwer Law International, 2009, ch1, also S MONTT, State Liability in Investment Treaty Arbitration: Global Constitutional and Administrative Law in the BIT Generation, Oxford, Hart Publishing, 2009. [↑](#footnote-ref-4)
5. See K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (Cambridge, Cambridge University Press, 2013) 97-100 [↑](#footnote-ref-5)
6. H Shawcross, ‘The Problems of Foreign Investment in International Law’ (1961) 102 *Recueil des Cours* 335, see also generally Andreas F. Lowenfeld, ‘Investment Agreements and International Law (2003) 42 *Columbia Journal of Transnational Law* 123. [↑](#footnote-ref-6)
7. See G Schwarzenberger, ‘The Abs-Shawcross Draft Convention on Investments Abroad: A Critical Commentary’ (1960) 9 *J Public Law* 147 [↑](#footnote-ref-7)
8. Shawcross, above n 6. [↑](#footnote-ref-8)
9. OECD Draft Convention on the Protection of Foreign Property (1968) 7 *ILM* 117. [↑](#footnote-ref-9)
10. See Montt, above n 4, p 76. [↑](#footnote-ref-10)
11. For an overview, see Anne van Aaaken, Anne Van Aaken, ‘Primary and Secondary Remedies in International Investment Law and National State Liability: A Functional and Comparative View’ in SW Schill (ed), *International Investment Law and Comparative Public Law*, Oxford, OUP, 2010, p 721. [↑](#footnote-ref-11)
12. See Article 26 ICSID. See also C. Schreuer et al, *The ICSID Convention: A Commentary*, 2nd ed, Cambridge, Cambridge University Press, 2009, pp 403–4, and the Report of the Executive Directors on the ICSID Convention (1993) 1 *ICSID Reports* 28, para. 32. [↑](#footnote-ref-12)
13. See for instance *Republic of Argentina v NML Capital* 134 SCt 2250 (2014). [↑](#footnote-ref-13)
14. J Kleinheisterkamp, ‘Investment Protection and EU law: The Intra- and Extra-EU Dimension of the Energy Charter Treaty’ (2012) 15(1) *JIEL* 85, 97; see also S Hindelang, ‘Member State BITs – There’s Still (Some) Life in the Old Dog Yet: Incompatibility of Existing Member State BITs with EU Law and Possible Remedies’ in Karl P. Sauvant (ed), *Yearbook on International Investment Law and Policy 2010–2011*, Oxford,OUP 2012, p 227. [↑](#footnote-ref-14)
15. CJEU, Case C-200/96, *Metronome Musik GmbH v Music Point Hokamp GmbH* [1998] ECR I-1953 para 21. [↑](#footnote-ref-15)
16. *Renta 4 SVSA, Ahorro Corporación Emergentes FI, Ahorro Corporación Eurofondo FI, Rovime Inversiones SICAV SA, Quasar de Valors SICAV SA, Orgor de Valores SICAV SA, GBI 9000 SICAV SA v The Russian Federation*, SCC No 24/2007, Award (20 July 2012) paras 21–23. [↑](#footnote-ref-16)
17. *Metalclad Corporation v Mexico*, Award, 25 August 2000 (ICSID Case No ARB (AF)/97/1) (2001) 40 *ILM* 36, para 103. [↑](#footnote-ref-17)
18. *Compañía del Desarrollo de Santa Elena SA v Costa Rica*, Final Award, 17 February 2000 (ICSID Case No ARB/96/1) (2000) 439 ILM 1317, para 171. [↑](#footnote-ref-18)
19. [↑](#footnote-ref-19)
20. See eg J McIlroy, ‘Canada’s New Foreign Investment Protection and Promotion Agreement: Two Steps Forward, One Step Back?’ (2004) 5 *Journal of World Investment and Trade* 621 also JE Mendenhall, ‘The Evolving U.S. Position on International Investment Protection and Its Impact on the U.S. Position in the Trans-Pacific Partnership Negotiations’ in NJ Calamita and M Sattorova (eds), *The Regionalization of International Investment Treaty Arrangements,* London, BIICL, 2015, p 255. [↑](#footnote-ref-20)
21. Annex A to Article VI of the 2009 Canada—Czech Republic BIT. [↑](#footnote-ref-21)
22. JC Thomas, ‘Reflections on Article 1105 of NAFTA: History, State Practice and the Influence of Commentators’ (2001) 17 *ICSID Review – FILJ* 21. [↑](#footnote-ref-22)
23. *Saluka Investments BV v Czech Republic*, Partial Award, 17 March 2006 (PCA—UNCITRAL Arbitration Rules) para 293. [↑](#footnote-ref-23)
24. Z Douglas, ‘Nothing if Not Critical for Investment Treaty Arbitration: *Occidental*, *Eureko*, and *Methanex*’ (2006) 22 *Arbitration International* 28. [↑](#footnote-ref-24)
25. C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *EJIL* 187, 193. [↑](#footnote-ref-25)
26. *Eureko v Slovak Republic*, PCA Case No. 2008–13, Award on Jurisdiction (26 October 2010) para 250. [↑](#footnote-ref-26)
27. See Mavluda Sattorova, “Investment treaty breach as internationally proscribed conduct: Shifting Scope, Evolving Objectives, Recalibrated remedies?,” 4(2) *Trade Law and Development* 315 (2012) [↑](#footnote-ref-27)
28. See Stephan W Schill, ‘Enabling Private Ordering: Function, Scope and Effect of Umbrella

    Clauses in International Investment Treaties’ (2009) 18 Minn J Intl L 1. [↑](#footnote-ref-28)
29. The full text is available at <http://investmentpolicyhub.unctad.org/IIA> [↑](#footnote-ref-29)
30. AC Sinclair ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (2004) 20 *Arbitration International* 411, 431. [↑](#footnote-ref-30)
31. DW Bowett, ‘State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach’ (1988) 59 *British Yearbook of International Law* 49, 58. [↑](#footnote-ref-31)
32. In this regard, the position of EU law is similar to that favoured in public international law as summarised in the *Ambatielos* case: ‘It is generally accepted that, so long as it affords remedies in its Courts, a State is only directly responsible, on the international plane, for acts involving breaches of contract, where the breach is not a simple breach . . . but involves an obviously arbitrary or tortuous element, e.g. a confiscatory breach of contract – where the true basis of the international claim is the confiscation, rather than the breach *per se* (Gerald Fitzmaurice, ‘Hersch Lauterpacht – The Scholar as Judge – Part I’ (1961) 37 *British Yearbook of International Law* 64-5; see also GH Hackworth, *Digest of International Law*, US Government Printing Office, Washington 1943) vol 5, p 611. [↑](#footnote-ref-32)
33. CJEU, Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* ECLI:EU:C:2013:28. [↑](#footnote-ref-33)
34. Ibid para 34 [↑](#footnote-ref-34)
35. See M Sattorova, “Investment treaty breach as internationally proscribed conduct: Shifting scope, evolving objectives, recalibrated remedies?,” (2012) 4(2) *Trade Law and Development* 315. [↑](#footnote-ref-35)
36. [↑](#footnote-ref-36)
37. In English law, for instance, although the crown remains subject to the law, procedural requirements effectively delimited opportunities for redress in practice. See D Fairgrieve, *State Liability in Tort. A Comparative Law Study*, Oxford, OUP, 200, p 8. [↑](#footnote-ref-37)
38. ### For an overview, see I Marboe, ‘[State Responsibility and Comparative State Liability for Administrative and Legislative Harm to Economic Interests](http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199589104.001.0001/acprof-9780199589104-chapter-12)’ in SW Schill (ed), *International Investment Law and Comparative Public Law*, Oxford, OUP, 2010, pp 382-99.

    [↑](#footnote-ref-38)
39. Fairgrieve, above n 37, 133. [↑](#footnote-ref-39)
40. Investor-State Dispute Settlement: Summary Reports by Experts at 16th Freedom of Information Roundtable, Organization for Economic Cooperation and Development, Investment Division, 20 March 2012) *available <* <http://www.oecd.org/daf/inv/investment-policy/50241347.pdf>> accessed 01.04.2017 [↑](#footnote-ref-40)
41. UNCTAD, *Best Practices in Investment for Development. How to prevent and manage investor-State disputes: Lessons from Peru*, Investment Advisory Series, Series B, number 10 (United Nations 2011) p 8. [↑](#footnote-ref-41)
42. See Philip Morris fails in PCA arbitration against Australia over plain packaging laws’, available

    <https://www.iisd.org/itn/2016/02/29/philip-morris-fails-in-pca-arbitration-against-australia-over-plain-packaging-laws/> accessed 1.04.2017 [↑](#footnote-ref-42)
43. This question was historically raised to examine the reasons why developing countries sign investment treaties that limit their sovereignty and hurt them financially. See AT Guzman, ‘Why LDCs Sign Treaties that Hurt Them: Explaining the Popularity of Bilateral Investment Treaties’ (1998) *Virginia Journal of International Law* 639. [↑](#footnote-ref-43)
44. See e.g. M Sattorova*,* ‘Between regional harmonization and global fragmentation? The variable geometry and geography of investment treaty law through the prism of regulatory flexibility provisions’, in NJ Calamita and M Sattorova (eds) *Investment Treaty Law Current Issues Volume V: The Regionalization of International Investment Treaty Arrangements*, London, BIICL, 2015, pp 277-305. [↑](#footnote-ref-44)
45. Lee Williams, ‘What Is TTIP? And Six Reasons Why the Answer Should Scare You’ *The Independent* (6 October 2015) <http://www.independent.co.uk/voices/comment/what-is-ttip-and-six-reasons-why-the-answer-should-scare-you-9779688.html>. [↑](#footnote-ref-45)
46. See e.g. Kyla Tienhaara , ‘ Regulatory Chill and the Threat of Arbitration : A View From Political Science ’ in Chester Brown and Kate Miles (eds), *Evolution in Investment Treaty Law and Arbitration,* Cambridge, Cambridge University Press , 2011, pp 606 – 28. [↑](#footnote-ref-46)
47. Lauge Poulsen, Jonathan Bonnitcha and Jason Yackee

    Transatlantic Investment Treaty Protection, Paper No. 3 in the CEPS-CTR Project on “TTIP in the Balance’’

    and CEPS Special Report No. 102 / March 2015, p 28, available <https://www.ceps.eu/system/files/SR102\_ISDS.pdf> accessed 1.04.2017. [↑](#footnote-ref-47)
48. The Commission consistently sought to eliminate any possibilities of the investment treaties that still remain in force being deployed in lieu of EU law. [↑](#footnote-ref-48)
49. See J Kleinheisterkamp, ‘Investment Treaty Law and the Fear for Sovereignty: Transnational Challenges and Solutions’ (2015) 78(5) Modern Law Review 793; also N Bernasconi-Osterwalder Martin Dietrich Brauch, ‘The State of Play in Vattenfall v. Germany II: Leaving the German public in the dark’, available at <<http://www.iisd.org/sites/default/files/publications/state-of-play-vattenfall-vs-germany-II-leaving-german-public-dark-en.pdf>>. [↑](#footnote-ref-49)
50. See e.g. B Choudhury, ‘Recapturing Public Power: Is Investment Arbitration’s Engagement of the Public Interest Contributing to the Democratic Deficit?’ (2008) 41 *Vand J Transnatl* L 775, also G Sampliner, ‘Arbitration of Expropriation cases Under U.S. Investment Treaties—A Threat to Democracy or the Dog that Didn’t Bark?’(2003)18 *ICSID Rev-FILJ* 1. [↑](#footnote-ref-50)
51. See in particular Article 13 (1) (c) of the Energy Charter Treaty, signed 17 December 1994, entered into force 16 April 1998) 2080 UNTS 100. [↑](#footnote-ref-51)
52. Poulsen, above n 3, p 68. [↑](#footnote-ref-52)
53. ibid. [↑](#footnote-ref-53)
54. See e.g. Shawcross, above n 6. [↑](#footnote-ref-54)
55. Denza and Brooks, above n 2, 911. [↑](#footnote-ref-55)
56. Even though investment treaties were formally reciprocal, the rationale behind their creation was to protect investors from developed states investing in developing economies. [↑](#footnote-ref-56)
57. Hansard HL Deb cols 1481–1482, cited in Calamita, NJ Calamita, ‘The British Bank Nationalizations: An International Law Perspective’ (2009) 58 *International & Comparative Law Quarterly* 58 119*,* 1230. [↑](#footnote-ref-57)
58. See e.g. KP Sauvant and LE Sachs (eds) ‘*The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*’, Oxford, OUP, 2009. See also J Yackee, ‘Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence’ (2010-2011) 51 *Va J Intl L* 397. [↑](#footnote-ref-58)
59. K Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*, Cambridge, Cambridge University Press, 2009, 59. [↑](#footnote-ref-59)
60. Ibid. [↑](#footnote-ref-60)
61. JE Stiglitz, ‘Regulating Multinational Corporations: Towards Principles of Cross- Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities’ (2008) 23 *Am U Intl L Rev* 451, 455. [↑](#footnote-ref-61)
62. C Tan, ‘The New Disciplinary Framework: Conditionality, New Aid Architecture and Global Economic Governance” in C Tan and J Faundez (eds), *International economic law, globalization and developing countries*, Cheltenham, Edward Elgar, 2010, p 122. [↑](#footnote-ref-62)
63. Statement from the new Prime Minister Theresa May, 13 July 2016, available at <https://www.gov.uk/government/speeches/statement-from-the-new-prime-minister-theresa-may>> accessed 30.04.2017. [↑](#footnote-ref-63)
64. C Harlow, ‘Global Administrative Law: The Quest for Principles and Values’ (2006) 17 *EJIL* 187, 193. [↑](#footnote-ref-64)
65. P Cerny, ‘Globalization and the End of Democracy’ (1999) 36 *European Journal of Political Research* 1, 6. [↑](#footnote-ref-65)
66. See generally D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise*, Cambridge, Cambridge University Press, 2008. [↑](#footnote-ref-66)
67. See Art 11(4) TEU. [↑](#footnote-ref-67)
68. For an overview, see A Warleigh, ‘On the Path to Legitimacy? The EU Citizens Initiative Right from a Critical Deliberativist Perspective’ in C Ruzza and V Della Sala (eds), *Governance and civil society in the European Union*, Manchester, Manchester University Press 2007, p 55; M Dougan, ‘What are we to make of the Citizens' Initiative?’ (2011) *CMLRev* 1807. [↑](#footnote-ref-68)
69. http://ec.europa.eu/citizens-initiative/public/initiatives/non-registered/details/2041 [↑](#footnote-ref-69)
70. <http://ec.europa.eu/citizens-initiative/public/documents/2552> [↑](#footnote-ref-70)
71. See e.g. the statement by the Commissioner Cecilia Malmstrom, available at http://ec.europa.eu/commission/2014-2019/malmstrom/blog/investments-ttip-and-beyond-towards-international-investment-court\_en. [↑](#footnote-ref-71)
72. See eg ‘European Commission pushes for full transparency for ISDS in current investment treaties’, available at http://europa.eu/rapid/press-release\_IP-15-3881\_en.htm. [↑](#footnote-ref-72)
73. See Malmström, above n 71. [↑](#footnote-ref-73)
74. To the extent that US NGOs called for similar opportunities to be created for public engagement with investment and trade negotiations in the US. See e.g. a letter to Ambassdor Froman < www.etuc.org/sites/www.etuc.org/files/press-release/files/letter\_to\_amb.\_froman\_requesting\_public\_consultation\_on\_investment\_2014.pdf>.. [↑](#footnote-ref-74)
75. See PT Muchlinski, ‘The Rise and Fall of the Multilateral Agreement on Investment: Where Now?’ (2000) 34 *Int'l L* 1033. [↑](#footnote-ref-75)
76. ibid 1040 [↑](#footnote-ref-76)
77. K Nowrot, ‘Legal Consequences of Globalization: The Status of Non-Governmental Organizations Under International Law’ (1999) 6 *Ind Law Journal* 579, 586; see also Choudhury, above n 50. [↑](#footnote-ref-77)
78. R Cotterrel, ‘Transnational Networks of Community and International Economic Law’ in A Perry-Kessaris (ed), *Socio-legal Approaches to International Economic Law: Text, Context, Subtext*, Routledge, 2013, p 148. [↑](#footnote-ref-78)
79. M Gehring and D Euler, ‘Public interest in investment arbitration’ in D Euler, M Gehring and M Scherer, *Transparency in International Investment Arbitration: A Guide to the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration*, Cambridge, Cambridge University Press 2015. [↑](#footnote-ref-79)